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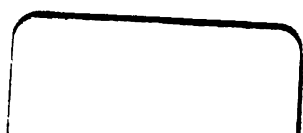
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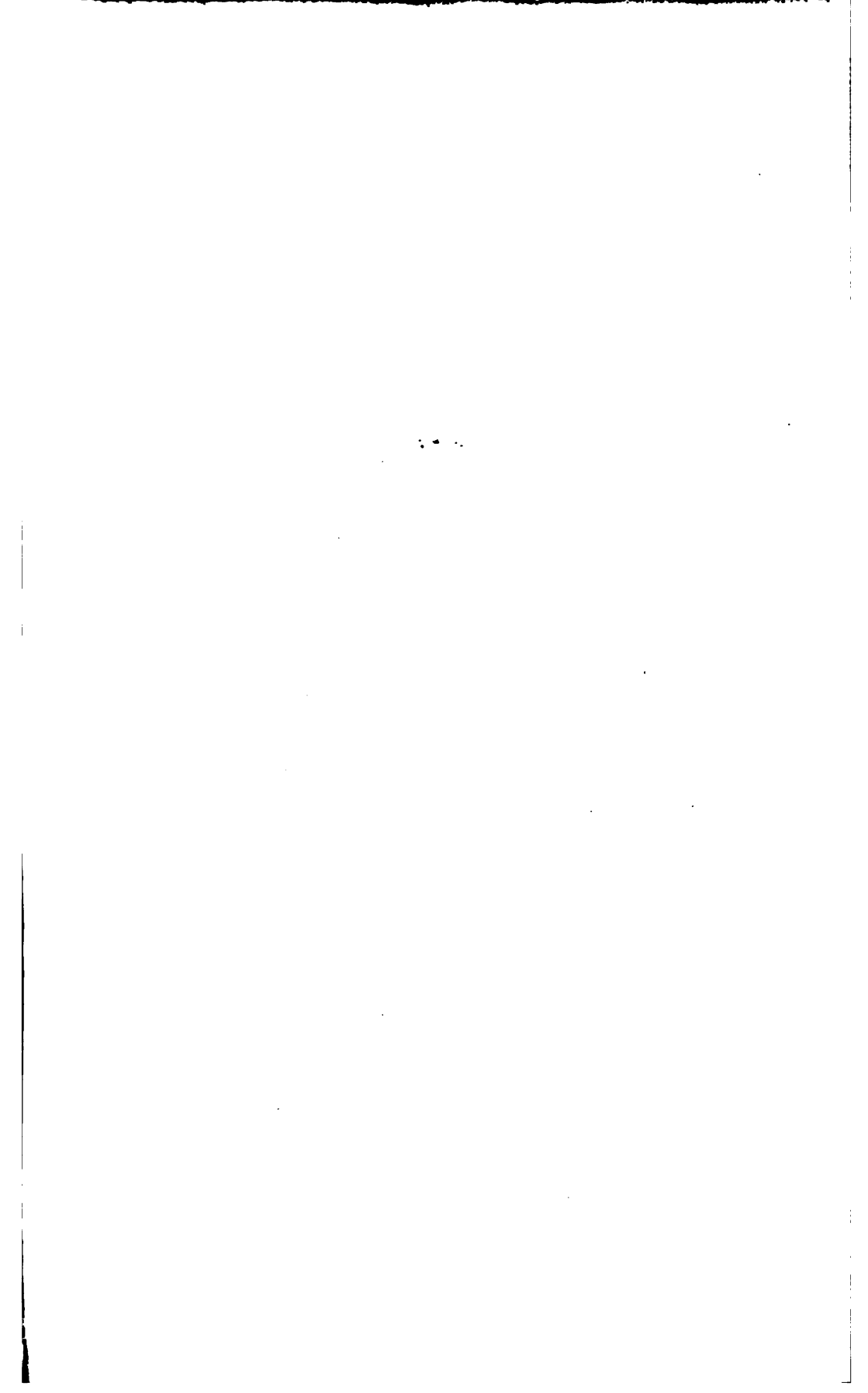
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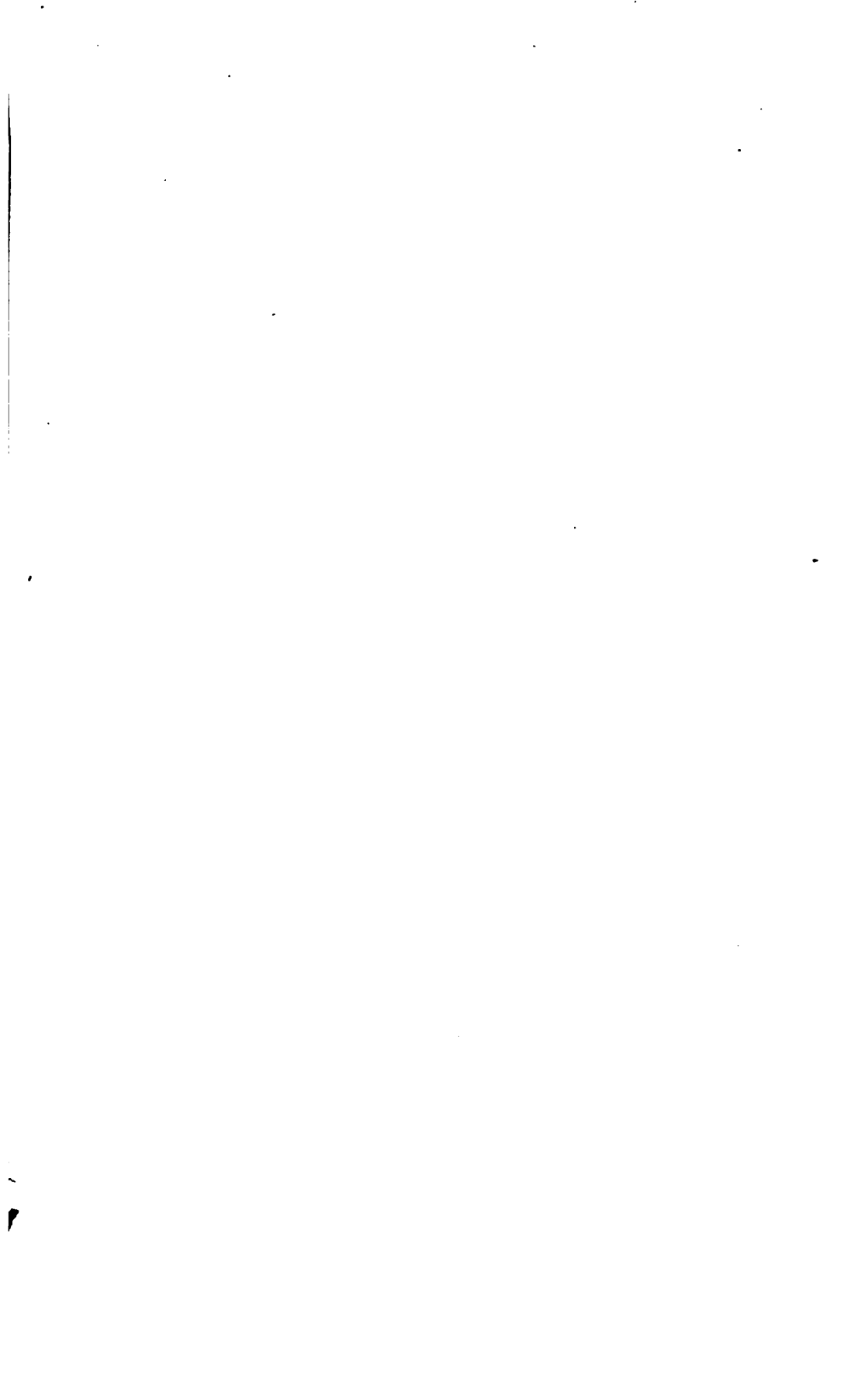
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THE
LAWYERS REPORTS
ANNOTATED

BOOK VI.

ALL CURRENT CASES OF GENERAL VALUE AND
IMPORTANCE WITH FULL ANNOTATION
ROBERT DESTY, EDITOR

BURDETT A. RICH, HENRY P. FARNHAM,
ASSISTANTS.

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LAWYERS' REPORTS,

ANNOTATED.

PENNSYLVANIA SUPREME COURT.

John B. FERGUSON, *Plff. in Err.*,

Thomas Levi RAFFERTY.

(....Pa....)

1. Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written

contract, though it may vary, change or reform the instrument.

2. Direct, positive and uncontradicted testimony of two witnesses to the fact of a contemporaneous verbal agreement as an inducement to sign a writing is sufficient, when it is precise, definite, distinct and highly probable and reasonable.

3. An oral agreement to give the vendor se-

Written contracts as evidence.

Where there is an effective written contract, there can be no verbal one. Long v. Straus, 4 West. Rep. 239, 107 Ind. 94.

The writing itself is evidence of its truth, which cannot be repelled by any extraneous evidence not clear and cogent. Wiles v. Harshaw, 8 Ired. Eq. 306.

The writing itself is the exclusive evidence of the relation of the parties (Miller v. Fichthorn, 81 Pa. 332), but the true relation of parties to a negotiable instrument, as between themselves, may be shown by parol. Goldsmith v. Holmes (Or.) 36 Fed. Rep. 484.

At law the written instrument is better evidence than can be furnished by parol proof; and in contemplation of law it contains the true agreement of the parties. Schwass v. Hershey, 15 West. Rep. 532, 125 Ill. 653.

The writing becomes the sole exponent of the contract, and cannot be varied by parol testimony. Perkins v. Young, 16 Gray, 389; Cocke v. Bailey, 42 Miss. 81; Kirk v. Hartman, 68 Pa. 97.

Parol evidence cannot be received in reference to a contract which the Statute of Frauds requires to be in writing. Lecroy v. Wiggins, 81 Ala. 13; Lockett v. Toby, 10 La. Ann. 713; Northrup v. Jackson, 13 Wend. 85; Martin v. Duffey, 4 Phila. 75.

Extrinsic evidence which goes beyond the purpose of aiding in the interpretation of an insurance policy, and to show a subject different from that described, is inadmissible. Landers v. Cooper, 5 L. R. A. 638, note, 115 N. Y. 279.

A written agreement is not to be varied by parol evidence of extrinsic facts, or the admission of parties or their agents as to their meaning or intentions. Winona v. Thompson, 24 Minn. 199.

The rule is the same in equity as at law. Elysville Mfg. Co. v. Okisko Co. 1 Md. Ch. 322; Cooper v. Tappan, 4 Wis. 362.

It does not depend upon the doctrine of estoppel. Wilkinson v. Wilkinson, 2 Dev. Eq. 376.

Parol evidence of written instrument.

It is the general rule that extrinsic or oral evidence is not admissible to contradict, vary, add to, subtract from, or otherwise modify the terms of a written instrument. *Alabama*.—Beard v. White, 1 Ala. 436; Duff v. Ivy, 3 Stew. 140; West v. Kelly, 19 Ala. 352; Barringer v. Sneed, 8 Stew. 201; Hair v. La Brosse, 10 Ala. 548; Kennedy v. Kennedy, 2 Ala. 371. *Arkansas*.—Richardson v. Comstock, 21 Ark. 60. 6 L. R. A.

California.—Lenhard v. Vischer, 2 Cal. 37; Rints v. Norton, 4 Cal. 359. *Connecticut*.—Beckley v. Munson, 22 Conn. 299. *Georgia*.—Rogers v. Atkinson, 1 Ga. 12; Wynn v. Cox, 5 Ga. 373; Griswold v. Scott, 13 Ga. 210. *Illinois*.—Abrams v. Pomeroy, 13 Ill. 133; Harlow v. Boswell, 15 Ill. 56; Robinson v. Magarity, 28 Ill. 423. *Indiana*.—Russell v. Braham, 8 Blackf. 277; Oiler v. Bodhey, 17 Ind. 600; Fankboner v. Fankboner, 20 Ind. 62; Lenard v. Patterson, 3 Blackf. 353; Madison etc. R. Co. v. Stevens, 6 Ind. 379; Irwin v. Ivers, 7 Ind. 303. *Iowa*.—Warren v. Crew, 22 Iowa, 315; Van Vechten v. Smith, 59 Iowa, 173. *Kentucky*.—McConnell v. Dunlap, Hard. 41; Martin v. Lewis, 1 A. K. Marsh. 102; Fowler v. Lewis, 3 A. K. Marsh. 443; Lemaster v. Burckhart, 2 Bibb, 2; Grundy v. Edwards, 7 J. J. Marsh. 367. *Louisiana*.—Barthet v. Estabene, 5 La. Ann. 315; Theurer v. Schmidt, 10 La. Ann. 125; Ferguson v. Glaze, 12 La. Ann. 667; Leesepe v. Wickes, Id. 739. *Maine*.—Eveleth v. Wilson, 15 Me. 109; Peterson v. Grover, 20 Me. 363. *Maryland*.—Wesley v. Thomas, 6 Har. & J. 24; Watkins v. Stockett, Id. 435; Young v. Frost, 5 Gill, 287. *Massachusetts*.—Colt v. Cone, 107 Mass. 285. *Michigan*.—Seckler v. Fox, 51 Mich. 92. *Mississippi*.—Elliott v. Conriell, 5 Smedes & M. 91; Sutherland v. Crane, 1 Miss. 523. *Missouri*.—Pears v. Davis, 29 Mo. 184; Singleton v. Fore, 7 Mo. 515; Lane v. Price, 5 Mo. 101; Huse v. McQuade, 52 Mo. 388. *New Jersey*.—Society v. Haight, 1 N. J. Eq. 398; Woodruff v. Frost, 2 N. J. L. 342; Kern v. Voorhies, 3 N. J. L. 1003; Perrine v. Cheeseman, 11 N. J. L. 174; Huffman v. Hammer, 14 N. J. L. 269. *New York*.—Douglass v. Peele, 1 Clarke, 503; Spencer v. Tilden, 5 Cow. 144; Lowber v. Lelroy, 2 Sandf. 202; Clark v. N. Y. L. Ins. Co. 7 Lans. 323. *North Carolina*.—Ward v. Iedbetter, 1 Dev. & B. Eq. 490; Chamness v. Crutchfield, 2 Ired. Eq. 148; Parker v. Vick, 2 Dev. & B. Eq. 186; Donaldson v. Benton, 4 Dev. & B. L. 435; Wade v. Odeneal, 3 Dev. L. 423. *Oregon*.—Hoxie v. Hodges, 1 Or. 251. *Pennsylvania*.—Herlimer v. Imbrie, 6 Serg. & R. 403; Albert v. Zeigler, 29 Pa. 50; Evans v. Evans, Id. 277. *South Carolina*.—Gibson v. Watts, 1 McCord, 490; Smith v. Tunno, Id. 443; McDowall v. Beckley, 2 Mill (Const.) 365; Falconer v. Garrison, 1 McCord, 209; Smith v. McCall, 1 McCord, 220. *Tennessee*.—Phillips v. Keener, 2 Overt. 329; Stewart v. Phoenix Ins. Co. 9 Lea, 104. *Texas*.—Boehl v. Wadgyrmar, 54 Tex. 587. *United States courts*.—Shankland v. Washington, 30 U. S. 5 Pet. 390 (8 L. ed. 186); Findley v. U. S. Bank, 2 McLean, 44; Randall v. Phillips, 3 Mason, 378; Van Ness v. Washington, 29 U. S. 4 Pet. 232 (7 L. ed. 842);

curity on the logs may be proved to show an inducement to him to sign a release to parties who had purchased of him by written contract certain timber, and the substitution in their place of other persons, although the written agreement contained no stipulation for such security.

4. A notice of a claim against property about to be sold at sheriff's sale is sufficient to render the property liable to the claim in the hands of an intending purchaser, if it contains a distinct claim of title to the property and is sufficient to put such purchaser upon inquiry, although it is not explicit and definite as to the nature and character of the claim.

5. Replevin may be maintained by one co-tenant in common in his own name, without joining his co-tenants, to recover possession of all the logs cut upon lands held in common, under a contract made by him alone with the consent of the life tenant and the passive acquiescence of

his co-tenants, for the sale of such logs by which he reserved a lien thereon for security of the purchase money, against either the purchaser or his assignee with notice; at least where the other co-tenants never interfered with the possession taken under the contract.

(October 7, 1889.)

ERROR to the Court of Common Pleas of Clearfield County to review a judgment for plaintiff in an action of replevin brought to recover possession of certain logs. *Affirmed.*

Thomas Rafferty died seised of a certain tract of land in Penn Township, leaving surviving him a widow and sons and daughters, among whom were the plaintiff Thomas Levi Rafferty and two deaf mutes. He devised the land to his son James, who died shortly after his father's death, unmarried and intestate.

United States v. Thompson, 1 Gall. 888; O'Harra v. Hall, 4 U. S. 4 Dall. 340 (1 L. ed. 858). *Vermont.*—Jones v. Webber, 1 N. Chip. 215; Bradley v. Bentley, 8 Vt. 248; Brandon Mfg. Co. v. Morse, 48 Vt. 322. *Wisconsin.*—Reed v. Jones, 8 Wis. 302; Hei v. Heller, 58 Wis. 415.

Parol evidence is not admissible to contradict written instruments.

Parol evidence is not admissible to contradict the written instrument. *Best v. Sintz*, 73 Wis. 243.

Evidence of former negotiations is inadmissible to contradict a written contract or its legal effect. *Hostetter v. Auman*, 119 Ind. 7.

Verbal testimony is inadmissible to contradict a written agreement in respect to the terms on which articles are shipped to another for sale (*Simonds Mfg. Co. v. Hiddle* (Mich.) 41 N. W. Rep. 675; *White v. Missouri Pac. R. Co.* 2 West. Rep. 155, 19 Mo. App. 400), or to contradict a charter-party. *The Gazelle*, 128 U. S. 474 (32 L. ed. 496).

Parol evidence is not admissible to contradict or vary notes and mortgages given at the same time and as a part of the same transaction. *Martin v. Hamlin*, 18 Mich. 365. See *Jones v. Phelps*, 5 Mich. 222; *Adair v. Adair*, Id. 204; *Stevens v. Cooper*, 1 Johns. Ch. 429; *Cook v. Combs*, 39 N. H. 598; *Oelricks v. Ford*, 64 U. S. 23 How. 49 (16 L. ed. 534); *Austin v. Sawyer*, 9 Cow. 39, 49; *Dix v. Otis*, 5 Pick. 38; *Powell v. Edmunds*, 12 East. 6; *Noble v. Bosworth*, 19 Pick. 314; *Conner v. Coffin*, 22 N. H. 542-544; *Gregory v. Hart*, 7 Wis. 532; *Hoyt v. French*, 24 N. H. 199; *Lang v. Johnson*, Id. 302; *Hoxie v. Hodges*, 1 Or. 251; *Underwood v. Simonds*, 12 Met. 278; *Adams v. Wilson*, Id. 133; *Richardson v. Comstock*, 21 Ark. 69; *Oskaloosa College v. Stafford*, 14 Iowa, 152; *Bomar v. Asheville & S. R. Co.* 30 S. C. 450.

It is not admissible to show that a note was not payable in money as expressed therein. *Clark v. Hart*, 49 Ala. 86.

Or, on the part of the drawer as against the drawee, that he was not to be liable as drawer. *Basenhorn v. Wilby*, 11 West. Rep. 270, 45 O. & St. 383.

It is inadmissible to contradict a soldier's discharge issued on a surgeon's certificate of disability, in the absence of any proof of conviction as a deserter. *Fitchburg v. Lunenburg*, 102 Mass. 358.

The party writing the letter cannot be allowed to contradict or vary its meaning by parol testimony. *Selby v. Friedlander*, 22 Ia. Ann. 351.

But a letter, which is the basis of a contract, is admissible to explain the contract. *Bennett v. Fryar*, 55 Tex. 145.

A subscription contract to pay money in aid of a contemplated manufacturing business cannot be enlarged or contradicted by a letter which was 6 L. R. A.

merely one of the preliminary negotiations to the subscription. *Smith v. Burton*, 4 New Eng. Rep. 900, 59 Vt. 408.

A written agreement in distinct instruments cannot be varied or contradicted by parol. *Hull v. Adams*, 1 Hill, 601.

Parol evidence inadmissible to contradict consideration of contract.

In the absence of fraud parol testimony is inadmissible to prove total lack of consideration for a conveyance purporting to have been made for a consideration. *Gardner v. Lightfoot*, 71 Iowa, 577.

A deed given in good faith for a valuable consideration recited, without fraud, accident or mistake, cannot be shown by parol to be without consideration. *Feeney v. Howard*, 79 Cal. 525.

Parol evidence is not admissible to show that there was in fact no consideration for a quitclaim deed expressing a consideration in money, and that the grantee agreed by parol to hold the lands for the grantor. *Salisbury v. Clark* (Vt.) 17 Atl. Rep. 185.

Parol evidence is inadmissible to vary a written covenant under guise of showing consideration. *Simanovich v. Wood*, 5 New Eng. Rep. 190, 145 Mass. 180.

The obligations under a written lease of a farm cannot be affected by evidence of a contemporary parol contract, as part of the consideration of the lease. *Diven v. Johnson*, 3 L. R. A. 308, 117 Ind. 512.

Yet a lease may be varied by a subsequent parol agreement. *Danforth v. McIntyre*, 11 Ill. App. 417.

Although the consideration of a contract cannot be contradicted, or shown to be different from that expressed therein (*Metropolitan Bank v. Hitz*, 1 Mackey (D. C.) 111), yet the true consideration may be shown by parol. *Stufflebeem v. Arnold*, 57 Cal. 11; *Andenried v. Walker*, 11 Phila. 183; *Hope v. Smith*, 35 N. Y. Sup. Ct. 458; *Holmes' App.* 79 Pa. 279; *Jackson v. Miller*, 32 La. Ann. 432; *Dean v. Adams*, 44 Mich. 117; *Tutwiler v. Munford*, 68 Ala. 124; *Brown v. Summers*, 91 Ind. 151.

As the rule of exclusion does not prevent proof of attendant circumstances to explain (*Simpson v. Kimberlin*, 12 Kan. 379) the consideration of an instrument, and the circumstances of its execution, are open to explanation. *De Savelette v. Wendt*, 75 N. Y. 579. See *Bragg v. Stanford*, 32 Ind. 234.

Prior negotiations merged in written contract.

As a general rule all preliminary negotiations are merged in the written contract, and a party to it is estopped to deny its terms; and hence oral evidence is inadmissible to contradict or vary a written contract. *Diven v. Johnson*, 3 L. R. A. 308. *note*, 117 Ind. 512; *La Fayette County Monument*

Plaintiff thus became tenant in common with his brothers and sisters of the tract, his mother having a life interest therein. Richard Danver was appointed trustee for the deaf mutes. Danver, claiming to act on behalf of the mutes, and, as plaintiff claimed, acting on behalf of the other heirs of James Rafferty, made an agreement to sell the timber on the tract to Thomas Levi Rafferty.

Subsequently Thomas Levi entered into an agreement to sell the timber to E. W. Hepburn and W. C. Hoover. Thereafter, with the assent of Hepburn and Hoover, Rafferty entered into the following agreement:

And now, this 2d day of December, 1882, I, Levi Rafferty, do agree to release E. W. Hepburn and W. C. Hoover on the within article, and to transfer the same to D. L. Ferguson,

and that the said D. L. Ferguson is to pay the balance due on the within agreement as soon as the logs are all delivered in Curry Run. Said logs are to be scaled straight and sound, and instead of six and one half cents per cubic foot, to be six and 50-100 dollars per thousand feet.

Witness our hands and seals. Done this 2d day of December, 1882.

T. L. Rafferty, [L. s.]
D. L. Ferguson, [L. s.]

After the logs were cut under this agreement, a judgment was recovered against Ferguson, execution levied on the logs, and they were sold at sheriff's sale and purchased by defendant, John B. Ferguson.

Plaintiff claimed title to the logs as security for the purchase money due him by D. L. Fer-

Corp. v. Magoon, 3 L. R. A. 761, 73 Wis. 627; Cole v. Spann, 18 Ala. 537; Mead v. Steger, 5 Port. (Ala.) 498; Dean v. Mason, 4 Conn. 428; Logan v. Bond, 13 Ga. 122; French v. Turner, 15 Ind. 58; Chadwick v. Perkins, 8 Me. 309; Saverool v. Farwell, 17 Mich. 302; Herridon v. Henderson, 41 Miss. 584; Gooch v. Conner, 8 Mo. 391; Vaughn v. Lynn, 9 Mo. 761; Walker v. Engler, 30 Mo. 180; Cox v. Bennet, 13 N. J. L. 165; State v. Stites, Id. 172; Parkhurst v. Van Cortlandt, 1 Johns. Ch. 274; Crosier v. Acer, 7 Paige, 127; Smith v. Higbee, 12 Vt. 113.

Conversations between the parties.

Previous conversations of the parties are not admissible to determine their intention. Bilmer v. Branch of State Bank, 16 Iowa, 321; Pollen v. Le Roy, 19 Bosw. 38; Sayre v. Peck, 1 Barb. 464; Ellmaker v. Franklin F. Ins. Co. 5 Pa. 188; Bedford v. Flowers, 11 Humph. 242; Van Buskirk v. Day, 82 Ill. 260.

But conversations just before the making, not admissible to vary the terms, but as independent proof to rebut an equity set up by complainant, may be proved. King v. Buckman, 21 N. J. Eq. 38.

So of conversations to show the extent of an agent's authority, admissible to explain allusions thereto in the letter. Durham v. Gill, 48 Ill. 151.

Parol evidence of what was said at the time of signing the contract is not admissible to vary it. Express Pub. Co. v. Aldine Press, 126 Pa. 347, 24 W. N. C. 125; Gorsuch v. Rutledge, 70 Md. 272.

A contract in writing cannot be varied or defeated by evidence of contemporaneous parol representations. Paddock v. Bartlett, 68 Iowa, 16.

Parol evidence as to what the parties understood or intended a written agreement to mean, and as to subsequent conversations between them as to what they would do in pursuance of the agreement, is not admissible, where the written agreement itself shows the true construction. Miller v. Butterfield, 79 Cal. 62.

Testimony of a conversation between the testator and his wife is not admissible. His intentions must be determined from the will itself. Patterson v. Wilson, 101 N. C. 584.

Acts and declarations of parties.

Acts of the parties cannot be received to prove construction where the language is fixed and ascertained. Giles v. Comstock, 4 N. Y. 270.

But the acts of the parties, performed under a written contract, are admissible to ascertain the construction to be placed upon the contract, without encroaching upon the rule that contemporaneous parol evidence is not admissible to vary a written instrument. Lyles v. Lescher, 7 West. Rep. 4, 105 Ind. 382.

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Proof of declarations made antecedent, coincident or subsequent is not competent to vary the terms of a sealed instrument, and may be rejected at any time before retirement of the jury. Mott v. Richtmyer, 57 N. Y. 49; Price v. Allen, 9 Humph. 708; Hale v. Handy, 26 N. H. 208.

They are inadmissible to explain subsequent acts of the party to whom the declarations were made touching the contract. Bonley v. Bush, 44 Tex. 1.

As to the declarations of a sheriff, at a sale for partition, it is not admissible to explain his deed. Caldwell v. Layton, 44 Mo. 220.

A memorandum made by a witness in her diary stands on the same footing as an oral declaration, in respect to parol evidence of her meaning. Dale's App. 57 Conn. 127.

The rule not to inhibit evidence of extrinsic facts.

The rule that parol contemporaneous evidence is inadmissible to contradict or vary the terms of a written instrument does not exclude evidence of extrinsic facts necessary to a full understanding of the meaning of the parties. Buford v. Lonergan (Utah) 22 Pac. Rep. 164.

A written but unsigned agreement is admissible in connection with the testimony of the attorney drawing up the contract to show how the parties at the time understood the arrangement as to a loan and share of profits. Eager v. Crawford, 78 N. Y. 97.

So parol evidence is admissible to show verbal alterations for the purpose of giving an understanding of the circumstances connected with the affair (Keller v. Bley, 15 Or. 429); or to show that a written instrument was, by agreement of the parties, not to take effect unless it should be pronounced lawful by counsel who were to be consulted (Ware v. Allen, 128 U. S. 560 (32 L. ed. 563)); or that a written agreement was delivered to take effect only upon certain conditions (Ottawa, O. & F. R. V. R. Co. v. Hall, 1 Ill. App. 612); as that the order to pay was conditional on there being a certain surplus of proceeds (Hymers v. Drube, 5 Mo. App. 580); or to show that the understanding of the parties to a contract for the sale and delivery of railroad ties was that they should be inspected when unloaded. Havana R. & E. R. Co. v. Walsh, 85 Ill. 58.

One not being a party to the written agreement is entitled to show an oral agreement between himself and the bank, by which he agreed to become surety only on condition. Fant v. Sprigg, 50 Md. 551.

The circumstances attending the transaction may be proved by parol.

Where a contract is entirely intelligible, the circumstances attending the negotiations are compe-

guson, in pursuance of a parol agreement entered into contemporaneously with the execution of the agreement with Ferguson, and caused the following notice to be read at the sheriff's sale:

To R. Newton Shaw, High Sheriff, and to all bidders and execution creditors:

Sirs:—You are hereby notified that the two certain lots of pine saw logs, to wit, 80,000 feet, more or less, pine saw logs in the woods on Rafferty's land in Penn Township, stamped W 4 T, and 155,000 feet, more or less, pine logs in Curry Run, stamped W 4 T, are the property of Thomas L. Rafferty, and not of D. L. Ferguson.

The conditions of the contract not having been complied with, and the purchase money or stumpage paid as per agreement, the said

Thomas L. Rafferty gives notice that he will hold said logs until paid for, and will assert his rights as against the purchase of the same under the said levy and sale.

Clearfield, Pa., February 27th, 1888.

T. Levi Rafferty,

By his Attorney, J. F. McKenrick.

At the trial in the court below defendant took exception to the admission of parol evidence to show the alleged agreement regarding the lien to secure the payment of purchase money.

Defendant requested the court to charge *inter alia* as follows:

"The notice purporting to have been read at the sheriff's sale of the logs in controversy, by J. F. McKenrick, the attorney of the plaintiff, was not sufficiently explicit and definite as to its

tent. *Field v. Munson*, 47 N. Y. 221; *Centenary M. E. Church v. Clime*, 7 Cent. Rep. 886, 116 Pa. 146.

They may be proved in explanation, but not to vary the terms of the contract. *Foster v. McGraw*, 64 Pa. 464; *Wood v. Clark*, 10 West. Rep. 117, 121 Ill. 359; *Bigelow v. Capen*, 5 New Eng. Rep. 257, 145 Mass. 270; *Chandler v. Thompson*, 30 Fed. Rep. 38.

Parol evidence is admissible to explain the circumstances under which the lease was made, or of applying it to its proper subject matter, or of raising and explaining a latent ambiguity. *Kamphouse v. Gaffner*, 73 Ill. 453.

So in a contract for the sale of flax the relations of the parties, and the usage of the trade, is admissible. *Goodrich v. Stevens*, 5 Lans. 230.

So in a suit on a building contract which does not prescribe any specific height for the building, evidence of the facts existing at the time of its execution, and the circumstances of the parties and of the building and of other buildings of which the one erected under the contract constitutes a component part, is admissible to show what the real contract was intended to be. *Doane Collage v. Lanham* (Neb.), 42 N. W. Rep. 405.

To ascertain the intention of the parties to a contract, all the facts and circumstances at the time of executing it may be taken into consideration. *Erwin's App. (Pa.)* 9 Cent. Rep. 678, 20 W. N. C. 278; *Thayer's App. (Pa.)* 8 Cent. Rep. 479; *Weller v. Henarie*, 15 Or. 28.

It is enough to render parol evidence competent to explain a written contract, that there were circumstances known to one of the parties, but unknown to the other, which might have influenced such party in making the contract. *Brady v. Cassidy*, 6 Cent. Rep. 73, 104 N. Y. 147.

The party who made an indorsement upon a note may testify to the circumstances attending the same. *Lawrence v. Graves*, 7 New Eng. Rep. 74, 60 Vt. 657.

Prior or contemporaneous agreement cannot be proved, to contradict or vary contract.

In the absence of fraud or mistake a contemporaneous or precedent parol agreement cannot be set up to vary or contradict the terms of a written agreement. *Scarborough v. Aloorin* (Tex.) 12 S. W. Rep. 72; *Minneapolis Threshing-Machine Co. v. Davis*, 3 L. R. A. 796, note, 40 Minn. 110; *Avery v. Miller*, 86 Ala. 495; *Caldwell v. May*, 1 Stew. (Ala.) 425; *Cincinnati, U. & Ft. W. R. Co. v. Pearce*, 28 Ind. 502; *Gelpecke v. Blake*, 15 Iowa, 387; *Jack v. Naber*, Id. 450; *Stevens v. Cooper*, 1 Johns. Ch. 425; *Thorp v. Roes* 4 Abb. App. 416; *Carlton v. Vineland Wine Co.* 33 N. J. Eq. 466; *Hubbard v. Marshall*, 50 Wis. 322; *Belcher v. Mulhall*, 57 Tex. 17; *Roundtree v. Gilroy*, 57 Tex. 176; *Keegan v. Kinmire*, 12 Ill. App. 484.

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Proof of a contemporaneous oral contract, whereby the plaintiff fraudulently promised to procure a change in the mail schedule, and that he did not thereafter do so, is inadmissible. *Knowlton v. Keenan*, 5 New Eng. Rep. 589, 146 Mass. 86.

Where a written contract has been made with a broker, oral proof is not admissible to show an anterior agreement. *Sayre v. Wilson*, 86 Ala. 151.

When a written warranty is established without conflict, evidence of a contemporaneous parol warranty is inadmissible. *Barrett v. Wheeler*, 71 Iowa, 632; *Nichols v. Wyman*, Id. 160.

Oral testimony of a previous, contemporaneous or subsequent colloquium is inadmissible, because tending to substitute a new contract for the one previously agreed upon. *Kerr v. Kuykendall*, 44 Miss. 137; *Randolph v. Perry*, 2 Port. (Ala.) 376; *Lawrence v. McGuire*, 21 Kan. 532.

Parol evidence is not admissible of a contemporaneous agreement postponing the time of payment of a note. *Doss v. Peterson*, 82 Ala. 253.

Or to exclude from a contract. *Newman v. Blum* (Tex.) 9 S. W. Rep. 178.

Or to deduct money then due from the next amount to become due. *Wright v. Smith*, 16 Gray, 499.

Or to prove the mode of testing the machinery sold. *Exhaust Ventilator Co. v. Chicago, M. & St. P. R. Co.* 69 Wis. 454.

Or to prove that grantors should have the right to materially alter the grade of the way. *Com. v. Wellington*, 6 New Eng. Rep. 205, 146 Mass. 566.

Or that, on a certificate of deposit payable one year after date, money might be withdrawn at any time. *Baer's App.* 4 L. R. A. 609, 127 Pa. 360.

Or that the pledgee might use the stock pledged. *Fay v. Gray*, 124 Mass. 500.

The rule of exclusion applies to a written acceptance (*Aultman v. Brown*, 39 Minn. 323); or a stipulation for release of interest in a patent machine. *Munsell v. Flood*, 18 Jones & S. 460; *Melville v. Baltimore & P. R. Co.* 2 Mackey (D. C.) 63.

Exceptions to rule; contemporaneous and subsequent agreements.

Parol evidence which tends to confirm a written contract is not objectionable. *Southern Mut. Ins. Co. v. Trear*, 29 Gratt. (Va.) 255; *Weaver v. Fletcher*, 27 Ark. 510; *Basshor v. Forbes*, 36 Md. 154; *Rearich v. Swinehart*, 11 Pa. 233.

Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, although it may vary, change or reform the instrument. *Thomas v. Loose*, 5 Cent. Rep. 180, 114 Pa. 35; *Cullmans v. Lindsay*, 4 Cent. Rep. 747, 114 Pa. 168; *Walker v. France*, 2 Cent. Rep. 781, 112 Pa. 208; *Ayer v. R. W.*

nature and character, as would render the logs liable to the claim of the plaintiff, in the hands of John B. Ferguson, the purchaser of the same, at the said sheriff's sale."

But the court made the following answer:

"We cannot give an unqualified affirmance to that proposition. We think the notice was sufficient to have put an ordinarily prudent man upon inquiry as to what the interest was, if it was read, as the plaintiff claims." [Seventh assignment of error.]

Defendant also requested the court to charge in substance that plaintiff had no such interest as would entitle him to maintain replevin in his own name. The court reserved this point and a verdict was rendered for plaintiff. Subsequently the court decided the reserved point in favor of plaintiff and entered judgment upon the verdict. [Seventeenth, eighteenth and nineteenth assignments.]

Defendant thereupon took this writ assigning for error the admission of the parol evidence, the answer to defendant's point and the decision upon the point reserved.

The other facts are fully stated in the opinion.

Mr. Frank Fielding, with Messrs. S. T. McCormick and R. D. Swoope, for plaintiff in error:

The written contract, being clear, explicit, unequivocal and complete in all its terms, could not be varied or contradicted by parol evidence, and the court erred in admitting plaintiff's evidence of such alleged verbal condition.

Juniata Building & Loan Assn. v. Hetzel, 103 Pa. 512; *Dillon v. Anderson*, 43 N. Y. 231; *Spencer v. Colt*, 89 Pa. 314; *North v. Williams*, 12 Cent. Rep. 369, 120 Pa. 118; *Murray v. New York, L. & W. R. Co.* 103 Pa. 42; *Phillips v. Meily*, 106 Pa. 536; *Sylvius v. Kosek*, 9 Cent.

Bell Mfg. Co. 6 New Eng. Rep. 329, 147 Mass. 46; *Hazard v. Loring*, 10 Cush. 267; *Erskine v. A'deane*, L. R. 8 Ch. App. 756; *Morgan v. Griffith*, L. R. 6 Exch. 70; *Lindley v. Lacey*, 17 C. B. N. S. 578; *Eighmie v. Taylor*, 98 N. Y. 238.

It must be alleged that the contract was executed on the faith of the parol agreement. *Callan v. Lukens*, 89 Pa. 134.

Evidence that a contract was to be made, without stating its terms, is not obnoxious to the rule excluding parol evidence which varies a written contract. *Davis v. Cochran*, 71 Iowa, 369.

A valid parol contract of the plaintiff, made at the same time and not reduced to writing, which is not in conflict with the provisions of the written agreement, may be proved. *Bonney v. Morrill*, 57 Me. 368; *Collingwood v. Merchants Bank*, 15 Neb. 118; *Carter v. Shibles*, 74 Me. 273; *McFarland v. Sikes* (Conn.) 3 New Eng. Rep. 252.

Hence, in a suit against vendee for specific performance, a parol agreement for a settlement of certain accounts between the parties, and the crediting of a balance due defendant upon the purchase price of the property in suit, is admissible. *Redfield v. Gleason* (Vt.) 17 Atl. Rep. 1075.

Testimony may be offered to prove the existence of an oral agreement made collaterally with a deed, and relating to the property conveyed, but an entirely independent and distinct contract. *Bruzzell v. Willard*, 44 Vt. 44; *Weeks v. Medler*, 20 Kan. 57; *Hawkins v. Lee*, 8 Lea, 42; *Oregonian R. Co. v. Wright*, 10 Or. 162; *Van Brunt v. Day*, 81 N. Y. 251, 8 Abb. N. C. 338, reversing 17 Hun, 166; *Lanphire v. Slaughter*, 61 How. Fr. 36; *Planters Ins. Co. v. Deford*, 38 Md. 382; *Babcock v. Deford*, 14 Kan. 408; *Polk v. Anderson*, 18 Kan. 243; *Malone v. Dougherty*, 79 Pa. 44.

It is admissible to show how and by what mode payment was to be made, that being an independent and collateral fact. *Paul v. Owings*, 32 Md. 402; *Dudley v. Vose*, 114 Mass. 34; *Sexton v. Windell*, 28 Gratt. 534.

So a collateral agreement between lessor and lessee and his assignee is admissible to vary the original contract of lease. *Whitney v. Shippen*, 80 Pa. 22.

Subsequent agreement may be proved.

After an agreement has been reduced to writing, it is competent to the parties, at any time before breach of it, by a new contract not in writing, either altogether to waive, dissolve, or annul, add to or subtract from, or qualify its terms, and thus make a new contract which has to be proved partly by the written agreement and partly by the subsequent oral one engrafted upon it. *Delaney v. Linder*, 22 Neb. 274.

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It is admissible to establish a new and subsequent agreement into which a former written one entered as inducement. *Hubbell v. Ream*, 31 Iowa, 280; *Woods v. Russell* (Pa.) 1 Cent. Rep. 336; *Sharkey v. Miller*, 69 Ill. 560.

The rule forbidding parol evidence to vary a written contract does not exclude evidence of a subsequent independent agreement for an extension of the time of payment or performance. *Kane v. Cortes*, 1 Cent. Rep. 245, 100 N. Y. 132.

Testimony is competent, not for the purpose to vary or contradict terms of the note, but to establish a separate collateral and substantive contract between the parties not embraced in the writing. *Lytle v. Bass*, 7 Coldw. (Tenn.) 308.

A subsequent parol agreement that the purchaser should pay a lower rate for damaged and down timber than the rate stated in the written contract is admissible. *Marsh v. Bellew*, 45 Wis. 36.

Evidence of subsequent negotiations between the parties, touching the subject matter of a written contract, is inadmissible, unless it is such as shows a discharge of the contract or a waiver of rights thereunder. *Miller v. Dunlap* (Mo. App.) 5 West. Rep. 91.

After rescission of a sale, parol evidence is inadmissible to show a subsequent agreement to retain the mortgage security for loans and advances. *Lindsay v. Garvin* (S. C.) 5 L. R. A. 219.

But the rule of exclusion has no application where the instrument is executed in part performance only of a verbal contract. *Birks v. Gillett*, 13 Ill. App. 369.

Parol evidence is admissible to supplement a writing which does not purport to contain the whole of the contract. *Barclay v. Hopkins*, 30 Ga. 562; *Kinney v. Whiton*, 44 Conn. 263.

Parol evidence not to add to, subtract from, vary or qualify a written contract.

Where a contract has been reduced to writing, verbal evidence is not allowed to be given of what passed between the parties, either before the writing was made or during the time it was in the state of preparation, so as to add to or subtract from, or in any manner vary or qualify, the written contract. *Delaney v. Linder*, 22 Neb. 274; *Stoddard v. Nelson*, 17 Or. 417; *Parker v. Morrill*, 98 N. C. 232; *Lowdermilk v. Bostwick*, 28 N. C. 299.

It is inadmissible to contradict or vary material recitals in an instrument. *Kirby v. Lewis* (Ark.) 89 Fed. Rep. 66; *Bomar v. Asheville & S. R. Co.* (S. C.) 9 S. E. Rep. 512.

Parol evidence is not admissible to add a stipulation to a written contract, not relating to a subject distinct from that to which the writing relates. *Thompson v. Libbey*, 34 Minn. 374.

Rep. 748, 117 Pa. 67; *Coen v. Adamson* (Pa.) 9 Cent. Rep. 820; *Bowman v. Tagg* (Pa.) 6 Cent. Rep. 563; *Lane's App.* 3 Cent. Rep. 116, 112 Pa. 499; *Pennsylvania R. Co. v. Shay*, 82 Pa. 198.

Plaintiff was not the absolute owner of the whole of the timber, and entitled to the immediate and exclusive possession of it; therefore, he could not maintain the action of replevin.

Reinheimer v. Hemingway, 85 Pa. 432; *Mathias v. Sellers*, 86 Pa. 493.

Mr. J. F. McKenrick, with *Messrs. A. L. Cole* and *Cyrus Gordon*, for defendant in error:

The parol evidence was rightly admitted.

Walker v. France, 2 Cent. Rep. 781, 112 Pa. 203; *Thomas v. Loose*, 5 Cent. Rep. 190, 114 Pa. 35.

The evidence was sufficient to establish a

right of possession in the plaintiff, and this was sufficient to entitle him to recover.

Mead v. Kilday, 2 Watts, 110; *Harlan v. Harlan*, 15 Pa. 507; *Young v. Kimball*, 23 Pa. 198; *Miller v. Warden*, 1 Cent. Rep. 878, 111 Pa. 800.

Green, J., delivered the opinion of the court:

The rather numerous assignments of error in this case may be considered under a few heads: first, those which relate to the admission and effect of parol testimony to change the written contract. These embrace the assignments numbered 4, 6, 8, 9, 10, 11, 12, 13 and 20. The learned court below, both in admitting the parol testimony and in submitting it to the jury, stated the law with great care and caution, and with entire correctness. It was

Nothing can be added to the subjects contracted for which extends the contract beyond the subjects specified in it. *Howlett v. Howlett*, 56 Barb. 467.

Parol evidence cannot add to an imperfect contract a material part in order to sustain it, but it can apply a description in it to the subject. *Watson v. Baker*, 71 Tex. 739.

Parol evidence as to what was intended by a bill of sale, or what was included in it, is inadmissible to contradict or add to the writing. *Schroeder v. Schmidt*, 74 Cal. 459.

Parol testimony is not admissible to add an additional obligation to a written contract. *Kramerv. Rieke*, 70 Iowa, 535.

Where the contract of sale is in writing, a warranty of quality cannot be shown by parol. *Thompson v. Libbey*, 84 Minn. 874.

Parol evidence is inadmissible to add to a written contract of sale a warranty as to quantity (*Etheridge v. Palin*, 72 N. C. 218; *Mast v. Pearce*, 56 Iowa, 579. Compare *Hanger v. Ivins*, 38 Ark. 334); or to engraft a term increasing obligations thereon. *Couch v. Woodruff*, 68 Ala. 466.

It is not admissible to add to a written sale of book-accounts a warranty that they were collectible. *Robinson v. McNeill*, 51 Ill. 225.

It is not admissible to add a covenant to a deed. *Sawyer v. Vories*, 44 Ga. 662.

Parol evidence to attach a condition to a deed is inadmissible in the absence of proper pleadings therefor. *Hawkins v. Bevel*, 61 Ga. 232.

It is not admissible to prove a verbal agreement that a deed of land should pass the manure then on the premises. *Proctor v. Gilson*, 49 N. H. 62.

So of a reservation of rent in a contract of sale, the deed showing none. *Winn v. Murehead*, 52 Iowa, 64.

Parol evidence is not admissible to insert in a bill of lading a warranty for the delivery of a cargo at a particular port. *Petrie v. Heller*, 35 Fed. Rep. 810.

Where a contract provides that the sellers agree to furnish and put in operation "machinery for a hundred-barrel mill," parol evidence is inadmissible to prove that the sellers agreed to furnish machinery that would manufacture three designated grades of flour, with the capacity specified. *Conant v. National State Bank* (Ind.) 22 N. E. Rep. 250.

In a contract for subscription to stock, it is not competent to show by parol a condition attached (*Corwith v. Culver*, 69 Ill. 502; *McCabe v. O'Connor*, 69 Iowa, 134); or that the parties had agreed that the railroad should be extended to another point. *Low v. Studebaker*, 8 West. Rep. 37, 110 Ind. 57.

It cannot be admitted to show that the contract was really different from that subscribed. *Stewards of Meth. Ch. v. Town*, 49 Vt. 22.

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It is not admissible to extend a logging contract as to time. *Spence v. Bowen*, 41 Mich. 149.

Agreements additional to the writing cannot be proved by parol. *Sennett v. Johnson*, 9 Pa. 335.

Parol evidence cannot vary terms of contract.

Parol evidence is not admissible to vary the terms of a written contract (*Stevens v. Haakell*, 70 Me. 202; *Keller v. Webb*, 126 Mass. 393); nor to explain it. *McCulloch v. Girard*, 4 Wash. C. C. 229; *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 174 (5 L. ed. 589); *Gilpins v. Consequa*, Pet. C. C. 85; *Smallwood v. Worthington*, 2 Cranch, C. C. 431; *Kemble v. Lull*, 3 McLean, 272; *Bennett v. Hubbard*, Minor (Ala.) 270; *Troy Iron & Nail Factory v. Corning*, 1 Blatchf. 467; *Lett v. Horner*, 5 Blackf. 296; *Lazare v. Peytavin*, 12 Mart. O. S. (La.) 684; *Sewall v. Roach*, 5 La. Ann. 683; *Stratton v. Rogers*, 11 La. Ann. 330; *Speer v. Whitfield*, 10 N. J. Eq. 107; *Rogers v. Colt*, 21 N. J. L. 704; *Norton v. Woodruff*, 2 N. Y. 153; *Carter v. McNeely*, 1 Ired. L. 448; *King v. Colding*, 1 McMull. L. 123.

Oral testimony is not received to contradict, enlarge or vary a written instrument, except in cases of fraud, mistake or surprise. *Meads v. Lansingh*, Hopk. Ch. 134; *Bunner v. Storm*, 1 Sandf. Ch. 302; *Fitzpatrick v. Fitzpatrick*, 38 Iowa, 674, 14 Am. Rep. 542; *Avery v. Chappel*, 6 Conn. 275, 16 Am. Dec. 58; *Re Estate of Garraud*, 35 Cal. 240; *Love v. Buohanan*, 40 Miss. 760; *Dunham v. Averill*, 45 Conn. 70; *Myres v. Myres*, 23 How. Pr. 411; *Enders v. Enders*, 2 Barb. 368; *Reynolds v. Robinson*, 32 N. Y. 106. Proof *alunde* which creates a doubt is inadmissible. *Kurtz v. Hibner*, 55 Ill. 514, 8 Am. Rep. 668.

A party's admissions cannot be proved to vary a written contract. *Fitts v. Brown*, 20 N. H. 386.

Nor can proof of custom be received to vary the express stipulations of a contract. *Haas v. Hudson*, 63 Ala. 174; *Spears v. Ward*, 48 Ind. 541.

The plaintiff cannot give evidence of a state of facts at variance with the contract, unless the defendant has been advised of the same. *Adams v. Hicks*, 41 Tex. 239.

Where there is no imperfection or ambiguity in the language no evidence of extrinsic matters or usages will be received to vary its terms expressed. *Glendale Woolen Co. v. Protection Ins. Co.* 21 Conn. 19.

Evidence cannot be introduced to contradict or vary a written contract in North Carolina, except in the cases authorized by statute. *Terrell v. Walker*, 66 N. C. 244.

The rule excluding parol evidence to vary the terms of a written contract has been applied to a contract to accept a bond in lieu of a check. *La Fayette County Monument Corp. v. Magoon*, 3 J. R. A. 761, 73 Wis. 627.

stated repeatedly in the charge that, in the first instance, the written contract of the parties must be regarded as the whole of their contract, and that it cannot be altered or changed by parol testimony of what occurred at the execution of the writing except by proof, which the learned judge thus defines: "We say to you, first, that the written agreement, the law says, is the contract between the parties, and that, when any person seeks to change a contract in writing, he must do it by clear, precise and indubitable proof. And, by that kind or measure of proof, is meant that the source from which the testimony comes must be credible; the statements of the witnesses must be clear and distinct as to what was said and done, and, altogether, it must be of a character to convince the minds of the jury that the part claimed was omitted either by fraud, accident

or mistake of the parties, or, if not so kept out of the contract, that the party who complains of the omission was induced to sign the contract by the statement or the contemporaneous agreement made at the time the contract was signed. We are not to look for testimony that is beyond all doubt, as that would be requiring a measure of proof that the law does not require."

There was more of the same kind of direction, and it was accompanied by a very lucid and perfectly impartial presentment of the testimony on both sides, and concludes by a repetition of the caution that the jury must be convinced that the witnesses stated what actually did occur at the time of the execution of the contract, that they were not mistaken in their testimony, and that the essential part of the contract thus omitted was the inducing cause

An order subject to acceptance. *Express Pub. Co. v. Aldine Press* (Pa.) 24 W. N. C. 165.

An unambiguous freight contract, or bill of lading in the absence of fraud or mistake. *Martin v. Union Pac. R. Co.* 1 Wy. Ter. 143; *Louisville, E. & St. L. R. Co. v. Wilson*, 4 L. R. A. 244, 119 Ind. 352; *Hill v. Syracuse, B. & N.Y. R. Co.* 73 N. Y. 351, overruling 8 Hun, 293.

The contract of a broker. *Coddington v. Goddard*, 16 Gray, 433.

A charter-party. *The Augustine Kobbe*, 37 Fed. Rep. 693; *The Serapis*, 36 Fed. Rep. 707.

A conveyance. *Miller v. Edgerton*, 38 Kan. 36; *Wood v. Moriarty*, 4 New Eng. Rep. 269, 15 R. I. 513; *Hess v. Cheney*, 33 Ala. 251.

A contract of employment. *Mann v. Independent School Dist.* 52 Iowa, 180; *Smith v. Moynihan*, 44 Cal. 53.

An agreement that executor shall share commissions. *Conrow v. Conrow* (Pa.) 24 W. N. C. 339.

An insurance policy, that no enlargement can be made without consent of the insurer. *Frost's Detroit L. & W. W. Works v. Millers & M. Mut. Ins. Co.* 37 Minn. 300.

A lease. *Martin v. Berens*, 37 Pa. 459.

The tenor of letters importing authority to act as agent. *McFarland v. Boston & L. R. Corp.* 115 Mass. 63.

A written offer to sell lands. *Atlee v. Bartholomew*, 69 Wis. 43.

A sale by one partner of his interest to another. *Wiggin v. Goodwin*, 68 Me. 399.

The obligation of one describing himself as principal. *McMillan v. Parkell*, 64 Mo. 236.

A promissory note. *Roberts v. Snow* (Neb.) 43 N. W. Rep. 241; *Haley v. Evans*, 60 Ga. 157.

The contract of indorsement (*Barnard v. Gaslin* 23 Minn. 192; *Third Nat. Bank v. Clark*, 23 Minn. 263; *Hauer v. Patterson*, 84 Pa. 274); or the contract created by a promissory note. *Wight v. Sampter*, 127 Ill. 167.

A rafting contract. *Meekins v. Newberry*, 101 N. C. 17.

A sealed contract unless terminated. *Lynch v. McBeth*, 7 How. Fr. 113.

A towing contract. *Milton v. Hudson River Steamboat Co.* 4 Lans. 78.

A warehouse receipt. *Leonard v. Dunton*, 51 Ill. 482.

A whaling voyage contract. *Slocum v. Swift*, 2 Low, 212.

Parol evidence not admissible to vary legal effect of contract.

A written contract cannot be varied by parol evidence of what one of the parties understood it to mean. A party must read a contract which he

signs, or, if unable to do so, must use diligence in endeavoring to have it read to him; and he is bound to know the legal effect of an instrument which he executes. *Keller v. Orr*, 4 West. Rep. 707, 106 Ind. 403.

The rule applied to what his "understanding" was at the time he executed the agreement (*McCormick v. Huse*, 66 Ill. 315); as that it was understood that another was to be interested with him. *Chambers v. Brown*, 69 Iowa, 213.

A writing creating or extinguishing a right cannot be controlled by parol testimony. *Gordon v. Gordon*, 1 Met. (Ky.) 235.

The legal effect of a deed cannot be varied by showing that a portion of land conveyed had been reserved by a contemporaneous parol agreement. *Campe v. Renandine*, 64 Miss. 441.

Evidence which would change the legal effect of a note is not admissible (*Mason v. Mason*, 72 Iowa, 457); or of a blank indorsement. *Farr v. Ricker*, 46 Ohio St. 235.

Inasmuch as the Arkansas statute prescribes the legal effect of a promissory note payable in "dollars," and makes a debt due to a county payable in county warrants, parol evidence is incompetent to prove an agreement that a note due to a county shall be paid in lawful money. *Richie v. Frazer*, 50 Ark. 363.

A question to a witness as to his understanding when he signed a note is not admissible. *Foedick v. Vanarsdale* (Mich.) 41 N. W. Rep. 361.

Evidence to attach a parol condition to the grant repugnant to its legal effect, cannot be received without first proving fraud. *Beers v. Beers*, 23 Mich. 42.

In the entire absence of any ground laid by fraud, accident or mistake in the making of either of two agreements which are claimed to relate in fact to the same transaction, parol evidence is not admissible at all to affect their legal construction. *Hennershotz v. Gallagher*, 124 Pa. 1, 23 W. N. C. 230.

Parol evidence of what the parties understood, and as to what they would do in pursuance of the agreement, is not admissible where the agreement shows the true construction. *Miller v. Butterfield*, 79 Cal. 62; *Bryan v. Idaho Quartz Min. Co.* 73 Cal. 249.

The rule excluding parol evidence where the contract is not ambiguous applied to a condition not stated in the writing (*Marquis v. Lauretson*, 76 Iowa, 23); to an understanding that the contract shall not be operative according to its terms (*McCormick Harvesting-Machine Co. v. Wilson*, 39 Minn. 497); to show that the assignment of a bond and mortgage was made on a condition (*Vau Brunt v. Day*, 17 Hun, 136); or that a written instrument transferring personal property, to be retrans-

that led the plaintiff to sign the written contract.

It is not necessary to review the numerous cases in which this subject has been discussed and the foregoing principles announced. They are well illustrated in the cases of *Walker v. France*, 112 Pa. 203, 2 Cent. Rep. 781, and *Thomas v. Loose*, 114 Pa. 85, 5 Cent. Rep. 190. In the latter case we said: "Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change or reform the instrument. It has been often said that such oral agreement must be shown by evidence that is clear, precise and indubitable; that is, it shall be found that the witnesses are credible, that they distinctly remember the facts to which they testify, that they narrate the details exactly, and that their statements

are true. Absolute certainty is out of the question."

The law having been defined by the learned court below with entire accuracy, the only remaining question is, whether there was evidence in the case of a character proper to be submitted to a jury for their action. The evidence consisted of the written contract and the testimony of one witness, D. L. Ferguson, on the one side, and the testimony of two witnesses, T. L. Rafferty and E. W. Hepburn, on the other. The written contract contains no reference to the verbal stipulation which, it is alleged by the plaintiff, formed part of the real contract of the parties, and induced the plaintiff to sign it. Rafferty had made an agreement with Hepburn and Hoover for the sale of a quantity of white pine timber on a designated tract of ninety acres. The contract in question here was, in

ferred on repayment within a specified time, was an absolute sale (*Proctor v. Cole*, 66 Ind. 576); to discharge an agent from liability on a contract made in his own name (*Bryan v. Brazil*, 52 Iowa, 860); or to limit the effect of a written release (*Drake v. Starks*, 45 Conn. 96); or to render certain one's subscription of "twenty acres of land," to the building of a church. *Palmer v. Albee*, 50 Iowa, 429.

Intention cannot be proved by parol.

An intended contract not made cannot be set up in place of the one made. *Sanford v. Howard*, 29 Ala. 684.

Parol evidence is not admissible to affect a written contract in which the parties have plainly expressed their intention. *Ames v. Brooks*, 3 New Eng. Rep. 485, 143 Mass. 344.

It is error to admit oral testimony of the intention with which a writing is executed. *Morris v. Robinson*, 80 Ala. 291; *Watson v. Watson*, 24 S. C. 229.

A contract made in the name of the principal, and signed in his name by another as his agent, cannot be shown by parol to have been signed by the agent with the intention to bind himself. *Hefron v. Pollard* (Tex.), 11 S. W. Rep. 165.

It is inadmissible to show that a written contract with a certain person who is named as "agent" was intended to be a contract with his wife, for whom he was acting as agent, and not with him personally. *Reab v. Pool*, 30 S. C. 140.

Parol evidence as to what was intended by a bill of sale, or what was included in it, is inadmissible to contradict or add to the writing. *Schroeder v. Schmidt*, 74 Cal. 459.

Or that the parties intended a sale at the market price at the time payment should be demanded. *Marks v. Cass County Mill & Elevator Co.* 43 Iowa, 146.

Or to show that the parties intended their interests should be different from those in the partnership articles. *Taft v. Schwamb*, 80 Ill. 289.

Or to prove that an ordinary note by a husband and wife was intended to be a charge upon her separate estate. *Ragsdale v. Gossett*, 2 Lea (Tenn.) 723.

To show that corporate officers who are bound as makers did not intend to make themselves personally liable. *McCandless v. Belle Plaine Canning Co.* (Iowa) 4 I. R. A. 326.

Parol evidence is not admissible to show that a reservation plainly expressed in a deed was not intended. *Lear v. Durgin*, 6 New Eng. Rep. 896, 64 N. H. 618.

Or an intention to postpone the operation of a deed. *Omaha & G. Smelting & Ref. Co. v. Tabor*, 21 Pac. Rep. 925.

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Or to show that a deed delivered to a grantee was intended to operate as an escrow and not as a deed. *Hargrave v. Melbourne*, 86 Ala. 270.

Or to show that a chattel mortgage was intended to embrace property not specifically included therein. *Van Evera v. Davis*, 51 Iowa, 637.

Intention cannot be proved except in cases of ambiguity. *McClelland v. James*, 33 Iowa, 571.

Parol evidence is admissible to explain a writing.

Parol evidence is admissible, not to contradict or vary, but simply to explain, a written instrument. *Willis v. Fernald*, 33 N. J. L. 206; *Epperson v. Young*, 8 Tex. 135; *Guillory's Succession*, 29 La. Ann. 495; *Hamman v. Keigwin*, 39 Tex. 34; *Green v. Batson*, 71 Wis. 54; *Cooper v. Berry*, 21 Ga. 523; *Quigley v. De Haas*, 98 Pa. 292.

When the party is allowed to produce evidence *abundant* to aid in determining the meaning of an agreement susceptible of different constructions, the other party is entitled to a like privilege. *McPhee v. Young* (Colo.) 2 Denver Leg. News, 289, 21 Pac. Rep. 1014.

It is admissible only when the terms are ambiguous and the intention of the parties not clear. *Lesing v. Grimland* (Tex.), 11 S. W. Rep. 1095.

Courts will then endeavor to determine the intention of the parties. *Benjamin's Succession*, 39 La. Ann. 614; *Koch v. Dunkel*, 90 Pa. 264.

Parol evidence is admissible to explain a doubt arising on the face of a negotiable instrument (*Auzerais v. Naglee*, 74 Cal. 80), as to the party bound or the character in which the signer acted, in an action between the original parties thereto. *Martin v. Smith*, 65 Miss. 1.

A party may show what was its date (*Fenderson v. Owen*, 54 Me. 372), explain and make certain its indefinite stipulations, and ascertain on what consideration, if any, it was based. *Perry v. Smith*, 34 Tex. 277.

Parol evidence is admissible to apply any ambiguous words in an instrument to the proper subject matter. *Howlett v. Howlett*, 56 Barb. 467.

It is admissible to show a doubt as to the subject matter of a deed. *Doe v. Jackson*, 1 Smedes & M. 494.

So it is admissible to make a description certain (*Steadman v. Taylor*, 77 N. C. 134), by evidence of construction given to the deed by the subsequent acts of the parties (*Lovejoy v. Lovett*, 124 Mass. 270); or to show for whose benefit the contract was made (*Lancey v. Phoenix F. Ins. Co.* 56 Me. 562); or to explain that a party's name on a negotiable instrument was not intended as an indorsement. *Cole v. Smith*, 29 La. Ann. 551.

So extrinsic evidence may be received to ascertain the meaning and intent of the parties in an in-

substance, a release by Rafferty to Hepburn and Hoover of their obligation under the original written agreement by him with them, and a transfer of the same to D. L. Ferguson. There was an added modification of the original agreement changing the price to be paid for the logs which were to be cut. There was no stipulation for security to Rafferty, the vendor, in the original contract, and there was none in the written agreement with D. L. Ferguson. But the plaintiff, Rafferty, alleges that he was not willing to make the transfer to Ferguson unless he had security for the payment of the purchase money, and whether there was an agreement for such security, made verbally, but omitted from the writing, was the question in controversy. The oral testimony on that subject was delivered by Rafferty and Hepburn for the plaintiff, and by D. L. Ferguson for the defendant.

Rafferty, being examined, testified, *inter alia*, as follows:

Q. Now what did Hepburn and Hoover do with this timber after the sale of it by you to them?

A. They came to me and wanted to sell it to D. L. Ferguson—they wanted to know if I would release them and take D. L. Ferguson. I told them I did not care if I would be secured on the logs. So we went and wrote the article out.

Q. Where was this conversation?

A. My recollection is that it was made at 'Ras Hepburn's house.

Q. Who was there at the time?

A. Bill Hoover, 'Ras Hepburn, Ferguson and I.

Q. What did you do when you met there?

A. He wrote out the article.

Q. Who wrote it?

insurance policy. *Weed v. London & L. F. Ins. Co.* 26 N. Y. S. R. 414.

It is not necessary to the validity of a policy that the name of the assured should appear in the contract, but he may be described in other ways than by name; and if the description is imperfect or ambiguous, extrinsic evidence may be received to ascertain the meaning and intent of the parties in its use. *Weed v. London & L. F. Ins. Co.* 26 N. Y. S. R. 414.

Where an insurance company became consolidated with another, it might be shown by extrinsic evidence that the guaranty was to indemnify the latter company against liability for the former. *Hedges v. Bowen*, 83 Ill. 161.

It is admissible to prove that the insurers, before issuing the policy, had for a long time insured the structure for the benefit of its prior tenants for the same purposes. *Mayor etc. of New York v. Exchange Fire Ins. Co.* 3 Abb. (N. Y.) App. Dec. 261.

Extrinsic evidence which goes beyond the purpose of aiding in the interpretation of a written insurance policy is inadmissible. *Landers v. Cooper* (N. Y.) 5 L. R. A. 638 and note.

A policy of life insurance is not more open to variation by parol evidence than any other written instrument. *Russell v. Russell*, 64 Ala. 500.

Parol evidence to explain intention of parties to contract.

Parol evidence is admissible to explain the true intent and meaning where it cannot be ascertained from the instrument itself. *Suffern v. Butler*, 21 N. J. Eq. 410; *De Wolf v. Crandall*, 1 Sweeny, 558; *Fisher v. Deibert*, 54 Pa. 460; *Goff v. Pope*, 83 N. C. 123.

The rule does not forbid inquiry into the object of the parties in executing it. *Brick v. Brick*, 98 U. S. 514 (25 L. ed. 256).

The whole written contract is to be considered in ascertaining its true intent. *Case v. Dexter*, 9 Cent. Rep. 259, 106 N. Y. 543.

The testimony must be clear and convincing to overcome the presumption that the contract correctly expressed the intent. *Melswinkel v. St. Paul F. Ins. Co. post*.

Parol evidence connecting the contract with its subject matter is admissible to show the intent of the parties. *Hannah v. Shirley*, 7 Or. 115.

Facts to which the words employed point may be proved as a key to the meaning of the writing. *Richards v. Schlegelmich*, 65 N. C. 150.

The rule admitting parol evidence to ascertain the intent of the parties to an ambiguous conveyance, applied to a description in a deed. *Chester Emery Co. v. Lucas*, 112 Mass. 424.

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It is admissible to prove that a deed was intended at the time of its execution as a conveyance. *Reeves v. Bass*, 39 Tex. 613.

And upon the issue whether a conveyance to a partner was absolute or for the use of the partners. *Black's App.* 89 Pa. 201.

So it is admissible to show whether the assignment of a mortgage was absolute or not. *Hill v. Goodrich*, 39 Mich. 439.

Or that money was actually collected for the benefit of the assignors of a mortgage. *Elder's App.* 39 Mich. 474.

Or to show that an instrument was intended as a security; but inadmissible at law, if the instrument is free from ambiguity. *Anthony v. Atkinson*, 2 Sweeny, 228.

It is admissible to show the intent of the parties to an instrument purporting to be a defeasance. *Walker v. McDonald*, 49 Tex. 458.

In case of an instrument not under seal, it is competent to show by parol that, notwithstanding its delivery, it was intended to become operative as a contract only upon the happening of a future contingent event,—such as, that it should be first executed by some other person. *Merchants Exchange Bank v. Luckow*, 37 Minn. 642.

Or to show that paper on its face payable generally was intended to be payable at a chartered bank. *McLaren v. Marine Bank*, 52 Ga. 131.

Or to show that the parties to a written contract for the manufacture and delivery of "horn chains," intended thereby chains made of hoof and horn. *Swett v. Shumway*, 102 Mass. 365.

Or to explain that a third party, who indorsed a note before delivery to the payee, intended to assume the liability merely of a indorser, and not that of guarantor. *DeWitt County Nat. Bank v. Nixon*, 125 Ill. 615.

Where a note was given for a sum certain, secured by mortgage, parol evidence is admissible to show what the agreement was and what the mortgage was intended to secure. *McAteer v. McAteer* (S. C.) 9 S. E. Rep. 966.

Whether money was loaned by one as principal or as a broker, evidence is admissible to show that receipts therefor, which were prepared by him in the name of another, were not intended to indicate any change in the business. *Comptoir D'Escompte de Paris v. Dresbach*, 78 Cal. 15.

Parol evidence that a writing on a draft, which constitutes a valid acceptance, was intended for that purpose, is not inconsistent with the writing itself. *Cortelyou v. Maben*, 22 Neb. 607.

Inadmissible to explain a patent ambiguity.

Parol evidence is inadmissible to explain a patent

A. D. L. Ferguson wrote it himself. It was written on the bottom of the old article.

Q. You have testified that when Hepburn spoke to you about making this change you stated that you would if you had security?

A. Yes, sir.

Q. Who was present then at Hepburn's house at that time?

A. Ras Hepburn, Bill Hoover and Ferguson.

Q. State what was said there about the transfer of this agreement?

A. Why, I told them that I would let them have the logs if they would give me security; he said he would let me have the logs as security.

Q. Did you then proceed to make a written contract?

A. Yes, sir.

Q. After he drew it did you sign it?

A. Yes, sir.

Q. Was there anything said then?

A. I asked him where the written security was, and he said the logs was security—that Hepburn and Hoover was witnesses. I asked him to put it in the article, but Ferguson said witnesses was as good as if it was in the article. (Repetition of part of answer). A. Yes, sir, of course I did not know it then; that is what he told me, that the witnesses was just as good as the article.

By the Court: What was the reason that you signed this agreement?

A. Why did I sign it? Because they wanted the losing of it, and I thought if I would give him (Ferguson) the agreement and have the logs for security it would be all right.

Q. When you found that this security that

ambiguity. *McNair v. Toler*, 5 Minn. 435; *Wilson v. Horne*, 37 Miss. 477; *Lazear v. Union Bank*, 52 Md. 78.

While a latent ambiguity may be explained by extrinsic parol evidence. *Hornbeck v. American Bible Soc.* 2 Sandf. Ch. 139; *McAllister v. Butterfield*, 31 Ind. 25; *Jackson v. Payne*, 2 Met. (Ky.) 567; *Worthington v. Hylzer*, 4 Mass. 196.

A patent ambiguity in the terms of the will cannot be explained by extrinsic evidence dehors the will. *Grimes v. Harmon*, 35 Ind. 208, 9 Am. Rep. 696.

A will having no ambiguity on its face cannot be explained by parol evidence. *Clark v. Clark*, 2 Lea (Tenn.) 723; *Mussey v. Curtis*, 6 New Eng. Rep. 545, 60 Vt. 271.

A referee cannot be allowed to explain orally his statement of an account which sufficiently shows, for itself, what is proposed to be shown. *Gulley v. Copeland*, 102 N. C. 828.

An ambiguity arising from phraseology cannot be explained by parol. *Richmond T. & Mfg. Co. v. Farquar*, 8 Blackf. 89.

There can be no resort to parol evidence to ascertain the meaning of the parties to an unambiguous contract. *Hunt v. Gray*, 76 Iowa, 238; *Morrill v. Robinson*, 71 Me. 24; *Davis v. Liberty & C. G. R. Co.* 84 Ind. 38; *Brady v. Read*, 94 N. Y. 631; *Findley v. Armstrong*, 28 W. Va. 113.

Where there is no ambiguity requiring explanation in the language of a written contract, and the intent is plain and complete, no evidence will be admitted to give any other construction to it than that which is so plainly expressed. *Weinberger v. Merchants Mut. Ins. Co. (La.)* 5 So. Rep. 738; *Iverson v. Indianapolis School Comrs.* 39 Fed. Rep. 735; *Pierce v. Tidwell*, 81 Ala. 299.

Parol evidence admissible to explain latent ambiguities in terms of contract.

Latent ambiguities may be explained by parol evidence. *Payson v. Ware*, 1 Ala. 160; *Piper v. True*, 36 Cal. 606; *Hotchkiss v. Barnes*, 34 Conn. 27; *Bowen v. Slaughter*, 24 Ga. 338; *Crawford v. Brady*, 35 Ga. 184; *Williams v. Waters*, 36 Ga. 454; *Doyle v. Batornet*, 13 La. Ann. 318; *Patrick v. Grant*, 14 Me. 233; *Shuetze v. Bailey*, 40 Mo. 66; *Hall v. Davis*, 36 N. H. 509; *Hartwell v. Camman*, 10 N. J. Eq. 128; *Masters v. Freeman*, 17 Ohio St. 323; *Bank of U. S. v. Dunn*, 31 U. S. 6 Pet. 51 (8 L. ed. 316); *Pelsch v. Dickson*, 1 Mason, 9.

But a patent ambiguity is not remediable by parol evidence. *Norris v. Hunt*, 51 Tex. 609; *Campbell v. Johnson*, 44 Mo. 247; *Johnson v. Ballew*, 2 Port. (Ala.) 29; *Panton v. Tefft*, 22 Ill. 396; *Mithoff v. Byrne*, 20 La. Ann. 363; *Morris v. Edwards*, 1 Ohio, 189; *Betts v. Demumbrune*, 1 Cooke (Tenn.) 39; *Bowyer v. Martin*, 6 Rand. 525.

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Where ambiguity occurs it is admissible to afford an explanation thereof (*Washington Ins. Co. v. St. Mary's Seminary*, 52 Mo. 480; *Bradstreet v. Rich*, 73 Me. 233; *Knick v. Knick*, 75 Va. 12; *Nashville L. Ins. Co. v. Mathews*, 3 Lea, 490; *Fabbri v. Phoenix Ins. Co.* 55 N. Y. 129); as where words or figures are unintelligible. *Walrath v. Whitteland*, 26 Kan. 482.

Where the language is doubtful, parol evidence is admissible to aid in its construction. *Mathews v. Westborough*, 134 Mass. 555.

Where the note was upon its face ambiguous it was competent for either party to show, by relevant, extraneous proof, on what account it was given. *Halle v. Peirce*, 33 Md. 327.

Ambiguities in a writing may be explained, varied, added to or contradicted, by parol, when it is shown that but for the oral stipulations the writing would not have been executed. *Caley v. Philadelphia & C. C. R. Co.* 80 Pa. 363.

Rule applied to a certificate of deposit, in the same manner as in the case of a receipt. *Long v. Straus*, 4 West. Rep. 239, 107 Ind. 94.

To entries in book accounts in order to make them precise and certain. *Rogers v. State*, 26 Tex. App. 404.

To the grant of a right of way, to show the agreement. *Indianapolis & V. R. Co. v. Reynolds*, 116 Ind. 356.

To the purchase of a mill seat, to show what land was excluded or included. *Towner v. Thompson* (Ga.) 9 S. E. Rep. 672.

To a partnership agreement to explain the nature of the business and indemnity of the property referred to. *Greenwood v. Marvin*, 111 N. Y. 423, 19 N. Y. S. R. 612.

To a sale of land as to improvements, location and value. *McLeroy v. Duckworth*, 13 La. Ann. 410.

The ambiguity in a submission to arbitration is explainable by parol. *Riley v. Hicks* (Ga.) 7 S. E. Rep. 173.

But an award in writing is not open to modification as to what was the "understanding of the arbitrators." *Scott v. Green*, 39 N. C. 273.

In a will parol evidence is not admissible, except to explain a latent ambiguity arising dehors the will, or to rebut a resulting trust. *Gilliam v. Brown*, 43 Miss. 653; *Magee v. McNeil*, 41 Miss. 25; *Ordway v. Dow*, 56 N. H. 17; *Love v. Buchanan*, 40 Miss. 759; *Doe v. Roe*, 1 Wend. 547; *Brainerd v. Cowdrey*, 16 Conn. 1.

Parol evidence is admissible to show the meaning of words and phrases.

Where there is a doubt as to what a word, letter or figure means, extrinsic evidence does not infringe upon the general rule that parol evidence is not admissible to change or explain a written instrument. *Arthur v. Roberts*, 60 Barb. 580.

you spoke of was not in the contract, why did you sign it?

A. He said the logs would be good for security; he told me he would give me security and I signed it. I asked him what the security was, and he said the logs was security; he told me that before, and then afterwards that the logs were security.

Under this testimony it can hardly be said there was any fraud, accident or mistake, except mistake of law, in omitting the verbal agreement for security from the written contract.

It was omitted in fact, and the plaintiff knew it, and assented to the verbal agreement for security. But it seems quite certain that Rafferty was induced to sign the written contract by means of the verbal agreement, and there is at least ample testimony to justify the jury in

finding that such was the fact. It is still necessary, however, to recur to the other evidence in order to determine whether, upon the whole, it conforms to the legal requirements in such cases.

E. W. Hepburn, another and a disinterested witness, was examined and testified as follows:

Q. Did you go and see Levi Rafferty and talk to him before you made this transfer to D. L. Ferguson?

A. Yes, sir.

Q. Where was this contract of December 12, 1882, made?

A. At my place.

Q. Who was present at your place at that time?

A. Nobody but the four of us, W. C. Hoover, D. L. Ferguson, T. L. Rafferty and myself.

Evidence of the sense in which equivocal words were used is admissible only when they are ambiguous or equivocal in meaning. *North American F. Ins. Co. v. Throop*, 22 Mich. 146.

A special sense, which vernacular words have acquired in a particular trade, may be shown, coupled with proof that the parties were contracting with reference to that trade. *Eneas v. Hoops*, 10 Jones & S. 517.

A witness in possession of a key to the reports of a mercantile agency may be allowed to explain what was indicated by reporting a merchant's standing "in blank." *Bradstreet Co. v. Gill*, 72 Tex. 115.

It is admissible to show by parol the meaning of the words "on margin." *Hatch v. Douglass*, 48 Conn. 116.

But it is inadmissible to prove that the words "house of" an obligor, in which he agrees to maintain another, mean the house on the place mortgaged by him to secure the bond. *Gatchell v. Morse*, 81 Me. 206.

In an action on an account stated evidence of the writer of a letter calling attention thereto is admissible to explain that he used the term "unsettled" in the sense of "unpaid," and the term "settled" in the sense of "paid." *Auzerals v. Naglee*, 74 Cal. 60.

In the certificate issued by a college it is admissible to explain the meaning of the words "entitled to all the privileges of a course of study." *Iron City Commercial College v. Kerr*, 3 Brewst. (Pa.) 196.

In a contract for laying brick, evidence of the meaning of the words "wall count, solid measure" is admissible. *Long v. Davidson*, 101 N. C. 170.

In a bill of lading, the term "rusty" may be explained, and it being a mere statement of fact may be contradicted. *The Nith*, 36 Fed. Rep. 86.

In a policy of life insurance the term "reserve-dividend fund" may be explained. *Fuller v. Metropolitan L. Ins. Co.* 37 Fed. Rep. 168.

Evidence is admissible that, in the subscription-book business, the words "order obtained" mean an order under which a certain number of volumes or parts are taken and paid for by the subscriber. *Newhall v. Appleton*, 3 L. R. A. 859, 114 N. Y. 140, 22 N. Y. S. R. 670.

Parol evidence is admissible to show whether by "dollars" federal or confederate money was intended. *Stewart v. Smith*, 3 Baxt. (Tenn.) 231; *Carmichael v. White*, 11 Heisk. (Tenn.) 202; *Atlantic etc. R. Co. v. Carolina Nat. Bank*, 36 U. S. 19 Wall. 542 (22 L. ed. 196).

Or to show that a written agreement expressed to be payable in "dollars" was limited to the actual 6 L. R. A.

value at the time and place of the contract. *Thorington v. Smith*, 75 U. S. 8 Wall. 1, 12 (19 L. ed. 361, 364).

It is admissible to prove the quality and style of the chart promised, in order to enable the jury to determine the meaning of "published," in the light of all the facts. *Stoops v. Smith*, 100 Mass. 68.

Parol evidence admissible to identify person and property.

Person.

Parol evidence is admissible to identify the contract. *Wilson v. Tucker*, 10 R. I. 578; *Briggs v. Munchon*, 56 Mo. 467; *Richards v. Millard*, 1 Thomp. & C. 247; *Wood v. Shurtleff*, 46 Vt. 325.

Where a note signed by two persons as makers is payable "to the order of myself," parol evidence is admissible to show which one is meant as the payee. *Jenkins v. Bass* (Ky.) 10 Ky. L. Rep. 937, 11 S. W. Rep. 233.

Parol evidence is admissible to identify an assignee of public lands with the confirmee. *Langlois v. Crawford*, 59 Mo. 456.

It is admissible to show that the plaintiff is the same person as the one named in a memorandum of a given sale. *Anslay v. Green* (Ga.) 7 S. E. Rep. 921.

It was competent for the plaintiff to show who was the party for whose benefit the note was made. *Green v. Skeel*, 5 Thomp. & C. 25, 2 Hun. 485.

Parol evidence is admissible to show that Melissa, the plaintiff, is the person referred to in a deed to Mercy. *Andrews v. Dyer*, 81 Me. 104.

It may be shown that the signer of a petition, "A. M. Allen" was "Augustus M. Allen." *Carleton v. Rugg*, 149 Mass. 560, 5 L. R. A. 193.

Parol evidence is admissible to identify a legatee named in the will (*Leonard v. Davenport*, 58 How. Pr. 384; *Jones v. Dove*, 7 Or. 467); or to show who is grantee (*Simpson v. Dix*, 131 Mass. 179); or who is the beneficiary of a fund. *Bartlett v. Remington*, 59 N. H. 364.

It is admissible to indicate who is the intended payee. *Barkley v. Tarrant*, 20 S. C. 574, 47 Am. Rep. 853.

Parol evidence is admissible to show that a person is one of a family prohibited from marrying under the will. *Phillips v. Ferguson* (Va.) 1 L. R. A. 837, 13 Va. L. J. 34.

But parol evidence is inadmissible to show that the father was intended as the patentee in the patent, and not the son, where there was no ambiguity in the patent. *Babcock v. Pittibone*, 12 Blatchf. 354.

Property.

Parol evidence is admissible to identify the subject matter of a grant. *Cleverly v. Cleverly*, 124 Mass. 314; *Scheible v. Slagle*, 89 Ind. 323.

Q. Who wrote that contract?

A. D. L. Ferguson.

Q. What, if anything, was said there between Ferguson and Rafferty with reference to security for the logs mentioned in that contract? State what occurred there and what was said by the parties in that room.

A. There was not a great deal said about it. When Rafferty allowed (insisted) he ought to have some security for the logs—that was either before or after this was written out—I don't know which, but I rather think before it was signed—Mr. Ferguson told him he could hold the logs until he got the money; he allowed he ought to have something in the agreement, and Ferguson allowed that witnesses were as good as a bargain. . . .

Q. Was your attention called to this as a witness?

When the debt secured is incorrectly described in the mortgage, parol evidence is admissible at law, as against a stranger, to identify the debt. *Powell v. Young*, 51 Ala. 518.

In a contract of sale it is admissible to identify the land. *Stout v. Weaver*, 72 Wis. 148; *Ames v. Lowry*, 80 Minn. 283; *Baucum v. George*, 65 Ala. 259.

Parol evidence is admissible to identify property described in a mortgage only when consistent with the description therein. *Hutton v. Arnett*, 51 Ill. 198.

It is admissible to identify the demand to which a mortgage refers. *Kimball v. Myers*, 21 Mich. 276.

Parol evidence is admissible to show that goods sold by contract and those offered for delivery were identical. *Habenicht v. Lissak*, 77 Cal. 139.

It is admissible to identify lands described in a lease, but not to supply a description (*Dougherty v. Chesnut*, 86 Tenn. 1); or land in a sheriff's deed. *McPike v. Allman*, 53 Mo. 551; *Shewalter v. Plmer*, 55 Mo. 218. Compare *Orr v. How*, Id. 328.

It is admissible to fit the description to land. *Wharton v. Eborn*, 88 N. C. 344.

It is admissible to identify a note designated in an award as "the note of McIndoe" (*Bancroft v. Grover*, 23 Wis. 463); or a note described in a mortgage. *Colby v. Dearborn*, 59 N. H. 384.

Parol evidence is admissible to identify leased premises. *Bulkley v. Devine*, 3 L. R. A. 330, 127 Ill. 408.

Rule excluding parol evidence confined to parties to the instrument.

The rule against contradicting the tenor of a written instrument by parol does not apply to strangers. *Burns v. Thompson*, 91 Ind. 146; *Lowell Mfg. Co. v. Safeguard F. Ins. Co.* 88 N. Y. 591; *Masterson v. Boyce*, 29 Hun, 456; *Hussman v. Wilke*, 50 Cal. 250; *Smith v. Moynihan*, 44 Cal. 53; *McMaster v. Insurance Co. of N. A.* 55 N. Y. 222; *Brown v. Thurber*, 77 N. Y. 613, 58 How. Pr. 93.

The rule excluding parol evidence of written contracts is confined to the parties to the contract, and does not preclude strangers to it from introducing such evidence. *Talbot v. Wilkins*, 81 Ark. 411; *Coleman v. Pike Co.* 83 Ala. 826.

A writing made by a grantor after the execution of his deed is not admissible against a grantee who has never signed the instrument. *Schwalbach v. Chicago, M. & St. P. R. Co.* 73 Wis. 137.

The rule admitting extraneous evidence does not apply to a contract to convey, or to an agreement to give a bond to convey where title derived is from a stranger. *Tobey v. Leonard*, 2 Cliff. 40.

Contract, part oral and part written.

Oral evidence of a contract, part of which only is in writing, may be admitted when offered to 6 L. R. A.

A. Yes, sir; he said Mr. Hoover and Mr. Hepburn could witness it. I was sitting between Ferguson and Levi Rafferty.

This testimony is corroborative of that of the plaintiff, and would also justify an inference that the signature of Rafferty was obtained by means of the verbal agreement in regard to the security.

The testimony of Hoover was not taken, and the only remaining evidence as to what occurred at the time of the execution of the written contract is the testimony of D. L. Ferguson, the other party to the contract. He says he was present with the other parties named when the agreement between himself and Rafferty was made, but gives no testimony whatever as to what was said at the time. There is but a single sentence in the whole of his testimony that relates in any manner to what was said by

prove the entire contract in conformity with the part that is written, and not to alter it. *Holt v. Pie*, 13 Cent. Rep. 55, 120 Pa. 425; *Blackerby v. Continental Ins. Co.* 83 Ky. 574; *Miller v. Fichtthorn*, 81 Pa. 256-290; *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. 81; *Brigg v. Hilton*, 1 Cent. Rep. 307, 99 N. Y. 517; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584 (28 L. ed. 527); *Unger v. Jacobs*, 14 N. Y. Sup. Ct. 220; *Juilliard v. Chaffee*, 92 N. Y. 529; *Smith v. O'Donnell*, 8 Lea. 468.

As to the admission of parol evidence, see *Farmers & D. Bank v. Fordyce*, 1 Pa. 454; *Barnhart v. Riddle*, 29 Pa. 92-96; *Barclay v. Weaver*, 19 Pa. 396; *Aldridge v. Eshleman*, 46 Pa. 420; *Buckley's App.* 48 Pa. 496; *Baltimore & P. Steamboat Co. v. Brown*, *supra*; *Ott v. Oyer*, 106 Pa. 6; *Broom, Legal Maxims*, 673; *Harper v. Kean*, 11 Serg. & R. 280; 1 Greenl. Ev. § 238 g; *Cunningham v. Shaw*, 7 Pa. 401; *Wolf Creek Diamond Coal Co. v. Schultz*, 71 Pa. 180; *Monocacy Bridge Co. v. American Iron Bridge Mfg. Co.* 83 Pa. 517, 523, 524.

Parol evidence is admissible to show that the original contract was verbal, and only partly reduced to writing; or that the parol portion of it was an independent, contemporaneous, collateral agreement relating to the same subject matter; or that, subsequent to the execution of the receipt of the note, a different and additional contract was entered into between the parties in relation to the note in controversy and payment out of its proceeds. *Brown v. Bowen*, 6 West. Rep. 825, 90 Mo. 184.

The writing not indicating that it was the whole contract, and the guaranty not being inconsistent therewith, parol evidence is admissible. *Chapin v. Dobson*, 78 N. Y. 74.

Parol testimony may be received to prove an agreement in which a written instrument originated and of which it constituted only a part. *McAtcer v. McAtcer* (S. C.) 9 S. E. Rep. 966.

It is permissible, where the writing does not purport to set out the entire contract, to show by parol other stipulations not inconsistent with those expressed. *Powell v. Thompson*, 80 Ala. 51; *Claflin v. Duncan*, 74 Ga. 348.

Limit and exceptions to the rule.

Parol evidence is admitted to show fraud, accident or mistake as to a written instrument; but the evidence should be of what occurred at the execution, and should be clear, precise and indubitable. *Martin v. Berens*, 67 Pa. 459; *Fisher v. Delbert*, 54 Pa. 460; *Hunt v. Rousmanier*, 21 U. S. 8 Wheat. 174 (5 L. ed. 599); *McMahon v. Spangler*, 4 Rand. 51; *Lemaster v. Burckhart*, 2 Bibb (Ky.) 25.

So in an action on a note, even though the effect of such evidence is to contradict or vary the terms

the parties when the contract was signed, and it is in these words: "There was no other contract made except that made in the supplemental agreement." Just what he means by this is not explained. The question to which the above was an answer is not printed, and it cannot be known whether his attention was called to the testimony of Rafferty and Hepburn as to the verbal agreement about security or not. Whether he meant to say there was no other written contract than the supplemental agreement we cannot know, but certain it is that his testimony as it stands means at the utmost nothing more than that in his opinion there was no other contract made than the supplemental agreement. He contradicts nothing that was testified to by Rafferty and Hepburn, although he wrote the agreement, was himself a party to it, and was present during the whole

of the time of its preparation and execution. Such silence in the face of the opposing testimony is much more than mere negative testimony. It is highly persuasive evidence that the conversation testified to by the other witnesses actually took place just as they stated it. The case then stands with the direct, positive and uncontradicted evidence of two witnesses to the fact of the contemporaneous verbal agreement, and the non-denial of it by the other party.

The testimony is precise, definite, distinct, positive, the witnesses are not impeached or contradicted in any manner, and the story they tell is highly probable and reasonable. If their testimony is believed it is of an indubitable character in legal effect, and fully warrants the inference that the signature of Rafferty was obtained by means of the verbal agreement.

of the instrument itself, parol evidence is admissible. *Officer v. Howe*, 32 Iowa, 142.

Exceptions to the rule. See *Bulkeley v. Devin* (Ill.) 3 L. R. A. 330; *Finlayson v. Finlayson* (Or.) Id. 801, note.

Where fraud or mistake is charged, parol evidence is admissible to contradict or vary the contract. *Isenhoot v. Chamberlain*, 59 Cal. 630; *Murray v. Dake*, 46 Cal. 644.

But the fraud charged must be in execution of the contract. *Mitchell v. Univers. L. Ins. Co.* 54 Ga. 230. See *Kuster v. Lebanon Mut. Ins. Co.* (Pa.) 5 L. R. A. 646, note.

It may be shown that the writing executed and delivered was for a wholly different purpose (*Grier v. Mason*, 60 N. Y. 394); or that by reason of the fraud or mistake the contract never existed. *Wilson v. Powers*, 131 Mass. 539; *Cotton States Life Ins. Co. v. Carter*, 65 Ga. 223; *Thorn v. Warfield*, 100 Pa. 519; *Camden & Atlantic Land Co. v. Lippincott*, 45 N. J. L. 406; *Snyder v. Jennings*, 15 Neb. 372; *Childs v. Dobbins*, 61 Iowa, 109; *State v. Gonce*, 79 Mo. 600, disapproving *Caldwell v. Craig*, 21 Gratt. 132; *Depue v. Sergeant*, 21 W. Va. 323; *Anderson v. Snyder*, Id. 632; *Wright v. McPike*, 70 Mo. 175.

In cases of fraud.

When a writing has been executed, the courts allow the fraud or mistake by which an omission or defect in the instrument has been occasioned to defeat the conclusiveness of the writing, and open the door for proof of the real agreement. *Glass v. Hulbert*, 102 Mass. 40, 8 Am. Rep. 431; *Moale v. Buchanan*, 11 Gill & J. 314; *Koop v. Handy*, 41 Barb. 454.

The rule that parol evidence is not admissible to vary a written contract does not apply where, by the fraud of one or both of the parties, the true contract is not shown, and not intended to be shown, by the writing; such as in the case of a usurious contract where the true consideration is not shown. *Grayson v. Brooks*, 64 Miss. 410.

A court of equity will admit parol evidence, to vary, only upon the clearest evidence of fraud, accident or mistake. *Wry v. Cutler*, 12 Heisk. (Tenn.) 26; *Wharton v. Douglass*, 76 Pa. 273.

So where a deed was obtained by fraud, evidence may be received notwithstanding it contradicts declarations of the defendant embodied in the instrument. *Willis v. Kern*, 21 La. Ann. 749.

The rule of exclusion does not apply to proof of a fraudulent or unauthorized alteration. *Buck v. Appleton*, 14 Me. 284.

If a material part of the instrument has been inserted by the fraud of one of the parties, this furnishes an exception to the rule, and parol evidence is admissible to establish the fact. *Bottomley v. U. S.* 1 Story, 135; *Waddell v. Glassell*, 18 Ala. 561; 6 L. R. A.

Townsend v. Cowles, 31 Ala. 423; *Pierce v. Wilson*, 34 Ala. 506; *Lunday v. Thomas*, 26 Ga. 538; *Hamilton v. Conyers*, 23 Ga. 276; *Hunter v. Bilyeu*, 30 Ill. 223; *Gatling v. Newell*, 9 Ind. 572; *Stannard v. McCarty*, 1 Morris (Iowa) 124; *Hunt v. Carr*, 3 G. Greene (Iowa) 581; *Akin v. Drummond*, 2 La. Ann. 92; *Morris v. Terrenoire*, Id. 456; *Williams v. Vance*, Id. 908; *Rachal v. Rachal*, 4 La. Ann. 500; *Gayoso v. Delaroderie*, 9 La. Ann. 278; *Davis v. Stern*, 15 La. Ann. 177; *Garrett v. Crooks*, Id. 483; *Barbin v. Gaspard*, Id. 530; *Farrell v. Bean*, 10 Md. 217; *Holbrook v. Burt*, 22 Pick. 546; *Sandford v. Handy*, 23 Wend. 200; *Bartle v. Vosbury*, 3 Grant, Cas. (Pa.) 277; *Baltimore & P. Steamboat Co. v. Brown*, 54 Pa. 77; *Starke v. Littlepage*, 4 Rand. 308.

Where a party has by fraud prevented the reduction of a part of a contract to writing, the whole contract is open to parol proof in favor of the other contracting party. *Kennedy v. Kennedy*, 3 Ala. 571; *Anderson v. Bacon*, 1 A. K. Marsh. 48; *Martin v. Lewis*, Id. 102; *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Huston v. Noble*, Id. 130; *Wesley v. Thomas*, 6 Har. & J. 24; *Watkins v. Stockett*, Id. 436; *Elliott v. Connell*, 5 Smedes & M. 91; *Chetwood v. Brittan*, 2 N. J. Eq. 438; *Phyfe v. Wardell*, 2 Edw. Ch. 47.

Parol evidence of the fraudulent representations of the vendee is admissible. *Barnard v. Roane Iron Co.* 35 Tenn. 139.

A parol agreement respecting land may be proved to show fraud (*Busick v. Van Ness*, 10 Cent. Rep. 831, 44 N. J. Eq. 82); as that vendor misrepresented the number of acres. *Deakins v. Alley*, 9 Lea, 494.

Parol evidence is admissible to prove fraudulent representations inducing a written contract for the sale or exchange of lands. *Wilson v. Haecker*, 85 Ill. 349.

It is admissible to prove fraudulent representations by a lessor, which induced the lessee to execute a lease. *Morris v. Shakespeare* (Pa.) 11 Cent. Rep. 196.

Evidence to prove by a witness that a widow was induced to execute the deed by fraudulent representations and false promises is admissible. *Westbrooks v. Jeffers*, 33 Tex. 86.

Parol evidence is admissible to show circumstances, to prove fraud in obtaining an indorsement. *Johnson v. Glover*, 10 West. Rep. 126, 121 Ill. 283.

It must be shown that the party was fraudulently deceived and misled as to the contents of the instrument. *Selden v. Myers*, 61 U. S. 20 How. 506 (15 L. ed. 976).

It is admissible to sustain the allegations of fraud in the bill where they are denied in the answer. *Harrell v. Hill*, 19 Ark. 102.

Other allegations made at the time are admissible to show fraud. *Prentiss v. Russ*, 16 Me. 30.

This brings the case within the frequent rulings of this court on this subject, and justifies the learned court below in its action in admitting the evidence and its treatment of it in the charge and answers to points. These several assignments of error are not sustained.

There is no merit in the seventh assignment. The notice was at least sufficient to put an intending purchaser upon inquiry, and the whole question as to whether it was read at the sheriff's sale and the defendant had opportunity to hear it, was very fairly treated in the general charge. The notice contained a distinct claim of title to the logs in Rafferty, and a prudent man inquiring of him, as he would be bound to do, would, it must be presumed, have been informed of the particular kind of title claimed and of the facts upon which it was based.

Seventeenth assignment, which covers also the eighteenth and nineteenth: These all relate to the right of the plaintiff to maintain his action of replevin in his own name without joining others who appear to be co-tenants in common with him of the land from which the logs were cut. The action was not brought by the plaintiff as one of several tenants in common to recover his undivided portion of the logs, but he asserted his right to recover and sought to recover the whole of the logs. The

defendant claimed title to the whole of the logs under a sheriff's sale of the title of D. L. Ferguson, and D. L. Ferguson's title was derived exclusively from the sale made to him by the plaintiff. The defendant, being a purchaser with notice of the plaintiff's claim of title, is in no better position than D. L. Ferguson would have been if he had been the defendant. He at least took the logs, and all the title he had to them came directly from the plaintiff. The sale was at least sufficient to pass over the logs to D. L. Ferguson, who actually took possession of the whole of them under his contract of sale with the plaintiff. The latter certainly had title enough to enable D. L. Ferguson, and through him the defendant, to get possession of the logs. In point of fact, neither D. L. Ferguson nor the defendant was ever molested or interfered with in any way, either in the taking or holding possession of the logs, or any of them, by any of the alleged co-tenants in common of the plaintiff, although five or six years had elapsed from the cutting at the time of the trial. Moreover, although Danver, who sold the timber to the plaintiff, was named in the contract of sale as guardian of two of the brothers of James Rafferty, who was the owner of the land from which the logs were cut at the time of his death, he assumed to sell the whole

In such case conversations may be proven and considered by the jury. *Van Buskirk v. Day*, 32 Ill. 290.

It is admissible to rebut allegations of fraud in application for insurance. *Myers v. Council Bluffs Ins. Co.* 72 Iowa, 178.

It is admissible under the allegations of fraud to show a confidential relation between the parties, such as to render the words and acts of one of them fraudulent. *Mallory v. Leach*, 35 Vt. 158.

Where the defense was equitable, and it would be a fraud on defendant if plaintiff was allowed to refuse performance on his part, parol evidence of the agreement is admissible. *Martineau v. May*, 18 Wis. 54.

In cases of accident.

The same relief will be given when the execution of a written contract, otherwise fully agreed upon, is prevented by an inevitable accident, as by the death of a party. *Whitridge v. Parkhurst*, 20 Md. 62; *Schmidt v. Gatewood*, 2 Rich. Eq. 162; *Collins v. Tillou*, 26 Conn. 368; *Brown v. Lynch*, 1 Paige, 147; *Sweet v. Jacobs*, 6 Paige, 355; *Pom. Eq. Jur.* § 921.

In cases of mistake.

Whether the contract is executory or executed, the plaintiff may introduce parol evidence to show mistake or fraud whereby the written contract fails to express the actual agreement, and to prove the modifications necessary to be made, whether such variation consists in limiting the scope of the contract, or in enlarging and extending it so as to embrace land or other subject matter which had been omitted through the fraud or mistake. *Kelselbrack v. Livingston*, 4 Johns. Ch. 144; *Coles v. Bowne*, 10 Paige, 528; *Hendrickson v. Ivins*, 1 N. J. Eq. 562; *Workman v. Guthrie*, 29 Pa. 495; *Raffensberger v. Cullison*, 28 Pa. 423; *Tyson v. Passmore*, 2 Pa. 122; *Gower v. Sterner*, 2 Whart. 75; *Philpott v. Elliott*, 4 Md. Ch. 273; *Tilton v. Tilton*, 9 N. H. 385; *Murphy v. Rooney*, 45 Cal. 78; *Quinn v. Roath*, 37 Conn. 16; *Monro v. Taylor*, 8 Macn. & G. 713; *Leuty v. Hilla*, 2 DeG. & J. 110; *Beardsley v. Duntley*, 69 N. Y. 577; *Pom. Eq. Jur.* § 866.

But parol evidence is not admissible if the mis-

take be a mistake of law. *Potter v. Sewall*, 54 Me. 142; *Wheaton v. Wheaton*, 9 Conn. 96.

Where there has been a mistake of fact parol evidence is admissible to rectify it (*Pierson v. McCahill*, 21 Cal. 122, 23 Cal. 240; *Sutton v. Sutton*, 25 Ga. 383; *Ward v. Allen*, 28 Ga. 74; *Keisselbrack v. Livingston*, 4 Johns. Ch. 144; *Fishell v. Bell*, 1 Clarke, 37; *Bush v. Tilley*, 49 Barb. 569; *Newson v. Bufferlow*, 1 Dev. Eq. 379; *Isakoe v. Proctor*, 6 T. B. Mon. 311; *Paige v. Sherman*, 6 Gray, 511); as a mistake in a balance of an account (*McCurdy v. Brethitt*, 5 T. B. Mon. 232), or in a contract of settlement. *Gill v. Claggett*, 4 Md. Ch. 470.

The burden of proof of mistake is on the one asserting it. *Coles v. Bowne*, 10 Paige, 528.

Mistake may be shown to relieve a party from his apparent liability. *Farwell v. Ensign* (Mich.) 10 West. Rep. 564.

Plaintiff suing to reform a written instrument on the ground of mutual mistake may prove such a mistake by parol. *Fudge v. Payne*, 18 Va. L. J. 637.

If the mistake is clearly proved or admitted courts of equity will give relief. *Van Ness v. Washington*, 39 U. S. 4 Pet. 232 (7 L. ed. 842); *Blanchard v. Moore*, 4 J. J. Marsh. 471; *Huston v. Noble*, Id. 180; *Peterson v. Grover*, 20 Me. 368; *Harrison v. Howard*, 1 Ired. Eq. 407; *Gibson v. Watts*, 1 McCord, Ch. 490; *Perry v. Pearson*, 1 Humph. 451. Consult *Welsey v. Thomas*, 6 Har. & J. 24; *Watkins v. Stockett*, Id. 485; *Sutherland v. Crane*, Walk. Ch. (Mich.) 528; *Harris v. Dinkins*, 4 Deaus. Eq. 60.

It is admissible to show that the contract is not the contract actually intended, and to prove the mistake. *Long v. Dooley*, 4 Hayw. (Tenn.) 128.

In case of fraud or mistake in drawing the instrument parol evidence is admissible. *Christ v. Diefenbach*, 1 Serg. & R. 464; *Soott v. Burton*, 2 Ashm. 312.

The Code may provide for correction of imperfections and mistakes in a writing. *Lee v. Summers*, 2 Or. 260.

Parol evidence, when admissible to supply an omission in a written contract, must be clear and satisfactory (*Pickett v. Ferguson*, 36 Tenn. 642); as the omission of a clause by mistake of scrivener. *Gower v. Sterner*, 2 Whart. 75.

of the timber, claiming he had a right to do so. Mrs. Martha Rafferty, who was the mother of James, was tenant for life of the land, and paid the taxes on it, testified that it was timber land, part of which had been cut off before her husband bought it, and that she consented to the sale of the timber by Denver to T. L. Rafferty, the plaintiff. Denver took a judgment note as trustee from T. L. Rafferty for \$1,100, the whole of the purchase-money of the timber, and entered it on record at once. None of the cotenants ever made objection to the sale or set up any title to the timber against either D. L. Ferguson or the defendant. We think it clear from these facts that the plaintiff must be regarded as seeking to recover upon the whole title to the logs, with evidence of consent of the other parties in interest, especially of his mother, who, quite possibly, had a legal right as tenant for life to cut off all the timber, that being the main profit of the land. *Willard v. Willard*, 56 Pa. 119.

This being so, his right to recover cannot be disposed of upon the assumption that he is simply one of several tenants in common seeking to recover his undivided interest only, and authorities to the effect that no recovery can be had upon such a title do not determine the case. It seems to us quite plain that, as between him-

self and D. L. Ferguson, or the defendant with notice, he had the right to the possession for the security of the purchase money, and at least a qualified title to the logs. In such circumstances the authorities are plain that there may be a recovery.

In *Harlan v. Harlan*, 15 Pa. 507, we said: "It is well settled, as a general principle, that in Pennsylvania replevin lies wherever one man claims goods in the possession of another, and this whether the claimant has ever had possession or not, and whether his property in the goods be absolute or qualified, provided he has the right of possession."

The same doctrine is repeated in *Miller v. Warden*, 111 Pa. 300, 1 Cent. Rep. 873, and in other cases.

The case of *Reinheimer v. Hemingway*, 35 Pa. 482, is not in point, as it presents a different question growing out of entirely different facts. The defendant here sets up no adverse title to the logs, whether derived from a stranger or from any of the co-tenants. He literally claims upon the very title which he derived from the plaintiff, and seeks to impeach it for the mere purpose of avoiding payment of the purchase money, which he certainly cannot do. He never has been evicted from his possession which the plaintiff gave him, nor has his title

It is admissible to show a clerical error in drawing the writing. *McNulty v. Prentice*, 25 Barb. 204; *Leggett v. Burkhalter*, 80 Miss. 421.

So a scrivener may show a mistake that would vitiate a will. *Dunlap's App.* 8 Cent. Rep. 844, 118 Pa. 600.

Parol evidence is admissible to prove a mistake in the name of the grantee in a deed (*Louisville, N. A. & C. R. Co. v. Power*, 119 Ind. 269); the identity of a legatee or mistake in his name. *Evans v. Hays*, 3 N. J. Eq. 204.

Parol evidence contradicting the date of a writing is admissible. *Gately v. Irvine*, 51 Cal. 172; *Claess v. Burgess*, 12 La. Ann. 142.

A purchaser may show by parol that the date in the power of attorney was a clerical error. *Finney's App.* 59 Pa. 308.

The true date of a misdated note may be shown by parol. *Biggs v. Piper*, 86 Tenn. 589.

A mistake in the date of a letter may be established and corrected by parol. *Stockham v. Stockham*, 32 Md. 196.

So a mistake in a date of advertisement of execution sale. *Arberry v. Noland*, 2 J. J. Marsh. 421.

In cases of illegal contracts.

Parol evidence is admissible whenever the contract is in fraud of law. *Lazare v. Jacques*, 15 La. Ann. 699.

It is admissible to prove the instrument void, or inefficacious, or that the consideration has failed (*Corbin v. Sistrunk*, 19 Ala. 208); or to show that the instrument was void, or that it never had any legal existence or binding force, for want of due delivery and acceptance (*Leppoc v. National Union Bank*, 32 Md. 136); or void because made in furtherance of an illegal object. *Martin v. Clarke*, 38 L. 389.

It is admissible to show that the contract never existed, where its existence is the immediate issue (*Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84); or that it never existed because induced by fraudulent representations (*Jamison v. Ludlow*, 3 La. Ann. 492); or to show that a signature to the writing was obtained by fraud. *Lull v. Cass*, 43 N. H. 62.

It can always be shown, in a suit at law or in

equity, that an instrument produced in evidence was never executed by the person whose signature it bears. *Marsh v. Nichols*, 123 U. S. 605 (32 L. ed. 538).

It may be shown that a patent for an invention was never signed by the officers whose names are attached to it. *Ibid.*

It is admissible to vary or contradict a written document introduced to support a usurious contract (*Fenwick v. Ratliff*, 8 T. B. Mon. 154); or to show that a written act contravenes the law passed in the interest of public morals. *Fletcher's Succession*, 11 La. Ann. 59.

Testimony to contradict a deed by denying that any consideration was paid is admissible. *McCampbell v. Durst* (Tex.) 11 S. W. Rep. 380.

The rule which excludes parol evidence is inapplicable to evidence of failure of consideration. *Meyer v. Casey*, 57 Miss. 615.

Parol evidence is admissible to show want, failure or illegality of consideration of a contract (*Waymack v. Hellman*, 28 Ark. 449); as that the seller agreed to take confederate money in payment, although nothing appeared upon the face of the contract. *Donley v. Tindall*, 33 Tex. 43.

Parol evidence to show trust.

Oral or written testimony showing the circumstances of a transaction and the intention of the parties, is admissible to prove or disprove an implied trust. *Moore v. Stinson*, 4 New Eng. Rep. 654, 144 Mass. 594.

Or resulting trusts. *Ibid.*; *Beck v. Beck*, 8 Cent. Rep. 548, 43 N. J. Eq. 39; *Jackson v. Jackson* (Pa.) 7 Cent. Rep. 850.

Or to show that the grantee in an absolute conveyance agreed to hold the land in trust for the grantor's benefit. *Morrall v. Waterson*, 7 Kan. 199.

Or to show that an unwritten declaration of trust was made contemporaneously with the making of the title under which it is declared. *McVay v. McVay*, 8 Cent. Rep. 598, 43 N. J. Eq. 47.

It is admissible to prove that a note executed to one as guardian was merely intended as a means of securing a trust for the support of the minor. *Collins v. Gilson*, 29 Iowa. 61.

even been threatened, yet he proposes to keep both the logs and their purchase money, upon the mere allegation that others are interested in the logs with the plaintiff, although there is satisfactory evidence of their assent to the plaintiff's action and claim of title.

These several assignments of error are not sustained. The remaining assignments are without merit and are dismissed. The case was tried with much care, and an extremely lucid and able charge was delivered to the jury. It has been argued in this court with great force and ability by the learned counsel on both sides. It seems to us substantial justice has been done, and we are not convinced that any error occurred on the trial.

Judgment affirmed.

Robert L. BROWNFIELD, *Plff. in Err.*,

v.
Lawrence JOHNSON *et al.*

(....Pa....)

1. Where the article is uniform in bulk and the act of separation throws no additional burden on the buyer, a tender of too much, from which the buyer is to take the proper quantity, is a good delivery; at least where the article is ordered from a correspondent who is agent for buying it.

2. A tender of 400 hectolitres of nuts to a purchaser, to be taken from a ship's hold containing 582 hectolitres of uniform quality, where the nuts are shipped as ordered except as to additional quantity, which is consigned to the seller and not to the buyer to whom the quantity ordered is consigned, the purchaser having agreed to furnish bags, is a good delivery as to the 400 hectolitres, especially where it was common to ship small orders of nuts in common bulk in this manner.

(October 7, 1890.)

ERROR to the Court of Common Pleas, No. 2, of Philadelphia County to review a judgment in favor of plaintiffs in an action to recover damages for an alleged breach of contract to purchase certain nuts. *Affirmed.*

The facts are fully stated in the opinion.

Mr. M. Hampton Todd, for plaintiff in error:

When it is sought to compel a party to pay for goods which he has refused to accept, there can be no recovery unless the order has been strictly and literally fulfilled.

Clark v. Wright, 5 Phila. 439; *Norrington v. Wright*, 115 U. S. 188 (29 L. ed. 366). See *Hare*, Cont. 569; *Bowes v. Shand*, L. R. 2 App. Cas. 455; *Welsh v. Gosser*, 89 N. Y. 540; *Filley v. Pope*, 115 U. S. 213 (29 L. ed. 372); *Cash v. Hinkle*, 36 Iowa, 623.

If more is sent than the purchaser agreed to buy, he may decline the risk and trouble of selecting part and return the whole.

Hare, Cont. 570; *Levy v. Green*, 1 El. & El. 969; *Cunliffe v. Harrison*, 6 Exch. 903; *Rommel v. Wingate*, 108 Mass. 827; *Rylands v. Kreitman*, 19 C. B. N. S. 351; *Cross v. Eglin*, 2 Barn. & Ad. 106; *Bostock v. Jardine*, 8 Hurl. & C. 700, 11 Jur. N. S. 586; *Tamaco v. Lucas*, 1 El. & El. 581; *Benjamin, Sales* (1888); *Bennet's Notes*, p. 534; *Reuter v. Sala*, 43 L. J. N. S. C. P. 492; *Blackburn Contract of Sale*, 156-162, *215 *et seq.*

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Before any property in goods sold can pass, they must be ascertained, designated and separated from the stock or quantity with which they are mixed.

Haldeman v. Duncan, 51 Pa. 66; *Schmertz v. Dwyer*, 53 Pa. 335.

Mr. John G. Johnson, for defendants in error:

Title was vested in defendants after vendors at Para had sold to La Roque, Da Costa & Company, acting for defendants, and after vendors had been paid for them and had delivered them.

See *Hare*, Cont. p. 425; *Jackson v. Anderson*, 4 Taunt. 28; *Gardner v. Dutch*, 9 Mass. 430.

Clark, J., delivered the opinion of the court:

A complete understanding of the rules of law governing this case involves a brief statement of the material facts. On the second day of December, 1886, Brownfield & Co., the defendants, gave an order to Lawrence Johnson & Co., to purchase for them, in Brazil, 300 bags best quality of new Brazil nuts of the first receipts; payment to be made in cash on arrival, or by sixty-day note, etc., at the defendants' option,—the plaintiffs to cable price at the time of shipment. On the same day the plaintiffs replied, stating that Brazil nuts were not bought by the bag, but by hectolitres, a measure which, in past years, averaged from 100 to 120 pounds; that the nuts came in bulk in the steamer and the defendants would have to furnish the bags on arrival in New York; and as "the out-turn of the measure is uncertain" they proposed to order 450 hectolitres, etc. To this the defendants replied by telephone, "Order 400 hectolitres, and buy only the very best nuts obtainable."

The plaintiffs placed the order in the hands of their correspondents, La Roque, Da Costa & Co., Para, Brazil, who undertook the purchase, and on the 9th of February following advised the plaintiffs of shipment per steamer Portuense, upon board of which were nearly 6,000 hectolitres of Brazil nuts for other parties. Of this shipment, and of the price, notice was on the same day given to the defendants. Upon the arrival of the Portuense in New York, Lawrence Johnson & Co. handed to the defendants a delivery order for 400 hectolitres Brazil nuts, in bulk, in separate hold, on board the Portuense, with copy of original invoice, and the plaintiffs' bill, amounting to \$3,441.18.

The invoice was for 312 hectolitres at 15,150 reis each, and 88 hectolitres at 14,000 reis each; showing that the nuts had been originally purchased in two separate lots, and at different prices. The defendants, with the delivery order in their possession, proceeded to New York and went on board the Portuense, where they found one consignment of nuts in the name of Brownfield & Co., but the plaintiffs' storekeeper informed them that the 400 hectolitres in question were embraced in a consignment of 582 hectolitres of Brazil nuts in separate hold, in the name of the plaintiffs. The defendants thereupon refused to receive any portion of these nuts as an execution of their order. The plaintiffs tendered to the defendants the whole 582 hectolitres or 400 hecto-

tires thereof, at their option, at the invoiced prices, which tender in either alternative the defendants declined to accept. The plaintiffs afterwards tendered 400 hectolitres at the average price, which the defendants also declined; subsequently the plaintiffs separated the 400 hectolitres from the lot, and notified the defendants of their weight, but the defendants absolutely declined to accept the nuts on any of the several propositions made by the plaintiffs.

The 582 hectolitres were made up of two lots, one of 812 hectolitres, invoiced at 15,150 reis; the other of 270 hectolitres, invoiced at 14,000 reis; 88 hectolitres of the latter were invoiced to the defendants, and the residue, being 182 hectolitres, to Lawrence Johnson & Co., for account of La Roque, Da Costa & Co., who, it is said, according to the method of dealing in Brazil, in order to get 88 hectolitres to fill the order were obliged to buy a larger lot. That all parties acted in good faith is a fact found by the jury, and the case turns upon the question whether the defendants' order was properly and legally executed.

If the purchase had been of 400 hectolitres only, shipped in separate hold, there could be no question as to the defendants' liability for the price. What, then, was the effect of placing the 182 hectolitres in the same hold with the 400 consigned to the defendants? It may be conceded as a general rule that, as between vendor and vendee, when it is sought to compel a party to pay for goods which he has refused to accept, there can be no recovery unless the order has been strictly and literally fulfilled. The buyer is entitled to refuse the whole of the goods tendered if they exceed the quantity agreed, and the vendor has no right to insist upon the buyer's acceptance of all, or upon the buyer's selecting out of a larger quantity delivered. Benjamin, Sales, § 1080. To the same effect are the cases cited by the plaintiffs in error. With reference to quantity, however, the rule is less rigid where goods are ordered from a correspondent who is agent for buying them (*Ireland v. Livingston*, L. R. 2 Q. B. 99, 36 L. J. N. S. Q. B. 50, L. R. 5 H. L. 395); for the relation of vendor and vendee, which finally results, is preceded by the relation of principal and agent, and the agent in such a transaction is necessarily invested with some degree of discretion in making the purchase. See also *Johnston v. Kershaw*, L. R. 2 Exch. 82, 36 L. J. N. S. Exch. 44; *Jefferson v. Quercus*, 30 L. T. N. S. 887.

It must be conceded, however, that the purchase and tender of 582 hectolitres, upon an order for 400, would involve a wider discretion than would be allowable under the special facts of this case, even as between principal and agent.

In this case, however, the plaintiffs' correspondent purchased for and invoiced to the defendants 400 hectolitres only, and that quantity was tendered; the remaining 182 hectolitres were not invoiced to the defendants, although the plaintiffs proposed that the defendants might have them if they chose to take them. The 400 hectolitres of nuts unquestionably became the property of the defendants when purchased in Brazil, for they were purchased upon their order. By force of that order the plaintiffs became the defendants' agent with author-

ity to constitute an agent in Para for its execution; and the nuts were bought in virtue of the authority thus conferred. The only question, therefore, would seem to be upon the effect of the shipping of the whole lot of 582 hectolitres in one hold, although upon separate invoices and to different consignees. It was shown that this was the usual method of shipping, especially when the orders were small. There was no effort to establish a custom of this kind, but simply to show that this was the usual and ordinary method pursued in the shipping trade. The defendant had a right to suppose these goods would be shipped in the usual manner, unless he directed otherwise, and that, although intermingled with others in the forward hold of the vessel for transportation, they would be separated at the place of delivery. The nuts in question were of the same quality; they were bought at different prices, but the evidence is clear that they were of uniform quality.

The weight of American authority supports the proposition that when property is sold to be taken out of a specific mass of uniform quality, title will pass at once upon the making of the contract, if such appears to be the intent. Oil in a tank and grain in an elevator may serve as illustrations of this rule. Where, however, the property sold is part of a mass made up of units of unequal quality or value, such as cattle in a herd, selection is essential to the execution of the contract, and of course the rule cannot apply. Benjamin, Sales, 477, 581, and cases there cited.

The storage of oil in tanks and of grain in elevators, although not universal, is the usual and ordinary means employed by large dealers in those commodities; and whilst no custom of that kind, technically speaking, could be established, the usage of the trade and general course of business in this country is well known. In view of the necessities which grow out of such usage, the American courts have departed from the rule adhered to in England, and have recognized a rule for the delivery of this class of property more in conformity with the commercial usages of the country. A distinction is made between those cases where the act of separation is burdensome and expensive or involves selection, and those where the article is uniform in bulk and the act of separation throws no additional burden on the buyer. In the latter class of cases a tender of too much, from which the buyer is to take the proper quantity, is a good delivery. Benjamin, Sales, 1080, note. See also *Kimberly v. Patchin*, 19 N. Y. 390; *Hutchison v. Com.* 82 Pa. 472, *Wilkinson v. Stewart*, 85 Pa. 255; *Bretz v. Diehl*, 117 Pa. 589, 10 Cent. Rep. 781.

The case at bar bears no analogy whatever to *Stevenson v. Burgin*, 49 Pa. 44, for all that is decided by that case is "that in a contract for a fixed quantity of merchandise to be delivered on board a vessel, the purchaser is not bound to accept and pay for a larger quantity." The principle has no application to the evidence in this case.

The case at bar bears a closer analogy to *Lockhart v. Bonsall*, 77 Pa. 53. In that case a tender of 5,000 barrels of oil was made by Lockhart to Bonsall out of a bulk of 5,961 barrels contained in 118 bulk cars. As it was

the duty of Bonsall to pump the oil from the cars into the tanks of the Anchor Works, which had been designated as the place of delivery, it was held that Lockhart was not bound to set apart the precise quantity named in the contract before offering to deliver. So here, the measuring of the nuts and their removal from the vessel was the work of the defendants, and as the article was uniform in bulk, selection was of no consequence, nor was the act in any sense burdensome or expensive; for, assuming

that the whole bulk was to be measured, yet the expense attached to the whole, and each part owner was liable to share it.

We are of opinion that, when the nuts were delivered on board the *Portuense* at Para the title to ~~the~~ the bulk belonged to the defendants and that upon the arrival of the vessel at New York the tender of the 582 hectolitres from which the defendants were invited to take their share was a good delivery.

The judgment is affirmed.

IOWA SUPREME COURT.

William HINTRAGER
v.
Cornelius MAHONY *et al.*

(.....Iowa.....)

1. A redemption from a tax sale is effected by the payment by the person entitled to redeem of the amount which he is informed by the proper officer is necessary, and his receipt of a certificate of redemption from the officer, although by mistake of the officer the amount paid is too small.

2. A valid redemption will not be avoided by the neglect of the redemptioner to pay the amount overlooked by the officer and omitted from the payment, even when notice of the mistake is given him by the officer and its payment demanded.

3. An appeal will not lie from a judgment which has been performed.

(October 18, 1889.)

CROSS appeals from a decree of the District Court for Dubuque County in an action to quiet title to certain lands which plaintiff claimed under a tax deed, plaintiff appealing from so much of the decree as permitted defendants to redeem from the sale, and defendants appealing from so much as required the payment of a certain sum to entitle them to the land. *Defendants' appeal dismissed and judgment affirmed.*

The facts sufficiently appear in the opinion.

NOTE.—Redemption from tax sale.

It is the duty of the proper officers to impart correct information to parties seeking to redeem from tax sales, and their mistake, error or negligence will support the right of redemption after the execution of the tax deed. *Corning Town Co. v. Davis*, 44 Iowa, 623; *Bubb v. Tompkins*, 47 Pa. 359; *Baird v. Cahoon*, 5 Watts & S. 540; *Laird v. Hester*, 24 Pa. 452; *Dougherty v. Dickey*, 4 Watts & S. 143; *Price v. Mott*, 52 Pa. 315; *Lamb v. Irwin*, 69 Pa. 433; *Dietrick v. Mason*, 57 Pa. 40; *Van Benthuyssen v. Sawyer*, 36 N. Y. 150; *Kinsworthy v. Austin*, 23 Ark. 375; 2 *Desty*, Taxn. 377.

It is the duty of the treasurer, on an offer to redeem, to state the taxes and costs to be paid; and if he misstate the amount it will not affect the redemption. *Dietrick v. Mason*, 57 Pa. 40; *Price v. Mott*, 52 Pa. 315; *Bubb v. Tompkins*, 47 Pa. 359; *Baird v. Cahoon*, 5 Watts & S. 540.

If redemption is prevented by the officer refusing to give a statement and receive the amount, the title is not cut off. *Van Benthuyssen v. Sawyer*, 36 N. Y. 150.

6 L. R. A.

Messrs. Powers & Lacy, for plaintiff:

The certificates of redemption do not constitute the redemption; they are only prima facie evidence of redemption.

Shawler v. Johnson, 52 Iowa, 477.

The sale is not discharged until the proper amount is paid.

Blackwell, Tax Titles, 4th ed. p. 500.

There is no such thing under our Statute as a partial redemption; there must be a complete redemption or it is no redemption at all. In this case, the requisite amount not having been paid, the fault as to its nonpayment before the deed issued must not in any manner be attributable to the fee owner; and he will not be allowed to set aside the tax deed and to redeem, unless he is free from negligence, and unless the evidence shows strong equities entitling him to the relief.

Harrison v. Owens, 57 Iowa, 314; *Bolinger v. Henderson*, 23 Iowa, 167; *Playter v. Cochran*, 37 Iowa, 280; *Moore v. Hamlin*, 38 Iowa, 433.

The certificates of redemption are but prima facie evidence of redemption, and marking the land "redeemed" on the tax books did not make a redemption when it was a mistake, and the land, in fact, had not been redeemed.

Blackwell, Tax Titles, 4th ed. p. 501; *State v. School & U. Land Comrs.* 13 Wis. 409; *Shawler v. Johnson*, 52 Iowa, 477.

Especially is this true when the fee owner is notified of the mistake and is asked and is offered to be allowed to redeem before the deed issued. If the party attempting to redeem has not paid all that was requisite to complete it,

The owner cannot be damaged by neglect of the officer. *Price v. Mott*, 52 Pa. 315.

The redemption is effectual, though by mistake all the taxes were not included which should have been. *Bubb v. Tompkins*, 47 Pa. 359.

Although redemption is a statutory right, yet a party attempting, in good faith, to make it, may be relieved against the mistakes or frauds of the officers of the law or of the purchaser. *Gage v. Scales*, 100 Ill. 218.

The sale will be discharged even though, in consequence of the mistake, he has paid less than the proper amount, if he will pay the deficiency. *Ibid.*

Where the owner of real estate sold for taxes applied to the county clerk to redeem the same, and paid the sum required of him by the clerk, and took a certificate of redemption, but the clerk, by mistake, failed to require the payment of taxes subsequent to the sale, a court of equity may relieve the owner as against such mistake, and protect the owner's title. *Ibid.*

he should make a clear showing that no responsibility for not paying rests upon him.

Cooley, Taxn. 2d ed. 541.

When defendants performed what was required of them by the decree, and thus, so far as they were concerned, derived the benefits to them arising from it, and assented to it, it became fixed and absolute as to them, and they cannot appeal from it.

Borgalithous v. Farmers & M. Ins. Co. 38 Iowa, 252; *Mississippi & M. R. Co. v. Byington*, 14 Iowa, 572; *Altoona Ind. Dist. v. Delaware Dist. Twp.* 44 Iowa, 201.

Messrs. Utt Brothers, for defendants:

If a party in good faith attempts to redeem, and applies to the proper officer, and pays the amount demanded by him for redemption, and this amount is accepted by the officer, it is in fact a redemption, and a deed thereafter issued upon the sale is void.

Bubb v. Tompkins, 47 Pa. 359; *Price v. Mott*, 53 Pa. 315; *Dietrich v. Mason*, 57 Pa. 40-48; *Breisch v. Core*, 81 Pa. 336; *Burroughs*, Taxn. 360; *Cooley*, Taxn. 2d ed. 540. See also *Van Benthuysen v. Sawyer*, 36 N. Y. 150; *Corning Town Co. v. Davis*, 44 Iowa, 622, 626; *Hartman v. Anderson*, 48 Iowa, 309.

The sale book does not show that Hintrager ever paid any of the subsequent taxes, and therefore the party applying to redeem was not compelled to pay them.

Shoemaker v. Lacy, 45 Iowa, 422; *Hough v. Basley*, 47 Iowa, 330; *Gardner v. Early*, 69 Iowa, 42.

Granger, J., delivered the opinion of the court:

The controversy involves the title to certain lots in the City of Dubuque. The basis of the plaintiff's title is a tax deed signed by the treasurer of said city. When the lots were sold for taxes, D. A. Mahony and others were the owners, as heirs to C. Mahony, deceased. Within the statutory period for redemption, D. A. Mahony paid to the proper officer the amount claimed, and received a certificate of redemption. Some years thereafter the city treasurer issued to plaintiff a deed in pursuance of the sale for taxes. Plaintiff in this proceeding seeks to quiet the title to the lots by virtue of his deed, and to avoid the effect of defendant's certificate of redemption, by showing that at the time of the redemption Mahony did not pay the amount necessary to redeem, and afterwards neglected to make such payment, when requested by the city treasurer to do so. We think it must be conceded that the requisite amount was not paid. The record, in this respect, hardly admits of a question. The particular facts in brief are that Mahony went to the treasurer and asked the amount necessary to redeem. The treasurer examined the books and stated the amount, which was paid without question. Mahony took no part in the examination of the books, and wholly relied on the information given him by the treasurer as to the amount to be paid. The amount necessary for redemption was \$63.70, and the amount actually paid was \$47.29. No question of fraud or deception is made as against Mahony. Within a month after redemption, the treasurer notified Mahony of the mistake, and requested him to make the additional payment, which he

neglected to do. No effort was made to set aside or avoid the redemption; but the treasurer, because of the deficiency in payment, treated the redemption as of no effect, and made the deed to the plaintiff.

The record presents the question if a treasurer's deed, under such circumstances, is valid to convey title. The specific point urged in argument is that there was a "redemption, or no redemption," and, as we understand, if a redemption, no deed could issue; if no redemption, then the deed could issue. If the expression is designed for acceptance without qualification, its correctness might be doubted; that is, if counsel claim that a redemption that would save the issuing of a deed must be one that could not be set aside because of defects in the proceeding, we are not at present prepared to accept it as a correct expression of the law.

A person desiring to redeem land from a sale for taxes must apply to the officer designated by law; the amount necessary for redemption must be determined from calculations based upon data from books or records of the office; and, of necessity, the question of amount must be determined by the officer. In this respect he must act for the tax-sale purchaser and the redemptioner. The laws prescribing the forms and methods for redemption are enacted in the light of the existing facts that many persons applying to redeem are not competent to make the calculations, nor to ascertain from the records the data necessary therefor; and an attempt so to do would result in confusion and failure. Many who are competent to make the calculations with the proper data are unfamiliar with the records of the office; and an attempt to trace the records would be impracticable, and often a serious impediment to the business of the office. The case of *Corning Town Co. v. Davis*, 44 Iowa, 622, may be profitably consulted, on this branch of the case, as to duties of officers, and reliance thereon. Now, when a party entitled to redeem applies to the proper officer, and asks for the proper amount to redeem, and, upon information, pays it, and takes his certificate, and by mistake of the officer the amount paid is too small, is it a redemption?

Barring one feature of the case to be hereafter noticed, the Supreme Court of Pennsylvania seems to have had the same question before it.

In the case of *Bubb v. Tompkins*, 47 Pa. 359, by mistake of the officer, subsequent taxes paid by the purchaser were not included in the redemption. This is the mistake that the appellant claims that the officer made in the case at bar. The court held that this was a complete redemption, and divested the lien, and that the deed which afterwards issued was void. The court said: "We think this land was well redeemed. The owner came in the proper time to the proper officer, and offered to pay all charges that were against the land; and it was by mistake of the officer that he did not pay all. His redemption is not invalidated by the mistake of the public officer. It was very natural to trust him. Most people do so, and the law cannot declare such trust wrong. If the purchasers did not get all they are entitled to by the redemption, their remedy is against the treasurer." The same question was again be-

fore that court in the case of *Price v. Mott*, 52 Pa. 815, and the case of *Bubb v. Tompkins* was cited and approved.

The case of *Dietrick v. Mason*, 57 Pa. 40, is also directly in point. In that case the officer also accepted a less sum than was necessary to redeem, and a deed issued, and it was held that the deed was void. The court said: "But it seems that in making out the statement the treasurer by miscalculation made it \$1.58 less than the true amount. It is argued that Dart and Fitch were bound to render the full amount and that no duty lay upon the treasurer except to receive what might be offered him. This is not the law. The parties acting in the redemption are the owner and the officer. The owner must apply for the redemption, but the treasurer must furnish him with the means of making his tender. The treasurer is the legal custodian of the books, and the entries of the taxes and costs, containing the information necessary to know the same, to be tendered. This information it is his duty to give, and he cannot even simply lay the books before the owner, and compel him to search them for himself. The knowledge of the latter may not be adequate to find what he needs. It is therefore the duty of the treasurer to state the taxes and costs to be paid, and, if he mistake the amount, his miscalculation or omission shall not defeat the redemption. The owner, having called for the amount, and paid all demanded for the redemption, cannot be involved in the loss of his land by the mistake of the officer; but the treasurer must make good the deficiency to the purchaser. The same principles apply to taxes subsequent to the sale."

The criticism by appellant upon these cases as authority is that "there was no negligence or fault of the fee owner. It was entirely the fault of the officer." We must infer that, but for the fault or negligence urged as against appellees, the cases would be good authority. Now, the fault or negligence on the part of appellees is the failure to make the additional payment when notified of the mistake after the redemption. There is no pretense of fault or negligence on the part of Mahony at the time of redemption, or that he knew of a mistake in amount till notified thereafter. If, then, there had been no notice to Mahony, and a failure to pay, the cases cited and the one at bar would be parallels on principle, and the redemption valid. We must then meet the question if a valid redemption will be avoided by a mere notice by the officers to the redemptioner that there was a mistake in the amount paid, and a request for payment refused. The dangers to be reasonably anticipated from the establishment of such a rule are too manifest to require reference. If a certificate may be thus avoided within one month, may it not be done within a year, or five or ten years; and, in the mean time, what is the condition of the land as to title? If, upon such notice, for any reason, the redemptioner refused payment, the deed may issue, and, with uncertainties as to an actual liability for payment, his land is lost, or at best the title involved.

It is urged with much earnestness that it is the payment that constitutes the redemption, and, inferentially, that it must be the full amount required by law, and that without such

payment there can be no redemption. We can add nothing to the force of the Pennsylvania cases on that subject. They appear to be direct in point, and very conclusive in argument. There can be no controversy with the quotation from Blackwell on Tax Titles, to the effect that it is the payment that makes the redemption; but when the party applies for redemption, and makes the payment demanded, he has answered the full spirit of the law as cited. The query is submitted, Would there be a redemption if the treasurer issued a certificate without any payment? The facts in such a case would be so widely different as to devalue it of all applicability to the case in hand. As bearing on the argumentative force of the query, it may be said to be at least doubtful if, with the certificate issued, and the record disclosing a redemption, the deed could issue without some proceeding for its correction. It seems to us, both on authority and reason, that, when the certificate issued, there was such a redemption as would prevent the issuing of a deed, and that the refusal to pay the deficiency when notified by the treasurer did not avoid the redemption.

In the district court the amount necessary to redeem fully at that time was ascertained, and, as a condition upon which the decree favorable to defendants was entered, they were to pay the ascertained amount into court for plaintiff within a specified time. From that part of the judgment the defendants appealed. However, within the required time, the amount was paid. The payment was a performance of the judgment, and from a judgment which had been performed an appeal will not lie; and hence the defendants' appeal is dismissed.

On plaintiff's appeal the case is affirmed.

C. HARDIN & Sons

v.

IOWA RAILWAY & CONSTRUCTION
CO. et al.

(....Iowa....)

1. **Depositions will be suppressed** if taken upon notice insufficient both as to the persons upon whom it was served and as to time of service; and affidavits of counsel, at least so far as they are in conflict, will not be read on appeal for the purpose of showing agreements between counsel as to the taking of such depositions.
2. **It will be presumed that directors** of a corporation were rightfully in session where the record shows that they met and took official action.
3. **Authority given by a board of directors to execute a note** for a certain sum of money and interest does not authorize the inclusion in the note of a stipulation for a further sum as an attorney's fee, if collected by an attorney.
4. **On foreclosure of deeds of trust on land across which a railroad is constructed**, the decree should not except the right of way from the sale, where the deeds make no exception thereof, and it is not shown that the company holds its right of way by a title superior to the trust deeds.

(October 30, 1899.)

CROSS appeals from a decree of the District Court of Hardin County in an action upon

a promissory note, and to foreclose certain securities held as collateral thereto. *Affirmed in part.*

The defendant, the Chicago, Iowa & Dakota Railway Company, employed the defendant, the Iowa Railway & Construction Company, to construct its road. The latter Company borrowed money from plaintiffs to carry on the work of construction, and, to secure its repayment, executed to plaintiffs its promissory note, and also gave, or caused to be given, to them as collateral security for such note certain deeds of trust upon real estate, a chattel mortgage upon rolling stock to be used on the railroad, and certain bonds issued by the Railroad Company.

Plaintiffs brought this suit upon the note and sought to realize upon the collateral securities. A decree was rendered favorable to plaintiffs but not giving them all the relief they claimed, and both plaintiffs and defendants appealed to this court.

The further facts appear in the opinion.

Mr. H. S. Huff, for C. Hardin & Sons:

The attorney's fee should have been allowed by the court below as the promissory note provides for a reasonable attorney's fee, and the Statute authorizes it. See Acts 18th Gen. Assembly, 180, 181, chap. 185.

Whenever a corporation aggregate is acting within the scope of the legitimate purpose of its institution, all parol contracts made by its authorized agents are express promises of the corporation; and all duties imposed on them by law, and all benefits conferred at their request, raise implied promises for the enforcement of which an action lies.

Index Dig. U. S. S. Ct. Rep. vol. 1, p. 485, § 270; *Bank of Columbia v. Patterson*, 11 U. S. 7 Cranch, 299 (8 L. ed. 351).

A corporation may, by parol, authorize its treasurer to execute a promissory note in its name.

Odd Fellows v. First Nat. Bank, 43 Mich. 451; *Merrick v. Burlington & W. Pl. Road Co.* 11 Iowa, 74.

For the purpose of effecting the object of the corporation its powers are as broad and comprehensive as those of an individual, unless the exercise of the asserted power is expressly prohibited.

Thompson v. Lambert, 44 Iowa, 289.

As to the declarations of trust all the parties concerned acted under them, the plaintiffs in good faith loaning the money to the defendant Company, and the defendant receiving the money with full knowledge of all the facts; they were the agreements of the plaintiffs and the defendant Company, and all are bound and concluded by the same.

Price v. Alexander, 3 Greene (Iowa) 432; *Atiz v. Phelan*, 5 Iowa, 386; *Dons v. Morse*, 62 Iowa, 231; *Wise v. Ray*, 8 Greene (Iowa) 430.

Every legal presumption should be entertained that an officer has done his duty, and the same presumption would prevail as to the official acts of officers of this class, where the contrary is not shown.

Cole v. Porter, 4 Greene (Iowa) 510; *Spitler v. Scofield*, 43 Iowa, 571; *Re Estate of Edwards*, 58 Iowa, 431; 1 Greenl. Ev. §§ 83, 40.

Messrs. John Porter and C. E. Albrook, for defendants:

6 L. R. A.

This question whether a note and mortgage executed under circumstances such as are disclosed in this case can provide for attorney's fees, was broadly decided in the negative.

Pacific Rolling Mill v. Dayton, S. & G. R. R. Co. 5 Fed. Rep. 852.

The creditor holding two securities, one of which unqualifiedly belonged to the debtor, and a third party holding a claim or some right in the other, the first, or that in which there is no conflict of interest, shall be first exhausted and the interest of the third party prejudiced no further than is absolutely necessary.

Miller v. Clarke, 37 Iowa, 825.

Rothrock, J., delivered the opinion of the court:

1. The appeal of the defendants will first be considered. They complain that a motion for a continuance made by defendants was improperly and erroneously overruled by the court. This objection, it appears to us, cannot be sustained. The continuance was asked to enable the defendants to take additional evidence. The record shows that the court was authorized in holding that ample time had been given for that purpose.

2. Next it is claimed that the court erred in suppressing certain depositions of witnesses taken by the defendants. These depositions were taken upon notice that was both insufficient, as having been served upon a clerk or employé of plaintiffs, and as not having been served a sufficient time before the depositions were taken. On this objection, as well as upon the question as to the continuance, we are invited to a perusal of a number of affidavits of counsel as to oral agreements and understandings between them touching the taking of the evidence and the management of the case. It is scarcely necessary to say that these affidavits must be disregarded, at least so far as they are in conflict. Code, § 218.

3. Both of the defendants are corporations, and, as the names indicate, they are railroad companies. As is usual when the building of a railroad is in contemplation, two companies were formed. One was the railroad company proper; that is, the projector of the enterprise. The other was the Railroad Construction Company. The Construction Company undertook to build the railroad for a certain amount of the stock and bonds of the Railroad Company. But stock and bonds are not in and of themselves available for procuring right of way and iron, and making roadbed, and building bridges, and furnishing materials necessary to construct a railroad. It requires money. The plaintiffs are bankers, and they advanced money to the Construction Company, and it gave the note in suit for the money, and also gave, or caused to be given, the securities now sought to be foreclosed. Among other objections raised by defendants to the decree, it is claimed that the president and secretary were not authorized to execute the note. This claim is not well founded. It appears that the execution of the note was expressly authorized at a meeting of the board of directors of the corporation. It is claimed that it does not appear that there was any notice to the directors that a meeting would be held. If this was material, it was for the defendants to show that there was no

notice. The record shows that they met and took official action, and it should be presumed that they were rightfully in session. The chattel mortgage given as security for the debt was upon certain rolling stock or cars. It is claimed the mortgage is void because the rolling stock was not the property of the Construction Company when the mortgage was executed. We do not think this claim is well founded. The contract between the Companies required that the road should be finished, and turned over to the Railroad Company. The evidence shows that the title to the property had not passed. The Construction Company was in possession of the road, and operating it, when the mortgage was given. We discover no ground for reversing the decree upon the defendants' appeal.

4. The plaintiffs complain of the decree because the court refused to allow an attorney's fee for the collection of the note. It contained a stipulation for an attorney's fee if collected by an attorney, by suit or otherwise. The learned judge who presided at the hearing must have been of opinion that the president and secretary of the Company who executed the note were not authorized to contract for an attorney's fee. The authority given by the board of directors to execute the note was in these words:

Eldora, Iowa, December 30, 1884.

Moved by Moorman that the president and secretary of the Company be, and they are hereby, authorized to execute to the City Bank, or C. Hardin & Sons, of Eldora, this Company's note for \$9,000, and a chattel mortgage upon the rolling stock of this Company, to secure payment of the same due March 1, 1885, at 10 per cent interest, being for advances heretofore made, with interest, as well as for a \$1,000 additional to be advanced. Motion carried.

This was an explicit direction to execute a note for \$9,000 and interest, and no more. The Company did not, by any official action, authorize the execution of a note in any amount exceeding said sum in any event. We think the court correctly held that the measure of liability was \$9,000 and interest.

5. In providing for the sale of the property under the decree, the court made the following order, and entered it as part of the decree: "The sale of any real estate under this decree shall be made subject to the right of way of the Chicago, Iowa & Dakota Railway Company, 100 feet in width, so far as such premises are now occupied and used for the purpose of such right of way; and defendants shall have the right, if they so elect, to determine the order in which the several items of property hereinbefore referred to shall be offered for sale." To all which both parties except.

It is urged that the order, in so far as it provided for a sale subject to the right of way of the defendant the Chicago, Iowa & Dakota Railroad Company, is erroneous. It appears to be conceded that the railroad runs across some of the tracts of land against which the decree operates; but in the deeds of the land, and the trust created therein, no exception is made, and there is nothing in the record from which it can be ascertained why this order was made. We do not think the court was authorized, from the record and evidence, to make the order complained of. If the Railroad Company held its right of way by a title superior to the trust deeds, it should have made some showing of that fact. So far as appears from this record, it has no right of way through the lands.

That part of the above order which gives the defendants the right to elect as to the order of sale of the property will be affirmed, and *as to the order excepting the right of way from the foreclosure sale the decree will be reversed. In all other respects the cause will be affirmed.*

MICHIGAN SUPREME COURT.

CITY OF PORT HURON, *Appt.*,

v.

George W. JENKINSON.

(....Mich.....)

1. The prior passage of an ordinance prescribing the kind of sidewalk to be built, its dimensions and materials and the time therefor, is necessary in order to make one liable for failure to build it, under a charter giving the common council power to prescribe by ordinance the grade, width and character of sidewalks, their materials and the time for construction, and providing for the punishment of those who fail to comply with the resolution or ordinance.
2. The nonperformance of an act, the performance of which by the person charged therewith is impossible, cannot be made a crime, by either a legislative or municipal body, for which the delinquent may be punished by fine and imprisonment.
3. A statute which makes criminally liable any person owning, occupying or having any interest in real estate in a city, for

failure to construct, keep and maintain good sidewalks, is unconstitutional, as it applies even to tenants, who may be unable to perform the acts required.

(November 8, 1889.)

ERROR to the St. Clair County Circuit Court to review a judgment reversing the judgment of a justice of the peace against defendant in a prosecution for failure to maintain a good and sufficient sidewalk along the street in front of his premises as required by the provisions of the charter and ordinances of the City of Port Huron. *Affirmed.*

The case sufficiently appears in the opinion. Mr. P. H. Phillips for plaintiff, appellant. No appearance for defendant, appellee.

Sherwood, Ch. J., delivered the opinion of the court:

This action was brought by the City of Port Huron to recover of the defendant a penalty claimed to have been incurred by him for the violation of an ordinance of said City, requiring him to keep and maintain a good and sufficient

sidewalk along the street in front of the premises owned by him, and which it was his duty to construct and maintain. The ordinance of the City, for the violation of which complaint was made, reads as follows:

Section 1. "All persons owning, or occupying, or having any real estate within the City of Port Huron shall keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate. And any such person failing or refusing to build or repair any such sidewalk in front of or adjacent to real estate owned or occupied by him, or in which he is interested, for ten days after notice to him to build or repair any such sidewalk by the superintendent of public works, shall be deemed a violator of this ordinance."

Section 14 provides that "violators of this ordinance shall, on conviction thereof, be punished by a fine, not to exceed \$100, or by imprisonment in the county jail not to exceed three months."

The ordinances established by the mayor and common council of said City further provide that "whenever the accused shall be tried for the violation or nonobservance of any ordinance, or any provision of the city charter, of the City of Port Huron, and found guilty, either by the court or by a jury, or shall be convicted of the charge made against him, upon a plea of guilty, the court shall render judgment thereupon, and inflict such punishment, either by fine, penalty, forfeiture or imprisonment, together with such costs of prosecution, as may be authorized by law and the court may order. But such punishment shall in no case exceed the limit fixed by law for the offense charged; and, in rendering such judgment and inflicting such punishment, the court may award against such offender a conditional sentence, and order him to pay a fine, with or without costs of prosecution, and, in default thereof, to suffer such imprisonment as is provided by law and awarded by the court in all cases where the offender shall be convicted of an offense punishable, at the discretion of the court, either by fine or imprisonment, or both; provided, that when any person is convicted of being a disorderly person, under any provision of the charter or ordinances of the City of Port Huron, the court may, in its discretion, require of the offender a recognizance, with sufficient sureties, for good behavior for a term of not less than sixty days, nor more than one year, thereafter; and, when such security for good behavior is required to be given, the court or magistrate may require and further order that the costs of prosecution, or any part thereof, shall be paid by such person, who shall stand committed until such costs are paid, or he is otherwise legally discharged. But such imprisonment shall not exceed ninety days."

The power of the council of the City of Port Huron to pass the ordinance in question is claimed under § 1, chap. 18, of the City Charter, and is as follows: "It shall be the duty of each and every person owning, occupying or having any interest in any real estate within the City to construct, keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate; and, upon failure so to do, such person, after

due notice, shall be liable to prosecution according to such ordinances as the common council of said city may adopt." Local Acts 1885, p. 588.

It is claimed the testimony showed a violation of the ordinance; and, after the same was given, the defendant, by his counsel, moved the court (the justice before whom he had been brought by warrant) that the complaint and warrant be quashed, and the defendant be discharged, for the reasons: *first*, that the charter of the City did not authorize criminal punishment or criminal proceedings in the case for the offense charged, nor empower said City to punish criminally the person so refusing or neglecting to build a sidewalk; *second*, if the charter was intended to confer such authority, the provision purporting to confer the same is unconstitutional; *third*, the ordinances referred to, providing criminal punishment for the offense charged against the defendant, and under which the proceedings were had against him wherein he was convicted, were illegal and void. The justice overruled the motion, found the defendant guilty, and gave judgment that he should pay a fine of \$25, and costs of prosecution, and, in default of such payment, he be confined in the county jail for thirty days. This conviction was removed to the Circuit Court for the County of St. Clair by certiorari, where the case was heard before Judge Canfield, who reversed the judgment of the justice, and gave judgment against the City for the costs of the suit. The City now seeks a review of the questions raised.

But two questions were argued in this court by counsel for the City: The *first* relates to the constitutionality of the Act under which the ordinance was passed; and *second*, Does the section of the Act referred to authorize the adoption of the ordinance under which the prosecution was had? The ordinance is clearly within the provisions of the statute; but that is of no consequence in this case, as will hereafter appear. In the affidavit upon which the writ of certiorari was obtained, the defendant made the following allegations of error, and which were presented for the consideration of the circuit court: "*First*. The warrant issued in said cause did not authorize the apprehension or arrest of the deponent, for the reasons that it was not directed to anybody, to any officer or person authorized to make arrests; that no criminal action was alleged therein. *Second*. That the provisions of the ordinance referred to, authorizing criminal prosecutions to be instituted against persons who fail to build or repair a sidewalk in the City of Port Huron is unconstitutional and void. *Third*. The judgment of the justice aforesaid was void, as the provisions of the charter aforesaid do not authorize an alternative judgment."

By § 2, chap. 18, of the city charter, it is provided that "the common council shall have power to prescribe, by resolution or ordinance, the grade, width and character of all sidewalks within said City, and the materials of which, and the time within which, the same shall be constructed or repaired; and may provide for the punishment by fine or imprisonment, or both, of any and every person who fails, neglects or refuses to comply with the provisions and requirements of such resolution or ordinance."

It will be seen, from an examination of the two sections of the Statute herein given, that, before a person owning land in the City can be required to build a sidewalk along the street upon which it abuts, the council must have passed an ordinance prescribing the kind of walk to be built, its dimensions, and the material to be used therein, as well as the time within which it must be made. In the case of that required of this defendant, the record does not show that this was ever done. The complaint and warrant are both defective in this respect, and the court was without jurisdiction in the case; and the magistrate should have yielded to the motion to dismiss the proceedings, when it was made by counsel for the defendant.

This defect would be sufficient to dispose of the case if no other infirmity appeared; but a more serious difficulty is encountered upon an examination of these two sections of the Statute, and the provisions of the by-law enacted by the council thereunder. Neither of them are of any validity whatever. No legislative or municipal body has the power to impose the duty of performing an act upon any person which it is impossible for him to perform, and

then make his nonperformance of such a duty a crime, for which he may be punished by both fine and imprisonment. It needs no argument to convince any court or citizen, where law prevails, that this cannot be done; and yet such is the effect of the provisions of the Statute and by-law under consideration. It will readily be seen that a tenant occupying a house and lot in the City of Port Huron, and so poor and indigent as to receive support from his charitable neighbors, if required by the city authorities to build or repair a sidewalk along the street in front of the premises he occupies, fails to comply with such request, such omission becomes criminal; and, upon conviction of the offense, he may be fined and imprisoned. It is hardly necessary to say these two sections of the Statute are unconstitutional and void, and that the provisions are of no force or effect. They are obnoxious to our Constitution and laws; and the two sections of the Statute are a disgrace to the legislation of the State.

The judgment of the Circuit Court will be affirmed, with costs to be paid to the defendant by the City.

The other Justices concurred.

NEW JERSEY SUPREME COURT.

TOWNSHIP OF LODI, *Ptff. in Err.*,
v.

STATE OF NEW JERSEY.

(.....N. J. L.....)

A statute changing the policy of the State by transferring the burden of repairing turnpikes acquired by a county, from the board of chosen freeholders of the county to the separate townships, but excepting therefrom any county having a county public-road board, is in violation of the Constitution, art. 4, § 7, par. 11, prohibiting private, local or special laws regulating the internal affairs of towns or counties.

(November 27, 1882.)

ERROR to the Court of Quarter Sessions of Bergen County to review a judgment convicting defendant of maintaining a nuisance. *Reversed.*

The facts sufficiently appear in the opinion. Argued before Beasley, Ch. J., and Depue, Van Syckel and Knapp, JJ.

Messrs. Luther Shaffer and Joseph D. Bedle for plaintiff in error.

Mr. A. D. Campbell for the State.

Knapp, J., delivered the opinion of the court:

The plaintiff in error was presented by the grand jury of the County of Bergen for nuisance arising out of its neglect to amend, repair and maintain a public highway which formed a boundary line between Lodi and Union Townships. The highway so found to be out of repair was formerly a turnpike road, the title to which had been acquired by the board of chosen freeholders of the County of Bergen. The assignments of error, based upon

sealed bills of exception, present the question whether there is a legal obligation on this Township to maintain and repair this former turnpike. If so, the conviction should be maintained. If otherwise, then this judgment is wrong. The general provisions of the road law put all public highways in charge of the several townships through which they ran, for the purpose of opening and keeping in repair. Various provisions of law have been enacted by the Legislature in respect to the maintenance of turnpike roads abandoned by, or taken by purchase or condemnation from, private corporations. An Act entitled "An Act Concerning Bridges and Turnpikes," approved March 12, one thousand eight hundred and seventy-eight, provided for the forfeiture of the charters of certain turnpike roads, and for the acquisition of title by the boards of chosen freeholders of the several counties in certain cases. The second section of that Act declared that the roads thus acquired should be free, and open to public travel, and directed that such roads "be maintained and worked as other . . . public roads are, or shall be, directed to be maintained and worked." Rev. Supp. 1098, 1099. Under this law, and the several supplements passed thereto, the liability to repair this class of highways was put upon the Township, in virtue of general regulations then existing, controlling that subject. But by an Act passed March 24, 1882, entitled "An Act Concerning Turnpikes" (Id. 1098), it was provided "that any turnpike road, or any part thereof, the title to or right of possession of which shall be acquired by or have become vested in any board of chosen freeholders of any county, for public use, shall be graded, regulated, worked, repaired, maintained and kept up at the cost and expense of said county, and as the said board of chosen

freeholders of said county shall order and direct." The costs of this were directed to be raised by county tax.

The second section of this Act repealed by express terms the several supplements passed to this Act of 1878, namely, Supplement March 14, 1879; March 4, 1880; March 25, 1881,—and, by necessary implication, it also repealed so much of the said Act of March 12, 1878, as related to the maintenance and repair of turnpike roads acquired by the county. The next Act of legislation respecting the subject was passed March 30, 1887, under the title of "A Supplement to an Act Entitled 'An Act Concerning Bridges and Turnpikes,' Approved March Twelfth, One Thousand Eight Hundred and Seventy-Eight." This Act of March 30, 1887, is made the basis of the indictment in question, through provisions contained in it placing the repairs of such turnpikes upon the townships in which they lie. The first section of the Act so provides, and relieves the board of chosen freeholders of the burden of repairs. The fifth section of the Act declares that "this Act shall not apply, or be in force, in any county having a county public-road board."

The cause was tried upon the theory that the liability of the Township under the indictment arises solely out of this legislation; and, after an examination of the large number of statutes enacted within the past twelve years touching this subject, I conclude that the judgment must be tested by the validity of that Statute. The constitutionality of this law is attacked by the plaintiff in error on the ground that it is not a general law, such as the Legislature, when regulating this among other subjects, is required by the Constitution to enact; that instrument disabling the Legislature to enact private, local or special laws regulating the internal affairs of towns or counties. Const. art. 4, § 7, par. 11.

The question presented, then, is whether a classification of the localities for the maintenance of this species of highway, which excludes counties having public-road boards, is the basis of a general law, within the meaning of the Constitution. The rule is that in any classification for the purpose of a general law all must be included, and made subject to it, and none omitted that stand upon the same footing, regarding the subject of legislation. To omit one so circumstanced is as fatal a defect as to include but one of a number. The cases in our own State in illustration of this rule are numerous. *State, Van Riper, v. Parsons*, 40 N. J. L. 123; *State, Richards, v. Hammer*, 42 N. J. L. 435; *State, Van Giesen, v. Bloomfield*, 47 N. J. L. 442.

Since the enactment of the Law of 1882, above mentioned, and up to the passage of this Act of 1887, the chosen freeholders throughout the State have by law had the sole management of this class of public highways; and the cost of maintenance in each county has been a county burden. The policy of the Legislature was on this subject a general one, as the subject itself was general. A change in that policy, by transferring this class of roads to the townships of the State, should be by enactments equally comprehensive. To leave out the townships of one county, or of half the counties, in the State, is in effect to make the law special, unless those omitted are so conditioned

as to render the legislation inappropriate and unsuited to them, because of such conditions. Here the condition which excepts localities from the operation of the law in question is the existence of a county road board. In point of fact, but one county in the State is so situated. What is there in the presence or constitution of such a body that should make the law less appropriate there than elsewhere? Nothing is suggested by counsel, and I am unable to perceive anything. The effect of the law would be that in Essex County alone the Act of 1882 would remain in operation. In my judgment the Act is special, and therefore unconstitutional, and cannot be distinguished in principle from the legislation under review in *State, Cloason, v. Trenton*, 48 N. J. L. 488, and *State, Bray, v. Hudson Co.* 50 N. J. L. 82.

This must result in a reversal of the judgment below.

STATE OF NEW JERSEY, *ex rel.*, John P. STOCKTON, Atty-Gen.,

v.

Mayor, etc., of SOMERS' POINT.

(.....N. J. L.....)

"The Act of March 29, 1878 (Pub. Laws 1878, p. 232), authorizing the formation of borough governments in seaside resorts, is unconstitutional, and borough governments formed under it will be dissolved on information filed by the Attorney-General *ex officio*.

(November 18, 1899.)

INFORMATION filed by the Attorney-General *ex officio* to oust the Borough of Somers' Point from the exercise of certain franchises. On demurrer to plea. *Judgment of ouster.*

The facts sufficiently appear in the opinion. Argued before Beasley, Ch. J., and Depue, Van Syckel and Scudder, JJ.

Mr. P. L. Voorhees for relator, in support of the demurrer.

Mr. D. J. Pancoast for respondents, *contra*.

Depue, J., delivered the opinion of the court:

The Borough of Somers' Point was incorporated under an Act of the Legislature entitled "An Act for the Formation of Borough Governments in Seaside Resorts," approved March 29, 1878 (Pub. Laws 1878, p. 232; Supp. Rev. 942).

The object of the information filed by the Attorney-General *ex officio* is to test the constitutionality of the Act under which this municipal corporation was organized. The contention against the validity of this corporation is founded upon the prohibitory clauses contained in paragraph 11, § 7, art. 4, Const. The first section of the Act provides "that the inhabitants of any township . . . which is a seaside resort for summer visitors, embracing within an area not to exceed two square miles taxable property of the amount of \$100,000 or more, may become a body corporate and politic in fact and in law, under the title of the Bor-

*Lead note by DUFUR, J.

ough of —, whenever, at a general or special election called for that purpose, it may be so decided by a majority of the votes of the electors of such township or part of a township." Section 2 provides that such election shall be called by one of the chosen freeholders of the township in which the district proposed to be incorporated is situate, on written application by persons representing one tenth of the taxable real estate in such district. The other sections of the Act provide for the election of a mayor and members of a common council, and officers, such as clerk, officers of election, assessors, collectors, chosen freeholders, surveyors of the highways, etc., with the powers and duties of such officers in any of the townships of this State. The Act also provides for ordinances laying out, opening and improving streets and sidewalks, erecting public buildings, water and gas works, and for the exercise of all those governmental functions which usually pertain to cities and towns. The powers granted to municipalities organized under this Act are found in a series of Acts contained in the Supplement to the Revision, from pages 942 to 950. They are equal to, and in some respects exceed, the powers conferred upon the largest cities in the State.

As applied to legislation of this character, a law is special or local, as contradistinguished from general, in the sense of the prohibitory clauses in this paragraph of the Constitution, which embraces less than the entire class of persons or places to whose condition such legislation would be necessary or appropriate, having regard to the purpose for which the legislation was designed. A law which so particularizes, and by such means is restricted in its operation

to persons or places which do not comprise all the objects which naturally belong to the class, is special or local, within the meaning of the constitutional interdict. The Act in question is limited to a specified location,—situation on the seaside. It is further restricted to places so situate which are the resort for summer visitors, and is applicable only to places within these limitations in which taxable property to an amount of \$100,000 or more is embraced within an area not to exceed two square miles. Municipal powers and franchises such as this Act confers are as appropriate to places in an inland situation as to those located on the seashore, and are as suitable to localities inhabited or frequented by other individuals as to resorts for summer visitors. The Act leaves population entirely out of view. The machinery to obtain the organization of a borough may be set in motion by "persons representing one tenth of the taxable real estate in such district," without regard to residence; and, if there be population enough to furnish a clerk and two judges of election who shall be legal voters in the district, the requirements of the Act are complied with. If taxable property, irrespective of population, be a proper classification on which to base a grant of municipal powers of the scope of those granted by this Act, such property presents the same characteristics, wherever situate, as it possesses when located in seaside places frequented by summer visitors. This law is so plainly a special and local law within the constitutional interdict that argument and citation of authorities are unnecessary.

Judgment of ouster from the franchises, etc., should be entered.

WISCONSIN SUPREME COURT.

HUBBARD, *Resp't.*,

v.

HUBBARD, *App't.*

(...Wis....)

The adultery of plaintiff is a good defense to an action for divorce on the ground of cruel and inhuman treatment.

(November 5, 1889.)

A PPEAL by defendant from an order of the Circuit Court for Fond du Lac County striking out portions of the answer in an action for a divorce on the ground of cruel and inhuman treatment on the part of defendant. *Reversed.*

Statement by Cassoday, J.:

This is an action for a divorce. The cause of action alleged in the complaint is for cruel and inhuman treatment on the part of the defendant. The answer is lengthy, and consists of admissions and denials; and, as a separate answer and counter-claim, alleges numerous acts of misconduct on the part of the plaintiff; and among other things, and for a further answer, alleges, upon information and belief, several acts of adultery committed by the 6 L. R. A.

plaintiff with divers persons, and at divers times and places, particularly named therein. On motion of the plaintiff, the court struck out of the answer, as irrelevant, all that portion thereof relating to such adultery. From that order the defendant brings this appeal.

Mr. William D. Conklin, with Messrs. Gerpheide & McKenna, for appellant.
Mr. A. M. Blair for respondent.

Cassoday, J., delivered the opinion of the court:

In support of the order, it is claimed that adultery is not pleadable as a mere defense or bar to the action, as it is said to be here pleaded. It has recently been held by this court that, where it is shown that each party has been guilty of an offense which the statute has made a ground for divorce in favor of the other, the court will not grant relief to either. *Pease v. Pease*, 72 Wis. 186.

In that case the wife was found guilty of adultery, and the husband was found guilty of cruel and inhuman treatment, which was alleged by the wife in her answer merely as a defense and bar to the action. The same principle has been sanctioned in a recent English case. *Otway v. Otway*, L. R. 18 Prob. Div. 141.

This is on the theory that "a judicial separation can only be granted where the petitioner comes to the court with a pure character, and is free from all matrimonial misconduct." *Ibid.*

The order of the Circuit Court is reversed, without costs, and the cause is remanded for further proceedings according to law.

Robert W. BOGIE, *Appl.*,

v.

TOWN OF WAUPUN, *Resp't.*

(....Wis.....)

The liability of a town for damages resulting from the insufficiency or want of repairs of "any bridge, sluiceway or road" therein, under Rev. Stat. § 1830, does not extend to those happening upon a mere temporary passageway over private property made necessary by a snow-drift in the highway, although the overseer has done some work upon it with the knowledge and approval of the supervisors; as he had no authority under the statutes to open a way over private property.

(November 5, 1889.)

A PPEAL by plaintiff from an order of the Circuit Court of Fond du Lac County sustaining a demurrer to the complaint in an action to recover damages for injuries resulting from a defect in an alleged highway. *Affirmed.*

Statement by *Lyon, J.*:

This action was brought to recover damages for personal injuries suffered by the plaintiff, charged to have been caused by the insufficiency and want of repair of what is termed in the complaint "a temporary winter road" in the defendant town. The complaint alleges that on March 15, 1888, and for more than five weeks immediately prior to that time, a certain highway in the defendant town was blockaded and rendered impassable for a distance of about ninety-eight rods by reason of snow, which had accumulated therein, and which was carelessly and negligently left therein, during the time aforesaid. The complaint then proceeds as follows: "Upon information and belief, the plaintiff alleges that in consequence of the said insufficiency and want of repair of said highway, and in consequence of the carelessness and negligence of said defendant, and its officers and agents, in leaving said highway so filled up and blockaded by snow, and unopened, and absolutely impassable, as aforesaid, some person or persons unknown to this plaintiff, about five weeks prior to said 15th day of March, 1888, with the full knowledge, consent and approbation of the supervisors of said town, and of the road overseer of the road district in which that section of the highway is located, opened for public travel through the fields adjoining, by the consent of the owners thereof, a temporary winter road on the east side of, and parallel to, the section of said highway so blockaded and unopened; which temporary road was thereafter, and before the said

15th day of March, 1888, with the knowledge and approval of the supervisors of the defendant town, repaired and worked upon by the road overseer of the road district, and was traveled continuously by the public, and by the supervisors of said town, and by the road overseer of said road district, from the time it was so opened till on or about the 15th day of March, 1888, aforesaid, and that said temporary winter road was opened and used for the purpose of public travel, and conducting travelers out of the passable and traveled sections of the said highway, by and around the blockaded and untraveled section thereof, and the said temporary road did in fact connect the open and traveled sections of the said highway with each other, and actually and necessarily formed a section of the main traveled highway from Waupun to Oshkosh, and that said sections were not connected by any other road or way, and that the travel of the said blockaded section thereof was wholly suspended during the five weeks aforesaid, and until after the injury of the plaintiff, as hereinafter stated."

It is further alleged that on said March 15, 1888, the plaintiff was driving along said highway in the exercise of proper care, and when he reached the point thus blockaded he necessarily turned off the highway, and drove along such temporary road until he reached a point where there was a ditch across the same, which was covered with snow, and its existence there was unknown to him, when his horses broke through the crust of snow into the ditch, throwing him from his cutter with great violence, and inflicting upon him severe personal injuries. The complaint also alleges due notice to the supervisors of such injury, and the filing of a claim for damages therefor in the office of the town clerk, as required by statute, and the refusal of the supervisors or town board to allow said claim, or any part thereof. The defendant interposed a general demurrer to the complaint, which was sustained by the court. The plaintiff appeals from the order sustaining the demurrer.

Messrs. J. A. & J. I. Kelley and George E. Sutherland, for appellant:

Towns having reasonable notice of obstructions in their highways are bound to remove them or make suitable by-ways to pass around them, or see to it that they are made by others, in order to exonerate themselves from liability to travelers; and in such case the town is responsible for the insufficiency of such by-ways.

2 Shearm. & Redf. Neg. note 1, p. 13, and cases cited; *Batty v. Duxbury*, 24 Vt. 155; *Mathews v. Winooks Turnp. Co.* Id. 480; *Wilard v. Newbury*, 22 Vt. 458; *Barber v. Essex*, 27 Vt. 62; *Morse v. Richmond*, 41 Vt. 435; *Dickinson v. Rockingham*, 45 Vt. 99; *Bates v. Sharon*, Id. 474; *Coates v. Canaan*, 51 Vt. 131; *Ang. Highways*, 8d ed. p. 335, § 267; *Savage v. Bangor*, 40 Me. 176; *Phillips v. Veazie*, Id. 96; *Munson v. Derby*, 37 Conn. 298; *Erle v. Schwingle*, 22 Pa. 384.

The by-way was the respondent's road *de facto*; it was respondent's road in such a sense at least as to estop it now from denying its liability to the plaintiff.

The fact of work being done upon a road under an authority of the proper officers of the

town is strong evidence of a claim of right on the part of the public.

State v. Preston, 84 Wis. 687, 688.

Acquiescence by a town in the use of a way distinct from the main traveled path of the highway is evidence of its adoption for public use.

Whitney v. Essex, 43 Vt. 530.

Where a bridge became impassable and the officers whose duty it was to keep the highway in repair permitted the public to use a road which leads to a crossing of the stream, travelers cannot be charged with a want of ordinary care in so doing, and may recover for injuries received on account of its imperfect condition.

Thompson, Neg. p. 1209, citing *Erie v. Schwingle*, *supra*. See also *Codner v. Bradford*, 8 Chand. (Wis.) 291; *Williams v. Cummington*, 18 Pick. 812; *Stark v. Lancaster*, 57 N. H. 88; *Treiss v. St. Paul*, 36 Minn. 526.

If the traveled portion of the highway is obstructed or otherwise unsafe or dangerous, thus making it necessary for a person to turn out and pass along on one side or the other of it, and he does so, using ordinary care, and an accident happens causing damage to him by reason of some obstruction or defect in the part of the highway over which he is so necessarily passing, he will be entitled to recover against the town for the injury so received.

Kelley v. Fond du Lac, 81 Wis. 187, and cases therein cited; *Barton v. Montpelier*, 80 Vt. 650; *Cogswell v. Lexington*, 4 Cush. 307; *Gerald v. Boston*, 108 Mass. 580; *Hayden v. Attleborough*, 7 Gray, 388; *Green v. Danby*, 12 Vt. 388. See also *Savage v. Bangor*, 40 Me. 176; *Houfe v. Fulton*, 84 Wis. 615, 616.

As to matters within the scope of their powers and the powers of their officers, municipal corporations may be estopped upon the same principles and under the same circumstances as natural persons.

Kneeland v. Gilman, 24 Wis. 39, 42.

Appellant was not guilty of negligence in driving into and along this by-way, there being nothing to indicate that this was not the way intended for public travel.

Cogswell v. Lexington, 4 Cush. 307; *Jones v. Waltham*, 4 Cush. 299; *Hayden v. Attleborough*, 7 Gray, 388; *Kelley v. Fond du Lac*, 81 Wis. 179; *Wheeler v. Westport*, 80 Wis. 392.

The obstruction in the highway was the proximate cause of the injury, notwithstanding the defect in the by-way was also another proximate cause contributing directly to produce the injury.

1 Shearm. & Redf. Neg. §§ 25-40 and notes; Wood, Nuis. note 1, p. 837; *Houfe v. Fulton*, 29 Wis. 296.

Mr. Maurice McKenna for respondent.

Lyon, J., delivered the opinion of the court:

The Statute under which this action was brought (§ 1839, Rev. Stat.) is as follows: "If any damage shall happen to any person, his team, carriage or other property, by reason of the insufficiency or want of repairs of any bridge, sluiceway or road in any town, city or village, the person sustaining such damage shall have a right to sue for and recover the same against any such town, city or village."

Unquestionably, the word "road," as here employed, means a public highway; and the insufficiency or want of repair thereof, which

is the foundation of an action under the Statute, must be the proximate cause of the injury complained of. These propositions will not, we think, be controverted. The insufficiency of the highway in question, caused by the obstruction thereof by reason of snowdrifts, is not, and is not claimed to be, the proximate cause of the plaintiff's injuries. Such cause was the presence of the hidden ditch across the track on which he was traveling in the adjoining field, and so it is alleged in the complaint. If, under the circumstances stated in the complaint, the town is liable for the damages caused by such insufficiency, the complaint states a cause of action, and the demurrer thereto should have been overruled. But if, on the other hand, the town is not so liable, the demurrer was properly sustained. Hence the question of such liability is the controlling one in the determination of this appeal.

It is argued by the learned counsel for the plaintiff, with much force and ingenuity, that this temporary road or by-way, upon which the plaintiff was injured, was, at the time of such injury, *pro hac vice* a public highway, made so by the acts of the town officers and the exigencies of the occasion. If the supervisors of the town, or the overseer of highways, had authority to locate, open and work such road, there would be great force in the argument; but, for reasons which will now be stated, we are of the opinion that they had no such authority.

Section 1249, Rev. Stat., provides that "every overseer of highways shall, whenever any part of the public highways in his district is blocked up by snowdrifts so as to render the same impassable, call out, upon one day's notice, the taxpayers of his district, and immediately put such parts of said highways in passable order." The section then provides for giving credit for such work upon the unpaid highway taxes assessed against the persons performing the same. The section, as originally enacted, contained, also, the following provision: "But whenever the overseer shall deem it impracticable to render such parts of such highways passable, and keep them in such condition, it shall be lawful for him to open a track through any field or inclosure in his district for the temporary accommodation of travel, whenever the same may be done without material damage to the owner or owners of such inclosure; and no person using such track shall be liable therefor in any civil or criminal action."

The above section was amended by chapter 179, Laws 1887, by adding a clause thereto requiring the overseer to make the highway passable for a certain width at the bottom of the track of said road. This amendment has no significance in this action.

By chapter 454, Laws 1887, it was enacted that "section 1249 of the Revised Statutes is hereby amended so as to read as follows." Then follows the section as amended, which is substantially the section as contained in the Revised Statutes, with the exception that the clause which authorized the overseer, under the conditions therein specified, to open a track through any field or inclosure for the temporary accommodation of travel, is omitted from the section. Such omission necessarily oper-

acts as a repeal of the omitted provision. This not disputed.

It seems very clear to our minds that the legislation of 1887 was intended to take from the overseer of highways the right to open a temporary track upon private lands, and to compel him at once to open highways to public travel which have become obstructed by snow; in other words, that the Legislature thought the power vested in that officer, and the duty imposed upon him to open highways so obstructed, was ample without vesting him with the extraordinary power of turning the public travel upon the lands of private owners without their consent, especially as no adequate means seem to have been provided for making them compensation for such use of their property.

Much stress was laid, in the argument, upon the averments in the complaint that the overseer performed labor upon this temporary road with the knowledge and approval of the supervisors, and that the same was traveled continuously by such officers and the public. It is claimed that these facts furnish strong evidence of a claim of right on the part of the public. In certain cases, and under certain circumstances, this may be true; but it is essential to such claim that the *locus in quo* is a public highway. In the present case it was not. The overseer worked the road, not as a public highway, but as a mere temporary passageway over private property, made necessary by the snowdrifts in the highway. This was patent to the plaintiff and all others. Nobody could be deceived or misled by it, and no one had any right to believe that by doing such work the overseer was asserting a right of way for the public upon the *locus in quo*. This fact distinguishes this case from those which give importance to the acts of the overseer or other officials of the town in doing work or traveling upon the temporary track.

Much reliance is placed upon the case of *Houff v. Fulton*, 84 Wis. 608, as an authority that the town is liable in this case.

There the bridge on which the plaintiff was injured was erected over a meandered stream without authority of law. Public highways extended to the bridge at either end thereof, and were connected by the bridge. It had been in use twenty years or more as a public highway. The annual town-meeting of the town in which it was situated, nearly or quite twenty years before the accident, had by resolution accepted it as town property, and appropriations to be expended upon it were made by several annual town-meetings. The proper town officers took charge of the bridge, and expended town funds in its repair and maintenance. In short, the town and its officers constantly treated and maintained the bridge for a series of years as though it had been lawfully erected across the stream, and was part of a lawful public highway. It was held that the town was estopped to deny that it was a public highway. Manifestly the case was properly decided. But the distinctions between the facts of that and the present case are so radical and important that the rule there adopted cannot properly be held applicable here.

In view of the above facts, especially of the 6 L. R. A.

legislation on the subject, the labor performed by the overseer on the temporary track is of no greater significance than it would be had it been performed by a private citizen, and could not have decided the plaintiff into the belief that the overseer was performing it officially on a public highway; for the plaintiff is chargeable with knowledge that the overseer had no authority to bind the town by such act.

We find here no element or fact upon which an estoppel against the town can be predicated. The learned counsel for the plaintiff has cited several cases elsewhere to the proposition that the town is liable for defects in such temporary track. Whatever may be the doctrine of those cases, the legislation in this State so clearly indicates that it was not intended to impose any such liability upon the town that we must hold that none exists.

The order sustaining the demurrer must be affirmed.

William WILTON, Resp't.,

v.

William MAYBERRY et al., Appls.

(.... Wis....)

A person who loans money to pay a mortgage under agreement for a new mortgage to himself may be subrogated to the rights of the former mortgagee, where the mortgagor, instead of executing the new mortgage, procures the discharge of the old one; and, with intent to defraud the lender, conveys the property to a third person who has full knowledge of the loan and agreement.

(December 8, 1889.)

APPEAL by defendants from an order of the Pierce County Circuit Court in favor of plaintiff in a proceeding by one who had loaned money to pay a certain mortgage, to have himself subrogated to the rights of the mortgagee. *Affirmed.*

The opinion sufficiently states the case.

NOTE.—Subrogation of equitable assignee to rights of mortgagee.

In general any person having a subsequent interest in the mortgaged premises and entitled to redeem to protect his interest, and who, not being the principal debtor, pays off the mortgage, becomes an equitable assignee thereof, and is subrogated to the rights of the mortgagee to the extent necessary for his own protection. This doctrine is extended to one who has no subsequent interest in the premises, but who, at the instance of the debtor, pays off the mortgage for his benefit or advances money for its payment under agreement with the mortgagor. Such a person is not a mere stranger and volunteer. *Cobb v. Dyer*, 69 Me. 494; *Barnes v. Mott*, 64 N. Y. 397; *Twombly v. Cassidy*, 82 N. Y. 156; *Wheeler v. Willard*, 44 Vt. 640; *Walker v. King*, 45 Vt. 525.

Discharged by one of two owners in common. See *Simpson v. Gardiner*, 97 Ill. 287; *Dings v. Parshall*, 7 Hun, 522; *McGIVEN v. Wheelock*, 7 Barb. 22; *Klock v. Cronkhite*, 1 Hill, 107; *Snelling v. McIntyre*, 6 Abb. N. C. 469; *Brainard v. Cooper*, 10 N. Y. 356; *Flacre v. Chapman*, 32 N. J. Eq. 463; *Robinson v. Urquhart*, 12 N. J. Eq. 515; *Moester's App.* 56 Pa. 79; *Roddy's App.* 72 Pa. 98; *Carter v. Taylor*, 3 Head, 30; 3 Pom. Eq. Jur. 202, 307.

Mr. F. L. Perrin, for appellants:

A mortgage after payment becomes *functus officio*, and neither the mortgagee nor anyone else has, as a general rule, any power to transfer it as a subsisting security, or to revive it to secure the same or any other liability.

2 Jones, Mort. § 943 and cases there cited; *Gammon v. Kentner*, 55 Iowa, 508.

Plaintiff does not show equities which entitle him to the subrogation asked.

Ellsworth v. Lockwood, 42 N. Y. 89; *Patterson v. Birdsall*, 6 Hun, 632; *Cottrell's App.* 23 Pa. 294; *Hayes v. Ward*, 4 Johns. Ch. 123; *Jenkins v. Continental Ins. Co.* 12 How. Pr. 66.

It is only in cases where the person advancing money to pay the debt of a third party stands in the situation of a surety, or is compelled to pay it to protect his own rights, that a court of equity substitutes him in the place of the creditor, as a matter of course, without any agreement to that effect. In other cases the demand of a creditor which is paid with the money of a third person, and without any agreement that the security shall be assigned or kept on foot for the benefit of such third person, is absolutely extinguished.

Watson v. Wilcox, 30 Wis. 643; *Sanford v. McLean*, 3 Paige, 117; *Downer v. Miller*, 15 Wis. 612; *Wormer v. Waterloo Agr. Works*, 62 Iowa, 699; 1 Jones, Mort. p. 780, § 874; *Levy v. Martin*, 48 Wis. 198.

Messrs. Smith & Vannatta, for respondent:

The doctrine of equitable assignment is justly extended by analogy to one who, having no previous interest, and being under no obligation, pays off the mortgage, or advances money for its payment, at the instance of a debtor party and for his benefit. Such a person is in no true sense a mere stranger and volunteer.

3 Pom. Eq. Jur. § 1212; *Gans v. Thieme*, 93 N. Y. 225; *Levy v. Martin*, 48 Wis. 198, 206.

Orton, J., delivered the opinion of the court:

The complaint sets out substantially the following facts: On or about the 5th day of November, 1881, the appellants, William Mayberry and Martha, his wife, executed a mortgage on certain real estate in Pierce County, Wis., to one Ann W. Grant, to secure to her the payment of \$1,000 on the first day of July, 1887; and said mortgage was duly recorded. On the fifth day of July, 1887, said mortgage being due, the respondent loaned to said appellants the sum of \$1,000, on the agreement that with said money said mortgage should be paid, and discharged of record, and that said appellants should execute to the respondent a new mortgage on said land, to secure said loan. This was done, on the part of the respondent,

in mere friendship without any selfish interest whatever. The money was used to pay off said mortgage, and it was duly discharged of record; but, instead of said appellants giving the respondent such new mortgage, as they agreed to do, and which was the inducement of said loan, they deeded said land to John R. Mayberry, one of the appellants, with intent to defraud the respondent out of his money. The said first-mentioned appellants had, and have, no other property. The said John R. Mayberry had full knowledge of said loan and said agreement. The respondent prays that he may be subrogated in place of the mortgagee of said first-mentioned mortgage; and that its satisfaction of record be canceled; and that it may be declared to be a good and subsisting mortgage to him; and that it be foreclosed. The appellants demurred to said complaint on the ground that it did not state a cause of action, and the demurrer was overruled; and this appeal is from such order.

The learned counsel of the appellants contend that the respondent was a mere volunteer, and had no interest in the land to protect, and cannot therefore be subrogated as mortgagee to the mortgage paid and discharged; and cites, besides other authorities, *Watson v. Wilcox*, 30 Wis. 643, and *Downer v. Miller*, 15 Wis. 612. In those cases it was a mere loan of money, to enable the borrower to pay off the mortgage debt, and without any agreement that the security should be assigned or kept on foot for the benefit of the party who loaned him the money. But this is no such case. The respondent, by the agreement, was to have equal security on the land, and, to protect that interest, caused the first mortgage to be discharged.

This case is ruled in principle by *Levy v. Martin*, 48 Wis. 198. It was there a part of the contract that the executors should secure the lender by another mortgage, as here, and they did so as they supposed; but the mortgage was void for want of authority. On the same principle are *Jones v. Parker*, 51 Wis. 218, and *Carey v. Boyle*, 53 Wis. 574.

This was a most outrageous fraud on the part of the appellants, and there is no other possible remedy to the respondent but subrogation. No one is injured or interested except these appellants who committed the wrong. When they deeded the land to the other Mayberry, they supposed they had succeeded in defrauding the respondent out of his security in it; but the grantee had knowledge of the agreement, and is therefore bound. It is really a strong case for equitable subrogation.

The order of the Circuit Court is affirmed, and the cause remanded for further proceedings according to law.

ILLINOIS SUPREME COURT.

John H. LESLIE, *Appt.*,
v.

Charles E. BONTE *et al.*

(.....Ill.....)

A judgment in favor of the makers of a note upon the merits, in an action thereon
6 L. R. A.

brought against them by an indorsee, is a bar to a subsequent suit brought in another State by the payee against the makers to recover on the note.

(October 31, 1889.)

A PPEAL by plaintiff from a judgment of the Appellate Court for the First District

reversing a judgment of the Superior Court of Cook County in his favor in an action upon a promissory note. *Affirmed.*

The action was brought by George and John H. Leslie. After the action was begun the death of George Leslie was suggested and an order entered that the suit proceed in the name of the surviving plaintiff, John H. Leslie.

The case sufficiently appears in the opinion. *Messrs. Tenney, Driggs & Hawley*, for appellant:

Although as a rule a man is not bound by the result of litigation to which he was not a party, or in privity with a party, yet there is an apparent exception where a person is bound to protect another from liability.

Commercial Union Assur. Co. v. Am. Cent. Ins. Co. 63 Cal. 430, and cases cited.

In such cases, however, it is essential to the creation of the estoppel that the person who is liable over to the party to the suit should be notified and have an opportunity to defend. But the person so notified does not thereby become a party to the suit; and the judgment is not an adjudication between him and the opposite party, but only between him and the person whom he is bound to protect.

Severin v. Eddy, 53 Ill. 189; *Cadwallader v. Harris*, 76 Ill. 370. See *Knox v. Sterling*, 78 Ill. 214; *Lacroix v. Lyons*, 83 Fed. Rep. 437.

The defense set up in the Ohio case was that Leslie had committed a fraud on appellees by palming off on them a lot of worthless stock. He knew the facts, and was acquainted with the evidence by which his honesty in the trade could be established. But, having no control over the case, he could not produce this evidence. The answer of the defendants in that case clearly set up no defense to the note. All that it alleges is that the consideration for the note was the sale of some stock in a corporation, that the stock was substantially worthless unless the corporation owned certain rights, that it did not own these rights, and the plaintiff knew it, and knew also that the defendants did not know it. No misrepresentation is alleged; only the failure to disclose facts which the party was under no obligation to disclose. It does not even show that the defendants did not have full opportunity to ascertain the facts. This was no fraud and no defense.

Cogel v. Kniseley, 89 Ill. 598; *Morris v. Thompson*, 85 Ill. 16; *Mitchell v. McDougall*, 62 Ill. 498; Benjamin, Sales, § 430.

The best and most invariable test as to whether a former judgment is a bar, is to inquire whether the same evidence will sustain both the present and the former action.

Freeman, Judgments, § 259; *Steinbach v. Relief P. Ins. Co.* 77 N. Y. 498.

Admissions of the indorsee would not be admissible against the indorser. So the same evidence would not support both actions.

See *Drennan v. Bunn*, 14 West. Rep. 184, 124 Ill. 175.

There is no such privity of title between Leslie and Grant as to take the case out of the rule requiring notice in order to make the judgment binding.

Bigelow, Estoppel, 69, 70.

The note was not payment of the debt for which it was given. The general rule is, that the taking of the note of the debtor, or even

of a third person, for a debt, does not pay the debt unless expressly so agreed; and, upon dishonor of the note, the creditor may sue and recover either on the note or the original consideration.

Archibald v. Argall, 53 Ill. 307; *Oheltenham Stone & G. Co. v. Gates Iron Works*, 14 West. Rep. 593, 124 Ill. 628.

When the note is dishonored, the original debt revives, and the note becomes merely collateral security.

2 Daniel, Neg. Inst. § 1272.

Leslie therefore had an undoubted right, upon taking up the note, to sue on the original promise. The defendants' liability on that promise did not depend on their liability on the note.

See *Eastman v. Porter*, 14 Wis. 39.

Messrs. Francis A. Riddle and John S. Stevens, for appellees:

The Constitution of the United States says, in § 1, art. 4: "Full faith and credit shall be given in each State to the public Acts, records and judicial proceedings of every other State, and the Congress may, by general laws, prescribe the manner in which such Acts, records and proceedings shall be proved, and the effect thereof."

See also Act of Congress May 26, 1790.

The maker of an indorsed note has a right to require that there shall be such a plaintiff as will make the recovery a bar to any other action by another for the same debt.

Parks v. Brown, 16 Ill. 454.

If a party, after a judgment against him, assigns his interest, his assignee will be bound; as it is conclusive against the assignor it must be against the assignee, for the substitute can be in no better position than the principal.

1 Herman, Estoppel, § 144.

After appellees' obligations on the note had been discharged under proceedings based on that very contract, no arrangement between Grant and the payees, made after the rendition of the judgment, could impair the rights of appellees thereunder or in any way annul the effect of their judgment.

Zimmerman v. Zimmerman, 15 Ill. 84; *Drake v. Perry*, 58 Ill. 122; *Levi v. McCraney*, 1 Morris (Iowa) 91; *Soward v. Coppage* (Ky.) 9 S. W. Rep. 389.

The purpose of giving notice to one liable to indemnify a party to the suit is not in order to give a ground of action, but is to make the judgment conclusive evidence of the liability of the indemnifying party.

Duffield v. Scott, 3 T. R. 974; *Drennan v. Bunn*, 14 West. Rep. 184, 124 Ill. 175.

In order that a judgment in one action shall be conclusive in another, it must appear with convenient certainty that the question in controversy in the second suit was litigated and decided in the first. When this appears on the face of the proceedings in the former action, the mere production of the record will be enough.

Herman, Estoppel, § 279; *Williams v. Hollingsworth*, 5 Lea (Tenn.) 360; *Bagot v. Williams*, 8 Barn. & C. 235.

It may be entirely true that the giving of a note or bill does not extinguish the debt for which they were given, and that the debtor, on their nonpayment, may bring suit for the debt;

but that right is "subject to the obligation of surrendering up the bill or note at the trial, or accounting for its absence."

2 Daniel, Neg. Inst. § 1272.

Even if the appellant could have avoided the bar of the prior judgment by surrendering the note at the trial, that was something he did not do, but on the contrary made it the basis of his suit.

Craig, J., delivered the opinion of the court:

This was an action of assumpsit brought by George and John H. Leslie, in the Superior Court of Cook County, on the following promissory note:

\$8,000. Cincinnati, Ohio, August 24, 1888.

Six months after date we jointly or severally promise to pay to Geo. and Jno. H. Leslie or order three thousand 00-100 dollars, value received. Payment at Third National Bank of Cincinnati, Ohio.

Charles E. Bonte,
J. Weller,
George H. Bonte.

Indorsed on back:

"Please pay to William Grant or order. Geo. and Jno. H. Leslie."

The note was given for shares of stock in a mining company known as the "Santos Manufacturing & Mining Company." The note was indorsed and transferred in Chicago to William Grant, and delivered to him. After Grant had procured the note, he brought suit upon it in Hamilton County, Ohio, where the makers resided. All of the makers were defendants in that suit, and on February 25, 1885, filed an amended answer therein, in which they denied that Grant had received the note before maturity, and set up as a defense want of consideration, alleging, among other things, that the stock of the Santos Manufacturing & Mining Company which they received from the payees of the note was fraudulently represented by them to be of value, when, in fact, it was worthless. To this answer Grant filed a reply, traversing the averments of the answer, and upon the issues thus made up a trial was had before a jury upon the merits of the case, resulting in a verdict and judgment in favor of the defendants to the action. October 16, 1886, a year and a half after the rendition of the judgment in Hamilton County, Ohio, George and John H. Leslie brought this action upon the same note, the indorsement which they had originally made on the note to William Grant having been erased. To the declaration the defendants filed, with others, a special plea setting up the judgment rendered in Ohio in bar of the action, and to this the plaintiffs replied *nul tiel record*. The case was submitted to the court without a jury by agreement, and upon the issue presented by the plea setting up the Ohio judgment, after the evidence was all in, the court held the following: "And the court, finding that the note was made and assigned in the State of Illinois, and that at the time the note became due, and ever since hitherto, the makers thereof were residents of the State of Ohio, and not of the State of Illinois, held, as a legal conclusion, that a judgment in favor of the defendants upon the merits in the suit brought 6 L. R. A.

in the State of Ohio against them by the assignee was no bar to the action by the payee, and therefore the plaintiff was entitled to recover."

On appeal to the appellate court the judgment of the superior court was reversed.

There is but one question presented by this record, and that is whether the judgment rendered in Hamilton County, Ohio, is a bar to this action. The appellate court held that it was. If Grant had recovered judgment on the note in the action in Ohio, the note would have been merged in the judgment, and no other action could be maintained against the defendants on the note. This principle was clearly established in *Wayman v. Cochrane*, 85 Ill. 152, where it is said: "The general rule is that by a judgment at law or a decree in chancery the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment."

In *Freeman on Judgments*, § 216, in discussing this question, the author says: "The weight of authority in the United States shows that whatever may be a cause of action will, if recovered upon, merge into the judgment or decree."

No judgment was rendered upon the note against the makers, but the validity of the note was in issue, and the makers had judgment against the owner of the note upon the merits. The judgment thus rendered, on principle, ought to operate as a satisfaction of the note, and a complete bar to any subsequent action brought upon it by any person in whose hands it might be found. *Zimmerman v. Zimmerman*, 15 Ill. 84, is an authority in point. There Jacob Zimmerman executed his note payable to Runnley. He assigned it to Peter Zimmerman, and Peter assigned the note to Thomas Craft. Thomas Craft brought suit before a justice of the peace on the note, and on a trial judgment was rendered against him for costs. Subsequently Peter Zimmerman brought suit on the note before a justice, and this court held that the first action brought on the note was a bar to any other action which might be brought on the note against the maker. If the action brought by the second indorsee on the note was a bar to a recovery on the instrument in a second action by the first indorsee, upon the same principle, had the payee of the note brought the action, he would have been barred.

In *Drake v. Perry*, 58 Ill. 122, a judgment in favor of the maker in an action on a note in the name of the payee for the use of the holder was held to be a bar to a second action on the same note in the name of the assignee.

In Iowa the Supreme Court of that State in *Levi v. McCraney*, 1 Morris (Iowa) 91, held that a judgment in favor of the maker of a note on the merits, in an action by the assignee, was a bar to a subsequent action brought by the payee. The same doctrine has been held by the Supreme Court of Kentucky in the late case of *Soward v. Coppage* (Ky.) 9 S. W. Rep. 889.

No reason occurs to us why the Leslies should not be barred and concluded by the judgment. They indorsed the note, and delivered it, indorsed, to Grant, thus placing the absolute title and ownership in him. By this act they clothed him with authority to sue in his own name the

makers of the note. He brought an action on the note, and upon a trial on the merits he was defeated. After judgment was rendered Grant returned the note to the Leslies. Under what arrangement he obtained the note and returned it is not shown by the evidence, nor is it material. They can only be regarded as purchasers from Grant. He had the title when the trial occurred in Ohio, and when the judgment was rendered against him. This title he transferred to the Leslies. They, after purchasing the note from him, stood in his shoes. If he could not maintain a second suit on the note, neither could they. They acquired Grant's title to the note subject to all defenses the makers might interpose against him. Among these defenses was a judgment in bar of the note.

We think the judgment of the Appellate Court correct, and it will be affirmed.

UNITED STATES LIFE INSURANCE CO., in the City of New York, *Appt.*,

v.

Elizabeth KIELGAST, Admr., etc.

(....ILL....)

A coroner's inquisition, under the statute by which coroners are required to proceed substantially as at common law, and the inquest to be sealed up and filed with the clerk of the circuit court, may be used as evidence to show the cause of the person's death, in an action to recover insurance on his life.

(October 31, 1889.)

APPEAL by defendant from a judgment of the Appellate Court for the First District affirming a judgment of the Cook County Superior Court in favor of plaintiff in an action upon a policy of life insurance. *Reversed.*

The facts are fully stated in the opinion.

Meara, Isham, Lincoln & Beale, for appellant:

Inquisitions, generally, are admissible in evidence as a species of judicial record somewhat analogous to judgments *in rem*.

Starkie, Ev. 10th Am. ed. *404, 405; 2 Phill. Ev. 5th ed. *262, 268; 2 Taylor, Ev. 6th ed. § 1487; 1 Greenl. Ev. § 556.

Inquisitions of lunacy are admissible in evidence.

1 Wharton, Ev. § 812; 2 Wharton, Ev. § 1254; 2 Phill. Ev. 5th ed. *266; *Banker v. Banker*, 63 N. Y. 409.

Inquests of office are admissible in evidence, and a coroner's inquest was at common law simply an inquest of office.

Stokes v. Davies, 4 Mason, 268; Starkie, Ev. 10th Am. ed. *404; 8 Jacob, L. Dict. title *Inquests*, p. 454; *Ree v. Britwell*, 8 T. R. 722.

The coroner's inquisition would have been *prima facie* proof that the insured committed suicide.

Walther v. Mutual L. Ins. Co. 65 Cal. 417; *Prince of Wales etc. Asso. Co. v. Palmer*, 25 Beav. 606; Jervis, Coroners, p. 318 *et seq.*; 2 Stevens, Nisi Prius, *1642. See also *Burridge v. Earl of Swacer*, 2 Ld. Raym. 1292; *Sergeon v. Sealy*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126; *State v. Duffy*, 39 La. Ann. 419.

4 L. R. A.

The presumption of law that a death entirely unexplained by evidence is the result of accident is not a strong presumption, and requires but slight evidence to be overcome. The coroner's inquisition would have been sufficient.

Walther v. Mutual L. Ins. Co. 65 Cal. 417; *Prince of Wales etc. Asso. Co. v. Palmer*, 25 Beav. 606.

Mr. George F. Westover for appellee.

Craig, Ch. J., delivered the opinion of the court:

This was an action brought by Elizabeth Kielgast, administratrix of the estate of Otto Wilhelm Kielgast, against the United States Life Insurance Company, in the City of New York, to recover the amount of a policy issued by the company to the deceased on the 22d day of July, 1884. To the declaration the defendant pleaded the general issue, and also filed one special plea, in which it set up that the policy of insurance contained a provision that if, within three years from the date of the policy, the insured should die by any act of self-destruction whatever, the policy should become null and void; and that the insured, Otto Wilhelm Kielgast, did die by an act of self-destruction, to wit, by shooting himself with a pistol, by means whereof the policy of insurance became void. It appears that a coroner's inquest was held over the body of the deceased by the coroner of Cook County and a jury, and in making proofs of death a certified copy of the record of the coroner's inquest, consisting of the inquisition and the deposition of three witnesses, was returned to the insurance company as a part of the proofs of death. The inquisition shows on its face that Kielgast came to his death on the 17th day of January, 1885; that the death was caused by a pistol shot fired by the hand of the deceased while laboring under a fit of temporary insanity. On the trial the defendant offered in evidence the certified copy of the inquisition which had been returned to defendant as a part of proofs of death. The court excluded the evidence. The defendant then offered in evidence the original papers of which those previously offered were copies, offering the entire set of papers together, including the verdict and testimony. This evidence was also excluded. The defendant excepted to the decision of the court in excluding the evidence so offered; and the determination of the ruling of the court on the evidence is the principal question presented by the record. The inquisition was as follows:

State of Illinois, County of Cook—ss.:

An inquisition was taken for the people of the State of Illinois, at 83 Grant Place, in the City of Chicago, in said County of Cook, on the 18th day of January, A. D. 1885, before me, Henry L. Hertz, coroner in and for said county, upon view of the body of Otto W. Kielgast, then and there lying dead, upon the oaths of six good and lawful men of the said county, who being duly sworn to inquire on the part of the people of the State of Illinois into all the circumstances attending the death of the said Otto W. Kielgast, and by whom the same was produced, and in what manner and when and where the said Otto W. Kielgast came to his death, do say, upon their oaths as aforesaid, that the said Otto W. Kielgast, now

lying dead at 88 Grant Place, in said City of Chicago, County of Cook, State of Illinois, came to his death on the 17th day of January, A. D. 1885; and we, the jury, find that O. W. Kielgast came to his death on the night of January 17, 1885, by a pistol shot fired by his own hand while laboring under a fit of temporary insanity. In testimony whereof the said coroner and the jury of this inquest have hereunto set their hands the day and year aforesaid.

Douglas Barstow, Foreman.

Louis Gasselin,

O. W. Haynie,

H. M. Gillette,

Angelo Faiei,

M. J. Shute,

Henry L. Hertz, Coroner,

P. Knoff, Deputy.

Among the depositions was one given by appellee, as follows:

The deceased is my husband. He was thirty-nine years of age, and was born in Germany. Insurance agent by occupation. On the evening of January 17th, about 9 o'clock P. M., I heard a shot fired in his room. We hollered, and went down stairs, and sent my hired girl for the police. When he came, we went up stairs, where we found the deceased dead. All of a week ago he said he would kill himself. That was every day for the last six days. On the evening of January 17th, when he arrived home, he kissed his little boy, and said, "Charlie, this is the last kiss that you will give your father." For the last week he was drinking more than usual.

her
Elizabeth X. Kielgast.
mark.

We shall not stop to inquire whether the court erred in excluding the offered evidence as a part of the proofs of death, but we will proceed at once to determine the question whether the inquisition was competent evidence for the defendant under its special plea tending to prove that Kielgast came to his death by his own hand. The office of coroner, at the common law, is an ancient one; so much so that Jervis on Coroners (page 2) says "that the office of coroner is of so great antiquity that its commencement is not known."

In 2 Bacon, Abr., 428, it is said: "The powers and duties of a coroner are, by the common law, both judicial and ministerial. His judicial authority relates to inquiries into the cases of sudden death, with the aid of a jury, *super visum corporis*, when the death has happened."

And Blackstone says (1 Com. 848): "The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial, but principally judicial. This is in great measure ascertained by Statute (4 Edw. I.) *de officio coronatoris*; and consists, first, in inquiring, when any person is slain, or dies suddenly, or in prison, concerning the manner of his death. And this must be *super visum corporis*; for, if the body be not found, the coroner cannot sit."

In *Giles v. Brown*, 1 Mill. Const. Rep. (S. C.) 230, it is said: "Coroners are very ancient officers at the common law. . . . In England they are chosen by the freeholders of the county; . . . and their powers, when appoint-

ed, are either judicial or ministerial. The judicial power of a coroner is, first, to inquire into or concerning the death of a man, when anyone is slain or dies suddenly, by a jury of inquest *super visum corporis*, and this must be done at the place where the death happened; and if anyone be found guilty, by this inquest, of murder or other homicide, he is to commit him to prison for further trial. They are also to make inquiry . . . of all things which occasioned it; after which it is his duty to certify the whole of this inquisition, under his seal and the seals of the jurors, together with the evidence thereon, to the court of King's Bench or the next assizes."

The earliest English statute relating to coroners was passed in the tenth year of Edward the First, and it is said by Jervis on Coroners, p. 29, that it was merely directory, and in affirmation of the common law. The first Act of the Legislature of this State regulating the duties of coroner was passed March 2, 1819. The next statute was passed January 20, 1821 (Laws 1821, p. 22). This Act, upon an examination, will be found to be substantially like the Statute of 4 Edw. I. Our present Statute does not differ materially from the earlier Acts; indeed, coroners are now required to proceed substantially as at common law, and as required by the Statute of 4 Edw. I. Under section 9 of our present Statute relating to coroners, they are made conservators of the peace in their respective counties. Section 18 makes it the duty of the coroner, upon information that the dead body of any person is found or lying within the county, supposed to have come to his death by violence or any undue means, to repair to the place where the dead body is, and take charge of the same, and summon a jury of six lawful men of the neighborhood to assemble where the body is, and, upon a view of the body, to inquire into the cause and manner of the death.

Section 17 makes it the duty of the jury, after being sworn, to inquire how, in what manner, and by whom or what the said dead body came to its death, and of all other facts of and concerning the same, together with all material circumstances in any wise related to or connected with the said death, and make up and sign a verdict, and deliver the same to the coroner.

Sections 19 and 20 are as follows: "(19) If the evidence of any witness shall implicate any person as the unlawful slayer of the person over whom the said inquisition shall be held, the coroner shall recognize such witness, in such sum as he may think proper, to be and appear at the next term of the circuit court for the said county, there to give evidence of the matter in question, and not depart without leave, except that in the County of Cook the recognizance shall be to the Criminal Court of Cook County. (20) If any witness shall refuse to enter into such recognizance, it shall be the duty of the coroner to commit the witness so refusing to the common jail of the county, there to remain until the next term of the said court, and the coroner shall carefully seal up and return to the clerk of the court the verdict of the jury and the recognizances, and it shall be the duty of the clerk to carefully file and preserve the same."

Section 21 requires the coroner to reduce to

writing the testimony of each witness examined at the inquest, which testimony shall be filed by the coroner in his office and preserved.

Section 23 provides that the coroner shall keep a record of each inquest.

Section 26 provides that, if a person implicated by the inquest is not in custody, the coroner shall apprehend and commit such person to the jail of the county, there to remain until discharged by due course of law.

The foregoing are the principal sections of the Statute which relate to the inquest of the coroner; and from the nature and character of the proceeding, as it has been recognized by courts and law writers, we must determine whether a coroner's inquisition should be used as evidence in a case of this character. It will be observed that the evidence of all witnesses examined before the coroner is required to remain in his office, while the inquest must be sealed up and returned to the clerk of the circuit court of the county, where it shall be filed. Thus the inquest becomes, by force of the Statute, a record of the circuit court,—a public record of the county where the inquest is held. It is a record containing the results of a public inquiry, made by a public officer under authority of law, relating to matters in which the public have an interest. Shall it be held that a public record of this character shall not be evidence in a judicial proceeding tending to prove the facts found to be true on the face of such record? We are not prepared to adopt a rule of that kind. Moreover, we believe the weight of authority to be in favor of the admission of such evidence.

1 Starkie, Ev., 1809, seems to lay down the rule that an inquisition is admissible in evidence. He says: "In *Bergeon v. Sealy*, 2 Atk. 412, Lord Hardwicke said that inquisitions of lunacy, inquisitions *post mortem*, and others, were always admissible, though not conclusive. In the case of *Burridge v. Earl of Sussex*, 2 Ld. Raym. 1292, an inquisition *post mortem*, setting out the tenor of a deed, was held to be evidence of the deed."

1 Greenleaf on Evidence, § 556, in speaking of inquisitions, says: "These are the result of inquiries made under competent public authority to ascertain matters of public interest and concern. They are said to be analogous to proceedings *in rem*, being made on behalf of the public; and that therefore no one can strictly be said to be a stranger to them. But the principle of their admissibility in evidence between private persons seems to be that they are matters of public and general interest, and therefore within some of the exceptions to the general rule in regard to hearsay evidence. . . . The general rule in regard to those documents is that they are admissible in evidence, but that they are not conclusive, except against the parties immediately concerned and their privies." See also, 2 Phill. Ev. 5th Am. ed. 262; 2 Taylor, Ev. 6th ed. § 1487, where the same doctrine is announced.

In *People v. Devine*, 44 Cal. 452, the question arose whether the evidence of a witness taken before the coroner could be used to contradict the evidence of the same witness subsequently given on a trial in court. In considering the question, it is said: "The testimony had been returned into court as part of certain proceed-

ings judicial in their character, had before an officer appointed by law, and expressly charged with the duty of reducing or causing it to be reduced to writing, and returning it into court. At common law, as well as under the Statute of Edward I., and our Statute concerning coroners, which are but declaratory of the common law, the coroner holding an inquest *super visum corporis* is in the performance of functions judicial in their character (*Reg. v. White*, 8 El. & El. 144; *Giles v. Brown*, 1 Mill. Const. Rep. (S. C.) 231; *Boisliniere v. St. Louis Co.* 32 Mo. 375); so distinctly judicial that he is protected under the principles which protect judicial officers from responsibility in a civil action brought by a private person (*Garnett v. Ferrand*, 6 Barn. & C. 611). Whether his proceedings be entered upon the coroner's roll at common law and the Statute of Edward, or returned into court under our own Statute, they amount to entries concerning matters of public interest, made under the sanction of an official oath, and in compliance, or presumed compliance, with the requirements of law. In our investigations we have not found any authority in text books or adjudicated cases which distinguishes between these and any other official proceedings taken and returned in the discharge of official duty, as to their admissibility in evidence upon the principle referred to." See also *Faulder v. Silk*, 8 Camp. 126; *Sills v. Brown*, 9 Car. & P. 601.

The citation of other authorities would seem to be unnecessary. We are satisfied, both upon principle and authority, that the coroner's inquisition was admissible in evidence. The inquisition was made by a public officer, acting under the sanction of an official oath, in the discharge of a public duty enjoined upon him by the law; and when it is returned into court, and is filed, we see no reason why it should not be competent evidence tending to prove any matter properly before the coroner which appears upon the face of the inquisition. We do not hold that such evidence is conclusive, but only that it is competent evidence to be considered.

Reliance is placed by the plaintiff on *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 1 West. Rep. 643, as an authority sustaining the ruling of the circuit court. That was an action brought against the railway company to recover damages for the killing of plaintiff's intestate, and on the trial the court excluded the deposition of a witness taken before the coroner. That ruling was approved, but whether a coroner's inquisition was admissible in evidence was not raised, nor was it decided, and hence the decision cited and relied upon has no bearing whatever on the question presented by this record.

We are of the opinion that the court erred in excluding the inquisition, and for that reason the judgment of the Appellate and Superior Courts will be reversed, and the cause remanded to the Superior Court for another trial.

Bailey, J., having heard this case in the Appellate Court, took no part in its decision here.

Baker, J., concurring:

I concur in the view of the case taken in the opinion of Justice Craig. The appellate court

evidently misapprehended the scope and effect of the decision of this court in *Pittsburgh, O. & St. L. R. Co. v. McGrath*, 115 Ill. 172, 1 West. Rep. 643. That case is authority to sustain the action of the superior court in excluding from the jury the depositions taken at the coroner's inquest, but not to justify the ruling against the admission in evidence of the inquisition itself, that is, the verdict of the jury, as independent evidence of suicide. In fact, no question in regard to the inquisition arose in that case. The courts below were probably misled by the inadvertent use in one place in the opinion of the word "inquisition" instead of the word "deposition" or "testimony." It is apparent from the context that one or the other of these latter words were intended, for otherwise the expression is inaccurate. At common law, and in this State until the adoption of the Constitution of 1848, a coroner and his jury, holding an inquest *post mortem*, constituted a court, with judicial power. Our present Statute in regard to coroners is substantially a re-enactment of the Statute of 4 Edw. I., and that was held to be merely in affirmance of the common law. In early days, the finding of the coroner and his jury was regarded as a judicial determination of a very absolute and binding character; and my Lord Coke considered an inquisition of *felo de se*, taken by the coroner *super visum corporis*, to be conclusive evidence of the fact against the executors or administrators of the deceased. Through the influence of Lord Hale the doctrine was modified to the extent that it was settled that such inquisition might be traversed, he conceiving it unreasonable that the executors or administrators should be concluded by an inquisition which might be taken by the coroner behind their backs, without an opportunity afforded them to make answer. The rule which now obtains, as appears from the text books, and also, almost without exception, from the decided cases, is that inquisitions *post mortem* are admissible in evidence, but are not conclusive. The general doctrine, as stated in 1 Greenleaf on Evidence, § 556, is that these inquisitions are within the exceptions to the rule in regard to hearsay evidence, and are distinguished from other hearsay evidence in having peculiar guarantees for their accuracy, and are the results of inquiries made under competent public authority to ascertain matters of public interest and concern, and that no one can be considered a stranger to them. The only difficulty in respect to the admissibility in evidence of the inquisition itself is found in the fact that section 1 of article 6 of the Constitution of 1870 provides that "the judicial powers, except as in this article is otherwise provided, shall be vested in one supreme court, circuit courts, county courts, justices of the peace, police magistrates and in such courts as may be created by law in and for cities and incorporated towns." Said article 6 disposes of all the judicial power of the State, and completely exhausts the subject, and a coroner's inquest is not provided for therein. So it is certain that in this State, and under its present Constitution, the coroner and his jury do not constitute a court, and are not clothed with judicial powers, as was the case at common law.

The inquisition not being the result of a judicial proceeding, is the old common-law rule 6 L. R. A.

of evidence that it is competent testimony thereby abrogated? I think not, and am of opinion that common-law principles and the analogies of the law and the decisions of this court justify such conclusions. The provision found in section 1 of article 5 of the Constitution of 1848 was substantially that contained in the present Constitution. An Act of March 8, 1845, made provision for an inquiry before a sheriff and a jury into the right of parties claiming property on which the sheriff had levied an execution.

In *Roue v. Bowen*, 28 Ill. 116, the point was made that this inquest or trial of the right of property created by the Statute for the purpose of enabling the sheriff to interpose the verdict of a jury as his justification for selling the property, or restoring it to the claimant, as the verdict might direct, had been abolished by the Constitution of 1848. The court held otherwise, and that said law was in no respect in derogation of the Constitution. It was held that the verdict of a jury under this Statute afforded a complete indemnity to the sheriff, and it was there said: "In the inquiry or inquest the sheriff decides nothing; nor does he, nor the jury, pronounce any judgment. The jury sign and render a verdict only, and to the effect that, from the facts before them, the property, *prima facie*, belongs to the claimant, or to the defendant in the execution, as the case may be, so far as the writ is concerned." Of course, under this decision, the verdict of the jury, found at the sheriff's inquest, would have been admissible as testimony in favor of the sheriff in suit brought by claimant for selling the property, or in suit brought by the execution creditor for abandoning the levy, or against the sheriff in suit prosecuted by the claimant for selling after a verdict in his (the claimant's) favor.

In *Andrews v. People*, 75 Ill. 605, it was held that the Act of 1873, making the collector's return in writing, and under oath, to the sheriff or county treasurer, of the taxes levied by a town or city due and unpaid, *prima facie* evidence that all the requirements of the law had been complied with in the assessing and levying of the taxes therein returned as unpaid, and that said taxes were due and unpaid, is not liable to the constitutional objection that it gives the collector judicial power to determine the question of delinquency, since this report is only made *prima facie* evidence of that fact.

In *Spencer v. People*, 68 Ill. 513; *Porter v. Rockford, R. I. & St. L. R. Co.* 78 Ill. 561; *East St. Louis Connecting R. Co. v. People*, 8 West. Rep. 342, 119 Ill. 182; *St. Louis, B. & T. R. Co. v. People* (Ill.) 21 N. E. Rep. 348, and in numerous other cases, this court has held that the valuation for taxation of certain kinds of property is by the Statute committed to the state board of equalization, and that its decision is judicial in its nature, and can only be assailed for fraud or want of jurisdiction. So, also, at common law, inquisitions of lunacy and inquests of office are admissible in evidence; and it is not understood that the provision of our State Constitution in question has rendered them incompetent as testimony. Moreover, under our Statutes, the findings, reports or schedules of various commissioners, boards and officers are either made competent evidence or *prima facie* evidence in express

terms, or are given the legal effect of evidence. See Rev. Stat. 1874, chap. 24, § 145, in respect to commissioners appointed to make special assessments; section 8, of the Extortion and Unjust Discrimination Act, in respect to schedules made by the railroad and warehouse commissioners; chapter 2, § 11, in regard to auditors in actions of account; the provision of chapter 10 with reference to the awards of arbitrations; the provisions of chapter 41 in regard to commissioners to assign dower; the provisions of chapter 106 in regard to commissioners to make partition; and various other statutory provisions of like character, too numerous to specify.

My conclusion is that, while under the Con-

stitution the coroner and coroner's jury no longer compose a court with judicial power, yet the inquisition or verdict made by them, and which is required to be returned to and filed in the office of the clerk of the circuit court, and which thereby becomes a record of that court, is competent testimony, and that the ruling of the trial court in the case at bar, refusing to admit in evidence the verdict of the coroner's jury which inquired into the matter of the death of Otto Wilhelm Kielgast, deceased, was erroneous; and I concur in the conclusion that for error the judgment should be reversed, and the cause remanded to the superior court for another trial.

KENTUCKY COURT OF APPEALS.

LOUISVILLE WATER CO., *Appt.*,
v.
COMMONWEALTH OF KENTUCKY *et*
al.

(...Ky....)

A suit cannot be maintained for the collection of taxes in the absence of legislative authority; especially where an express provision is made authorizing suit for that purpose against certain corporations, among which the one from which the taxes are demanded is not included.

(October 30, 1889.)

APPEAL by defendant from a judgment of the Louisville Law and Equity Court in favor of plaintiffs in a proceeding for the collection of certain taxes. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. William Lindsay, T. L. Burnett and Lane & Burnett* for appellant.

Messrs. Helm & Bruce, for the Commonwealth:

This proceeding is exclusively *in rem* against the property of the Water Company. It is simply a judicial proceeding to enforce a lien which the statute expressly gives, but for the enforcement of which it provides no mode of procedure. The remedy by sale of property to enforce the lien is not applicable to a case like the one at bar.

Louisville Water Co. v. Hamilton, 81 Ky. 522, 523.

The Legislature has imposed a moneyed obligation or liability upon the corporation and in express terms gives a lien on the property of the person liable to secure the payment of the money thus due. But it provides no mode of procedure at all for the enforcement of this lien, and equity can enforce such a lien by proceedings adapted to the nature of the property.

See *Cooley*, Taxn. 2d ed. chap. 1, p. 15, chap. 14, p. 435; 2 *Desty*, Taxn. chap. 21, § 126; *Burroughs*, Taxn. § 106; *Dillon*, Mun. Corp. 8d ed. chap. 19, § 815; *Baltimore v. Howard*, 6 Har. & J. 394; *State v. Seeverance*, 55 Mo. 389; *Carondelet v. Picot*, 38 Mo. 180; *Dudley v. Mayhew*, 3 N. Y. 9; *Almy v. Harris*, 5 Johns. 175; *Perry Co. v. Selma*, M. & M. R. Co. 58 Ala. 583; *State v. Williams*, 8 Tex. 386; *Houston & T. O. R. Co. v. State*, 39 Tex. 158; *State v. Duncan*, 6 L. R. A.

8 Lea, 679; *McInerney v. Reed*, 23 Iowa, 410; *Merriam v. Moody*, 25 Iowa, 172; *U. S. v. Lyman*, 1 Mason, 482; *U. S. v. Washington Mills*, 2 Cliff. 607; *Meredith v. U. S.* 38 U. S. 13 Pet. 486, 493 (10 L. ed. 258); *Dollar Sav. Bank v. U. S.* 86 U. S. 19 Wall. 240 (22 L. ed. 82).

In addition to the foregoing authorities holding that judicial proceedings may be resorted to when no other remedy is given by statute for the collection of taxes, there is another line of cases which hold that the government may sue for taxes even though a different remedy be pointed out by statute.

Dollar Sav. Bank v. U. S. 86 U. S. 19 Wall. 227 (22 L. ed. 80); *U. S. v. Lyman*, *supra*; *U. S. v. Washington Mills*, 2 Cliff. 601; *Meredith v. U. S.* *supra*; *U. S. v. Truck*, 28 Fed. Rep. 846.

Then there are other authorities of high standing which hold, even as to taxes due municipal corporations, that the giving by statute of a special remedy for collecting taxes will not exclude the right to collect by suit, unless such clearly appears to have been the legislative intent.

Dubuque v. Ill. Cent. R. Co. 39 Iowa, 56, 74; *New Haven v. Fair Haven & W. R. Co.* 83 Conn. 423, 9 Am. Rep. 399; *Geneva v. Cole*, 61 Ill. 398; *Dunlap v. Gallatin Co.* 15 Ill. 7; *Ryan v. Gallatin Co.* 14 Ill. 78; *Camden v. Allen*, 26 N. J. L. 398. See also *Board of Education v. Old Dominion, I. M. & Mfg. Co.* 18 W. Va. 441; *Andover & M. Turnp. Corp. v. Gould*, 6 Mass. 44.

In the cases holding that a tax cannot be recovered by suit it will be seen that the statute law of the State provided a different remedy which was deemed exclusive.

See *Packard v. Tidale*, 50 Me. 376; *Augusta v. North*, 57 Me. 392; *Hibbard v. Clark*, 56 N. H. 155; *Staley v. Columbus*, 36 Mich. 39; *Crapo v. Stetson*, 8 Met. 394; *Peirce v. Boston*, 8 Met. 520; *Shaw v. Peckett*, 26 Vt. 482.

In England informations of debt (a legal remedy) and exchequer informations (an equitable remedy) to recover duties on importations, and other dues of the Crown, have always been common, even though the Acts of Parliament provided a different mode of collection.

Dollar Sav. Bank v. U. S. 86 U. S. 19 Wall. 240 (22 L. ed. 82); *U. S. v. Lyman*, 1 Mason, 482.

The cases holding a contrary doctrine are mostly cases in which an individual sought to compel the levy of a tax as a means of collecting his debt.

Meriwether v. Garrett, 102 U. S. 472 (26 L. ed. 197); *Thompson v. Allen Co.* 115 U. S. 550 (29 L. ed. 472); *Walkley v. Muscatine*, 73 U. S. 6 Wall. 481 (18 L. ed. 980); *Ross v. Watertown*, 86 U. S. 19 Wall. 107 (22 L. ed. 72); *Heine v. Levee Comrs.* 86 U. S. 19 Wall. 655 (22 L. ed. 228).

The Kentucky decisions are not out of the line of authorities which hold that where a tax is imposed by a statute, and no remedy provided for enforcing its payment, or a lien is given to secure it, and no means provided for enforcing the lien, resort may be had to judicial proceedings to enforce the obligation or the lien.

See *Portland Dry Dock & Ins. Co. v. Portland*, 12 B. Mon. 77; *Instone v. Frankfort Bridge Co.* 2 Bibb, 578; *Thompson v. Buckhannon*, 2 J. T. Marsh. 417; *Tull v. Geohagen*, 8 J. T. Marsh. 377; *Prather v. Davis*, 18 Bush, 877; *Russell v. Muldraugh's Hill, C. & C. Turnp. Road Co.* 18 Bush, 810; *Brightwell v. Com.* 79 Ky. 539; *Stephens v. Miller*, 80 Ky. 49; *Johnston v. Louisville*, 11 Bush, 583; *Meriwether v. Garrett*, 102 U. S. 514 (26 L. ed. 205); *Elizabethtown & P. R. Co. v. Elizabethtown*, 12 Bush, 233; *Lincoln Co. Ct. v. Louisville & N. R. Co.* 8 Ky. Law Rep. 438; *Louisville Water Co. v. Hamilton*, 81 Ky. 517; *Jones v. Gibson*, 83 Ky. 561.

Holt, J., delivered the opinion of the court:

The property of the Louisville Water Company not having been assessed for state taxes for the years from 1882 to 1885, inclusive, the sheriff of the county, in obedience to statutory provision, returned a list of it for each of those years to the county court clerk, who entered the same upon the assessor's books, and certified it to the state auditor, and also to the sheriff for collection. The Company refused payment, claiming that it was exempt from taxation under an Act of the Legislature. It is a corporation, and, as its name indicates, supplies the City of Louisville with water. The property assessed was that in use for this purpose. It could not, therefore, be seized and sold by a collecting officer, as this would deprive the city of water. Its safety, as well as the health and comfort of its citizens, required the exercise of the corporate franchise, and forbade interference with it by a sale of the means necessary to operate it. The sheriff thereupon brought this action in his own name, but subsequently, by an amended petition, united the Commonwealth as a co-plaintiff, asking that the Company be compelled to show cause, if any existed, why it should not, within a given time, pay the taxes into court, and, in the event it failed to do so upon the court's order, that it be placed in the hands of a receiver, and its receipts applied to their payment.

Various defenses were presented. But one question requires notice, however, as it is decisive of the case. The lower court, upon final hearing, was of the opinion that the Company was liable to taxation, and ordered it to pay the taxes into court within a certain number of days. This it declined to do, and thereupon a receiver was appointed, and the Company has

appealed. It was held by this court, in the case of *Baldwin v. Hewett* (Ky.) 11 S. W. Rep. 803, that taxes could not be recovered by suit in the absence of legislative authority; and, there being no statute to this effect in this State, save as to railroad companies, an action for such a purpose could not be maintained, even in the absence of any other adequate remedy. There an administrator had failed for several years to list and pay the taxes upon the assets in his hands, consisting altogether of choses in action. When the suit was brought seeking a recovery against him as administrator, he had distributed the estate, and it had been removed by the distributees out of the State. It is urged that this case differs materially from that one; that here the statute gives a lien upon the property for the payment of the taxes; and that the proceeding is *in rem*, no personal judgment being sought. If, however, no right exists to use the courts as a vehicle for the collection of tax claims, we fail to see any difference between the two cases. It is said, however, that in the case cited an adequate remedy in fact existed, but was ineffectual, while here there is none whatever; and that in such a case the right to sue should be implied as a matter of necessity. We do not grant that such a difference exists between the two cases. If the administrator had still been in possession of the assets, no suit could have been maintained against him for the taxes, although the estate could not have been seized for them, as it consisted of choses in action. It is true, they might have been reached, in the manner provided by statute, by the summary mode of attachment by notice served upon those owning them, if the debtors could have been found, and a judgment obtained in the county court, but this would have been because the Legislature had expressly provided such a mode of collection. Granting, however, that there is a difference between the two cases, and admitting for the sake of further discussion that the one cited is not altogether decisive of this one, yet it is certainly true that it is not any more an inherent power of a court to collect taxes than it is to levy them.

It has been held by this court that a tax is not a debt within the legal meaning of the term, and therefore assumpsit cannot be maintained upon it, as is done in some States where it is regarded as an indebtedness. It comes upon the citizen *in invitum*, and its payment rests upon the duty he owes to the State in return for the protection extended by it to him. The exercise of the power of taxation is legislative in character, while the collection of taxes, when once authorized by the law-making power, is ministerial. The one is legislative and the other executive. Neither is a judicial act, and one department of the government should be careful not to encroach upon the domain of another. It is true, the judiciary may be called upon by the Legislature to enforce the collection of taxes in a judicial way, but it has not done so in this State, save as to railroads, where suit has been authorized to recover them; and this exceptional case inferentially says that this remedy cannot be resorted to in other cases. The collection of taxes depends, and properly so, upon the remedies afforded by statute. Their speedy and prompt

collection is necessary to the life of the State. The interest of the citizen demands that it should be done with as little expense as possible. If resort can be had to the courts, in the absence of statutory provision, then delay, expense and abuse will certainly follow. But it may be said it is only in cases where there is no remedy, or it is ineffectual, that the right to sue for taxes should be implied. We are aware that it has been held by some courts, and said by some text-writers, that if no specific remedy be given by statute, or only an imperfect or inadequate one, then it is but reasonable to infer that a remedy by suit was intended by the Legislature. This court has, however, never assented to such a rule. Public policy, in our opinion, forbids it. Its adoption would burden the courts with litigation, and be likely to lead to abuse of such a character as not only to unjustly harass the citizen, but injure the State greatly more than it would suffer by the loss of taxes from its non-adoption. It would tend to confuse the powers of the different departments of the government, and there would be no limit to its exercise. If one delinquent could be sued because he had made a fraudulent transfer of his property, or another for some other reason, upon the ground that there is no remedy or adequate one, the State, in the end, would be the sufferer. Besides, it would violate a policy which has prevailed in this State from its earliest history. It is true, it has been said by this court, in some cases, that wherever a legal liability exists the law raises a promise, and assumption lies; that, if a right be created, and no remedy appointed, the usual remedy for that class of cases will be appropriate; that, when the statute creates a liability, and provides no specific remedy, the common law must afford it; and that when the chancellor finds a party with a legal right, but no remedy, he should furnish it. This is all true, generally speaking, and a review of the cases shows that they were general expressions, used in the argument contained in the opinions, and where questions unlike this one were presented.

In the case of *Portland Dry Dock & Ins. Co. v. Portland*, 12 B. Mon. 77, the company was required by its charter to pay annually to the City of Louisville 50 cents on each \$100 of its capital stock. Subsequently the trustees of the Town of Portland were authorized by the Legislature to collect annually \$200 of the assessment. It was urged that they could not sue for it, but must collect it, as they did their ordinary taxes. The difference between that case and this one is manifest. There a certain sum was fixed by statute, and the fact that it was called a tax by the statute creating the lia-

bility did not preclude an action of debt to recover it.

The cases of *Johnston v. Louisville*, 11 Bush, 537; *Elizabethtown & P. R. Co. v. Elizabethtown*, 12 Bush, 233 and *Louisville Water Co. v. Hamilton*, 81 Ky. 517,—are not in conflict with the views above expressed. Expressions of a general character may be found in the argument in the opinions in those cases which seem to support a different view; but the question as now presented was not then before the court, nor was it decided. In the last-named case the water company sued out an injunction to prevent the sale of some property for its taxes. It was not sued for them. It voluntarily came into a court of equity asking relief, and, under such circumstances, the court said: "The chancellor, having been appealed to by the appellant [the water company] for some sort of relief, should have taken cognizance of the case, and required the appellant by rule to pay the money into court, and, if not, to place the management of the corporation in the hands of a receiver, in order that the burthen might be discharged."

It is apparent that case is not this one. If, where a tax has been imposed, and no remedy or any adequate one furnished for its collection by the statute, it were in our opinion a correct rule to imply the right to sue for it on account of the silence of the Legislature, yet we would not apply it in view of the fact that our Legislature has expressly provided that a railroad corporation may be sued for its taxes. Gen. Stat. App. chap. 92, p. 1031, § 5.

This was equivalent to a declaration by it that, in the absence of such a statute, no such suit could be maintained. The judiciary should not, in our opinion, merely because of legislative silence as to the collection of a tax, imply to itself a power not inherent in itself, and the exercise of which will not only be confusing as to the powers of the different branches of the government, but likely to lead to great abuse. Indeed, in view of the legislation as to taxes owing by railroads, it cannot do so. We do not intimate whether, in this instance, the taxes are or are not owing, but merely decide that for the lack of legislation no action can be maintained looking to their collection. If, in such a case, the State is likely to lose any of its revenue, the Legislature can, by additional legislation in the form of penalties for nonpayment, or by authorizing suits for its recovery, provide against it, and will, no doubt, do so where in its wisdom it may be proper and necessary.

Judgment reversed, with directions to dismiss the petition.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Matilda B. MILLER, *Plff.*,

v.

John ROACH.

(.....Mass.....)'

A promissory note having for signature the written words "John Roach, Treas-

urer," over which is stamped into the paper a large round seal bearing the name of a corporation declaring "We promise to pay," but naming no maker in the body of it, is the note of the corporation, and not the individual obligation of the treasurer.

(November 27, 1889.)

NOTE.—See *McCandless v. Belle Plaine Canning Co. (Iowa)* 4 L. R. A. 386.
6 L. R. A.

ON plaintiff's exceptions. *Overruled.*
This was an action of contract upon a

promissory note. At the trial in the Superior Court before Dunbar, J., the court ruled that the note was the contract of the New York Skating Rink Construction Company, and not the contract of the defendant, and gave judgment for the defendant, and the plaintiff excepted.

The facts appear in the opinion.

Mr. M. E. Couch, for plaintiff, cited—

Tucker Mfg. Co. v. Fairbanks, 98 Mass. 101, 104; *Bank of British North America v. Hooper*, 5 Gray, 567, 578; *Draper v. Mass. Steam Heating Co.* 5 Allen, 839; *Whitmore v. Nickerson*, 125 Mass. 496; *Mellen v. Moore*, 68 Me. 390; *Dutton v. Marsh*, L. R. 6 Q. B. 361.

Mr. C. J. Parkhurst, for defendant, cited—

Johnson v. Smith, 21 Conn. 627; *Carpenter v. Farnsworth*, 106 Mass. 561; *Mann v. Chandler*, 9 Mass. 385; *Fuller v. Hooper*, 3 Gray, 834.

Knowlton, J., delivered the opinion of the court:

This suit is brought upon a promissory note in the usual form, containing the words, "We promise to pay," with nothing in the body of the note to indicate who is meant by the word "we." On that part of the note where the signature is usually found there is stamped a large, circular, corporate seal, upon the face of which, in a circle near its outer edge, appear in print the words "New York Skating Rink Construction Company," and in the center of it the words, "Incorporated, 1884." A little to the left, and below the center of the seal, in such positions that the circumference passes through the last letter of the word "Roach," and also through the word "Treasurer," are

written the words, "John Roach, Treasurer," and the question is whether this is the note of the defendant or of the corporation. The answer to this question depends upon whether it fairly appears that John Roach, in signing it, acted as the agent of the corporation. The case is peculiar in the use of the corporate seal. If the words which appear on the face of the seal had been written in their place on the note, and had been followed by the words, "John Roach, Treasurer," there would have been no doubt that they were so written as the signature of the corporation appended by its treasurer. *Draper v. Mass. Steam Heating Co.* 5 Allen, 388.

That mode of signing is common among corporations, and if the words had been affixed in print by a stamp designed to be used in signing the corporate name, and a blank space had been left in which the treasurer's name was afterwards inserted by him in manuscript, the result would have been the same. We think it makes no difference that the name of the corporation impressed upon the paper was so impressed by the corporate seal, which is ordinarily used only in connection with a corporate act of signing. We are of opinion that the paper should be treated as a promissory note, signed with the signature of the corporation, affixed by its treasurer, who for convenience in affixing it used a stamp, except in that part which contained for verification his own name and official designation. See *Carpenter v. Farnsworth*, 106 Mass. 561; *Mann v. Chandler*, 9 Mass. 385; *Fuller v. Hooper*, 3 Gray, 834; *Chipman v. Foster*, 119 Mass. 189.

Exceptions overruled.

GEORGIA SUPREME COURT.

W. C. GRAY, Admr., etc., of John R. Hamil, Deceased, *Plff. in Err.*,

v.

A. J. HAMIL.

(....Ga....)

***An agreement to allow partner compensation for services**, one of two partners having, by the excessive use of stimulants, voluntarily disabled himself from performing service in the firm affairs, and thus cast upon his copartner more than a due share of labor, his agreement after dissolution, but before full settlement and final division of the assets, to allow his copartner, out of the assets, a specific sum per month for a definite number of months for past service, so as to equalize to that extent the difference resulting from the failure of one to do his part, and the overlooking by the other of his part, is not without consideration, but is supported by a strong

*Head note by BLACKLEY, Ch. J.

moral obligation, which, under the Code, is sufficient to render the agreement obligatory as a contract.

(July 31. 1890.)

ERROR to the Sumter County Superior Court to review a judgment in favor of defendant in a suit for a settlement of the affairs of a partnership concern and an accounting. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. J. A. Ansley and E. A. Hawkins*, for plaintiff in error:

One partner cannot charge the other or the partnership for services rendered to the partnership without a specified contract.

Marsh's App. 69 Pa. 80, 8 Am. Rep. 206; *Emerson v. Durand*, 64 Wis. 111, 54 Am. Rep. 593.

Messrs. Guerry & Son, E. G. Simmons and B. P. Hollis for defendant in error.

NOTE.—Partner, when entitled to compensation for services to firm.

A joint partner is not entitled to compensation for his services in the business unless by special agreement. *Bradford v. Kimberly*, 3 Johns. Ch. 421, 1 N. Y. Ch. L. ed. 673; *Denver v. Roane*, 99 U. S. 355 (25 L. ed. 473).

6 L. R. A.

A partner is entitled to reward for his services, if it can be clearly implied from the course of dealing which the partnership adopts, or other circumstances of equivalent force. *Cramer v. Bachmann*, 69 Mo. 313; *Emerson v. Durand*, 64 Wis. 111, 54 Am. Rep. 593. See *Lewis v. Moffett*, 11 Ill. 302; *Levi v. Karriek*, 18 Iowa. 344; *Godfrey v. White*, 43 Mich. 171; *Sheridan v. Healy*, 15 Chic. Leg. News, 104.

Blackley, C. J., delivered the opinion of the court:

As to matters of practice, taking the whole record together, with the explanations given therein by the presiding judge, we are unable to discover any error; and, as to the merits, we think there was evidence which justified the jury in arriving at a conclusion different from that which the auditor reached. This leaves as the controlling question of the whole case one matter of law only, viz., whether, under the facts proved, an agreement was obligatory, made by one of the partners, J. R. Hamil, to allow the other, A. J. Hamil, a fixed compensation, to wit, \$80 per month for seventeen months, for services rendered by the latter while the former was incapacitated to do his part as a member of the firm; his incapacity (as might well be inferred from the evidence) being a voluntary one, brought on by him, during the existence of the partnership, through the excessive use of stimulants. The agreement was made after the dissolution, but before the business was entirely wound up, and before the assets had all been divided.

The general rule, no doubt, is that a partner is entitled to nothing extra for any inequality of service rendered by him as compared with that rendered by his copartner. The authorities to this effect are so numerous and so uniform that they need not be cited. It is equally clear that an express agreement made by the partners with each other, either in the partnership articles or upon a valid consideration outside of them, for such allowance, can be enforced. The ultimate question, therefore, is whether there was such consideration for the agreement in the present case. That the circumstances proved raised a strong moral obligation upon the disabled partner, his disability being voluntarily contracted, to pay for services which he ought to have rendered, but which his copartner rendered for him, admits of scarcely any doubt. According to the common law, as now generally understood and administered, such an obligation would not suffice as a consideration for an executory promise. Chitty, Cont. 11th Am. ed. 52 *et seq.*; Wharton, Cont. §§ 512, 514; Bishop, Cont. § 44; Hare, Cont. 262 *et seq.*; *Lampleigh v. Brathwait*, 1 Smith, Lead. Cas. 280, notes; 8 Am. & Eng. Cyclop. Law, 840.

Our Code, however (§ 2741), expressly recognizes a strong moral obligation as a consideration for a contract; and we see no reason for confining this to executed contracts, especially in a case of such strong natural equity as the present. *Parrott v. Johnson*, 61 Ga. 475.

Taking the evidence on this subject as true, the parties must have had their attention directed deliberately and minutely to the questions both of the right to, and the exact amount of, the compensation. They thus settled for themselves the precise measure of inequality between them in the distribution of the assets thereafter to be completed; and we think, with the court below, that such an adjustment of their respective equities, made by themselves, should be left to stand. Though courts will not undertake to equalize partners with reference to the personal services rendered by them, respectively, in conducting the firm business, there is no reason why the parties cannot and

should not do it by their own voluntary agreement, whether made before or after the services are rendered. If delayed till afterwards, the agreement should not be enforced, unless manifestly just and equitable; but if manifest justice and equity will not generate a strong moral obligation, such as the Code contemplates when treating of a good consideration for a contract, we know not what would. We find no error for which there ought to be a new trial.

Judgment affirmed.

W. B. LOWE, *Plff. in Err.*,

J. T. RAWLINS, Sheriff, *et al.*

(....Ga.....)

***Though property be sold at a judicial sale under a junior mortgage**, and purchased by the junior mortgagee, the proceeds of the sale belong to the debtor, under the maxim *caveat emptor*; and if applied by the court to liens superior to both mortgages, and the property be afterwards sold under the senior mortgage, there is, when the proceeds of the second sale come up for distribution, no right of subrogation in the junior mortgagee, as purchaser at the first sale, to the position originally held by the owners of the superior liens discharged out of the proceeds of that sale.

(July 8, 1890.)

ERROR to the Dodge County Superior Court to review a judgment denying plaintiff's petition as a second mortgagee who had foreclosed and purchased the mortgaged property to be subrogated to the rights of the holders of certain laborers' liens which had been satisfied out of the money paid by him, and permitted to hold the same as against the first mortgage. *Affirmed.*

A. F. Whitman & Co., on December 9, 1882, executed a mortgage to I. C. Plant & Son to secure past-due accepted and protested drafts, who foreclosed said mortgage in equity, but before trial the case was marked "settled" on the docket of the court, the evidence afterwards disclosing that Plant & Son, pending the suit, transferred such mortgage to the First National Bank of Nashville without recourse.

*Head note by **BLACKLEY, Ch. J.**

NOTE.—Caveat emptor.

Where there is neither fraud nor warranty, and the buyer receives and retains the goods without objection, under the maxim *caveat emptor* (let the buyer beware), he waives his right to object afterwards. *Miller v. Tiffany*, 68 U. S. 1 Wall. 809 (17 L. ed. 540); *Barnard v. Kellogg*, 77 U. S. 10 Wall. 888 (19 L. ed. 987).

Where there is no implied warranty, in the absence of an express warranty of fitness for the purpose, the rule applies. *Horner v. Parkhurst (Md.)* 17 Wash. L. R. 492; *Hoffman v. Oates*, 77 Ga. 701.

So where the goods sold are in the possession of a third party, and there is no warranty, express or implied, the buyer purchases at his peril. *Budd v. Power*, 8 Mont. 380; *Hall v. Aitkin*, 25 Neb. 380; *Paulsen v. Hall*, 39 Kan. 386.

Where it is shown that the intention was to pass only such title as the vendor had, no warranty is implied, and it is immaterial in whose hands the

This transfer was not recorded, but the mortgage itself was recorded January 8, 1883.

Whitman & Co. and W. B. Lowe were afterwards incorporated under the name of the Georgia Lumber & Turpentine Company, and in this corporate name executed to W. B. Lowe a mortgage upon the same property dated December 26, 1883, to secure advances made by Lowe for supplies, etc. Lowe foreclosed and brought the property to sale, and at the sale purchased the property, and paid the money to the sheriff, Rawlins, who informed him that the first mortgage had been settled, and was so marked on the court docket.

Under a rule against the sheriff for distribution of this money the court awarded a large portion of it to satisfy certain laborers' liens against the property of the Georgia Lumber & Turpentine Company, which were superior to both mortgages, and such liens were thus satisfied out of the money paid into the court by Lowe. Subsequently the First National Bank of Nashville foreclosed the prior mortgage which had been transferred to it, levied upon the property which Lowe had purchased, and had the same resold.

By petition and rule against the sheriff and First National Bank of Nashville, Lowe asked to be reimbursed out of the proceeds of this second sale to the extent of the superior liens of laborers which had been satisfied and paid by order of the court out of the money paid by him under his purchase of the same property at the first foreclosure sale, and asked to be subrogated to the rights of the laborers whose liens had been paid out of his money by the court.

The court refused to reimburse or subrogate him, and he excepted and took this writ.

Messrs. DeLacy & Bishop and R. F. Lyon, for plaintiff in error:

Lowe, second mortgagee, having paid the statutory liens of laborers, they being superior and prior incumbrances, is entitled to be subrogated to all the rights of the holders of such prior liens until reimbursed the amount paid by him or by the court out of his money. Lowe, who paid those liens either voluntarily or by order of the court to protect his own interests, would be subrogated to their rights and priorities in regard to the fund arising from the subsequent sale of the same property under the bank mortgage. These liens being of higher dignity than the bank's mortgage in the first instance, the payment of them by the court out of the money paid by Lowe for the prop-

erty at the first sale does not affect their dignity or destroy their priority over the bank's mortgage. See 2 Hilliard, Mortg. 162, 163; *Carter v. Neal*, 24 Ga. 847; 2 Bouvier, L. Dict. 677.

The right of subrogation to a prior incumbrance is sometimes enforced by a court of equity by compelling the holder of it to assign it to the party entitled to subrogation.

Sheldon, Subrogation, § 45; 2 Bouvier, L. Dict. 679; *Ex parte Waring*, 21 Cent. L. J. 460.

Where a person paying the debt of another is compelled to pay in order to protect his own interests a court of equity substitutes him in place of the creditor whose debt he paid as a matter of course without any agreement to that effect.

Neely v. Jones, 87 Am. Rep. 797. See also Sheldon, Subrogation, §§ 3, 11, 12, 14, 31, 33, 36, 38.

Messrs. E. A. Smith and L. A. Hall for defendants in error.

Bleckley, Ch. J., delivered the opinion of the court:

This case presents but a single question. Personal property was mortgaged twice and sold twice. The first sale was under the junior mortgage, and the mortgagee was himself the purchaser. He paid the money to the sheriff, and a part of it was applied, by judgment of the court, to the discharge of certain liens which were superior to both mortgages. Afterwards the property was seized and sold under a *fi. fa.* founded on the senior mortgage, and, the proceeds of this sale being in court for distribution, the junior mortgagee claimed to be subrogated to the rights of the holders of the superior liens which had been satisfied out of the proceeds of the first sale. The denial of this claim is the foundation of the present writ of error.

The rule of *caveat emptor* as to all purchasers at judicial sales is not only recognized by many decisions of this court (see *McWhorter v. Beavers*, 8 Ga. 300; *Worthy v. Johnson*, Id. 236; *Methvin v. Bealy*, 18 Ga. 551; *Colbert v. Moore*, 64 Ga. 502), but is expressly declared by statute. Code, § 2022.

We think a necessary result of the rule is that the money produced by a sheriff's sale is to be regarded, not as the money of the purchaser, but as that of the defendant in *fi. fa.* Consequently, when the proceeds of the first sale were applied to these superior liens, the money

property is at the time of sale. *Gould v. Bourgeois*, 12 N. J. L. 247.

The maxim *caveat emptor* does not apply to a sale of goods where the buyer had no opportunity for inspection (*Hood v. Bloch*, 29 W. Va. 244); nor does it apply to cases of fraud.

Caveat emptor, rule of.

The rule of *caveat emptor* applies in all its rigor to judicial sales. *Worthington v. McRoberts*, 9 Ala. 297; *Mason v. Wait*, 5 Ill. 127; *Bingham v. Maxcy*, 15 Ill. 296; *Walden v. Gridley*, 36 Ill. 523; *Anderson v. Foulke*, 2 Har. & G. 346; *Strouse v. Drennan*, 41 Mo. 286; *Fox v. Mensoh*, 3 Watts & S. 444; *Mellen v. Boarman*, 18 Smedes & M. 100; *Vandever v. Baker*, 43 Pa. 124; *Bleckley v. Biddle*, 33 Pa. 276; *Lynch v. Baxter*, 4 Tex. 431; *Thompson v. Munger*, 15 Tex. 523.

4 L. R. A.

A sale under an order or decree of the court transfers only the rights and interests vested in the parties when such order or decree was made, with such as are specifically enumerated and directed to be sold. *Wells v. Chapman*, 4 Sandf. Ch. 330; *Shotenkirk v. Wheeler*, 3 Johns. Ch. 275.

A purchaser at a judicial sale acquires such title only as the owner had. If the property was then subject to a prior lien he acquires it with that impurity, and to preserve his title he must clear it from the incumbrance. *Walden v. Gridley*, 36 Ill. 523; *Creps v. Baird*, 3 Ohio St. 277; *Corwin v. Benjamin*, 2 Ohio St. 36; *Miller v. Finn*, 1 Neb. 254; *Hamilton v. Pleasant*, 31 Tex. 638; *Aven v. Beckom*, 11 Ga. 1; *Ramsey v. Blalock*, 32 Ga. 376; *Glenn v. Clapp*, 11 Gill & J. 1; *Bassett v. Lockard*, 60 Ill. 164; *Irving v. Thomas*, 18 Me. 418; *Otto v. Alderson*, 10 Smedes & M. 476.

of the mortgagor was used, and not the money of the mortgagee. The purchaser at that sale did not have any advantage as purchaser by reason of his being the junior mortgagee. His money, when paid in on the purchase, stood just as the money of any other purchaser would have stood, and it makes no difference whether he knew or did not know that the older mortgage was unsatisfied, and might be used to sell the property away from him. That risk is covered by the maxim *caveat emptor*. He was bound to beware, not only of the state of the title, but of all incumbrances superior to his own mortgage. There was no fraud, concealment or

misrepresentation by any person authorized to speak for the owner of that mortgage. Granting that the sheriff said, on making the first sale, that the older mortgage was paid or settled, that could not affect the owner of the incumbrance. There is no complaint that the mortgage was not duly recorded. It is said that the assignment by the mortgagees to the present holder was not recorded, but there is no law requiring such assignments to be recorded. We feel constrained to agree with the court below, and to hold that there is no case for subrogation made out in this record.

Judgment affirmed.

UNITED STATES CIRCUIT COURT, DISTRICT OF VERMONT.

John HOWARD, Admr., etc.,
v.

DELAWARE & HUDSON CANAL CO.

(40 Fed. Rep. 186.)

1. **Trackmen on a hand-car have a right to suppose that an approaching train will slow up** in obedience to a warning that has been sent by a flagman, and are not negligent in remaining at their place upon the hand-car with their boxes until it appears that the trainmen do not intend to heed the signal, and that the hand-car will be struck by the train.
2. **To run a train towards a hand-car after warning**, without keeping any lookout ahead, is a neglect of duty on the part of the trainmen for which the railroad company is liable, in case of injury from a collision.
3. **Trackmen are not fellow servants with trainmen on the same road.**
4. **A right to support from the person killed is not necessary** to give a right of action under the statute providing for an action in the name of the personal representative of a person wrongfully or negligently killed, for the benefit of his wife or next of kin.
5. **The pecuniary injury resulting from the**

death of a person from whom the beneficiaries of the action had no right to claim support is the loss of what deceased would probably have accumulated afterward if he had lived.

6. **A declaration which sets forth adequately the right of a personal representative to recover for causing the death of a person is sufficient without alleging specifically the rights of the respective distributees.**

(October 26, 1889.)

ACTION at law to recover damages for the alleged wrongful killing of plaintiff's intestate. *Judgment for plaintiff.*

The facts are fully stated in the opinion.

Messrs. David E. Nicholson and Joel C. Baker, for plaintiff:

It is the duty of the master to furnish the servant a reasonably safe place to work; and if the master delegates that duty to a servant, that servant is the agent of the master, for whose negligence the master is liable.

Hough v. Texas & P. R. Co. 100 U. S. 218 (25 L. ed. 612); *Ford v. Fitchburg R. Co.* 110 Mass. 241.

Men in charge of the track are not the fellow

NOTE.—Trackmen and trainmen not fellow servants.

A laborer in the employ of one who contracts with a railroad company to do certain grading is not a fellow servant of an engineer engaged and paid by the company, and who is under its direction and control; and such laborer may recover against the company for an injury caused by the negligence of such engineer. *Louisville, N. O. & T. R. Co. v. Conroy*, 68 Miss. 552.

Duty of master to exercise care and caution to protect servant.

It was the duty of defendant in prosecuting its business, and in the construction of its tracks, to use and exercise care, skill and caution to protect the lives and persons of its employes, and the degree of care must be proportionate to the dangerous nature of the means, instruments and machinery used. *Porter v. Hannibal & St. J. R. Co.* 71 Mo. 72; *Muirhead v. Hannibal & St. J. R. Co.* 2 West. Rep. 193, 19 Mo. App. 684.

Those who have the control and management of trains have no right to assume that persons who are required to be attentively engaged upon the track, or under or about cars upon tracks, will look out for moving trains, or apprehend danger, in the absence of such customary signals or other warn-

ing as the circumstances require, and as they are led to rely upon. *Goodfellow v. Boston, H. & E. R. Co.* 106 Mass. 461; *Cincinnati, I. St. L. & C. R. Co. v. Long*, 11 West. Rep. 326, 112 Ind. 166.

Unless those controlling the train have reasonable assurance that a person who is seen at work on a track is aware of the approach of the train, and that he is in a condition to apprehend and avoid the danger, they are guilty of negligence if they fail to give warning and stop the train. *Indianapolis, P. & C. R. Co. v. Pitzer*, 4 West. Rep. 267, 109 Ind. 179; *Cincinnati, I. St. L. & C. R. Co. v. Long*, 11 West. Rep. 327, 112 Ind. 166.

Even when a plaintiff is guilty of contributory negligence, the company is nevertheless liable if, by the exercise of ordinary care, after discovery by defendant of the danger in which the plaintiff stood, the accident could have been prevented, or if the company failed to discover the danger through the recklessness or carelessness of its employes, when the exercise of ordinary care would have discovered the danger and averted the calamity or injury. *Maher v. Atlantic & P. R. Co.* 64 Mo. 267; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 138; *Frisk v. St. Louis, K. C. & N. R. Co.* Id. 595; *Harlan v. St. Louis, K. C. & N. R. Co.* 65 Mo. 22; *Scoville v. Hannibal & St. J. R. Co.* 81 Mo. 434-440; *Welsh v.*

servants of the employes of the same company who run the trains on the same track.

Davis v. Central Vt. R. Co. 55 Vt. 84.

No service is common that does not admit a common participation, and no servants are fellow servants when one is placed in control of the other.

Chicago, M. & St. P. R. Co. v. Ross, 112 U. S. 877 (28 L. ed. 787); *Northern Pac. R. Co. v. Herbert*, 116 U. S. 642 (29 L. ed. 755); *Cunard Steamship Co. v. Carey*, 119 U. S. 245 (30 L. ed. 854).

Although plaintiff did not bestow his earnings upon his brothers and sisters while he lived, they were his next of kin and heirs at law, and would be entitled to any estate he might have at his death.

Ill. Cent. R. Co. v. Barron, 72 U. S. 5 Wall. 90 (18 L. ed. 591).

Messrs. John Prout and Henry Ballard, for defendant:

At common law, when an heir sues, he must set out in the declaration, and he must by evidence prove, his heirship,—that is his pedigree or relationship and how and when he became the alleged heir.

2 Starkie, Ev. 658; *Denham v. Stephenson*, 1 Salk. 355, 6 Mod. 241; *Jefferson v. Morton*, 2 Wms. Saund. 7, note 4.

This rule ought to apply to this case.

Under our statute relative to the support or relief of poor relations, the intestate was under no liability or legal obligation and never could be compelled to contribute anything for the support or relief of these alleged heirs or next of kin.

Rev. Laws, § 2822; *Cooley, Torts*, 270, 271.

The purpose of §§ 2188, 2189, Rev. Laws, giving a right of action for injuries to family rights, is "to make a provision for the family or surviving family of the deceased, who might naturally have calculated on receiving support or assistance from the deceased had he survived."

Cooley, Torts, 249; *Good v. Towns*, 56 Vt. 410; *Needham v. Grand Trunk R. Co.* 38 Vt. 305.

Jackson Co. Horse R. Co. Id. 466; *Bergman v. St. Louis, I. M. & S. R. Co.* 4 West. Rep. 594, 38 Mo. 678; *Donohue v. St. Louis, I. M. & S. R. Co.* 8 West. Rep. 628, 91 Mo. 366; *Rine v. Chicago & A. R. Co.* 3 West. Rep. 800, 38 Mo. 532; *Kelly v. Union R. & Transit Co.* 14 West. Rep. 723, 95 Mo. 279.

Master liable to servant for his own neglect of duty.

It is a well established general proposition that, under the common law in America, a master is liable to his servant for any neglect of the master's duty, whether committed by the master, or by one to whom he has delegated his authority. *Madden v. Chesapeake & O. R. Co.* 28 W. Va. 610.

Risks of employment assumed by employe.

Risks of employment assumed are those which occur after the master has done what the law enjoins. *Benzing v. Steinway*, 2 Cent. Rep. 491, 101 N. Y. 547.

The servant assumes those risks alone which cannot be obviated by the adoption of a reasonable measure of precaution by the master. *Pantzar v. Tilly Foster Iron Min. Co.* 20 N. Y. 368; *McGee v. Boston Cordage Co.* 139 Mass. 445; *Zelgler v. Danbury & N. R. Co.* 1 New Eng. Rep. 277, 53 Conn. 543.

A servant has the right to rely on the superior knowledge and judgment of his master and to assume

The statute does not mean remote relations that have no recognized legal claim upon the intestate for support or assistance.

R. R. Guidant Law, 482.

The intestate's life was of no pecuniary value to them.

Dickinson v. North Eastern R. Co. 2 Hurl. & C. 735; *Muhl v. Mich. Southern R. Co.* 10 Ohio St. 272; *Cooley, Torts*, 269, note 5, 271.

The administrator stands upon the right of the next of kin.

Dickins v. N. Y. Cent. R. Co. 23 N. Y. 158.

The statute enacting this cause of action does not modify or alter the order of proof of the value of pleading applicable to a case for negligence.

1 Shearm. & Redf. Neg. last ed. 181, 184.

The neglect of the engineer and train hands was not the negligence of the company.

1 Shearm. & Redf. Neg. § 189.

It is not sufficient that plaintiff could prove that he was in the exercise of due care; but the burden was on him to produce such a state of the evidence as would enable the trier of the fact to say that the defendant was negligent.

Malaney v. Taft, 6 New Eng. Rep. 922, 60 Vt. 571; *Houston v. Vicksburg, S. & P. R. Co.* (La.) 84 Am. & Eng. R. R. Cas. 80; *Selinas v. Vermont State Agr. Society*, 6 New Eng. Rep. 770, 60 Vt. 249; *Cornwell v. Metropolitan Sewer Comrs.* 10 Exch. 771; *New York, P. & N. R. Co. v. Kellams* (Va.) 32 Am. & Eng. R. R. Cas. 114; 2 Shearm. & Redf. Neg. § 460.

When a person is on the track not within view of the engineer it is not negligence if he does not blow the whistle or ring the bell, or stop.

Houston & T. C. R. Co. v. Fowler, 56 Tex. 452, 8 Am. & Eng. R. R. Cas. 504; 1 Shearm. & Redf. Neg. §§ 179, 180, 189; *Bishop, New Cont. Law*, §§ 637, 638; *Cadin v. Ben. & R. R. Co.* 4 W. N. C. 51; *Ross v. Boston & A. R. Co.* 58 N. Y. 217; *Wharton, Neg.* § 227.

The intestate entered the service of the defendant with reference to these known risks of work on the track. If the Company furnished

sume that the latter will not expose him to evitable risk, and that he has taken proper precautions to guard him from danger. *Faren v. Sellers*, 39 La. Ann. 1011.

While a servant assumes the risk, more or less hazardous, of the service in which he engages, he has a right to assume that all reasonable attention will be given by his employer to his safety, and that he shall not be carelessly and needlessly exposed to risks which might be avoided by ordinary care and precaution on the part of his employer. *Boyce v. Fitzpatrick*, 80 Ind. 527-529; *Rogers v. Overton*, 87 Ind. 410, 418; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 3 West. Rep. 387, 105 Ind. 151, 161; *Louisville, N. A. & C. R. Co. v. Wright*, 13 West. Rep. 804, 115 Ind. 578.

The employe cannot be assumed to have accepted in advance a peril which he could not estimate, and the extent of which he could not have known. *Rummell v. Dilworth*, 1 Cent. Rep. 905, 111 Pa. 343.

The employe had a right to suppose that his employer would exercise care to avoid injuring him by sending cars along the track at an awful rate of speed. See *Quirk v. Holt*, 99 Mass. 164; *Ominger v. New York Cent. & H. R. R. Co.* 4 Hun. 159; *Mark v. St. Paul, M. & M. R. Co.* 33 Minn. 208; *Cincinnati, L. St. L. & C. R. Co. v. Long*, 11 West. Rep. 323, 112 Ind. 163.

him and the employés proper tools, machinery, cars, hand-car, and his co-employés were known to be proper men when employed, the Company has performed the full measure of its duty, and is not liable.

Farrell v. Boston & W. R. Corp. 4 Met. 49; *Hudson v. Ocean Steamship Co.* 110 N. Y. 625; *Davis v. Central Vt. R. Co.* 55 Vt. 90; *Hussey v. Coger* 3 L. R. A. 559, 112 N. Y. 614; *Beach, Contrib. Neg.* 820, § 102; *Warner v. Erie R. Co.* 39 N. Y. 468; *Clark v. Boston & A. R. Co.* 128 Mass. 1, 1 Am. & Eng. R. R. Cas. 134; *Pennsylvania R. Co. v. Wachter*, 60 Md. 395, 15 Am. & Eng. R. R. Cas. 187; *Hard v. Vermont & C. R. Co.* 32 Vt. 473; *McGrath v. New York & N. E. R. Co.* 1 New Eng. Rep. 124, 15 R. I. 95, 5 Am. & Eng. Corp. Cas. 5; *Wright v. N. Y. Cent. R. Co.* 25 N. Y. 562; *Pierce, Railroads*, 380; 3 Wood, Railway Law, 1452, 1454, 1456 and note, 1461, 1467, 1468, 1482; *Noyes v. Smith*, 28 Vt. 62; *Bishop, New Cont. Law*, 675; *Railway Accident Law*, 349, 350, 354; *Brick v. Rochester, N. Y. & P. R. Co.* 98 N. Y. 211; 1 *Shearm. & Redf. Neg.* § 185; *Rev. Laws*, 3436, 3439, 3357; 2 Wood, Railway Law, 1174.

If he was a co-employé he cannot recover.

Bishop, New Cont. Law, § 665, 666; 3 Wood, Railway Law, 149, 1453, 1461, 1495, 1499, 1501; *Stringham v. Hilton*, 111 N. Y. 188; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Cooley, Torts*, 264, 541; 1 *Shearm. & Redf. Neg.* §§ 185, 224, 235, 239, 241; *Hard v. Vermont & C. R. Co.* 32 Vt. 473; *Holden v. Fitchburg R. Co.* 129 Mass. 268, 2 Am. & Eng. R. R. Cas. 94 and note; *Railway Accident Law*, 356, 366, 367; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 (27 L. ed. 1003); *Wolcott v. Studebaker*, 84 Fed. Rep. 8 and note; *Byrnes v. New York, L. E. & W. R. Co.* 118 N. Y. 251; *Buckley v. Gutta Percha & R. Mfg. Co.* Id. 540; *Cullen v. Delaware & H. Canal Co.* Id. 667; *Beach, Contrib. Neg.* §§ 108, 109; *Wharton, Neg.* §§ 199, 214, 224.

Wheeler, J., delivered the following opinion:

Clary, the plaintiff's intestate, was about thirty-seven years old, had three brothers and two sisters, no wife, children or parents, and had accumulated no property. He was employed as a trackman by a section boss of the defendant's road; and, with four others, under direction of the boss, was running a hand-car over a part of their section towards a train coming from the other way, to which the boss had sent their signal flag by one of the trackmen, to warn those in charge of the train of the approach of the hand-car. Neither the engineer nor anyone in charge of or on the train was keeping any lookout ahead as it approached the hand-car, and no one on the train saw it till within two or three rods of it. The trackmen supposed the train would slow up as it approached them, in obedience to the warning, and came so near it before stopping to take the hand-car from the track that the boss saw it would be struck by the train before they could get it off, and told the men to run it the other way. They tried to do so, but could not move it fast enough to get away from the train, and he directed them to abandon it. In jumping from it, Clary was thrown un-

der it, the engine struck it, and he was instantly killed.

The statutes of the State provide that when the death of a person is caused by such wrongful act, neglect or default as would, if death had not ensued, have entitled the party injured to maintain an action therefor, the person or corporation that would have been liable if death had not ensued shall be liable to an action in the name of the personal representative for the benefit of the wife and next of kin, and that such damages may be given as are just, with reference to the pecuniary injury resulting from such death to them. *Rev. Laws Vt.* §§ 2188, 2189.

This action is brought upon this Statute, for the benefit of the brothers and sisters, as next of kin, and has been tried by the court upon waiver in writing of a trial by jury.

The defendant claims that Clary was negligent in remaining so long upon the car, and in jumping from it, and thereby contributed to the injury; that the collision was caused by the negligence of the flagman, a fellow servant with Clary, in giving wrong information to the trainmen about where the hand-car would be met; and that, if it was caused by negligence of the trainmen, all were so fellow workmen with Clary that the defendant is not liable to his representative for it.

Clary could see the train coming, and could have got out of its way; but with the others he relied upon due respect of the trainmen to the flag, and to the directions of the boss, for safety; and, in view of what he had a right to rely upon in those respects, he does not appear to have been negligent of duty to himself or others in staying at his place on the car as he did. He was moving backwards with the car, working it, with the others, to his utmost strength, when directed to abandon it; and appears to have been thrown before it by a misstep, caused by haste in turning and jumping, made necessary by the nearness of the train, and ledges of rock which prevented jumping off from the side of the car on which he was. Natural instinct would impel him to do what he could to save himself, and nothing shows that he did not obey it.

The testimony is conflicting as to what the men who carried the flag told those in charge of the train about where the trackmen and hand-car would be. Whatever that was, the flag of the section-men itself was a warning that they were on the track somewhere near, and were to be approached with caution; and it would be in force from the time when the flag was observed until they should be passed. To run the train towards them, after that warning, without keeping any lookout ahead for them, was a neglect of duty required for their safety as well as for that of the train. This negligence appears to have caused the collision, and the injury to Clary, without any contributing neglect of duty on his part. If the flagman contributed to the happening of the collision by giving wrong information, it would not have happened but for the negligence of those in charge of the train; and whoever is chargeable for that is liable for its consequences to Clary. *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 90 [18 L. ed. 591].

The question of law whether the defendant is

liable to its trackmen for injuries done to them by negligence of those in charge of its trains is presented by these facts. If this question was to be determined by the decisions of the court of last resort of the State, that in *Davis v. Central Vermont R. Co.* appears to be the latest and most apt. 55 Vt. 84. It appears to hold, in effect, that a railroad company in the State is liable to its trainmen for the negligence of those it has placed in charge of its tracks. It overrules, in view of intervening decisions of other courts, *Hard v. Vermont & C. R. Co.* 32 Vt. 473, which classed all persons employed in maintaining the track and machinery of railroads and operating their trains as fellow servants, for injuries to whom by negligence of each other the companies were not liable. If the company is responsible to trainmen for the negligence of those in charge of the track, that it should be held responsible to trackmen for the negligence of those in charge of its trains would seem to directly follow. But the courts of the United States are not bound by the decisions of the courts of the States upon questions of general law like this, although they are entitled to and receive the highest respect. *Boyce v. Tabb*, 85 U. S. 18 Wall. 546 [21 L. ed. 757]; *Chicago v. Robbins*, 67 U. S. 2 Black, 418 [17 L. ed. 298].

This court is, however, in duty bound to follow the decisions of the Supreme Court of the United States upon all such questions. That court has held that a railroad company is liable to its trainmen of one train for the negligence of those whom it has placed in charge of another train, and of the same train. *Chicago, M. & St. P. R. Co. v. Ross*, 112 U. S. 377 [28 L. ed. 787].

This decision appears to have been made by a bare majority of the court, but it stands unrevoked and unshaken, and is equally binding here with those that are unanimous. Trackmen are no more co-laborers with trainmen than the trainmen of one train are with those of another train on the same road, and not so much so as trainmen of the same train are. Those in charge of this train were placed there, and clothed with that authority, by the defendant. They acted for the defendant in the exercise of the control given them over the movements of the train; and their negligence in that behalf appears, according to this decision of the Supreme Court of the United States, to be the negligence of the defendant. The principles of this decision lead to the same conclusion as those of the latest decision on this subject of the highest court of the State, as cited.

In *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 [27 L. ed. 1003], a brakeman of one train appears to have been held to be so the fellow servant of the engineer of another train of the same company as not to be entitled to recover of the company for injuries occasioned by his negligence. That engineer does not appear to have been clothed with any of the authority of the company about the moving of the engine or train; and in that respect it differs from the later case. In the case under consideration the flag was brought to the notice of the conductor, who had control of the train, as to where it should undertake to pass the hand-car. In this respect it is like the later case, rather than the former. Upon all of these cases Clary would

appear to have been entitled to recover damages of the defendant if he had not been killed, and by force of the Statute the plaintiff appears to be entitled to recover now. As the plaintiff is entitled to recover, he is entitled to nominal damages at least, and to such further sum as is proved within the meaning of the Statute.

No case has been cited or observed from the courts of the State in which the right of recovery, or measure of damages, in actions upon this Statute for the benefit of collateral kindred, has been considered.

In *Illinois Cent. R. Co. v. Barron*, 72 U. S. 5 Wall. 96 [18 L. ed. 591], the action was up a statute of Illinois, almost like this in words, and precisely in meaning, as to giving a right of recovery to the wife and next of kin, and authorizing such damages as are just with reference to the pecuniary injury resulting from such death to them, and was for the benefit of brothers and sisters. The defendant there, as here, asked the circuit court to hold that no recovery could be had for the benefit of any but those who had a legal right to support from the deceased. The court ruled that the action was given for the benefit of those named in the Statute, whether they had such right to support or not; and instructed the jury that they could not take into consideration the wounded feelings of the surviving relatives, but might the amount of property of the deceased, the character of his business, and the prospective increase in wealth likely to accrue to a man of his age, with the business and means which he had.

These rulings were approved, and *Mr. Justice Nelson*, in the opinion of the supreme court, said: "If the deceased had lived they may not have been benefited, and, if not, then no pecuniary injury could have resulted to them from his death. If the person injured had survived and recovered, he would have added so much to his personal estate, which the law on his death, if intestate, would have passed to his wife and next of kin. In case of his death by the injury, the equivalent is given by a suit in the name of his representative."

This shows that the pecuniary injury resulting from the death is the loss of what the deceased would probably have accumulated afterwards if he had lived. In this case the deceased had accumulated nothing for anyone up to the time of his death in middle life. He was no more likely to accumulate property from then forward than before. The deprivation of his society, affection or counsel is not to be considered. The actual probable pecuniary loss is all that the statute covers and can be allowed for. Upon the evidence, considering all the probabilities of his future, no just ground for finding that he would ever have accumulated any property for his brothers and sisters is apparent.

Question is made as to the sufficiency of the allegations of the declaration for supporting a recovery for the benefit of the brothers and sisters. If the action was given directly to those suffering the injury, the declaration would need to set forth the facts constituting the right of recovery of those who should bring suit. But the action is given to the personal representative; and the right is the same for whoever benefit the suit may be brought.

The recovery is to go to the widow and next of kin, as the personal estate would, exclusive of creditors and legatees. *Illinois Cent. R. Co. v. Barrin*, 73 U. S. 5 Wall. 96 [18 L. ed. 591].

The questions as to who are beneficiaries are left until distribution. A declaration which

sets forth adequately the right of the personal representative to recover would seem to be sufficient without alleging specifically the rights of the respective distributees.

Let judgment be entered for the plaintiff for \$1 damages.

LOUISIANA SUPREME COURT.

STATE OF LOUISIANA

Jud BURT *et al.*, Appts.

(41 La. Ann.)

- *1. Newly discovered testimony, for the purpose of impeaching a witness who had testified on the trial, is insufficient to justify the allowance of a new trial.
2. Much more importance is due to the testimony of a witness given on the trial in open court than to any statements which he may have made on some other occasion, either before or after the trial.
3. The same principles of law are applicable to the contradictory statements of persons in *extremis*, as to those of a witness under examination under oath.

(October, 1880.)

APPPEAL by defendants from a judgment of the District Court for the Parish of Claiborne denying their motion for a new trial in an action in which they had been convicted of the crime of manslaughter. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. John R. Phipps and C. W. Seale*, for appellants:

The witnesses whose evidence we are seeking to use, and whose affidavits are attached to the bill of exceptions, swear that Jim Henderson told them the next morning after he was shot that he did not know who shot him. Now, this evidence goes to impeach the truth of the witness Henderson, also to contradict him.

Mr. Wharton in his Criminal Evidence, 8th ed. § 298, says: "The character of the deceased for truth may be impeached."

Id. § 302.

Messrs. E. H. McClendon and J. Henry Shepherd, Dist. Attys., for the State:

In a criminal case a new trial will not be granted on newly discovered evidence when it appears that the object and effect of the new evidence is to impeach the credit of a witness who testified for the State.

State v. Williams, 38 La. Ann. 361; *State v. Fahy*, 35 La. Ann. 9; *State v. Young*, 34 La. Ann. 346; Knobloch, 335, 336.

In matters of new trial, the ruling of the trial judge will not be disturbed unless glaringly erroneous.

State v. Williams, 38 La. Ann. 361; *State v. Johnson*, 30 La. Ann. 305.

Before a witness can be discredited on the ground of having made a contradictory statement, he must first be put on his guard (1 Greenl. Ev. § 462); and if he be dead this cannot be done.

State v. Johnson, 35 La. Ann. 371.

*Head notes by WATKINS, J.

6 L. R. A.

Watkins, J., delivered the opinion of the court:

The defendants seek relief from a conviction of manslaughter and a sentence to imprisonment at hard labor. Their appeal depends upon their complaint of the refusal of the trial judge to grant them a new trial, on the ground of newly discovered evidence since the trial, the purport and effect of which was to impeach the dying declarations of the deceased by contradicting them in an important particular, and upon which dying declarations their conviction solely depended. The names of the witnesses relied upon are given, and their affidavits are appended to the motion. They show that the deceased made a statement to them on the next day after he was shot (and of the wounds inflicted he died several days subsequently), and in the course of which he said "that he did not know who shot him; that he did not see the parties who shot him, nor could he know them by their voices; and . . . the reason he did not make an affidavit against anyone for shooting him was that he did not know who shot him."

In the judge's reasons for refusing the new trial he does not state that there was other testimony than the dying declarations of the deceased; and hence the averment of the defendants' motion must be accepted as true. The statement in the motion is of a most material fact, and the trial judge did not certify that, if a new trial were granted, its introduction in evidence would not exercise an important bearing on the verdict of the jury; but he bases his ruling on the following grounds, viz.: (1) that the law and evidence justify the verdict; (2) that defendants did not exercise due diligence in procuring the evidence which was newly discovered; (3) that the new evidence could only be introduced for the purpose of impeaching the dying declarations of the deceased, and, under the jurisprudence of this court, a new trial will not be granted for the purpose of admitting new evidence, the effect of which is "to impeach the credit of a witness for the State, who has testified on the trial; and impeaching dying declarations must come under the same rule;" (4) that in his opinion the newly discovered testimony could not be admitted under any rule of law.

We need not consider the first ground assigned, because the question is not what was proved on the former trial, but what is the value of the proffered newly discovered testimony. The second cannot avail, because the motion avers that due diligence was used, and their counsel swear, positively and circumstantially, that they exercised all possible diligence in searching out and obtaining evidence, and that the accused were continuously incarcerated in jail, after their indictment, on the charge of

murder. This is a sufficient showing on that score. The third ground assigned presents the serious difficulty for our consideration. Under varying circumstances this court and its predecessors have uniformly held that newly discovered testimony, for the purpose of impeaching a witness who has testified on the trial, was insufficient to justify the allowance of a new trial. *State v. Johnson*, 80 La. Ann. 806; *State v. Young*, 84 La. Ann. 846; *State v. Fahey*, 85 La. Ann. 12; *State v. Diskin*, 85 La. Ann. 48; *State v. Williams*, 88 La. Ann. 862; *State v. Gauthreaux*, 88 La. Ann. 610.

These decisions are in perfect accord with the common-law authorities. Wharton, *Crim. Law*, § 8354; Waterman, *Crim. Dig.* 458, 459; 1 Archb. *Crim. Pr.* 649, 658.

But the contention of the defendants' counsel is to the effect—conceding the correctness of the rule announced in the authorities we have cited—that newly discovered evidence, tending to impeach dying declarations of a deceased person, come under the operation of a different rule, and hence those authorities do not apply to the question raised here. Their insistence is that while dying declarations are, under certain circumstances and restrictions, received as evidence, the deceased does not become *ex nomine* a witness, in the ordinary acceptance of that term. The statement of a deceased person made *in articulo mortis* is not receivable in evidence as that of a witness; but, as we said in *State v. Keenan*, 88 La. Ann. 662, "dying declarations are those made under a consciousness of impending death. . . . To this sense of approaching death the law attaches the solemnity of an oath, and impresses upon a statement made under it the character of evidence."

In *State v. Trivas*, 82 La. Ann. 1088, we again said that statements made "under a sense of impending dissolution, . . . concerning the *res gesta*, . . . are to be accredited under the law as would his sworn testimony in ordinary cases."

Thus it is that the law gives sanction to the declarations of a deceased person, made while he is *in extremis*, as equivalent to evidence; but it does not make him a witness. He does not testify before the court and jury. The defendant has no opportunity afforded him of cross-examination. Ordinarily these declarations are made out of the presence of the accused, or of any public officer, and are simply detailed, in

the presence of the jury, by other persons who were present.

It would perhaps seem reasonable that the rule announced in the preceding opinions should not apply to dying declarations of a deceased person; but it appears to have been settled otherwise, for Wharton says: "Nothing can be evidence in a declaration *in articulo mortis* that would not be so if the party were sworn." Wharton, *Crim. Ev.* 8th ed. § 294. He says further that "the same principles of law are applicable to the contradictory statements of persons *in extremis* as are to those of a witness under examination on oath." *Id.* § 298.

The same learned author says, in the same section, that "in Ohio, however, it has been ruled, though with doubtful propriety, that where dying declarations are proved in a case, a statement of the deceased made at another time, which is neither a dying declaration nor a part of the *res gesta*, is not admissible to impeach such declarations." *Wroe v. State*, 20 Ohio St. 460.

In furtherance of the same idea of this author he says: "It has been held that evidence is admissible, on part of the defense, to impeach the character of the deceased for truth, he standing on the same footing as a witness called into court and then examined." *Id.* § 802.

Bishop simply announces the principle tersely that "the bad character of the declarant for veracity may be shown to impeach his dying declarations, the same as of a witness. So, statements by the declarant, contradictory of his dying declarations, and contradictions in the latter, may be shown to detract from their weight with the jury." 1 Bishop, *Crim. Proc.* § 1209. Again he says: "Like other evidence, they are open to observation, but the jury alone are to decide on their effect, giving them such weight as may seem to them, under all the circumstances, to be just." *Id.* § 1216.

There appears to be no material difference between the views entertained by these distinguished writers on the subject, and we must conform our jurisprudence to the principles they have announced. In this view of the question propounded by the defendants' appeal, we think the ruling of the judge below was correct, and that he properly declined to grant a new trial to the defendants.

Judgment affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

Andrew WREN

v.

George A. PARKER, *Appt.*

(....Conn.....)

1. Proof of the payment of taxes upon land is admissible upon an issue as to a claim of ownership to it by adverse possession, as tending to establish such claim.
2. In such case, where the assessment list does not describe the claimant's property so particularly as to make it certain that it embraces the precise strip in question, the assessor who made the assessment from an actual
- 4 L. R. A.

view of the land may testify as to whether or not the strip was actually assessed to claimant.

3. An instruction as to the effect of the interruption of possession by a stranger, even if erroneous, is immaterial where there was no evidence of any interruption by a stranger or anybody else.

(September 12, 1899.)

APPEAL by defendant from a judgment of the Meriden City Court in favor of plaintiff in an action to recover damages for trespass upon lands. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. George W. Smith and Case & Ely*, for appellant:

Actual possession of a part of the premises in dispute when the party in possession claims possession of the whole does not draw with it possession of the whole.

Watrous v. Southworth, 5 Conn. 804; *Proprietors of Kennebec Purchase v. Springer*, 4 Mass. 416; *Rust v. Boston Mill Corporation*, 6 Pick. 158, 169; *Poignard v. Smith*, 8 Pick. 272.

The doctrine seems to be that when an usurper enters upon land he acquires possession inch by inch of the part which he occupies.

Bristol v. Carroll Co. 95 Ill. 84; *Humphries v. Huffman*, 38 Ohio St. 395; *Kennedy v. Prucitt*, 24 Mo. App. 414; *Bracken v. Jones*, 63 Tex. 184; *Boynnton v. Hodgdon*, 59 N. H. 247; *Hall v. Gay*, 68 Ga. 442.

The court erred in charging the jury "that interruption by a stranger,—that is, one holding neither by title nor possession at the time of the interruption,—is not sufficient to destroy or interrupt a title by adverse possession."

Burrows v. Gallup, 32 Conn. 493-498; *Thompson School Dist. v. Lynch*, 33 Conn. 380-384; *Connor v. Sullivan*, 40 Conn. 26-30.

Payment of taxes is not evidence of adverse possession.

Raymond v. Morrison, 59 Iowa, 371; *Chapman v. Templeton*, 58 Mo. 463; *McDermott v. Hoffman*, 70 Pa. 31.

Messrs. George A. Fay and Wilbur F. Davis, for appellee:

Payment of taxes is admissible to show a claim of title by adverse possession although not of itself evidence of title.

Paine v. Hutchins, 49 Vt. 814; *Cornelius v. Giberson*, 25 N. J. L. 86, 87, 88; *Farrar v. Fessenden*, 39 N. H. 268; *Ewing v. Burnet*, 36 U. S. 11 Pet. 54 (9 L. ed. 630); *Murphy v. Doyle*, 37 Minn. 113.

The charge that an interruption by a stranger is not sufficient to destroy or interrupt a title acquired by adverse possession is in full harmony with the law.

Clark v. Potter, 32 Ohio St. 49; *Bell v. Denison*, 56 Ala. 444; *Connor v. Sullivan*, 40 Conn. 30.

The charges complained of, that actual possession of a part draws to it a possession of the whole, when clearly defined by boundaries, and the occupant claims possession of the whole, is supported by numerous authorities.

Abbott, Tr. Ev. 635; *Allen v. Holton*, 20 Pick. 460; *Becker v. Van Valkenburgh*, 29 Barb. 319; *Jackson v. Halstead*, 5 Cow. 220, 221; *Smith v. Isaacs*, 1 Root, 151.

One who enters upon land intending to take possession of the entire tract, no part of which is held adversely at the time of the entry, is in possession to the extent of his claim.

Langworthy v. Myers, 4 Ohio, 18; *Clark v. Potter*, 32 Ohio St. 62.

Andrews, Ch. J., delivered the opinion of the court:

The complaint in this action alleged certain acts of trespass *quare clausum fregit* upon lands in the Town of Meriden of which the plaintiff claimed to be the owner by an adverse possession for more than fifteen years, with a claim also for damages to personal property on the land. The answer asserted title in the defendant, and admitted the acts of entry and the removal of the personal property. The case was
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tried to a jury in the City Court of the City of Meriden and a verdict was returned for the plaintiff. The defendant has appealed to this court.

Upon the trial the judge charged the jury: "That to entitle the plaintiff to recover he must prove an actual exclusive possession under a claim of right. That the right of possession is usually the only question involved in an action of trespass, but in this case, as the defendant claims title, the plaintiff must prove actual exclusive possession, adverse and under a claim of right, for a period of fifteen years last past before the trespasses complained of."

The verdict finds all these things to be proved and true, and that the plaintiff has had the actual exclusive possession of the land in question, adverse and under a claim of right, for a period of fifteen years last past before the acts of trespass complained of, and thereby establishes the plaintiff's title to and his possession of the land upon which the trespasses were committed. The verdict also establishes that the deed under which the defendant claimed the title to the land was void because it was given by a grantor ousted of the possession, and not to the person in the actual possession of the land attempted to be conveyed.

This verdict is absolutely conclusive of the case unless there was some error in the course of the trial. Taken in their order the errors assigned are:

First. That the court erred in overruling the defendant's objection to the question asked of Mr. Miles, the assessor. The plaintiff was seeking to prove that he had been in the possession of the land claiming it as his own, and among other evidence for this purpose he desired to show that he had paid the taxes thereon. To do this it was necessary to prove that it had been assessed to him. The assessment list did not describe the property so particularly as to make it certain that it embraced the precise strip here in question; and he called the assessor of the town who had made the assessment from an actual view of the land and asked him the question which was objected to. We think the question was admissible. It is entirely analogous to the parol testimony by which a deed is applied to its subject matter, or by which the bounds named in a deed are ascertained. The objection, however, goes a little further than this—that the payment of taxes on land is not evidence at all of an adverse possession. Adverse possession consists not simply of possession, but of a possession by the occupier claiming the land as his own and denying the right of everybody else. As tending to prove the claim of ownership the payment of taxes seems clearly admissible. The payment of taxes is "powerful evidence" of a claim of right. *Ewing v. Burnet*, 36 U. S. 11 Pet. 41, 54 (9 L. ed. 624, 630); *Farrar v. Fessenden*, 39 N. H. 268; *Paine v. Hutchins*, 49 Vt. 814.

The second assignment was abandoned by the defendant. The third, fourth, fifth and sixth were all contingent upon a finding by the jury that the defendant was the owner of the land. As the verdict has found the other way these assignments require no further notice.

The seventh is: "That the court erred in charging the jury that interruption by a stranger,—that is, by one holding neither title nor

possession at the time of the interruption,—is not sufficient to destroy or interrupt title by adverse possession." Admitting that this is erroneous as a proposition of law (and perhaps it is), still the jury could not have been misled, for the reason that there was no evidence tending to show, nor was there any claim, that the plaintiff's possession had been interrupted by a stranger or anybody else.

The same may be said in regard to the eighth assignment. There was no evidence that the plaintiff had not been in the possession of every part of the premises in controversy for the whole fifteen years.

There is no error in the judgment complained of.

In this opinion the other Judges concurred.

Richard FISHEIL, *Appt.*,
v.
William MORRIS.

(57 Conn. 547.)

1. A lien is the right which a creditor has of detaining in his possession the goods of his debtor until the debt is paid.
2. A lien at common law can exist only when the creditor has the actual possession of the goods over which the lien is claimed, and the debt was incurred in respect to these very goods.
3. Parting with possession operates as a waiver or forfeiture of a common-law lien.
4. A lien for the price of keeping animals under Gen. Stat., § 3047, although created by statute, is the same in kind as a common-law lien, and can exist only in favor of a person in possession of the animals.
5. The lien of a livery-stable keeper on a horse, for keeping it under a special contract by which the owner had the right to use it, if any lien exists under Gen. Stat., § 3047, is devested when the owner rightfully takes the horse from the stable and sells it while away to an innocent purchaser for value.

(September 13, 1889.)

APPEAL by plaintiff from a judgment of the New Haven City Court in his favor, but for less than he claimed, in an action of replevin to recover possession of a horse and other articles of personal property. *Reversed in part.*

NOTE.—*Lien on animals for cost of their keeping.*

A lien is defined as a right to obtain satisfaction of a debt out of property belonging to the debtor. *Frick v. Hilliard*, 98 N. C. 117.

Possession of the chattel on which a lien is claimed for work done, at common law, is absolutely necessary for the existence of the lien; and by the surrender of the possession the lien is lost. *McDougall v. Crapon*, 95 N. C. 232.

But consent of the owner is not inferred from the fact that the mortgagee leaves property with the mortgagor, where the property is such as is usually cared for by the owner. *Howes v. Newcomb*, 5 New Eng. Rep. 568, 146 Mass. 76.

Mass. Pub. Stat., chap. 192, § 32, giving a lien upon
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The facts are fully stated in the opinion.

Mr. Jacob P. Goodhart, for appellant: A lien is a right to hold.

2 Bouvier, L. Dict. 47; 1 Jones, Liens, 8.

The previous owner of the horse rightfully took it from the defendant's custody and delivered it to the plaintiff, and it was not obtained from the defendant's stable by fraud. Such a transaction would devest a common-law lien, and would equally devest that which the defendant had previously acquired under § 3047, Gen. Stat.

See *Vinal v. Spofford*, 139 Mass. 180; *Perkins v. Boardman*, 14 Gray, 481; 1 Jones, Liens, 697. See also *Goodrich v. Willard*, 7 Gray, 183; *Thompson v. Dolliver*, 132 Mass. 103; *Walker v. Staples*, 5 Allen, 84; *Papineau v. Wentworth*, 136 Mass. 548.

The right of lien has never been carried further than while the goods remained in the possession of the parties claiming them.

Sweet v. Pym, 1 East, 4.

If the claimant once parts with the possession after the lien attaches the lien is gone.

Lickbarrow v. Mason, 6 East, 21, 25; 1 Jones, Liens, 20, 21; *Forth v. Simpson*, 18 Q. B. 680, 696; 13 Ad. & El. N. S. 680; *Bigelow v. Heaton*, 4 Denio, 496; *Bailey v. Quint*, 22 Vt. 474.

The livery-stable keeper who holds a horse at the constant disposal of the owner is the mere servant of the latter, and has nothing more than the bare custody of the animal.

Addison, Cont. *422, 428.

It is certain that when the horse was sold to an innocent purchaser for value while out of the possession of the party claiming under the lien the lien was devested.

1 Jones, Liens, 22; *The Boliver*, Olcott, Adm. Rep. 474; *Loring v. Flora*, 24 Ark. 151; *Rose v. Gray*, 40 Ga. 156; *McFarland v. Wheeler*, 26 Wend. 467, 472; *Marseilles Mfg. Co. v. Morgan*, 12 Neb. 66.

Mr. P. W. Chase, for appellee:

The special agreement entered into by the defendant and the said Patrick F. Bohan, wherein the defendant was to receive a certain sum per week for the keeping of said Bohan's horse, places the defendant within the privileges of Gen. Stat. § 3047.

The plaintiff claims that the word "lien" in said statute has the same meaning as the word at common law.

A stable-keeper does not lose his lien when he permits a horse to be used temporarily by its owner.

Caldwell v. Tutt, 10 Lea, 258; *Young v. Kimball*, 23 Pa. 193.

domestic animals for their keeping, is strictly construed. *Ibid.*

A party claiming a lien under this statute for charges for their keeping must prove that the animals were brought to his premises with the owner's consent, and a mortgage of animals is not owner within the statute. *Ibid.*

Tex. Rev. Stat. art., 3183, giving a lien to livery-stable keepers, does not apply when an animal is placed in a livery stable by one who is not the owner or his agent. *Stott v. Scott*, 68 Tex. 302.

A lien upon a mare, prescribed for the benefit of the keeper of a jack, by Mansf. (Ark.) Dig. § 4408, does not take precedence of a prior recorded mortgage. *Raster v. Goynes*, 51 Ark. 222.

Andrews, Ch. J., delivered the opinion of the court:

The plaintiff brought an action of replevin against the defendant for a horse, a wagon, a harness, a whip and two robes. The trial court rendered judgment that he retain possession of all the chattels but the horse, and that he should return the horse to the possession of the defendant. From that judgment the plaintiff appeals.

The defendant is a livery-stable keeper. One Bohan, of whom the plaintiff bought all of the property, on or about the 17th day of November, 1887, he then being the owner, made a special contract with the defendant to keep and feed the horse for the sum of eighteen dollars a month. Bohan owned the horse up to December 1, 1888. During all that time the defendant continued to keep and feed the horse under the agreement, Bohan calling for, taking, temporarily using and returning the horse at his pleasure, without objection on the part of the defendant on account of arrearages usually due for the keeping of the horse. The plaintiff bought the horse and the other property of Bohan on the said 1st day of December, 1888. Previous to that day Bohan had advertised the property for sale and had requested and urged the plaintiff to buy the same. The defendant had full knowledge of such intended sale by Bohan. On that day Bohan was justly indebted to the defendant in the sum of \$48 for the keeping and feeding of the horse. On the morning of that day Bohan took the horse and the other property from the defendant's stable, as he had been accustomed to do, with the knowledge and consent of the defendant (although it did not appear that the defendant had knowledge that Bohan intended to sell the property on that day), and while away from the stable again applied to the plaintiff to purchase the same, which the plaintiff did, and took all the chattels into his possession and paid therefor in full. The plaintiff used the horse and wagon in his own business for a short time, and then, at the suggestion of and in company with Bohan, drove to the defendant's stable for the purpose of engaging further keeping for the horse. Bohan introduced the plaintiff to the defendant, informed him that he, Bohan, had sold the horse to the plaintiff, and said he thought the plaintiff would like to board the horse there, and named \$20 per month as the price to be paid therefor. The defendant received and stabled the horse. After he had done so he inquired of the plaintiff if he had paid for the horse and the other property. The plaintiff replied that he had paid in full. The defendant then said to the plaintiff that he had a claim of \$48 on the horse for its keeping and feeding, and that the plaintiff must govern himself accordingly. The plaintiff said he should want to take the horse out the next day to use, whereupon the defendant said the horse could not be taken from his possession till the claim of \$48 was paid. Afterwards on the same day the plaintiff made demand on the defendant to deliver to him the horse and the other articles, which the defendant refused. This suit was then brought. The plaintiff had no knowledge at the time he bought the property that Bohan was indebted to the defendant,

and there was no claim that he acted otherwise than in good faith.

The defendant claimed the right to detain the horse in his possession until the debt of \$48 was paid, by virtue of his lien thereon for its keeping and feeding. The plaintiff, on the other hand, asked the court to rule that the lien of the defendant on the horse for its keeping and feeding was divested when the horse was taken from his immediate possession, without objection on his part, by the owner of the horse, and by such owner sold and delivered to the plaintiff, an innocent purchaser for value; and that the lien did not revive when the horse was returned to the defendant's stable by the plaintiff. The court did not so rule, but rendered judgment for the return of the horse as above stated.

A lien is the right which a creditor has of detaining in his possession the goods of his debtor until the debt is paid. To the common-law idea of a lien it is necessary that the creditor should have the actual possession of the goods over which the lien is claimed, and that the debt should have been incurred in respect to the very goods detained. As possession is the foundation of the common-law lien, any parting with the possession operates as a waiver or forfeiture of it. "A lien is a mere right to retain possession of a chattel, which right is immediately lost on the possession being parted with." *Cockburn, Ch. J., in Donald v. Suckling*, L. R. 1 Q. B. 612. See also *Story on Bailments*, § 811; *Case of an Hostler*, Yelv. 67, note; *Pinney v. Wells*, 10 Conn. 115.

It is admitted by the defendant's counsel that he would have no right of lien except for the Statute. Gen. Stat. § 3047. This Statute gives a lien in cases where the common law does not give one. *Miller v. Marston*, 85 Me. 153; *Goodrich v. Willard*, 7 Gray, 183; *Judson v. Etheridge*, 1 Cramp. & M. 743; *Jackson v. Cummins*, 5 Mees. & W. 342; *Parsons v. Ginnell*, 4 C. B. 545.

But there is no intimation in the Statute that it uses the word "lien" in any different sense from that which it has in the common law. On the contrary the Statute seems to use that word in its precise common-law meaning. It creates a lien in favor of the "keeper"—that is, the one in possession—of animals. It says that the animals, naming the kind, "shall be subject to a lien for the price of such keeping in favor of the person keeping the same until such debt is paid."

This is the exact idea of the common law, the right of a creditor to detain the property of his debtor in his possession till the debt is paid.

In all cases where statutes have created any right of security on the property of a debtor in the nature of a lien, not depending on possession, they have provided carefully for a registration of the transaction.

The contract between Bohan and the defendant, as interpreted by their usage, was such that Bohan had the right to take the horse at any time from the stable for the purpose of using it. The plaintiff claims that a livery-stable keeper who holds a horse at the constant disposal of the owner is the mere servant of the owner and does not have any such possession as would in-

vest him with the right of lien. We do not decide the point. On the finding we must assume that Bohan rightfully took the horse from the defendant's stable and sold it to the plaintiff. This was a transaction which devastated the lien. Whatever right the defendant might have had to detain the horse as

against Bohan, we are of opinion he had none against the plaintiff.

There is error in the judgment, so far as it directs a return of the horse to the defendant, and for the defendant to recover cost, and *this part is reversed.*

In this opinion the other Judges concurred.

MISSOURI SUPREME COURT.

STATE OF MISSOURI, *ex rel.* Ashley C. CLOVER, Circuit Atty., *Appt.*,

LADIES OF THE SACRED HEART,
Resp't.

(....Mo....)

1. **The twenty years' limitation on the existence of a corporation**, under Gen. Stat. 1845, chap. 84, § 1, providing that every corporation may have succession for the "period limited in its charter, and when no period is limited for twenty years," even if it applies to any purely charitable incorporated association, as to which there is doubt, does not apply to one whose charter reserves the right in the Legislature to amend or repeal it "at any time hereafter," and shows a determination on the part of the Legislature to make it perfect and complete without reference to the general law; especially where the objects and purposes of its creation are such as to negative the presumption that the Legislature intended to limit its duration to twenty years.

2. **Although the General Corporation Law of 1845 was repealed** in 1855, including the twenty years' limitation upon the existence of corporations, and the repealing law took effect only from its passage, yet, as the limitation is re-enacted in the same language in which it appeared in the original law, and the provision as re-enacted applies to corporations created previous to its passage, it leaves such corporations in the same condition they were in before, subject to the same limitation.

(November 4, 1889.)

NOTE.—Public charities, what constitute.

A charity is a gift to be applied consistently with existing laws for the benefit of an indefinite number of persons, either by bringing their minds and hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves in life, or by erecting public works or otherwise lessening the burdens of government. *Jackson v. Phillips*, 14 Allen, 539; *Statute of 48 Eliz.*; *Cottman v. Grace*, 3 L. R. A. 145, 112 N. Y. 299; *Fire Ins. Patrol v. Boyd*, 1 L. R. A. 418, note, 120 Pa. 624.

Trusts for private objects do not fall within the denomination of charitable trusts, and are void if they create perpetuities, while the full conception of a charitable trust includes the idea that it is or may be perpetual, and to which the statute against perpetuities does not apply. *Fire Ins. Patrol v. Boyd*, 1 L. R. A. 419, note, 120 Pa. 624; *Miffin's App.* 1 L. R. A. 453, note, 121 Pa. 206; *Heiskell v. Chickasaw Lodge*, 4 L. R. A. 690, note, 87 Tenn. 668; *Cottman v. Grace*, 3 L. R. A. 145, note, 112 N. Y. 299.

The essential elements of a charitable purpose are that the gift must be for an indefinite class, and that the benefit conferred upon them shall be in its nature public. See *Heiskell v. Chickasaw Lodge* and *Cottman v. Grace*, *supra*.

6 L. R. A.

APPEAL by plaintiff from a judgment of the St. Louis Circuit Court in favor of defendant in a proceeding by *quo warranto* for defendant's dissolution. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Alexander J. P. Garesche, for appellant:

Since no term was declared in the charter, its duration was limited to twenty years.

Code of 1845, p. 122, *Corporations*, § 1, par. 1.

In interpretation of a charter, the provisions of a general law are to be regarded as if embodied in the charter itself.

Pacific R. R. v. Renshaw, 18 Mo. 215; *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 865 (25 L. ed. 185); *Revere v. Boston Copper Co.* 15 Pick. 361.

In interpretation of charters every presumption is in favor of the State. No power not expressly granted is to be inferred by construction.

St. Louis v. Missouri R. Co. 13 Mo. App. 524; *Fertilizing Co. v. Hyde Park*, 97 U. S. 650 (24 L. ed. 1036); *Wait, Insolv. Corp.* p. 94; 1 *Morawetz, Priv. Corp.* §§ 816, 817.

No extension is presumed, even by a fresh grant of franchises.

St. Clair Co. Turnp. Co. v. Illinois, 96 U. S. 68 (24 L. ed. 651).

The point that the restriction of the Code of 1845 to twenty years is by § 20, Code of 1855, vol. 2, p. 1026, repealed, is futile, because this charter is expressly excepted from this repeal by section 18 of the same Act.

A revision, as in section 20 cited, purports to

Charitable uses may be for religious purposes, and these are highly favored in law. *Cottman v. Grace*, 3 L. R. A. 148, note, 112 N. Y. 299.

They may also be for benevolent and educational purposes (*Fire Ins. Patrol v. Boyd*, 1 L. R. A. 417, note, 120 Pa. 624. See *Penny v. Croul* (Mich.) 5 L. R. A. 858; and for public purposes not in the ordinary sense benevolent, but directed to the benefit of the public at large, or of some particular district, or to lighten the burden for defraying the expense of local administration of government of a designated district;—as, for the benefit of the country generally, to aid in payment of the public debt (*Newland v. Atty-Gen.* 8 Meriv. 884; for improvement or other benefit of a town (*Atty-Gen. v. Eastlake*, 11 Hare, 205; *Atty-Gen. v. Brown*, 1 *Swanst.* 285; *Jones v. Williams*, Amb. 651; *Howse v. Chapman*, 4 Ves. Jr. 542; *Atty-Gen. v. Lonsdale*, 1 *Sim.* 105; *Mitford v. Reynolds*, 1 *Phil.* 185; *Atty-Gen. v. Bushby*, 24 *Beav.* 299); for a parish or parishioners (*Atty-Gen. v. Webster*, L. R. 20 *Eq.* 483); and in Pennsylvania for fire companies, *Humane Fire Co's App.* 88 Pa. 389; *Bethlehem v. Perseverance Fire Co.* 81 Pa. 445; *Fire Ins. Patrol v. Boyd*, *supra*.

repeal, but in effect so far as it is the repetition of the former law it is only a re-enactment, not repeal.

St. Louis v. Foster, 52 Mo. 516; *Cape Girardeau v. Riley*, Id. 428; *St. Louis v. Alexander*, 23 Mo. 509; *State v. Heidorn*, 74 Mo. 410.

But if a repeal, a private Act would not be affected by it, unless expressly named.

State v. Wesleyan Cemetery Assn. 11 Mo. App. 580; *State v. Fiula*, 47 Mo. 319. See *Krutz v. Paola Town Co.* 20 Kan. 399.

Messrs. Hitchcock, Madill & Finkelnburg and Peter Taaffe, for respondent:

Defendant is an eleemosynary corporation. Its prescribed work is a charity.

Dartmouth College v. Woodward, 17 U. S. 4 Wheat 181 (4 L. ed. 629); *State, Pittman, v. Adams*, 44 Mo. 570; *Am. Asylum at Hartford v. Phoenix Bank*, 4 Conn. 172; *Vidal v. Girard*, 43 U. S. 2 How. 127 (11 L. ed. 205); *Chambers v. St. Louis*, 29 Mo. 586; *Washington University v. Rouse*, 75 U. S. 8 Wall. 439 (19 L. ed. 498); *Pom. Eq. Jur.* §§ 1020-1024; *Stat. Eliz.* 1601.

A charity is, in its essential character and qualities and in the estimation of the law, a perpetuity.

Gray, Perp. § 590, p. 361; 1 Am. Law Reg. p. 140; *Philadelphia v. Girard*, 45 Pa. 18.

A charity is a favorite of the law. The Statute of Elizabeth (1601) is in force in this State.

Chambers v. St. Louis, 29 Mo. 586.

Education, with, as well as without, charitable aspects, has always been encouraged and its promotion assigned a prominent place in the organic law of the State.

Const. 1820, § 1, art. 6, in force in December, 1847; 1865, § 1, art. 9; 1875, § 1, art. 11.

Perpetual succession is one of the incidents annexed by the law to all corporations aggregate.

2 Morawetz, *Priv. Corp.* §§ 1003, 411.

The first section of the General Corporation Statute of 1845 has no application to the charter of respondent.

Rev. Stat. 1845, p. 122.

Even if the first section of the General Act of 1845 could be held applicable to respondent's charter, yet that section was repealed by the 20th section of the Act, found at p. 1026, 2 *Rev. Stat.* 1855.

Fairchild v. Masonic Hall Assn. 71 Mo. 581 *et seq.*; *Coffin v. Rich*, 45 Me. 512, 513; 1 Redf. Railroads, 6th ed. p. 199; *Pacific R. R. v. Renshaw*, 18 Mo. 210; *Bailey v. Hollister*, 26 N. Y. 112; *Greenwood v. Union Freight R. Co.* 105 U. S. 13 (26 L. ed. 961); *Tomlinson v. Jessup*, 82 U. S. 454 (21 L. ed. 204); *Sugar Tree Grove Academy*, 52 Mo. 322; *McRoberts v. Washburne*, 10 Minn. 23.

Black, J., delivered the opinion of the court:

This is a proceeding upon *quo warranto* in the name of the State at the relation of the Circuit Attorney of the Eighth Judicial Circuit against the Ladies of the Sacred Heart, a corporation created and duly organized under the special Act of the Legislature of the 7th December, 1846. The record discloses these facts: On the 12th of March, 1827, John Mullanphy conveyed about twenty-four arpents of land to

Philipine Duchesne, Octavie Berthold and Lucilla Matheron, who were nuns of the order of the Sacred Heart, to have and to hold for 999 years, upon trust "for the sole use of said nuns and their successors, being nuns of the same order, for the establishment and maintenance of the charity herein specified, which trust shall remain so long as the said charity shall be kept up and dispensed according to the true intent and meaning hereof; that is to say, said nuns shall occupy said premises as a convent, and shall therein board, lodge, clothe, provide for and educate all such indigent female children who are orphans, or whose parents are both indigent and helpless, not exceeding the number of twenty at any one time, as shall be designated by said Mullanphy during his life, or, in case of his death, by his three eldest female lineal descendants," or, in case of no designated lineal descendants, "then by the Roman Catholic bishop of the diocese wherein the City of St. Louis is or shall be situate."

At the date of this deed the premises were, for the most part, outside of the limits of the City of St. Louis, and were covered with brush and timber, save less than one acre, upon which there was a small house. These trustees, their associates, and the respondent corporation have maintained on the premises a convent, an orphanage, a boarding school, and a free day school. The boarding school was discontinued on these premises in 1872, but continued on what is called the "Withel Property," acquired by respondent. By reason of the increased value of the property, the income exceeds the cost of supporting twenty orphans.

By mesne conveyances the title to the Mullanphy property was vested in Madame Galloway, and she conveyed it to respondent on the 12th of December, 1871, some twenty-five years after the date of the charter; but the title in the mean time had been in persons who were members of the order, and also of the respondent, and was held in trust for respondent. The persons named in the special Act as incorporators were members of the order. This order of the Sacred Heart, as distinguished from the respondent, has many institutions throughout the country; and one of its objects has been and is the education of young ladies as boarders, and in exceptional cases, like the one in hand, it supports an orphan asylum. The petition for the writ asks the court to adjudge the respondent guilty of unlawfully using corporate franchises, and to that end it is alleged that its charter expired in twenty years after the grant thereof; all of which is denied. Further allegations are made to the effect that the respondent has and does appropriate portions of the revenues of the trust property to purposes not contemplated by the trust, namely, the support of a seminary of learning for young ladies other than orphans. The court declined to go into a hearing of the issues on this branch of the case until the question as to the expiration of the charter was determined, and on that issue found for respondent.

As the case stands before us, the only question is whether the charter granted on the 7th of December, 1846, expired in twenty years. The charter is as follows:

"Section 1. That Ellenor J. M. Gray, Mary Prudeom, Josephine Jaquet, and their succes-

sors, shall be, and are hereby, constituted a body corporate, in fact and in name, by the name and style of the 'Ladies of the Sacred Heart,' for the purpose of conducting a seminary of learning and an orphan asylum in the City of St. Louis, and by that name and style shall have succession, and be in law capable of suing and being sued, defending and being defended, in all courts and places, and in all manner of actions and cases whatsoever, and may have a common seal, and change it at pleasure, and by that name and style be capable in law of purchasing, holding and enjoying, to them and their successors, for the purposes above mentioned, any real estate, in fee simple or otherwise, and any goods, chattels and personal estate, and of selling and otherwise disposing of the said real estate, or any part thereof, at their will and pleasure; but the operations of said corporation shall be confined to the promotion of the objects above mentioned.

"Sec. 2 Said corporation shall have power to make such constitution, by-laws, ordinances, rules and regulations for the government of the same as they deem proper, provided the same are not repugnant to, or inconsistent with, the laws and Constitution of this State, or of the United States.

"Sec. 3. That nothing in this Act contained shall be so construed as to prevent the Legislature from altering, amending or repealing the same at any time hereafter."

The first paragraph of the first section of chapter 84 of the General Statutes of 1845, concerning corporations, provides: "Every corporation, as such, has power: *first*, to have succession by its corporate name for the period limited in its charter, and, when no period is limited, for twenty years." Page 281.

The question is whether this general statute fixes the period of existence of the respondent at twenty years, no time being in terms stated in the charter. In considering this question, some general rules must be kept in view. Where special privileges in derogation of common right, or exemptions from the General Law governing other persons, are claimed by a corporation, its charter must be construed strictly in respect of such alleged grants. Nothing is to be presumed in favor of the grant of such privileges. But no such question is involved in the present case, and the rule has no application here. This charter is to be construed like any other written instrument. We must look for the intention of the parties. 1 Morawetz, Priv. Corp. 2d ed. §§ 816, 323.

A corporation whose charter does not limit its existence to a definite period of time continues, in legal contemplation, until it has been dissolved by some prescribed method. Id. § 411.

Aside from the first paragraph of section 1 of the General Law of 1845, this corporation would have succession without limitation as to time.

Again, it is conceded on both sides that the respondent is a charitable institution, and nothing more. It is therefore in many respects unlike an ordinary business corporation having shareholders. Most of the provisions of the General Law can have no application whatever to charters like the one now in question. The first section says: "Every corporation, as such,

has power," among other things, to make laws "for the transfer of its stock." The next section says: "The powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created, although they may not be specified in its charter," etc.

This provision in relation to stock has no application to this corporation; for it has, and under its charter can have, no shareholders. The same is true in respect of many other of the subsequent sections. It is therefore clear that, though the General Statute does say that every corporation shall have the designated powers, we must look to the objects and purposes of the particular corporation to see whether it does or can possess all of them. We see no reason why we may not also look to the objects and purposes of the corporation to see whether the limitation of twenty years fairly applies to it.

Now, it can hardly be believed that the Legislature, in creating this corporation for the purposes, in part at least, of rearing and educating orphans, designed to limit it to twenty years. Such an institute, with such a limitation, would end about as soon as fairly established. If this charter contained the words "perpetual succession," instead of simply the word "succession," then there would be no limitation as to time, notwithstanding the General Law. It was so held in the case of a business corporation having a competent stock. *Fairchild v. Masonic Hall Assn.* 71 Mo. 527.

The purposes of this corporation considered, it is believed we should reach the same result. If the charter on its face disclosed a purpose to administer the Mullanphy trust, there could be no occasion for doubt, for the trust is practically perpetual. The charter, however, is specific in the grant of powers; so that in these respects there is no need of reference to the General Law. The Legislature has, by the third section, reserved the right to amend or repeal it "at any time hereafter." The charter bears evidence on its face of a determination on the part of the Legislature to make it perfect and complete in and of itself and without reference to the General Law. In view of these considerations, and of the objects and purposes for which the corporation was created, we conclude the Legislature intended to and did give it perpetual succession. This construction carries out what seems to have been the purpose of the Legislature; and it is enough to overcome the limitation in the General Law that it appears from the special charter, taken as a whole, and read like any other written instrument, that the Legislature designed to give it unlimited succession. Indeed, it is a matter of some doubt whether the twenty-year limitation in the Law of 1845 applies to any purely charitable incorporated association.

Though what has been said disposes of this appeal, another point pressed by respondent will be noticed. Section 20, 2 Rev. Stat. 1855, p. 1026, provides: "All Acts of a public, general, or permanent nature, revised at the present session of the General Assembly, so soon as such Acts shall take effect, shall be taken and construed as repealing the Acts in force at the commencement of the present session of the General Assembly so revised."

According to the ruling in *Fairchild v. Ma-*

sonic Hall Assn., 71 Mo. 527, this section repealed out and out the General Corporation Law of 1845, and the General Corporation Law of 1855 took effect only from the time when that revision went into operation. Concede that the first section of the Corporation Law of 1845 (the one which contains the twenty-year limitation) was repealed by the Revision of 1855, and concede, further, that, because of the peculiar language of the repealing section, the re-enacted Statute cannot be construed as a continuing law, still the Statute of 1855 says: "Every corporation, as such, has power," etc., following the exact language of the first section of the Law of 1845. This language applies to corporations created previous to the Revision of 1855, and leaves the respondent where it was before the repeal. The second section of the Statute of 1855, like that of 1845, says: "The

powers enumerated in the preceding section shall vest in every corporation that shall hereafter be created," etc.; but this does not destroy the force of the first section. The specified powers are made to apply to corporations then, before and thereafter created.

In the *Fairchild Case* the court had under consideration the thirteenth section of the General Corporation Law of 1845 and 1855; and that section only professes to act upon corporations thereafter created. There was no section making the same provisions apply to existing corporations.

For the reasons before stated the judgment is affirmed.

Ray, Ch. J., absent; **Sherwood, J.**, not sitting. The other Judges concur.

Motion for rehearing overruled.

DAKOTA SUPREME COURT.

ST. PAUL FIRE & MARINE INSURANCE CO., *Appt.*,

T. W. COLEMAN, *Respnt.*

(-----Dak.-----)

1. The whole premium, and not merely a *pro rata* part of it, is earned although the insurer is relieved from liability by the default of the assured in payment of an installment due on a policy of insurance providing that no liability of the insurer shall exist after default in the payment of any installment of an installment note given for the premium, or a part thereof.
2. An agreement that the premium note of the assured shall remain binding upon him although the insurer is relieved from liability by default in payment of a sum due is not illegal or contrary to public policy.
3. An assured person is not entitled to a reduction, under Civ. Code, §§ 1542-1544, providing for the return of insurance premiums in certain cases, in the amount of his premium note which he has given for five years' insurance, if he forfeits his insurance by failing to pay an installment due on the note after the risk has attached and been in operation for one year.
4. A statute denying plaintiff costs in a district court if his recovery is below \$50 does not limit the jurisdiction of the court to cases in which that sum is involved.

(October 10, 1889.)

APPPEAL by plaintiff from a judgment of the District Court for Stutsman County in his favor but for a less amount than was claimed in an action to recover upon an insurance premium note. *Reversed.*

The facts are sufficiently stated in the opinion.

Mr. C. E. Joslin, for appellant:

The respondent claims that his own default made the policy absolutely void; but such is not the case, as a careful reading of the conditions of the entire contract will show.

Viele v. Germania Ins. Co. 26 Iowa, 48; *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 114, 115.

The policy was suspended during the default,

— L. R. A.

and the Company had the right to elect to treat it as suspended in case a loss had occurred during the default, or to waive the conditions. The provision was made for the benefit of the Company to facilitate the collection of these notes out of which it must pay its losses, and such condition was reasonable, and the Company was entitled to recover the full amount of the note.

American Ins. Co. v. Klink, 65 Mo. 78; *American Ins. Co. v. Elliott*, 62 Ind. 311; *American Ins. Co. v. Henley*, 60 Ind. 515; *American Ins. Co. v. Charles*, 63 Ind. 210; *Williams v. Albany City Ins. Co.* 19 Mich. 451; *Caulfield v. Continental Ins. Co.* 47 Mich. 447; *Blackberry v. Continental Ins. Co.* 38 Ky. 574.

Where the note is not paid a stipulation that the whole amount shall be deemed earned is a valid stipulation.

Wall v. Home Ins. Co. 36 N. Y. 157; *Shrouts v. Hawkeye Ins. Co.* 43 Iowa, 289; *Shakey v. Hawkeye Ins. Co.* 44 Iowa, 540.

Messrs. Nickens & Baldwin, McMillan & Frye and S. L. Glasspell for respondent.

Crofoot, J., delivered the opinion of the court:

The plaintiff brings this action to recover on an installment note, given by the defendant for insurance premium. The note is dated May 27, 1884, and contains the promise to pay plaintiff \$8.40 on the first day of July of each of the years 1885, 1886, 1887 and 1888, and also contains the following clause: "This note being given as consideration for insurance under the above-named policy, I consent that, in case of default in the payment of any of the installments named herein the whole amount remaining unpaid on this note shall immediately become due and payable."

The application for insurance is in writing, signed by the defendant, and is headed: "Application of T. W. Coleman . . . for insurance against loss by fire and lightning . . . for the term of five years from the day of approval of this application by the general agent of the Company." The application contains an express agreement that "if any payment on the note

given for premium hereon be not paid when due, the policy shall be void until the same is made, when it is to again attach."

The policy shows that it is issued in consideration of \$8.40, and the installment note sued on, and insures defendant's property from the 29th day of May, 1884, at 12 o'clock at noon, to the 29th day of May, 1889, at 12 o'clock at noon. The policy contains this provision: "It is expressly agreed that this Company shall not be liable under this policy for any loss or damage if any default shall have been made in the payment of any note, or installment of any note in full, given in payment or part payment of premiums under this policy: provided, however, that on the payment by the assured, or his assigns, of all such notes, or installment of any such note in full, the liability of the Company under this policy shall again attach, and the policy shall thereafter be enforced, unless the same shall be inoperative or void from some other cause; but in no event shall this Company be liable for any loss or damage happening during the continuance of such default of payment." It also provides: "This Company may at any time cancel this policy, returning the unexpired premium *pro rata*. The assured may at any time have this policy canceled by paying all premiums due therefor, at customary short rates, for the time the policy has been issued."

The defendant contends that, by the terms of the policy, the plaintiff was under no liability after July 1, 1885, at which time, without fraud on his part, the defendant made default in the payment of the installment due at that time, and that the whole premium has not been earned, but only a *pro rata* portion of it. To support this position, the defendant relies upon the following authorities: *Yost v. American Ins. Co.* 39 Mich. 531; *American Ins. Co. v. Stoy*, 41 Mich. 385; *Matthews v. American Ins. Co.* 40 Ohio St. 135; *Joliffe v. Madison Mut. Ins. Co.* 39 Wis. 111; *Smith v. St. Paul F. & M. Ins. Co.* 8 Dak. 80.

The first three cases cited are the only ones that pass directly upon the right of the insurer to collect a premium installment, where, by the terms of the contract, the policy is void during the continuance of default in the payment of any installment. The contracts considered in these cases were all made with the same Company, and are identical. There was no provision in the note, policy or application that, if default should be made in the payment of any installment, the whole note should immediately become due, or the whole premium should be considered as earned. The policy, however, contained a clause that the charter of the Company was to be resorted to and used to explain the rights and obligations of the parties thereto, in all cases not therein otherwise specially provided for; and the charter provided that, on nonpayment of any installment, the whole note should immediately become due.

In *Yost v. American Ins. Co. supra*, suit was brought to recover past-due installments, and a statement of facts was agreed upon, which contained only the note and the policy, but not the charter. The court, in construing the contract, held it to be an absolute insurance for one year only, which might be continued and kept in force from year to year thereafter, for 6 L. R. A.

a period of five years, by paying an annual premium; that the Company had declared, by its policy, what the effect of a default should be; that it gave the insured the right to come in and have the policy revived, and it was optional with the insured to pay or not. In conclusion, the court expressly distinguishes it from the case of *Williams v. Albany City Ins. Co.* 19 Mich. 462, by the absence of an express stipulation that "in case the notes or obligation given for the premium, or any part thereof, be not paid at maturity, the full amount of premium shall be considered as earned," and the policy void during default.

In *American Ins. Co. v. Stoy, supra*, the question again came before the Supreme Court of Michigan upon the claim that new and important facts were presented by the record which distinguished it from *Yost v. American Ins. Co., supra*, and brought it within the decision in *Williams v. Albany City Ins. Co., supra*. The new and important facts referred to were the provision of the charter of the company that, if default should be made in the payment of any installment, the whole note should immediately become due, and the clause in the policy, above cited, referring to the charter. The court held, however, that the charter did not form a part of the contract; that the rights and obligations of both parties, so far as was in issue in that case, were fully and expressly provided for in their agreement; and that the provision of the charter could neither enlarge, vary nor change the written obligation; and that to so hold would be to permit an instrument, not seen and inspected, to change, in important matters, by mere reference thereto, the deliberate agreement which the parties had entered into. In an elaborate opinion the court adhered to its former construction of the contract as an insurance from year to year; and after citing other reasons against the plaintiff, relative to its right to do business in the State, affirmed its former decision.

In *Matthews v. American Ins. Co.*, 40 Ohio St. 135, it was held, principally on the authority of the Michigan cases, but by a divided court, that the charter did not form a part of the contract; and, there being no express provision to the contrary, when the insurance ceased the premium ceased to accrue.

What conclusion these courts would have reached had the stipulation in the charter been embraced in the note, as in the case now before us, it is of course impossible to say. That they regarded as important a clause giving the company the right to the premium, notwithstanding the policy was void during default, is evident from the care with which they distinguish the case of *Williams v. Albany City Ins. Co.*; and when the question again came before the Supreme Court of Michigan, in *Caulfield v. Continental Ins. Co.*, 47 Mich. 447, upon a note providing that, in case of nonpayment of any one of the installments at maturity, the whole amount of installments remaining unpaid should be considered as earned, the company was allowed to recover. That they would have reached a different conclusion seems probable, not only from the language used, but also from the fact that in *American Ins. Co. v. Klink*, 65 Mo. 78, and *American Ins. Co. v. Henley*, 60 Ind. 515, in construing the same contract, the

provision in the charter above referred to being held by the courts of Indiana and Missouri to be a part of the agreement, it was held that the plaintiff was entitled to recover, notwithstanding the Company had been released from liability during the default.

The other cases cited by defendant's counsel only involve the question of waiver, where the Company had accepted payment of a past-due note, with notice of a loss.

It seems to us that the construction of this contract is very plain, and we are unable to construe it to be other than a contract of insurance for five years, as every clause seems to indicate such intention. The defendant applied for insurance for five years. The defendant gave an installment note, which contained a provision that, in case default was made in the payment of any installment, the whole note (which presumably represented four years' premium) should immediately become due. The policy, upon its face, insures the property for five years, from a day certain to a day certain, on condition that the Company should not be liable during default in the payment of any installment of the premium. The insured had the right to have the policy canceled upon paying the premium due thereon, at customary short rates. To hold it to be a policy from year to year would not only be doing violence to the plain language in which the parties have expressed their intention, but it would also lead to the absurd conclusion that, while the insured had the option to renew the insurance each year by paying an annual premium, still, if he failed to do so, the premium for the remaining years would immediately become due, and, when collected, the insurance would be revived for the whole term, whether he desired to exercise his option or not. There is nothing unfair or unreasonable in the stipulation that the Company shall not be liable for loss during default in the payment of the premium; and there is nothing contrary to public policy, or prohibited by statute, in the agreement that, although the insurer is relieved from liability by default, the premium note of the assured remains binding upon him. Neither is there anything particularly harsh in such a contract, since the insured, if he finds himself unable to continue his payments, can at any time have the policy canceled by paying the premium due at customary short rates. The parties have the right to make their own contract, and fix its terms and conditions; and such a contract has frequently been upheld by the courts. *Williams v. Albany City Ins. Co.* 19 Mich. 482; *Bucknerby v. Continental Ins. Co.* 88 Ky. 574; *Wall v. Home Ins. Co.* 36 N. Y. 157; *Caufield v. Continental Ins. Co.* 47 Mich. 447.

But the defendant further claims that he is entitled to a reduction of the amount recoverable by the terms of the note, by the principles which apply to the return of premiums, claiming that "risk and premium go hand in hand, and, one ceasing, the other also ceases." This is not by any means true. If the premium had been paid, and the risk incurred, for any period, no matter how short, no breach of a subsequent condition for which the assured was responsible would entitle him to a return of any of the premium, although the Company thereby ceased to be liable

The law relating to the return of premiums is clearly laid down in our Civil Code, §§ 1542-1544, and we are not aware that it differs materially from the general law of insurance elsewhere.

"Section 1542: A person insured is entitled to a return of premium as follows: (1) to the whole premium, if no part of his interest in the thing insured be exposed to any of the perils insured against; (2) where the insurance is made for a definite period of time, and the insured surrenders his policy, to such proportion of the premium as corresponds to the unexpired time, after deducting from the whole premium any claim for loss or damage under the policy which has previously accrued.

"Sec. 1543: A person insured is entitled to a return of the premium when the contract is voidable on account of the fraud or misrepresentation of the insurer, or on account of facts of the existence of which the insured was ignorant without his fault; or when, by any default of the insured, other than actual fraud, the insurer never incurred any liability under the policy.

"Sec. 1544: If a peril insured against has existed, and the insurer has been liable for any period, however short, the insured is not entitled to return of premiums, so far as that particular risk is concerned."

We cannot see how section 1544, which is particularly referred to by defendant's counsel, in any way sustains his position. The words, "so far as that particular risk is concerned," do not refer to the time in which the subject is exposed to the peril; but where a premium is applicable to risks on two or more distinct subjects of insurance, and no risk has ever been incurred upon one subject, the proportionate premium may be recovered. This is evident, not only from the reading of the previous sections, but from the history of the legislation which led to the adoption in the Code States of section 1542. This section, as originally adopted in California, read: "A person insured is entitled to a return of premium paid, or a ratable proportion thereof, if no part of his interest in the thing insured is exposed to any of the perils insured against; or where the insurance is made for a definite period of time, if it is not exposed to such peril for the whole of that time."

In proposing as an amendment the language of section 1542, the Code examiners said: "The present section does not conform to the general rule and the law elsewhere, and is manifestly unjust. Under it, the insured, meeting with a loss in the first month of a policy for a year, could recover not only the loss but eleven twelfths of the premium, thus depriving the insurer of that proportion of the consideration for which he assumed the risk." If the defendant had sustained a loss during the first year, the premium for which had been paid in cash, he would have been liable on his note, because the peril had existed, the insurer had been liable, and the event insured against, in consideration of the entire premium, had happened. This being an insurance for five years, and the risk having attached, the insured is not entitled to any reduction on his note.

As a new trial must be granted, the question in relation to costs, presented on the hearing,

will again come before the trial court, and it is deemed advisable to indicate our views thereon. The Organic Law gives to the district courts chancery, as well as common-law, jurisdiction, and limits the jurisdiction of justices of the peace to matters in controversy where the debt or sum claimed does not exceed \$100. It also provides that the jurisdiction of these courts shall be limited by law.

This court in *St. Paul F. & M. Ins. Co. v. Hanson* (Dak.), 28 N. W. Rep. 193, held that, under the Organic Law and the Acts of the Territorial Legislature, in all actions arising on contracts for the recovery of money only, where the amount claimed does not exceed \$100, the district courts and justices of the peace have concurrent original jurisdiction.

Section 5191, Comp. Laws Dak., allows costs of course to the plaintiff, in an action for the recovery of money, where he recovers \$50, and allows costs of course to the defendant, in such an action, unless the plaintiff is entitled to costs. It is claimed that the effect of this section is to indirectly limit the jurisdiction of the district courts to \$50 by denying the plaintiff costs, and allowing the defendant costs, where the amount recovered is below that sum.

We cannot concur in this position. That the Legislature had the power to limit the jurisdiction of the district court, if they had so desired, we cannot doubt, in the face of § 1866, Rev. Stat. U. S., expressly conferring that power. They have not done so directly, nor, in our opinion, does this section have any such effect upon the jurisdiction of the court indirectly. At the common law, costs were unknown. They are purely the creatures of statute. *Eastman v. Sherry*, 37 Fed. Rep. 844; *Gibson v. Memphis & C. R. Co.* 81 Fed. Rep. 553.

The legislative power is expressly extended to all rightful subjects of legislation; and that the allowance or refusal of costs in judicial proceedings is such a subject we cannot doubt. The exercise of that power in no wise affects the question of jurisdiction. If the suitor desires to present his claim, he may avail himself of either court, and jurisdiction could not be denied; but he must accept such costs as the Legislature has provided for that court. *Busby v. Carpenter*, 3 Pac. Rep. 193.

The judgment of the District Court is hereby reversed, and a new trial ordered.

All the Justices concur, except *Rose, J.*, not sitting.

CALIFORNIA SUPREME COURT.

Leo B. GARDNER, *Reopt.*,

v.

Fred STROEVER, *Appt.*

(.....Cal.)

(October 22, 1889.)

1. To justify a mandatory preliminary injunction a clear case of prospective injury for which the plaintiff will have no adequate remedy at law is indispensable.
2. An allegation that plaintiff will be damaged in a certain sum by a building already erected which obstructs his use of a road, without any allegation that any other or further act to his damage is threatened, or that defendant is not responsible for that sum, or that there will be any extraordinary impediment in the way of recovering that sum by an action at law, is not sufficient to justify a mandatory preliminary injunction.
3. A preliminary injunction will not be retained where the acts sought to be restrained had been performed before the order for the injunction was made or served.

APPEAL by defendant from an order of the Superior Court of Butte County denying a motion to dissolve a preliminary injunction restraining him from obstructing a certain road. *Reversed.*

Commissioner's opinion.

The facts are fully stated in the opinion.

Messrs. Reardan & Freer, for appellant:

If the injury be already committed, the writ can have no operation to correct it; and equity will not interfere for the purposes of punishment, or to compel persons to do right, but only to prevent them from doing wrong.

1 High, Inj. pp. 8, 5, ed. 1880.

The injunction will not be retained, where it appears that the acts, the performance of which is sought to be restrained, had been performed before the order for the injunction was made or served.

Delger v. Johnson, 44 Cal. 185.

In reference to private actions for obstruc-

NOTE.—*Injunction to restrain a threatened wrong.*

The restraining power of equity extends through the whole range of rights and duties which are recognized by the law. This jurisdiction is, however, modified and restricted by considerations of expediency and of convenience. *New York Printing & D. Establishment v. Fitch*, 1 Paige, 98; *New York v. Mapes*, 6 Johns. Ch. 46; *Ordgen v. Kip*, 1d. 160; 3 Pom. Eq. Jur. 368.

Thus it will not interfere to restrain the breach of a contract, or the commission of a tort, or the violation of any right, when the legal remedy of compensatory damages would be complete and adequate. The incompleteness and inadequacy of the legal remedy is the criterion which, under the settled doctrine, determines the right to the equitable remedy of injunction. *Jersey City v. Gardner*, 6 L. R. A.

33 N. J. Eq. 322; *Powell v. Foster*, 59 Ga. 790; *Johnson v. Connecticut Bank*, 21 Conn. 148, 157; *Watson v. Sutherland*, 72 U. S. 5 Wall. 74 (18 L. ed. 580); 3 Pom. Eq. Jur. 368.

A preliminary or interlocutory injunction can only be used for prevention or protection. It cannot be used for the purpose of commanding defendant to undo anything already performed or previously done. See *Chicago & N. W. R. Co. v. Dey*, 1 L. R. A. 744, and note, 35 Fed. Rep. 866.

An injunction to restrain a threatened wrong can issue only in an extreme case where the injury threatened will be irreparable. *Chicago & N. W. R. Co. v. Dey*, *supra*.

The legal remedy must be inadequate. *Ibid.*; *Haines v. Hall*, 3 L. R. A. 613, note.

tions of public highways, the injury complained of must be special in character, and not merely greater in degree than that of the general public.

Bigley v. Nunan, 53 Cal. 404; *Payne v. McKinley*, 54 Cal. 533; *Crowley v. Davis*, 63 Cal. 461; 1 High, Inj. § 762, ed. 1880.

The complaint is insufficient to support the injunction upon the theory that the obstruction constitutes a private nuisance in that it prevents plaintiff from carrying on his business, and occasions loss to him.

See *Tomlinson v. Rubio*, 16 Cal. 204; *Mechanics Foundry v. Ryall*, 63 Cal. 418; *Aram v. Schallenberger*, 41 Cal. 449; *Lewiston Turnp. Co. v. Shasta & W. Wagon Road Co.* 41 Cal. 562; *Jorris v. Santa Clara Valley R. Co.* 52 Cal. 438; *Yolo Co. v. Sacramento*, 36 Cal. 196; *Tibbets v. Blade*, 60 Cal. 430; *Marini v. Graham*, 67 Cal. 182; *Shirley v. Bishop*, 67 Cal. 545.

Messrs. Gray & Sexton, for respondent:

In this case the injury to plaintiff had just begun; his business had not been damaged much. It was to prevent the business from being entirely destroyed, not because that it had already been destroyed, that the writ was called for. The work of destruction had but just begun.

Code Civ. Proc. subd. 2, § 526; High, Inj. 1st ed. § 13.

An injunction may be granted "when it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste or great or irreparable injury to the plaintiff."

Code Civ. Proc. *supra*.

The injury to us is as irreparable as it was to the plaintiff in the case of—

Richards v. Dower, 64 Cal. 62. See High, Inj. 2d ed. § 886.

Van Olief, J., delivered the following opinion:

The complaint describes a public road, "extending from the Oroville and Miner's Ranch public road northeasterly past the slaughter-house of defendant and the slaughter-house of plaintiff, to the residence of Nancy Cooper," about seventy rods in length, situate in Butte County, and alleges that plaintiff is in possession of a slaughter-house on the south side of the road described; "and that the only means of entrance and exit to and from said slaughter-house to said public highway leading from Oroville to Miner's Ranch, or any other public highway, is over and along said highway leading to the residence of Nancy Cooper aforesaid. That the defendant on the 20th day of February, 1889, wrongfully, unlawfully and fraudulently, and for the purpose of vexing, annoying and preventing this plaintiff from reaching his said slaughter-house, entered upon said public highway leading from the Oroville and Miner's Ranch road to the residence of Nancy Cooper aforesaid, at a point between plaintiff's slaughter-house and said Oroville and Miner's Ranch road, and caused to be erected across said public highway an obstruction, to wit, a building which completely obstructed said road for all uses of a road, and wholly prevented this plaintiff from reaching his said slaughter-house. That plaintiff has no other way, convenient or otherwise, by which he can reach his said slaughter-house. That plaintiff

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is engaged in the butchering business in the Town of Oroville, and is compelled, in order to supply the wants of his customers, to slaughter a number of animals each day. That he has no other place for slaughtering said animals than the place heretofore described. That if defendant is "permitted to maintain his said obstruction across the public road, as aforesaid, plaintiff's business will be entirely destroyed and broken up, to his damage in the sum of \$5,000. That, by reason of the acts heretofore complained of, plaintiff has been damaged in the sum of \$800. Wherefore plaintiff prays judgment against the said defendant for the sum of \$300 and costs of suit; that defendant be enjoined and restrained from maintaining any obstruction in and across said road during the pendency of this action; and that upon the trial of this case said injunction be made perpetual; and for such other and further relief as may be equitable and just."

Upon this complaint alone the superior judge granted an injunction until further order, commanding the defendant and his agents "to desist and refrain from obstructing, or in any way, manner or form interfering with, the road leading from the Oroville and Miner's Ranch road to the residence of Nancy Cooper."

The defendant moved, on the complaint alone, to dissolve the injunction upon "the ground that the complaint does not state facts sufficient to warrant the issuance or continuance of an injunction." This motion was denied, and the appeal is from the order denying it.

I think the motion to dissolve the injunction should have been granted. It appears by the complaint that the building complained of as being an obstruction to plaintiff's use of the road had been erected before the commencement of the action; and it is not alleged that defendant has threatened to do any other or further act tending to obstruct the road, or otherwise to injure the plaintiff. There was therefore no foundation in the complaint for a merely preventive injunction; and mandatory preliminary injunctions are seldom granted, and only in a peculiar class of extreme cases, of which this case is not one. High, Inj. §§ 2, 4; *Murdock's Case*, 2 Bland, Ch. 461, 20 Am. Dec. 381, and notes citing the principal English and American cases.

To say the least, there is nothing in our Code of Civil Procedure more favorable to mandatory injunctions than is to be found in the general current of English and American authority. Indeed, our Code definition of an injunction (Code Civ. Proc. § 525) entirely omits the mandatory ingredient found in nearly all the definitions of the text writers. High, l. j. § 1, and note.

But, without regard to statutory provisions, it seems to be well settled that a very strong and urgent case is required to justify a mandatory preliminary injunction. A clear case of prospective injury for which the plaintiff will have no adequate remedy at law is indispensable.

In this case it is only alleged that plaintiff will be damaged in the sum of \$5,000; and there is no allegation that the defendant is not responsible for that sum, nor that there will be any extraordinary impediment in the way of

recovering that sum by an action at law. *Tomlinson v. Rubio*, 16 Cal. 204; *Mechanic's Foundry v. Ryall*, 62 Cal. 418.

Besides, it has been decided by this court that a preliminary injunction "will not be retained where it appears [by the answer, uncontradicted by affidavit] that the acts, the performance of which is sought to be restrained, had been performed before the order for the injunction was made or served." *Delger v. Johnson*, 44 Cal. 182. *A fortiori*, where the

fact of performance appears in the complaint, as in this case. I think the order denying the motion to dissolve the injunction should be reversed, with direction to grant the motion.

We concur: **Hayne, C.; Gibson, C.**

Per Curiam:

For the reasons given in the foregoing opinion the order denying the motion to dissolve the injunction is reversed, with direction to grant the motion.

IOWA SUPREME COURT.

FIRST NATIONAL BANK of Stuart,
Appt.,
v.

Milton HOLLINGSWORTH and Wife.

(.....Iowa.....)

1. Improving premises with a design to use them for a homestead is not sufficient without actual occupancy to give the homestead character.
2. No part of a debt is secured within the meaning of the law with reference to the application of payments, because of the fact that a part of the debt was created before the homestead of the debtor became exempt.
3. The application of payments should be made by the law so as to preserve a homestead right of the debtor, where neither party has directed the application of the payments, and a part of the indebtedness, which is an entire unsecured claim, was created before the property constituting the homestead became exempt.

(October 21, 1899.)

A PPEAL by plaintiff from a decree of the District Court for Guthrie County in favor of defendants in an action to subject certain premises claimed as a homestead to the payment of a judgment. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Fogg & Hinkson, for appellant:

It is the duty of the court in making the application to make it upon the indebtedness where the plaintiff's security is the most precarious. As to the loan made prior to the occupancy of the homestead, plaintiff has the right, in the absence of other property of defendants, to have said homestead property subjected to its payment, and that right to have said homestead subjected is, in legal contemplation, security for that part of the indebtedness.

"A security is something which makes the enjoyment or enforcement of a right more secure or certain. . . . A security on property is where a right over property exists by virtue of which the enforcement of a liability or promise is facilitated or made more certain."

Rapalje & L. Law Dict.

Where neither the debtor nor creditor has made any application of payments, a court of equity will apply them to those debts for which the security is most precarious.

Field v. Holland, 10 U. S. 6 Cranch, 8 (8 L. ed. 136); *Gordon v. Hobart*, 2 Story, 248; 6 L. R. A.

Chester v. Wheelwright, 15 Conn. 562; *Bosley v. Porter*, 4 J. J. Marsh. (Ky.) 621; *Burks v. Albert*, Id. 97; *Hammer v. Rochester*, 2 J. J. Marsh. 144; *Taylor v. Talbot*, Id. 49; *Hillyer v. Vaughan*, 1 J. J. Marsh. 583; *Sager v. Warley*, Rice, Eq. (S. C.) 28; *Heilbron v. Bissell*, 1 Bailey, Eq. (S. C.) 430; *Gregory v. Forrester*, 1 McCord, Ch. (S. C.) 318; *Smith v. Wood*, 1 N. J. Eq. 74; *Pattison v. Hall*, 9 Cow. 747; *Jones v. Kilgore*, 2 Rich. Eq. (S. C.) 68; *Faine v. Williams*, 10 Smedes & M. 113.

If there are separate demands, part of which are secured and part not secured, the application will be made on those not secured.

Langdon v. Bowen, 46 Vt. 512; *Trullinger v. Koford*, 7 Or. 228; *Camp v. Smith*, 16 N. Y. S. R. 933.

The law secures to a creditor the benefit of all the securities he has, and will so appropriate the sums realized as to secure the payment of both debts.

Small v. Older (Iowa), 10 N. W. Rep. 734; *Samborn v. Stark*, 31 Fed. Rep. 18; *Hanson v. Manley* (Iowa), 33 N. W. Rep. 357; *Mayor of Alexandria v. Patten*, 8 U. S. 4 Cranch, 317 (2 L. ed. 633); *U. S. v. January*, 11 U. S. 7 Cranch, 573 (3 L. ed. 443); *Shellbarger v. Binns*, 18 Kan. 345.

1 Sutherland on Damages, page 422, says: "If one debt be secured and another not secured, and a general payment is made, the general rule is that the court will apply it to the debt which is not secured—to the debt where the security is most precarious."

See *McDaniel v. Barnes*, 5 Bush, 183; *Thomas v. Kelsey*, 30 Barb. 268; *Blanton v. Rice*, 5 T. B. Mon. 253; *Field v. Holland*, 10 U. S. 6 Cranch, 8 (8 L. ed. 136); *Burks v. Albert*, 4 J. J. Marsh. 97; *Hammer v. Rochester* 4 J. J. Marsh. 144; *Foster v. McGraw*, 64 Pa. 464; *Pattison v. Hull*, 9 Cow. 747; *Dove v. Morewood*, 10 Barb. 183; *Johnson's App.* 37 Pa. 268; *Langdon v. Bowen*, 46 Vt. 512; *Sprinkle v. Martin*, 72 N. C. 92.

Messrs. Applegate & Brown, for appellees:

Appellant acquired no lien upon the property prior to the date upon which its judgment was rendered, viz.: February 16, 1887.

Higley v. Millard, 45 Iowa, 586.

There had been paid then prior to the rendition of judgment \$1,540.50. At the time of the payment of the \$1,540.50 appellant had no lien upon the property and hence no security for the payment of any part of the \$5,000 indebtedness; and the rule that where neither the debtor

nor creditor has made application of payments, a court of equity will apply them to those debts for which the security is most precarious, has no application to the case at bar.

See *Small v. Older* (Iowa), 10 N.W. Rep. 784.

Payments made on an open account are presumably to be applied to the extinguishment of the items thereof in the order of their date.

Story, Eq. Jur. § 459 f; *Allen v. Brown*, 39 Iowa, 380 and cases there cited; 2 Parsons, Notes and Bills, p. 227 and note (h); *Mackey v. Fullerton*, 7 Colo. 556; *Truscott v. King*, 6 N.Y. 147; Munger, Application of Payments, p. 102, and cases cited.

The above rule as to the application of payments will govern without reference to the fact that one item may be better secured than another when the particular parts have been blended together in one common account, and have no longer any separate existence and the balance only is considered as due.

Munger, Application of Payments, p. 107; *Harrison v. Johnston*, 27 Ala. 445. See also *Willis v. McIntire*, 70 Tex. 84; *Crompton v. Pratt*, 105 Mass. 255; *Miller v. Miller*, 10 Shep. 22; *Cushing v. Wyman*, 44 Me. 121; *Quigley v. Duffey*, 53 Iowa, 610; *Hollister v. Davis*, 54 Pa. 508.

Mr. Sutherland in his work on Damages, vol. 1, p. 420, says: "It has been held that this rule should apply without reference to the fact that one item may be better secured than another, since the particular parts, being blended together in one common account, have no separate existence; the balance only is considered as due; and a payment made on such account, without a more specific appropriation, is treated by a majority of the cases as applied to the earliest items, although for some of these the creditor has a lien or other security and has none for the others."

Worthley v. Emerson, 116 Mass. 374; *Truscott v. King*, 6 N.Y. 147; *Moore v. Gray*, 22 La. Ann. 289; *Cushing v. Wyman*, 44 Me. 121. See also *Crompton v. Pratt*, 105 Mass. 255.

Code, § 2000, authorizes a change of homestead.

Furman v. Dewell, 35 Iowa, 170.

A change can be made by the building of a new house and improvements upon other land of the owner of the old homestead, and his right to such change is effectually guarded by the law. The law will secure to him a reasonable time in which to make the change.

Congell v. Warrington, 66 Iowa, 666; *Robb v. McBride*, 28 Iowa, 386; *Benham v. Chamberlain*, 39 Iowa, 358.

Granger, J., delivered the opinion of the court:

On the 16th of February, 1887, the plaintiff obtained a judgment against the defendant for \$3,542.83 on an unpaid balance of a promissory note for \$5,000, dated June 16, 1886. The consideration for the \$5,000 note was made up in part of prior loans, the earliest of which was \$1,500, loaned May 5, 1883. Prior to the entry of the judgment, there had been paid on the \$5,000 note \$1,833.96, but no application of such payments had been made by indorsements. The defendant for years prior to May 5, 1883, had owned and occupied a homestead in Guthrie County, and during the

season of 1882 and 1883 he built his present homestead, and moved into it in October of the latter year, from the old homestead.

1. The case deals, to some extent, with the question as to when the homestead character attached to the new house, the point of contention being as to its having that character on May 5, 1883, when the \$1,500 was loaned. The record discloses that the house and barn were inclosed in 1882, that some stock was kept on the place, and other facts on which appellee bases the homestead character; but to our minds there was not, prior to October, 1883, a change of homesteads. It is true, the premises were being improved with a design to use them for a homestead; but something more than the improvement of property with such a design is necessary to give it the homestead character. The occupancy disclosed in the record is entirely consistent, or might be, with a purpose to retain the old homestead, and merely improve the premises in question. The facts do not bring the case within any of the cases defining actual occupancy. There must be actual occupancy, to give the homestead character. *Givans v. Dewey*, 47 Iowa, 414; *Eaton v. Robinson*, 23 Iowa, 208; *Charles v. Lamberson*, 1 Iowa, 435.

2. With the fact established as to when the homestead character attached, it is a question of the liability of the homestead for any part of the judgment. This branch of the case incidentally involves a question of the application of payments. There is no claim that any part of the debt represented in the judgment was contracted prior to the occupancy of the homestead, except the \$1,500 loaned May 5, 1883; and, conceding that without any payments the homestead would be liable for as much of the judgment as represented the indebtedness contracted before the homestead character attached, the question is presented as to how the payments, aggregating \$1,833.96, made before judgment, shall be applied. If it is to be applied to the part of the note representing the \$1,500 of May 5, then the judgment represents no indebtedness contracted before the property in question became a homestead; but if, as claimed, it should be applied to the other part of the indebtedness represented by the note, then the judgment would represent an indebtedness contracted before the property was a homestead. It is conceded that no special application of payments was directed by the defendant, nor was any such application made by the plaintiff. The money was received and passed to the credit of the defendant without even indorsement on the note. The case presents the question of what application the law will make, under the circumstances of the case. The authorities furnish different rules as applicable to cases controlled by different circumstances. It is contended by appellee that the rule governing payments on an open, running account should apply,—which is that the payments are to be applied to the extinguishment of the items in the order of their dates; and the rule is fully supported by authority. *Field v. Holland*, 10 U. S. 6 Cranch, 8 [8 L. ed. 186]; *Schuelenburg v. Martin*, 2 Fed. Rep. 747; *Pardee v. Markle* (Pa.) 5 Atl. Rep. 36; *Mack v. Adler*, 23 Fed. Rep. 570; *Hersey v. Bennett* (Minn.) 9 N. W. Rep. 590;

Hannon v. Engelmann (Wis.) 5 N. W. Rep. 791.

In fact it is doubtful if any authority can be found contravening the proposed rule. We think, however, that the rule is not applicable to the case at bar, as, under the authorities cited, the rule is applicable only to open accounts; and, if there was ever a strictly open account between these parties to which the rule would apply, it had been settled by the note in question, after which the payments were made. The different transactions between the parties, giving rise to the different items of indebtedness which finally culminated in the note in question, were loans upon notes in such manner that we incline to the view that they were "distinct debts," rather than being items of an open account.

8. Viewing the items of indebtedness which made up the aggregate of the \$5,000 note, as above stated, we are led to the rule of the application of payment under that state of facts. If the items of indebtedness had continued as separately evidenced before the \$5,000 note was given, the defendant, in making the payments, had a right to elect on which it should apply. If he failed to do this, the plaintiff could make the application. If neither made the application, "then the law applies it according to its own notions of justice." *Whiting v. Eichelberger*, 16 Iowa, 422.

This rule has abundant support in authorities before cited, as well as many others. Neither the quite elaborate briefs of counsel on this branch of the case, nor our own research, have brought to our notice a case in which, after distinct debts are so united as to be evidenced by a single note, an application of payments not indorsed on the note was sought as to a distinct part of the debt; and as the interests of both parties in this case lead to the discussion of the question of such particular application rather than to an application generally, and governed somewhat by the fact that on the question of general application, without any reference to particular parts of the debt, we desire to be better informed by arguments and briefs directed to that question, we dispose of the case on the line of arguments presented, and in so doing we leave undecided the question if the application should be general.

A case in which some light is given, where the application is made by indorsement, is *Sheldon v. Bennett* (Mich.), 7 N. W. Rep. 223. Appellant's view of the case is that, inasmuch as neither party has directed the application, it is to be made under the rules of law applicable to such failure; and, as fixing the duty of the court under that rule, it claims that the application should be so made as to preserve to plaintiff its security, and best to enable it to collect its entire debt; and to that end, if any part of the debt is unsecured, the payment should be applied to the unsecured part, and, if all is secured, then the payment should be applied to the part where the security is most precarious. The rule, with a slight modification, has strong support on authority. *Leeds v. Gifford* (N. J.) 5 Atl. Rep. 795; *Hersey v. Bennett* (Minn.) 9 N. W. Rep. 590; *Coons v. Tome*, 9 Fed. Rep. 632; *Schulenburg v. Martin*, 3 Fed. Rep. 747; *Sanborn v. Stark*, 31 Fed. Rep. 18; 6 L. R. A.

Field v. Holland, 10 U. S. 6 Cranch, 8 [8 L. ed. 188].

Quite an extended collection of authorities is to be found in notes to *Nichols v. Knowles*, 17 Fed. Rep. 494, many of which support the rule. The modification of the rule as claimed is that it is not arbitrary, but is to be applied only under equitable considerations applicable to particular cases. It may be conceded as the law that, in the absence of facts showing equitable demands otherwise, the application of payments under the law should be with a view to preserve to the creditor the full benefit of his security; but the rule goes no further. Most of the cases, in making mention of the rule, use some modifying term; as "the rule generally is," or "ordinarily is," or, unless there are "controlling equities," or that "the question rests largely in the discretion of the chancellor."

In some cases the rule is stated without the qualification, but it is believed that it is because of the peculiar facts of the case rendering it unnecessary. We think it may be stated on authority that the rule with the modification is universal.

The particular facts upon which appellant relies for the benefit of the rule in his behalf is that, if the \$1,500 was loaned before the occupancy of the homestead, the homestead is not exempt, but stands as a security for its payment; and that, as to the payments, the law will apply them to the later items of debt, with a view to preserve the homestead as security for the balance. The only security claimed in the case is the alleged liability of the homestead on the ground of its liability for the debt because of occupancy after the debt was contracted.

Counsel have given considerable attention to the term "security." Appellant urges that the homestead stands as security for a part of the debt, because the law authorizes it to be sold for antecedent debts. Counsel quote from *Rapalje & L. Law Dict.*: "A security is something which makes the enjoyment or enforcement of a right more secure or certain."

... A security on property is where a right over property exists, by virtue of which the enforcement of a liability or promise is facilitated, or made more certain."

Then, as applying the definition, the argument states: "The right to have the homestead sold for antecedent debts is expressly given by statute."

The statement is of doubtful accuracy, if the meaning is that the homestead, merely as such, where liable for debts only because previously contracted, bears the same relation to the debt as mortgaged or pledged property does to the debt it secures; or, in other words, if the meaning is that the law makes any specific pledge of the homestead a security. The law exempting the homestead is an exception to the general law as to the liability of property, and the provision making it liable for certain debts is but a limitation on the exception, and leaves it, in such cases, under the general law; and hence we say that a homestead, when liable, stands no more as security than any other property liable to execution, and not specifically pledged. But we think the definition comes short of the purpose intended. The language of the definition is

that it makes the "enforcement" or "promise" more certain. More certain than what? We are not informed, and our inference is that the security makes the enforcement or promise more certain than the mere personal obligation of the debtor or promisor, whatever may be his possessions or financial standing. It may be a pledge of property, or an additional personal obligation; but it means more than a mere promise of the debtor with property liable to general execution. It is true that the greater the possessions of the promisor the more certain the enforcement of his promise, and in a sense the creditor is more secure; but such is not the security known and expressed in the law. "Security," as applied to commercial transactions, is less comprehensive than when generally used, and has a known legal significance. We are clearly of the opinion that no part of the debt was secured within the meaning of the law with reference to the application of payments.

It remains to be determined if the payments of the \$1,833.96 shall be so applied as to cancel the \$1,600 indebtedness that might otherwise be a lien on the homestead of the defendant. The case under our finding is one where there is an entire unsecured claim, for a part of which the homestead might be liable, and payments are made without application by either party; and the query is, Will the law so apply it as to subserve the interest of the creditor, and exhaust the homestead of the debtor in so doing, or will it so make the application that the part which could be made a lien on the homestead shall be paid, and leave the debtor his homestead? Were we to adopt the former, we should go beyond the spirit or reasoning of any case which has come to our notice, and to our minds contravene the true spirit and policy of the laws of the State on the question of homestead rights.

This court, in consonance with the legislative purpose, has at all times adopted a liberal construction of the law for the preservation of the homesteads of debtors, both from considerations of individual and public good. The spirit of our Homestead Law goes further than to subserve the design or purpose of the debtor and owner of the homestead. It looks to the protection of the family of which the debtor

is the head, and will not allow him, except by the concurrence of his wife, to make a valid pledge or disposition of it. The law undertakes to guard it for the family. It is certainly the spirit and purpose of the law to guard it against indebtedness, except for debts contracted before its purchase; and if it may be said that both the creditor and the debtor have had the opportunity, in this case, to make the application, and each has failed, will not the law, in applying the equitable rule, look beyond the act of the debtor, and save to the family its home? It is to be kept in mind that the wife is a party against whom this relief is sought, and has in no manner relinquished her homestead privilege. In view of the authorities cited, and of our own laws on the subject of homestead protection, we think the application of the payments should be such as to preserve the homestead right.

Under the head of "The Justice of the Case," appellant calls attention to the character of the homestead in this case; it being stated that it contains about forty acres, with buildings costing about \$10,000, with terraces, drives, etc., and that the homestead was built in part with the money obtained from plaintiff. It has seemed to be the policy of legislation in this State not to place restrictions on the value of homesteads. We have no greater discretion in the application of the law in a case like this than in a case where the homestead as to value would be at the other extreme. In either case the rule as applicable to the facts is the same. Again, while the statement as to the cost may be true, it is doubtful, in view of the record, if, after discharging the \$4,000 incumbrance, there remains a homestead of extravagant value. The house seems to have been built when the defendant was thought to be solvent and prosperous in business. There is no evidence of fraud or design to cheat in making the expenditures. The former homestead, after its abandonment, was exhausted by his creditors. It is conceded that the defendant is insolvent, and that his other property has been applied to the payment of his debts. To us it does not seem a greater hardship to the plaintiff than the other creditors.

Affirmed.

MICHIGAN SUPREME COURT.

Walter ROBINSON, *Appt.*,
v.
CONTINENTAL INSURANCE CO.

(.....Mich.....)

1. A stipulation in an insurance policy that the Company shall not be liable for any loss or damage which may be incurred while any promissory note given for the premium remains past due and unpaid is not invalid.
2. The effect of a condition in an insurance policy that no liability shall exist while any part of a premium note is due and unpaid cannot be

avoided by an oral statement of the agent that the insured would be notified when to pay, and by a custom of the Company to give notice when and where to pay, where, by the terms of the policy itself, the note was payable at the Company's offices, or to any authorized person having it in his possession for collection.

(October 18, 1892)

ERROR to the Circuit Court for St. Clair County to review a judgment entered upon a verdict directed for defendant in an action to recover upon a policy of fire insurance.

Affirmed.

The facts are fully stated in the opinion.
Messrs. Atkinson, Vance & Wolcott,
for plaintiff, appellant:

NOTE.—See *Fowler v. Metropolitan L. Ins. Co.*
(N. Y.) 5 L. R. A. 805, note
6 L. R. A.

The absolute payment of the premium for this policy was proved in this case and entitled the plaintiff to recover. The note was agreed to be secured as payment.

Mich. Mut. L. Ins. Co. v. Bowes, 42 Mich. 19; *Gardner v. Gorham*, 1 Doug. Mich. 507; *Breitung v. Lindauer*, 37 Mich. 217; *Vary v. Shea*, 36 Mich. 388; *Holchin v. Secor*, 8 Mich. 494; *Burchard v. Frazer*, 23 Mich. 224.

An agent may take a note in payment of the premium, and the failure to meet such note at maturity will not make the suspension clause operative in the policy.

Berryman, Dig. Insurance, 1022, § 48; *Southern Mut. Ins. Co. v. Best*, 8 Ky. Law Rep. 535.

Under the custom shown in this case, and there being no place of payment definitely fixed, the plaintiff was not in default by not paying until he received notice where his notes would be.

Berryman, Dig. Insurance, 1023, §§ 52, 54, 1025, § 56; *Blackerby v. Continental Ins. Co.* 83 Ky. 574; *Continental F. Ins. Co. v. Adams*, 8 Ky. Law Rep. 269; *Mich. Mut. L. Ins. Co. v. Bower*, 42 Mich. 19; *Tabor v. Mich. Mut. L. Ins. Co.* 44 Mich. 324; *Tutt v. Covenant Mut. L. Ins. Co.* 19 Mo. App. 677. See *Western H. & C. Ins. Co. v. Scheidle*, 18 Neb. 495; *Phenix Ins. Co. v. Lansing*, 15 Neb. 494.

Plaintiff was entitled to show defendant's custom, and the representations made by Lutz as to when and how payment would be demanded.

Berryman, Dig. Insurance, 1021, §§ 46, 47, 1034, § 75; *Dean v. Aetna L. Ins. Co.* 62 N. Y. 642, 2 Hun. 358; *Bodine v. Exchange F. Ins. Co.* 51 N. Y. 117; *Church v. La Fayette F. Ins. Co.* 66 N. Y. 232; *Mound City Mut. L. Ins. Co. v. Twining*, 19 Kan. 349; *Nat. Mut. Ben. Assn. v. Jones*, 84 Ky. 110; *Southern Mut. Ins. Co. v. Best*, 8 Ky. Law Rep. 535.

Mr. P. H. Phillips, for defendant, appellee:

By the terms of both policy and note there was no liability on the part of the company.

McIntyre v. Mich. State Ins. Co. 52 Mich. 188.

The contract between the parties was completed by the delivery of the policy; and even if the agent made the statements claimed by the plaintiff, the insured must be held to a knowledge of the conditions of the policy.

Van Buren v. St. Joseph Co. Village F. Ins. Co. 23 Mich. 398; *Cleaver v. Traders Ins. Co.* 8 West. Rep. 815, 65 Mich. 527.

The holder of the policy is estopped by accepting the policy from setting up or relying upon powers in the agent in opposition to limitations and restrictions in the policy.

Hartford F. Ins. Co. v. Davenport, 37 Mich. 609; *Cleaver v. Traders Ins. Co. supra*; *Merserau v. Phenix Mut. L. Ins. Co.* 66 N. Y. 274.

The plaintiff made an express contract and he is bound by its conditions. Custom on the part of the defendant to notify its patrons when and where to pay their notes and the reliance of the assured upon having such notice is no excuse for nonpayment.

Thompson v. Knickerbocker L. Ins. Co. 104 U. S. 252 (26 L. ed. 765); *Union Mut. L. Ins. Co. v. Mowry*, 96 U. S. 544 (24 L. ed. 674). See also *Williams v. Albany City Ins. Co.* 19 Mich. 451; *Hartford F. Ins. Co. v. Davenport*, 37 Mich. 609; *American Ins. Co. v. Stoy*, 41 Mich. 385; *McIntyre v. Mich. State Ins. Co.* 52 Mich. 188.

6 L. R. A.

Long, J., delivered the opinion of the court:

This action is brought to recover for a loss by fire of property insured under a policy issued by defendant Company. The policy was issued on the 3d day of August, 1885, and was to continue in force until July 27, 1888, being three years from the date of the approval of the written application therefor (signed by the plaintiff) by the officers of the Company at their office in Chicago. The loss occurred on October 7, 1886. The court below directed the verdict for the defendant. Plaintiff brings error. The following condition appears upon the face of the policy of insurance: "But it is expressly agreed that this Company shall not be liable for any loss or damage that may occur to the property herein mentioned while any promissory note or obligation, or part thereof, given for the premium, remains past due and unpaid."

It appeared upon the trial in the court below that the application for insurance was made to a solicitor of the Company, and at the time of the application a note for the sum of \$8.60 was executed by the plaintiff, payable on February 1, 1886, in part payment of the premium, in case the risk was accepted. The policy was afterwards made and delivered to the plaintiff, and at the time the fire occurred the note had not been paid. It was past due from February 1, 1886. On March 30, 1886, this note had been sent by the defendant company to the First National Bank of Port Huron, Mich., for collection. On October 9, 1886, two days after the fire, the plaintiff called at the bank, paid and took up the note, and the proceeds of the note were sent by the bank to the defendant at Chicago. Immediately after the defendant became advised of the fact that the note had remained unpaid until after the fire occurred, it returned the money to the plaintiff, who admits having received it. Defendant Company denies all liability.

The court below, we think, was correct in holding that no recovery could be had. The case falls within the ruling of this court in *McIntyre v. Mich. State Ins. Co.*, 52 Mich. 188. The stipulation was one which the Company had a right to make. It was inserted in the policy, and the language of it was also embodied in the note. It is not claimed that there was any fraud, misrepresentation or concealment in procuring the policy to be taken with this clause inserted in the policy. The plaintiff was aware that the policy and note contained this clause: It is contended, however, that the terms of the contract were changed by the oral statement of Mr. Lutz, defendant's agent, that plaintiff would be notified when to pay the note, and by the custom of defendant to notify its patrons when and where to pay their notes, and that the note itself was a payment of the premium. By the terms of the policy, it is evident that the note was not given or received as payment of the premium. The policy was to remain valid and in force up to the time the note became due, and if the note was not then paid the policy was to lapse. This is the plain meaning of the terms of the policy. There is no force in the other suggestions. By the terms of the policy, the note was payable at the office of the Company in Chicago, or at its offices in New York, or to any authorized person having such

note in possession for collection. The plaintiff made no effort to pay it until after the fire occurred, though it had been in the bank there from the March previous. It is apparent that, if he had been as diligent in search for his note before the fire as after, he would have had no difficulty in finding it and making payment in time to have kept his policy alive. As it is, he is bound by the contract which he has made.

The judgment of the court below must be affirmed, with costs.

The other Justices concurred.

DETROIT HOME AND DAY SCHOOL, Appt.,

CITY OF DETROIT *et al.*

(....Mich....)

A corporation organized under How. Stat. chap. 138, providing for the incorporation of institutions of learning, the only corporate purpose mentioned in its charter being "to establish, maintain and conduct a seminary of learning," and its only actual business having been the maintenance of such a seminary with the usual studies pursued in such institutions, is a "scientific institution" within the meaning of Act 1855, p. 176, § 3, subd. 2, exempting property of "library, benevolent, charitable and scientific institutions" from taxation, although the corporation has a capital stock, the holders of which own its property, and its expenses are met by tuition charges; and the fact that the corporation has unlawfully declared a dividend among its stockholders will not remove the exemption.

(Morris, J., *dissenta.*)

(October 12, 1889.)

APPEAL by plaintiff from a decree of the Circuit Court for Wayne County in favor of defendants in a suit against the City of Detroit and the receiver of taxes to have certain real estate in said City declared to be exempt from taxation. *Reversed.*

The facts are fully stated in the opinion and in the dissenting opinion.

Mr. Alfred Russell, for complainant, appellant:

This school corporation, incorporated under the Act of 1855 (1 How. Stat. p. 1126, § 4373), and which owns its lands and buildings in fee, and which is in possession and use of the same for a seminary of learning, occupies the same for the purposes for which it is incorporated, *i. e.*, for a seminary of learning, and is exempt from taxation.

Pierce v. Cambridge, 2 Cush. 611; *Wesleyan Academy v. Wilbraham*, 99 Mass. 599; *Cooley*, Taxn. p. 150; *Sisters of Charity v. Detroit*, 9 Mich. 94; *Chegaray v. New York*, 18 N. Y. 225; *Detroit Y. M. Society v. Detroit*, 3 Mich. 172.

The court will take judicial notice that from 1835 till now such schools have not been taxed in this State.

Brown v. Piper, 91 U. S. 37, 42 (23 L. ed. 200, 201).

Neither tuition fees nor surplus income destroy the educational character and purposes of the complainant School.

See *Sisters of Charity v. Detroit*, *supra*

6 L. R. A.

Mr. John W. McGrath, City Counsellor, for defendants, appellees:

Prima facie the tax is legal, and the burden is on complainant to show that it comes within the exemption.

Ill. Cent. R. Co. v. People, 6 West. Rep. 720, 119 Ill. 137.

All exemptions are to be strictly construed. They embrace only what is within their terms. *Cooley*, Taxn. p. 146, and *note 1*; *Lefevre v. Detroit*, 2 Mich. 586; *Detroit Y. M. Society v. Detroit*, 3 Mich. 172.

No property is beyond the reach of the taxing power of the State, unless designedly put beyond it by an unequivocal act of the sovereign power.

Robertson v. State Land Office Comr. 44 Mich. 274; *Vicksburg, S. & P. R. Co. v. Dennis*, 116 U. S. 665 (29 L. ed. 770); *Detroit Y. M. Society v. Detroit*, *supra*; *Cincinnati College v. State*, 19 Ohio, 110.

The omission of the taxing officers to assess in previous years cannot control the duty imposed by law upon their successors, or the legal construction of the Statute under which the exemption is claimed.

Vicksburg, S. & P. R. Co. v. Dennis, 116 U. S. 665 (29 L. ed. 770). See *State v. Ross*, 24 N. J. L. 497-504; *Wyman v. St. Louis*, 17 Mo. 385; *Chegaray v. New York*, 18 N. Y. 220.

An academy of learning, whose chief source of maintenance is tuition fees, is not exempt. *Philadelphia's App.* (Pa.) 15 Atl. Rep. 683.

A building owned by a benevolent society and leased for profit is taxable, although built with a fund which was exempt, and into which the rents are paid.

Fort Des Moines Lodge, I. O. O. F. v. Polk Co. 56 Iowa, 34; *Massenburg v. Grand Lodge F. & A. M.* (Ga.) 7 S. E. Rep. 636. See also *Connecticut S. C. M. Assn. v. East Lyme*, 2 New Eng. Rep. 915, 54 Conn. 152.

Campbell, J., delivered the opinion of the court:

The only question in this case is whether the corporation complainant is taxable for its realty in the City of Detroit, in reference to the tax law, which provides for exemption from taxation of the personal property of "library, benevolent, charitable and scientific institutions incorporated under the laws of this State, and such real estate as shall be occupied by them for the purposes for which they were incorporated." Laws 1855, p. 176, § 3, subd. 2.

This corporation was organized under an Act to provide for the incorporation of institutions of learning, approved February 9, 1855 (How. Stat. chap. 138), and subsequently amended in some particulars. The only corporate purpose named in its charter is "to establish, maintain and conduct a seminary of learning" in Detroit. Its only actual business has been the maintenance of such a seminary, with the usual studies pursued in such institutions, and its real estate is all occupied by the school buildings. Its expenses are met by tuition charges, and those have been exclusively used for its maintenance, except that one year, in 1886, a dividend of 3 per cent was paid to the stockholders.

Unless the term "scientific institutions" includes educational corporations, there is no statute exempting from taxation any schools,

unless those in the hands of the public authorities, and those are only exempt by implication; and, if it does not include the seminaries of learning, there is practically nothing exempted, for there are no other scientific institutions, properly so called. But it is a matter of common knowledge that all general educational establishments have universally been known as "scientific institutions," and fall naturally and directly within it. A "scientific institution," under the language of all civilized countries, means an institution for the advancement or promotion of knowledge, which is the English rendering of "science."

We need not, in our history, go beyond the Ordinance of 1787, which declares that "religion, morality and knowledge being necessary to good government and the happiness of mankind, schools and the means of education shall forever be encouraged." Exemption from taxation is the only form of encouragement that our laws provide,—that they have always provided; and they have not required tuition to be free, even in our public institutions, most, if not all, of which, except in favored circumstances, derive considerable revenue from pupils. The advantage of multiplying the facilities of learning has been rightly regarded as worth to any decent community very much more than can be counted in money. The only condition imposed on the exemption is that the land exempted shall be "occupied for the purposes for which they were incorporated." That condition is fulfilled in this case, and, under repeated decisions of this court, the line is very easily drawn. *Detroit Y. M. Society v. Detroit*, 8 Mich. 172; *Sisters of Charity v. Detroit*, 9 Mich. 94.

It is worthy of remark that, after the court equally divided in the last case upon the question whether property held by one corporation under lease from another could be regarded as belonging to the lessee, the statute was amended to its present form by making an exemption of the whole estate actually occupied for the purposes declared in the law, although the owners of the fee might collect rent. The laws for the incorporation of libraries, all, so far as the statute books show, contemplate associations for the benefit of the stockholders alone; and while dividends are not usually, if at all, allowed directly on the stock, the funds all go to the augmentation of the private property of the shareholders. Yet there is no exception to library exemptions. In all these cases, the Legislature, by confining the exemption to corporations, have, by the incorporating Acts, thrown such safeguards as they deemed necessary around the management of the business, so as to prevent its being abused into a mere scheme for money getting. If any corporation misuses its funds, the remedy is not by the action of assessing officers, who have no authority to punish it by taking away its exemption; but by direct proceedings to restrain and punish any corporate abuses. If it is true that the dividend made was not lawfully made, the recipients can be made to refund it, and anyone legally at fault can be made responsible according to law. But the assessment of taxes on exempt property is not a legal remedy. Where language is so plain as to convey a clear and intelligible meaning, we have no right to go be-

yond it, and impose another meaning. The language of the Legislature in exempting from taxation is as much entitled to obedience as that imposing taxation. This law has been in force for a very long time, and has never been amended, except to enlarge the scope of the exemption. Its purpose, as expressed, does not appear ambiguous, and in the continued application of it has not impressed any Legislature as too liberal. When it is so regarded, it will have to be changed in form to narrow it.

The taxation was in violation of the exemption in the Statute, and the court below erred in sustaining it, and *the decree should be reversed, and relief granted, with costs of both courts.*

Sherwood, Ch. J., and Champlin and Long, JJ., concurred with Campbell, J.

Morse, J., dissenting:

The complainant files its bill in the Circuit Court for the County of Wayne, in chancery, praying that certain real estate held by it in the City of Detroit may be declared exempt from taxation, and that the defendants may be enjoined by preliminary, and also perpetual, injunction from advertising or selling said real estate for taxes levied upon the same in 1888, or from attempting in any way to collect the same. The bill alleges that the complainant is a scientific association incorporated under an Act of the Legislature of this State, entitled "An Act to Provide for the Incorporation of Institutions of Learning," approved February 9, 1885, and being section 4375 of Howell's Statutes.

The course of studies and discipline in the complainant's institution is such as is usual in academies, and comprises the seven sciences, grammar, logic, rhetoric, arithmetic, geometry, music and astronomy. The complainant is subject to the visitation and examination of the superintendent of public instruction, and of a board of visitors appointed by him. The complainant is the owner in fee of certain real estate in the City of Detroit, with school buildings thereon, and occupies the same for the purposes for which it was incorporated.

It is further averred that, "by Act No. 301 of the Session Laws of this State of 1887, said real estate is exempt from taxation. Said law is a re-enactment of the Laws of 1871, 1857, 1846, 1835 and 1827 in that regard." The bill alleges that the practical construction of said laws in this State, during its entire existence, has been that it includes institutions like this of complainant; and this institution has been exempted by the board of assessors, and by the common council of Detroit, from payment of taxes upon said real estate for every year since the complainant owned and occupied the same up to the year 1888. The complainant shows, upon information and belief, that other like institutions in the State have always uniformly been held exempt from taxation, as respects their real and personal property, to wit: The Seventh-Day Baptist School at Battle Creek, the Michigan Female College at Kalamazoo, the German-American Seminary at Detroit, the Detroit Female Seminary, Olivet College, Albion College and Kalamazoo College.

It avers that its real estate has been assessed for the year 1888 as the property and in the

name of D. Whitney, Jr., who has no interest whatever in said real estate. The complainant duly protested against such assessment, and appealed to the Common Council of the City of Detroit, stating that it was exempt by its ownership and occupancy for said purpose for which complainant was incorporated. The common council confirmed said assessment, and rejected said appeal. Thereupon said real estate has been ratably taxed, upon the tax rules, for the various taxes, in the sum total of \$406.07; and the defendant Karrer, receiver of taxes, has duly published the same for payment. The first day of August, 1888, has passed, and said receiver is now charged with the collection of that amount, and the same is a lien and a cloud upon the said real estate of the complainant; and further alleges that the defendants threaten to sell said real estate for the payment of said taxes. The defendants answered. They deny: *first*, that the complainant is a scientific institution in the sense in which the word is used in the Statute relating to exemptions, or in any other sense whatever; *second*, that the course of study and discipline is such as is usual in academies,—deny that any instruction is given in English grammar or logic; *third*, that said property is exempt from taxation under Act 301 of the Session Laws of 1887. They neither admit nor deny that the institution has heretofore been exempted from taxation. They admit that complainant has filed articles of association in the form prescribed by the Act referred to in complainant's bill; that the complainant is the owner in fee of the real estate taxed, but deny that it is occupied for the purposes for which complainant was incorporated. They admit its assessment, the rejection of the appeal, and confirmation of the assessment by the common council, and that the real estate is taxed as averred in the bill, and for the amount therein stated, and that they propose to collect it, if possible.

They further aver that the complainant's institution is not in any sense a free school or academy; that it was not established as a free school or academy, or as a benevolent school or academy, nor is it at present conducted or carried on as a benevolent school or academy; that said School or academy was not established, nor is it sustained, in whole or in part, by contributions or donations or endowments; that it is a purely commercial enterprise, conceived, established and operated for pecuniary results and gain solely; that particular attention is given in said School to French, German, music, drawing, painting and dancing; that the fees are large for board and tuition; that they cover, and are intended to cover, the entire expense of the maintenance of the School, and are fixed so as, in addition, to afford a profit to the stockholders; "that the persons establishing said School are its stockholders; that the articles of association filed by complainant show but \$5,000 worth of stock subscribed, and but one half of that sum paid in, while the cost of said building, and the real estate upon which it stands, exceeded \$84,000; that the trustees of complainant bear the same relation to complainant corporation that a board of directors of an ordinary corporation bear to such corporation; that the Act under which complain-

ant purports to be incorporated provides that the persons who have subscribed the articles of association, 'with such other persons as may from time to time become donors to such institution,' shall be a body corporate, etc.; but the articles of association filed by complainant provide that trustees to succeed those named in the articles" shall be chosen by the subscribers heretofore named, or by such persons as may become owners of the stock thus subscribed, and by such other persons as may become corporators, in accordance with the by-laws hereafter to be adopted, either by subscription to the stock of said institution, or by donations to the same, or otherwise. They aver that the institutions in this State mentioned in the bill of complaint as being exempted from taxation, such as Albion College and Kalamazoo College, are each and every of them institutions established and maintained by religious denominations, subscriptions, endowments, bequests and contributions; that they have no stockholders or trustees who are personally interested, directly or indirectly, in the profits or revenues of the institution with which he or she is connected; that the fees charged by said institutions, and by each and every of them, are but nominal, and do not, and are not intended to, pay the expenses of instruction, even; that said institutions are, each and every of them, free institutions, and are practically benevolent institutions; that said institutions are the property of the denominations establishing them, and such denominations have the right to prevent their sale or diversion, but the stockholders of complainant are the only persons interested therein. The patrons have no interest, except that which grows out of contract relations, and the stockholders may sell, transfer or divert any of the property owned by complainant; in other words, the stockholders are not managers merely, but are sole owners.

These defendants submit that it is not the intention of the Statute to exempt from taxation institutions which, although educational, are purely commercial in their purpose; that the complainant has no greater right to claim an exemption than a business college, or school of telegraphy, or school of stenography, which is established as a purely commercial enterprise; that complainant is not such an institution as is contemplated by provisions of the Act under which it is claimed that complainant is incorporated, and the complainant does not come within the intent or purview of said Act, and said complainant is not entitled to exercise corporate rights thereunder, or by virtue of the filing of the articles of association aforesaid.

It was stipulated in the court below that the cause might be heard on bill, answer and replication and the following statement of facts: (1) The articles of incorporation annexed (to the bill of exceptions) are copies of the original, duly filed in the office of the Secretary of State. (2) The complainant possesses certain property, which is taxed as set forth in the bill, and built brick buildings on said land at a cost of over \$80,000, and uses said property for a seminary of learning. (3) The said school is operated for two terms in each year, to wit, the September term, covering _____ weeks; and the February term, covering _____ weeks. That the fees for tuition are

as follows: tuition in the kindergarten department, \$25 per term; tuition in the primary department, \$25 per term; tuition in the preparatory department, \$40 per term; tuition in the collegiate department, \$50 per term; music, \$50 per term. In the home department the fees for board and tuition are \$250 per term. That the course of study in said school is as follows: in the primary and preparatory course, arithmetic, geography, language lessons, reading, spelling, penmanship, English composition, history of the United States; in the other courses, algebra, geometry, trigonometry, physiology, botany, physics, astronomy, chemistry, French, German, Latin, Greek, rhetoric, English literature, French, Roman and Grecian history, music, dancing, drawing, painting and special topics in American history. (4) The amount of stock issued by said corporation is \$34,500, which is held by seventeen stockholders, one of whom owns \$200 worth, two of whom hold \$500 worth each, one who holds \$1,000 worth, one who holds \$1,800 worth, four who own \$1,500 worth each, three who hold \$2,500 worth each, two who own \$3,000 worth each, one who holds \$4,000 worth, and one who owns \$7,500 worth; that no other persons have taken stock or donated any moneys to said institution, or have any pecuniary interest in the same. (5) That for the academic year 1886 and 1887 the receipts of complainant from fees aggregated the sum of \$15,622.07, and the expenses of said year aggregated the sum of \$14,223.09. (6) That said school is not a free or benevolent school, but is sustained by tuition and board fees, and any excess over cost of maintenance is divided among the stockholders. (7) That said corporation has a code of by-laws, which provide: *first*, when the annual meeting shall be held; *second*, for the election of a president, vice-president, treasurer and secretary; *third*, that the above officers shall constitute the executive committee, who shall have the oversight of all the affairs of the corporation, call meetings, etc. That said corporation has no other by-laws. Upon such hearing, the bill of complaint was dismissed, with costs. The complainant appeals to this court.

Subdivision 2, § 8, Act 301, Pub. Acts 1887, provides that "the personal property of all posts of the Grand Army of the Republic, library, benevolent, charitable and scientific institutions incorporated under the laws of this State, and such real estate as shall be occupied by them for the purposes for which they were incorporated," shall be exempt from taxation. Pub. Acts 1887, p. 415.

By an examination of this Act, which is an amendment to section 8, Act No. 153, Sess. Laws 1885, being the general tax-law, it will be found that private educational institutions or schools, whether owned and managed by corporations or individuals, are not exempted from taxation by the laws of this State as such, and cannot claim exemption unless they can properly be classed as "library, benevolent, charitable or scientific institutions." See Pub. Acts 1887, pp. 414, 415; Pub. Acts 1885, Act No. 153, pp. 175, 210.

The complainant cannot claim that it is either a library, benevolent or charitable institution. There is no benevolence or charity

about it, or in its method of doing business. It is simply an enterprise entered into for gain, as a private person would open a school for profit or a livelihood. That the persons engaged therein—the stockholders—may lose money in some years on their venture does not alter at all the *status* and character of the enterprise. They simply take the chances of profit and loss as other-business men and corporations do.

If the complainant has any right to have its real estate, under the law, exempted from its share in the burdens of taxation, it must be as a scientific institution, and on no other ground. Outside of the fact that it purports to be incorporated, and has filed its articles of association under chapter 138 of Howell's Statutes, which relates to the incorporation of educational institutions and associations, such as colleges, seminaries, academies and other institutions of learning, it has no more claim to be classed as a scientific institution than has any private school established and taught for profit; and unless this incorporation, or pretended incorporation, makes it a scientific association in the sense of the Exemption Statute, it has no more claim or right to exemption from taxation than such private school. The complainant comes into a court of equity and asks relief upon the ground that it is so situated under the law that its property is exempt. The burden is upon it to show that it is a scientific institution in the eye of the Statute exempting the real estate of such institutions, and it must also show that such real estate is occupied for the purposes of a scientific institution. There is another chapter (How. Stat. chap. 144) which provides for the incorporation of associations for literary and scientific purposes; and the query at once arises, What is meant by the term "scientific institutions" as used in the Exemption Statute? Does it have reference solely to institutions incorporated under chapter 144, Id., pp. 1186-1188, or does it embrace the colleges, seminaries and other institutions of learning organized and existing under chapter 138, Id., pp. 1126-1129?

It is contended by the counsel for the complainant that this exemption of scientific institutions has existed in this State since 1827, while the associations (literary and scientific) authorized by chapter 144 were not provided for by any Statute until in 1865; that therefore the exemption could not have been intended to apply to them, but to incorporated institutions of learning, which are in fact scientific institutions where the sciences are taught. And it is also urged, in support of complainant's claim to exemption, that a similar exemption clause in Massachusetts has uniformly been construed by the courts of that State to include incorporated schools. If it be granted that colleges and schools properly incorporated under chapter 138, and existing and operating under said chapter, are exempt from taxation as scientific institutions, still, in my opinion, the complainant, on its showing, is not entitled to such exemption. Under a like exemption clause in Massachusetts, and the one referred to by the counsel for complainant, it was held by the supreme judicial court of that State that if the real estate sought to be exempted, in the shape of a farm, was carried on for profit, it

would not come within the Statute, and must bear its proper share of the burden of taxation, even if the profits of the farm went into the funds of the institution, which was conceded to be one having a benevolent as well as an educational object, it being designed and carried on for the benefit of poor students. *Wesleyan Academy v. Wilbraham*, 99 Mass. 599.

In no case that I can find has an institution, confessedly run for gain and profit, even for educational purposes, been held exempt from taxation under statutes similar to ours; nor is it right that it should be. "Taxation is an act of sovereignty, to be performed, so far as it conveniently can be, with justice and equity to all. Exemptions, no matter how meritorious, are of grace, and must be strictly construed." Cooley, Taxn, p. 146, note 1.

It will be noticed that the complainant, while pretending to organize and to become incorporated under chapter 188, does not, in its articles of association, comply with the terms of such chapter, and is not operating or using its property in conformity therewith. The fact that it has filed its articles of association under this chapter does not preclude the City of Detroit or the tax assessors from questioning the good faith or the legality of such incorporation. But, furthermore, in the present suit the complainant comes into a court of equity, and asserts that it is incorporated under such chapter 188, and that it is using its real estate for the purposes of such incorporation. This is denied by the answer, and therefore put in issue. Upon the affirmative of this issue depends the right of exemption which the complainant claims. It is said that no one but the people of the State, acting through the Attorney-General by *quo warranto*, can question the legality of complainant's incorporation; that the tax gatherer must treat it as a corporation *de facto*, and assess it accordingly. There are two answers to this claim: *first*, the assessor certainly has a right, even if the corporation was legally and properly incorporated under chapter 188, to inquire whether or not its real estate is being used for the purposes of its incorporation; and, *second*, when the complainant comes into court asserting its due and proper incorporation as the basis of its rights and relief asked, it must show such incorporation before it can demand such rights or relief, depending entirely upon such incorporation.

Corporations cannot exempt themselves or their property from taxation, or from any other liability, by organizing in form under a statute of incorporation which so exempts them, when it is evident, not only from the articles of association, but from the character of the business actually transacted, that the primary object of the organization and existence is the carrying on of a business wholly foreign to the Statute under which they were incorporated. See *Mohr v. Minnesota Elevator Co.* 40 Minn. 848, and *State v. Minnesota Thresher Mfg. Co.* 40 Minn. 218.

The Statute (chap. 188, How. Stat.) under which the complainant is ostensibly incorporated evidently was intended for the incorporation of those institutions of learning established mainly by donations, legacies and bequests, and not for the incorporation of

business enterprises for gain. And it will be seen by the first section (§ 4873, Id.) that it is not designed that the institution thus incorporated shall be a close corporation, whose stockholders shall be composed entirely of the original corporators, and such other persons as they may see fit to sell, give or bequeath stock to; but it expressly provides that the persons who have subscribed to said articles, with such other persons as may from time to time become donors to such institution, or, if such articles of association so declare, the trustees elected as herein provided shall be a body corporate, etc. But the articles of association filed by complainant provide that the trustees to succeed the trustees incorporating the institution shall be chosen by the original subscribers to the stock or by such persons as may become owners of the stock thus subscribed, and by such other persons as may become corporators in accordance with the by-laws hereafter to be adopted, either by subscription to the stock of said institution, or by donations to the same, or otherwise. And no by-laws have been adopted specifying how persons can become corporators, though the incorporation was in 1882; and the stipulation of facts shows that there have been no donations, bequests or legacies to the institution, but stock has been sold or taken, and the persons buying or taking the same are stockholders.

Section 4879, How. Stat. (§ 7, chap. 188), provides that the trustees shall, under the provisions of that Act, "apply all funds and property" belonging to the institution, "according to their best judgment, to the promotion of its objects and interests."

The stipulation of facts shows that the complainant "is not a free or benevolent school, but is sustained by tuition and board fees, and any excess over costs of maintenance is divided among the stockholders." This of itself precludes donations, bequests or legacies by charitable persons; and it is also stipulated that for the academic year 1886 and 1887 there was an excess, which was divided among the stockholders; and it cannot be successfully maintained that the division of the profits of the institution among its stockholders is "applying the funds and property" belonging to the institution for the promotion of its objects and interests. A glance at the board and tuition fees will at once show that this School is not for the benefit of poor people; and it is difficult to perceive why a school that must be patronized by the rich, and that has not an element of charity or benevolence about it, but is simply nothing more nor less than a business enterprise for the purposes of gain and profit, should be exempted, with its real and personal property, from taxation, the burden its stockholders ought to bear being thrown upon the rest of the community, rich and poor alike; while the man or woman who opens a school that is accessible to the children of nearly all of the community, for the purposes of an honest livelihood, must pay his or her share of taxation upon everything used in keeping up and carrying on such private school. Therefore, unless the complainant can clearly show, not only that it is organized, but also that it is operating, under chapter 188, there is no good reason why its property should be exempted from taxation.

Chapter 188 contemplates that the trustees shall be a body corporate, or the persons subscribing the articles in the first place, "with such other persons as may from time to time become donors to such institution." This corporation, the complainant, is composed of the stockholders, who became such in exactly the same way, and upon the same terms and conditions, as if the corporation had been organized for selling furs, or carrying on any other business for profit. A person becomes a stockholder by buying stock. There is no provision by which a donor can become a stockholder, and nowhere in the articles of association or by-laws is found anything which invites donations, or furnishes a motive for gifts or charity.

Chapter 188 concludes with this section (§ 4384, How. Stat. § 12): "Nothing in this Act shall be construed as granting banking powers, or as allowing the business of brokerage, or any other powers not usually granted to or exercised by institutions for educational purposes."

It was not intended that schools should be organized and operated under this chapter for the purposes of taking money to be divided among the stockholders of the corporation. There is another chapter for incorporations of this kind. Exemption laws of this character, though beneficial in their objects, are in derogation of equal rights, and must be construed strictly. *Detroit Y. M. Society v. Detroit*, 3 Mich. 182, citing *Cincinnati College v. State*, 19 Ohio, 110.

"By the terms of the law, all property not expressly exempted therefrom is subject to taxation; and any exemption claimed must come plainly within the meaning of the Statute." See opinion of Campbell, J., *Sisters of Charity v. Detroit*, 9 Mich. 100.

It was also said by the same justice in that case that the occupation of the real estate to be exempted is not constructive, but actual, and must be by the institution, and for its corporate purposes, and those purposes must be those coming within the Act under which it was incorporated.

It seems to me that the Act under which this complainant claims to be incorporated expressly precludes the idea that the institutions organized under it shall be perpetually controlled by their founders and their assigns, or that there shall be a return of revenue to the founders. But this institution, the complainant, is built, by its articles of association and its by-laws, upon the idea that the original incorporators and their assigns shall forever dominate it and control, and that the capital invested in it shall pay dividends. The decree of the court below, dismissing complainant's bill, is right, and ought to be affirmed.

Charles E. EATON, *Appt.*,

Charles H. WALKER *et al.*

(.... Mich.)

1. The amendment of an Act entitled "An

NOTE.—Constitutional provisions as to title of Act. See *Titusville Iron Works v. Keystone Oil Co.* 1 L. R. A. 362, note, 122 Pa. 627.
6 L. R. A.

Act for the Incorporation of Manufacturing Companies," which makes it include mercantile companies, is in violation of the constitutional provision that the object of an Act shall be expressed in its title.

2. There can be no corporation *de facto* where there is no law authorizing associated parties to file their articles of association, or to become incorporated.

3. Carrying on business in a corporate name is not evidence of user which can be considered in aid of legal corporate existence, where there is no law authorizing the members to file their articles of incorporation or to become incorporated.

4. On the question whether defendants, though claiming to be incorporated, are liable as a partnership or not, where their firm never had any corporate existence even as a *de facto* corporation, evidence of the creditor that he did not deal with them as a corporation, but was informed by one member that they were a partnership, is admissible.

5. One dealing with persons claiming to be a corporation, but whose corporate existence is not a valid one because not authorized by law, is not estopped from denying such corporate existence in a suit against such persons individually to collect a debt arising out of such dealings, if he never knew of their claim to be a corporation and always thought he was dealing with a partnership.

6. The fact that persons took counsel and acted in good faith in organizing themselves into a corporation under what they were advised was a valid law does not relieve them from individual liability for obligations incurred by the concern if the law proves invalid; as obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts.

(October 18, 1889.)

APPEAL by plaintiff from a judgment of the Circuit Court for Wayne County in favor of defendants in an action against them individually to recover a debt which they alleged to be the debt of a corporation. *Reversed.*

The facts are fully stated in the opinion.

Mr. Henry M. Duffield, for plaintiff, appellant:

The mere form of a corporate organization entered into fraudulently and with intent to obtain commercial credit upon the faith of the public in statements that are false will not protect the participants in the fraudulent scheme from joint personal liability.

Young v. Erie Iron Co. 8 West. Rep. 153, 65 Mich. 111. See also *Paterson v. Arnold*, 45 Pa. 410; *Abbott v. Omaha Smelting & Ref. Co.* 4 Neb. 416; *Oroville & V. R. Co. v. Plumas Co.* 37 Cal. 354.

The law under which defendants claimed to act falls plainly within the constitutional prohibition of Pub. Acts, art 4, § 20, art 15, § 1, and *East Saginaw Mfg. Co. v. East Saginaw*, 19 Mich. 295; and as amended it plainly covers incongruous objects having no necessary connection, and is therefore void.

People v. State Ins. Co. 19 Mich. 398; *People v. State Treasurer*, 81 Mich. 6, 17; *People v. Bradley*, 86 Mich. 458; *People v. Young Men's F. M. T. A. Benev. Society*, 41 Mich. 67.

There being no valid law of this State under

which the defendants could legally be incorporated, they could not even colorably become a corporation, and could not have any existence as a corporation *de facto*.

Swartwout v. Mich. Air Line R. Co. 24 Mich. 393.

Parties can acquire no color of corporate existence by simply professing to be a corporation unless there is a valid law under which they might have been incorporated by complying with its provisions.

Doyle v. Misner, 42 Mich. 332; *Taylor, Priv. Corp.* §145; *Methodist Epis. U. Church v. Pickett*, 19 N. Y. 482, 485; *De Witt v. Hastings*, 8 Jones & S. 463; *Heaton v. R. Co.* 16 Ind. 275; *Harriman v. Southam*, 16 Ind. 190; *U. S. Bank v. Stearns*, 15 Wend. 814; *Childs v. Smith*, 55 Barb. 45.

There being no law under which defendants could legally incorporate and become even a *de facto* corporation, they were liable as joint contractors.

Pateron v. Arnold, 45 Pa. 410; *Fuller v. Rowe*, 57 N. Y. 23; *Wells v. Gates*, 18 Barb. 554; *Doubleday v. Muskett*, 7 Bing. 110, 115; *Nat. Union Bank v. Landon*, 45 N. Y. 410; *Moore v. Mandelbaum*, 8 Mich. 433.

Notice to plaintiff, by the publication in the Free Press and News, and the letter-heads, business cards and circulars do not constitute any legal evidence of corporate existence; a mere notice by a party cannot relieve him from a liability.

Mich. Cent. R. Co. v. Hale, 6 Mich. 243; *Mich. Cent. R. Co. v. Ward*, 2 Mich. 538; *Am. Transp. Co. v. Moore*, 5 Mich. 368.

The declarations of a party to the suit as to the existence of a partnership are unquestionably competent to prove him to have been a member of the alleged firm and who were admitted by him to have been the persons composing it.

Wharton, Ev. § 1194, and cases cited in *note* 6.

Messrs. Dickinson, Thurber & Stevenson for defendants, appellees.

Mr. F. H. Canfield, for defendant Livingstone, appellee:

A creditor who has been defrauded by the stockholders in a corporation undoubtedly has his remedy, but it is by a special action for the tort, and not in a general action *ex contractu*.

Scott v. Thayer, 105 U. S. 151 (26 L. ed. 972).

The plaintiff, having dealt with the company as a corporation, is estopped from denying the validity of its corporate existence.

Swartwout v. Mich. Air Line R. Co. 24 Mich. 399; *Merchants & M. Bank v. Stone*, 88 Mich. 779; *Worcester Medical Inst. v. Harding*, 11 Cush. 285; *Commercial Bank v. Pfeiffer*, 10 Cent. Rep. 721, 108 N. Y. 242; *Central City Sav. Bank v. Walker*, 66 N. Y. 424; *First Nat. Bank v. Almy*, 117 Mass. 476; *Blanchard v. Kaul*, 44 Cal. 450; *Gartside Coal Co. v. Maxwell*, 23 Fed. Rep. 197; *Troubridge v. Scudder*, 11 Cush. 83.

While it is true, as a general rule, that all are presumed to know the law, it is also true that every Act of the Legislature is presumed to be constitutional.

Sears v. Cottrell, 5 Mich. 255. See *Cooley*, Const. Lim. chap. 7.

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The rule which declares that the validity of a corporation can only be questioned by a direct proceeding on the part of the State, and which estops those who have dealt with it as a corporation from denying the validity of its incorporation, applies with full force to this case.

Planters & M. Bank v. Padgett, 69 Ga. 159; *Society Perun v. Cleveland*, 1 West. Rep. 506, 43 Ohio St. 481; *Swartwout v. Mich. Air Line R. Co. and Merchants & M. Bank v. Stone*, *supra*; *Estey Mfg. Co. v. Runnels*, 55 Mich. 133; *Cochran v. Arnold*, 58 Pa. 399; *Smith v. Sheeley*, 79 U. S. 12 Wall. 358 (20 L. ed. 430); *Stout v. Zulick*, 5 Cent. Rep. 333, 48 N. J. L. 599; *Thompson, Liability of Stockholders*, § 415; *McCarthy v. Lavasche*, 89 Ill. 270; 2 Morawetz, *Priv. Corp.* § 760; *Rouland v. Meader Furniture Co.* 83 Ohio St. 270; *Laflin & R. Powder Co. v. Sinsheimer*, 46 Md. 815, 24 Am. Rep. 522.

Long, J., delivered the opinion of the court: Plaintiff, in the year 1883, was a dealer in grain and produce, residing at Mason, in this State. Defendants were the sole parties interested in a business of buying and selling grain and provisions for immediate and future delivery for themselves and other persons on commission at Detroit, and were members of the Board of Trade of Detroit. This action is brought upon an account stated by defendants to plaintiff in the sum of \$3,562.68. The account was erroneously made out in the name of the firm of Walker, Summer & Co., with whom plaintiff had formerly done business, and of whom Mr. Walker was at that time a member. No question was made on the trial as to the amount due the plaintiff from Walker, Hopkins & Co., but the defense rested on the single ground that Walker, Hopkins & Co. were a corporation, and not liable as individuals. The cause was tried before the court without a jury, and the court made the following findings of facts and conclusions of law:

"(1) On the 3d day of May, 1882, the defendants organized a corporation under the name of Walker, Hopkins & Co. by executing articles of association, and having the same duly filed in the offices of the clerk for the County of Wayne and the Secretary of State for the State of Michigan. The object of such corporation, as described in such articles of association, was 'to carry on mercantile business in buying and selling grain for immediate or future delivery.'

"(2) This corporation assumed to organize under Act No. 187 of the Session Laws of 1875, as amended by Act No. 274 of the Session Laws of 1881. The capital stock of the corporation was filed at \$50,000, each of the defendants subscribing for an equal portion of the same.

"(3) The defendants Livingstone and Hopkins paid for their stock. The defendant Livingstone, on the 6th of May, 1882, paid \$10,000 on account of his stock; on the 29th day of May, \$1,000; 1st day of June, \$1,000; on the 12th day of July, \$325; on June 9, 1883, \$1,000; and on July 25, 1883, \$1,675. The defendant Hopkins paid for his stock in cash at or about the time of the organization of the corporation.

"(4) Prior to the organization of the corporation, a copartnership, of which the defendant

Charles H. Walker was one of the copartners, conducted a business in buying and selling grain, and doing a general commission business, under the name of Walker, Sumner & Co. Neither the defendant Hopkins nor the defendant Livingstone was connected with this copartnership. Prior to the organization of the corporation of Walker, Hopkins & Co., the defendant Walker purchased all the assets of the firm of Walker, Sumner & Co., and transferred such assets to Walker, Hopkins & Co.; an agreement being executed between the defendant Walker and Walker, Hopkins & Co. providing, in effect, that the stock of the defendant Walker should be paid for out of collections to be made out of the assets thus transferred to Walker, Hopkins & Co.; but it does not appear that collections to any considerable amount were ever made upon the assets thus transferred to Walker, Hopkins & Co., or that the stock of the defendant Walker was ever paid for.

"(5) Soon after the organization of the corporation of Walker, Hopkins & Co., as above stated, it commenced to do business as a corporation in buying and selling grain and provisions for immediate or future delivery; the defendant Mark Hopkins, Jr., having been elected president of the corporation, the defendant Walker secretary and treasurer, and defendant Livingstone vice-president. The three defendants herein were elected a board of directors, and records of the meetings of such corporation were duly kept, a corporate seal had and used, and regular stock certificates issued, and the fact of its incorporation duly announced through the public press and by circular. Such business was continued by said Walker, Hopkins & Co., as such corporation, till the 27th day of July, 1888, when it made an assignment for the benefit of its creditors to Charles M. Swift as assignee, who qualified as such assignee, and executed the trust under such assignment so made by such corporation.

"(6) The business of said corporation during the time it so conducted said business was managed by the defendants Hopkins and Walker as president and secretary and treasurer of said corporation. The defendant Livingstone took no part in the transaction of the ordinary business of the corporation.

"(7) The plaintiff, who had been a customer of the firm of Walker, Sumner & Co., upon the organization of the corporation of Walker, Hopkins & Co. continued to do business with it as he had done business with Walker, Sumner & Co. prior to the organization of Walker, Hopkins & Co.

"(8) At the date of the execution of the assignment aforesaid, Walker, Hopkins & Co. was indebted to the plaintiff in the sum of \$3,562.68.

"(9) At the time Walker, Hopkins & Co. commenced business as aforesaid, and during the time it continued to do business, the plaintiff had full notice that Walker, Hopkins & Co. was a corporation and not a copartnership, and he continued to do business with said Walker, Hopkins & Co. as such corporation.

"(10) That the plaintiff transacted his business with Walker, Hopkins & Co. as a corporation, and the indebtedness sued for herein was contracted while said plaintiff was dealing

with said Walker, Hopkins & Co. as such corporation.

"(11) The defendant Livingstone became a party to the organization of said corporation of Walker, Hopkins & Co., and a subscriber to its stock, in entire good faith, and all his dealings had with said corporation were had in good faith, and he never after the organization of said corporation received, directly or indirectly, any benefit therefrom by way of return of stock subscribed and paid for, or dividends thereon, and never at any time while said corporation continued to do business had any suspicion that the organization of said corporation was in any wise defective.

"CONCLUSIONS OF LAW.

"Whether Act No. 274 of the Session Laws of 1881, under which the corporation of Walker, Hopkins & Co. assumed to organize, was a valid law or not, by reason of the alleged defect or imperfection in its title, the plaintiff is not entitled to recover in this cause. The defendant Livingstone having acted in good faith with reference to the organization of said corporation and the transaction of its business, and the plaintiff having dealt with it as a corporation, he is now estopped to question the validity of its incorporation. The defendants are entitled to judgment."

The court subsequently filed the following conclusions:

"From these facts found, I am clearly of opinion that Walker, Hopkins & Co., with whom the plaintiff dealt, and by whom the account was rendered, was a corporation *de facto*, if not *de jure*, and that the plaintiff knew that Walker, Hopkins & Co. was a corporation. He never dealt with them as partners, and under the weight of authority I think the plaintiff is estopped to deny that Walker, Hopkins & Co. was a corporation, or to claim that the defendants, who were stockholders therein, are liable as partners."

Judgment was entered upon these findings in favor of defendants. Plaintiff brings the case to this court.

The defendants claim to be incorporated under Act No. 187 of the Public Acts of Michigan of 1875. The title of this Act is "An Act for the Incorporation of Manufacturing Companies." The first section authorizes a number of persons, not less than three, to associate, according to the provisions of the Act, "for the purpose of engaging in and carrying on any kind of manufacturing business, and who shall comply with all the provisions of this Act, shall, with their successors and assigns, constitute a body politic and corporate under the name assumed by them in their articles of association." Act No. 187, Pub. Acts 1875.

This section was amended by Act No. 274, Pub. Acts 1881, so as to read, "for the purpose of engaging in and carrying on any kind of manufacturing or mercantile business, or any union of the two," the Act in other respects being unchanged. The title of the amending Act is "An Act to Amend Section One of An Act Entitled 'An Act for the Incorporation of Manufacturing Companies,' Approved May 1, 1875, Being Act No. 187 of the Laws of 1875, so as to Include Mercantile Business."

The title of the Act of 1875 remains un-

changed, and only provides for the incorporation of manufacturing companies. The Act of 1881 provides for the incorporation of companies to carry on a mercantile business,—a business entirely foreign to the Act of 1875, which it purports to amend,—and therefore introducing matters not embraced in the purposes indicated in the title to the Act amended. Section 20, art. 4, of the Constitution provides that “no law shall embrace more than one object, which shall be expressed in its title.”

This attempt to incorporate a new business into the Act of 1875 by the Amendment of 1881 falls plainly within the prohibition of this section of article 4 of the Constitution. The Amendment is, in effect, an independent Statute, and provides for the incorporation of companies that are not mentioned or provided for by the Act of 1875.

As was said by this court in *People v. Young Men's F. M. T. A. Benev. Society*, 41 Mich. 67, “No one can hesitate to see that the purpose of the Statute of 1867 was to introduce an entirely new object of legislation, foreign to the existing Statute, and incapable by the most liberal construction of falling within its terms. The constitutional provision that ‘no law shall embrace more than one object, which shall be expressed in its title,’ is violated if an Act is amended so as to embrace a purpose outside of its title, and inconsistent with provisions remaining unrepealed. As amended, this Statute plainly covers objects having no necessary connection, and therefore void.” Therefore there was no statute under which defendants could lawfully incorporate as a mercantile company, and their acts as such are wholly void.

Defendants’ counsel, however, insists that Walker, Hopkins & Co. were a corporation *de facto* if not *de jure*. But there being no valid law of this State under which the defendants could legally be incorporated, could they, even colorably, become a corporation, or have any existence as a corporation *de facto*, or would the plaintiff be estopped from inquiry into their corporate existence under such circumstances? Two things are necessary to be shown in order to establish a corporation *de facto*, viz.: (1) the existence of a charter or some law under which a corporation, with the powers assumed, might lawfully be created; and (2) a user by the party to the suit of the rights claimed to be conferred by such charter or law. *U. S. Bank v. Stearns*, 15 Wend. 814.

If the law exists, and the record exhibits a bona fide attempt to organize under it, every slight evidence of user beyond this is all that can be required. *Methodist Epis. Union Church v. Pickett*, 19 N. Y. 487.

In *Heaton v. Cincinnati & Ft. W. R. Co.* 16 Ind. 275, the court says: “The estoppel goes to the mere *de facto* organization; not to the question of legal authority to make an organization. A *de facto* corporation that by regularity of organization might be one *de jure* can sue and be sued. And a person who contracts with such corporation while it is acting under its *de facto* organization—who contracts with it as an organized corporation—is estopped, in a suit on such contract, to deny its *de facto* organization at the date of the contract; but this does not extend to the question of legal power to organize. Hence, if an organization is com-

pleted where there is no law, or an unconstitutional law, authorizing an organization as a corporation, the doctrine of estoppel does not apply.”

The same rule was laid down by implication by this court in *Swartwout v. Mich. Air Line R. Co.* 24 Mich. 398, as follows: “Where there is thus a corporation *de facto*, with no want of legislative power to its due and legal existence; where it is proceeding in the performance of corporate functions, and the public are dealing with it on the supposition that it is what it professes to be; and the questions suggested are only whether there has been exact regularity and strict compliance with the provisions of the law relating to incorporation,—it is plainly a dictate, alike of justice and of public policy, that in controversies between the *de facto* corporation and those who have entered into contract relations with it, as corporators or otherwise, that such questions should not be suffered to be raised.” And again it was said: “But both in reason and on authority the ruling should be the same where an attempt has been made to organize a corporation under a general law permitting it. If due authority existed for the organization, and the question is one of regularity merely, ‘the rule established by law, as well as reason, is that parties recognizing the existence of corporations by dealing with them have no right to object to any irregularity in their organization.’”

In the present case, however, there was no law authorizing the parties to file their articles of association, or to become incorporated; and there could, under such circumstances, be no corporation *de facto*. It cannot therefore, in any proper legal sense, be said that the carrying on of the business in the corporate name is evidence of user which can be considered in aid of their legal corporate existence.

Counsel for the defendants contends that the case of *Merchants & M. Bank v. Stone*, 38 Mich. 779, is decisive of this case. In that case the defendants claimed to be incorporated as the Charles Stone Timber Company. It appeared that the plaintiff transacted a large amount of business with the defendants, upon the specific understanding that the concern was contracting as a corporation, and not otherwise; and this court said: “Now, the proof that, as matter of fact, the company carried on business as a corporation in the name of the Charles Stone Timber Company when the bank dealt with it, established, *prima facie*, that it was a corporation pursuant to law; and certainly the evidence the bank adduced in regard to the operations of the company, the attitude it maintained, and the character in which the two concerns dealt together, showed that the company was a corporation *de facto*, and so acknowledged by the bank.”

In the present case the plaintiff offered evidence to show that he never knew, or had any information, that the defendants claimed that Walker, Hopkins & Co. was a corporation, but, on the contrary, that Mr. Walker of that firm asked him to continue his business with the firm as he had carried it on formerly with Walker, Sumner & Co., and that the firm was composed of himself, William Livingstone, Jr., and Mark Hopkins, Jr., and that he always believed and understood that Walker, Hopkins

& Co. was a firm. This testimony the court below excluded. In addition to this, and upon this point, this case differs radically from the case of *Merchants & M. Bank v. Stone*. The whole facts show that the firm never had any corporate existence, and never was a corporation, even *de facto*. It is very evident to us that the facts here presented do not bring this case within the ruling of the former case. In the present case, as in that, the name would not indicate that the firm was a corporation. It gave no clue to the nature of the company as being corporated or incorporated, and there is no pretense of proof that the plaintiff dealt with it as a corporation, except the fact that defendants were doing business as a corporation, and had published such fact in two of the Detroit papers, and mailed circulars to its customers announcing that they had organized as a corporation under the laws of the State of Michigan, and that also their letter-heads showed this fact, some of the circulars being mailed to plaintiff, and the corporation having also sent by mail statements of its accounts to plaintiff written upon such letter-heads. The plaintiff testified that he had no recollection of receiving such circulars, or of ever having seen such announcements in the public press. Plaintiff also testified that he had no recollection of ever having received any letter-heads containing the information that defendants were a corporation; and it appears that when the account was made up by defendants showing their indebtedness to plaintiff, and transmitted to him, it was upon the letter-head of Walker, Sumner & Co., which did not contain any showing that Walker, Hopkins & Co. was a corporation.

Plaintiff's counsel also offered to show by the testimony of the plaintiff that Mr. Walker solicited plaintiff to do business with Walker, Hopkins & Co., stating to him that it was a partnership composed of Walker, Livingstone and Mark Hopkins, Jr., and that in the faith of that statement the plaintiff commenced business with them. This testimony the court excluded. Defendants' counsel, however, contend that inasmuch as the trial court found as a fact that Walker, Hopkins & Co. was a corporation, and that during the time it continued to do business plaintiff had full knowledge that they were a corporation, and not a copartnership, and continued to do business with them as a corporation, such finding is conclusive, and will not be disturbed by this court. It would be true that, if there was any proof to support the finding, this court would be bound by it, though, upon the facts, it might not be able to agree with the circuit court in its conclusions. But the fact is made to appear, by the evidence returned, that the court excluded the evidence of the plaintiff that he did not know they were a corporation, and did not deal with them as such, but was informed by Walker that they were a partnership, and dealt with them in the belief that they were a partnership; and yet the court below finds, under the evidence which defendants were permitted to offer, that plaintiff did deal with them as a corporation, and had full knowledge that they were such,

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and bases such finding and conclusion upon the fact that defendants published the statements in the public press, and mailed circulars and letter-heads to plaintiff which it is not shown he ever received. Under such circumstances, the court was in error in excluding the testimony, and we think there is no proof to sustain the finding.

It is undoubtedly well settled that a person who has entered into contract relations with a *de facto* corporation cannot, in an action thereon, deny its corporate character, or set up any informality in its organization, to defeat the action. The distinction between such cases and the present one is to my mind clear. If there had been any law under which defendants had a right to incorporate, and the offer had been to show a mere abuse or excess of its corporate powers, or had it appeared that it was a *de facto* corporation, and the question related to the regularity of its organization merely, there could be no doubt that the plaintiff would be estopped from questioning its corporate existence. But the two things necessary to show a corporation, even *de facto*, do not exist. There is no law under which the powers they assumed might lawfully be created; and the mere fact that they assumed to act as such, even in the full belief that they were legally incorporated, would not constitute them a corporation *de facto*.

It is submitted upon this record that an indebtedness was due to the plaintiff in the sum of \$3,562.68 at the date of the trial, July 19, 1888, and plaintiff seeks to hold defendants liable therefor as partners, and in this contention we think he is right. The defendants were not a corporation. They had associated together, each sharing the profits and losses of the business equally, according to the money each put in as capital stock, each holding and owning one third part of the shares. The fact that they took counsel and acted in good faith in organizing under what they were advised was a valid law does not relieve them of their liability.

It is well settled that obligors are bound, not by the style which they give to themselves, but by the consequences which they incur by reason of their acts. They have had the benefit of the plaintiff's means; they are indebted to him, as is conceded; but have sought to shift individual liability to a corporate one. There is no such corporation, and the mere fact that defendants assumed to act as such does not relieve them from personal liability. Under the circumstances of this case the defendants must be held liable as partners.

The judgment of the court below must be set aside and vacated, and judgment entered here in favor of plaintiff for the sum of \$3,562.68, with interest from July 27, 1888, being the date when the parties, claiming to be a corporation, made an assignment for the benefit of their creditors, together with costs of both this and the circuit court.

Sherwood, Ch. J., and Morse, J., did not sit. Campbell and Champlin, J. J., concurred with Long, J.

ARKANSAS SUPREME COURT.

E. G. COLLIER, *Appt.*,

v.

E. H. COWGER, Guardian, *et al.*

(....Ark....)

1. A judgment against a covenantor in possession upon foreclosure of a lien created prior to the covenant rendered after notice to the warrantor to appear and defend is a constructive eviction giving a right of action upon the covenant.

2. Interest on the purchase price of land bought with warranty, where the covenantor has again purchased the land on a foreclosure sale, which constituted a constructive eviction, may be recovered from the time of thus extinguishing the incumbrance, but not from the date of the original purchase.

(December 21, 1892.)

APPEAL from a judgment of the Circuit Court of Yell County in favor of plaintiffs in an action for breach of covenant of warranty. *Affirmed in part.*

The land was bid off for plaintiffs on foreclosure of a mortgage in a suit which the warrantor was notified to defend. He was also notified to pay off the incumbrance before sale after the foreclosure decree was rendered. The court decreed in favor of plaintiffs for \$274.69, being the purchase money paid for the land with 6 per cent interest thereon from the date of payment.

Messrs. S. W. Williams and W. N. May, for appellant:

There must be an actual or constructive eviction of the whole or part of the premises to constitute a breach of this covenant.

Tiedeman, Real Prop. § 855.

While possession is undisturbed, there is no breach of the covenant of warranty.

Rawle, Cov. pp. 212, 218; Yeates v. Pryor, 11 Ark. 59; Lewis v. Davis, 21 Ark. 235; McDermott v. Cable, 23 Ark. 200.

Where a purchaser has been let into possession, in the absence of fraud, he is entitled to no relief in equity, etc., his remedy being at law on the covenants of his deed; and if there be no covenants which cover the defect, he is without remedy at law or in equity.

Hoppes v. Cheek, 21 Ark. 585; Worthington v. Curd, 23 Ark. 284.

The mere existence of a paramount title is not enough; it must be asserted; and where one knows of an incumbrance, as Mrs. Cowger should have known, he must be held in equity to waive any right arising in consequence of it.

Worthington v. Curd, supra; Walker v. Towns, 23 Ark. 147.

In 2 Wait, Act. and Def., p. 888, is a full presentation of the authorities upon this point, which shows clearly that all the courts hold, except in South Carolina, that there must be a paramount title, asserted adversely, and an actual or constructive eviction under it, to constitute a breach of the covenant of warranty.

In case of breach of covenants which run with the land, in order to recover, the plaintiff must aver and prove eviction.

Day v. Chism, 23 U. S. 10 Wheat. 449 (6 L. ed. 863).

The court erred in assessing damages by giv-

NOTE.—Covenants defined and construed.

A covenant is an agreement reduced to writing and executed by a sealing and delivery, whereby some of the parties named, or one of them, engages that some act is already done, or to be done or is not to be done. *De Bollé v. Pennsylvania Ins. Co. 4 Whart. 68; McVoy v. Wheeler, 6 Port. 201; Vicary v. Moore, 2 Watts, 451; Randal v. Chesapeake & D. Canal Co. 1 Har. (Del.) 233; Tribble v. Oldham, 5 J. J. Marsh. 187; Ludlum v. Wood, 2 N. J. L. 56; 1 Burrill, Law Dict. 397; Anderson, Law Dict. 287.*

It is a clause of agreement in a deed whereby either party may stipulate for the truth of certain facts, or bind himself to perform or give something to or for the other (2 Bl. Com. 304); a promise under seal. *Greenleaf v. Allen, 127 Mass. 248.*

It may be and often is used, not in its technical sense, but in the wider sense of a contract in general. *Riddle v. McKinney, 67 Tex. 31; Hale v. Finch, 104 U. S. 266 (26 L. ed. 734); Johnson v. Gurley, 52 Tex. 223.*

It may be either express or implied. *Taylor v. Hopper, 62 N. Y. 649; Parker v. Smith, 17 Mass. 418, 9 Am. Dec. 157; Emerson v. Wiley, 10 Pick. 310; Frey v. Johnson, 22 How. Pr. 323.*

An express covenant is one explicitly stated; an implied covenant is one inferred or imputed in law from the words used. *Conrad v. Morehead, 89 N. C. 24; 4 Kent, Com. 463, 473, note.*

No particular form is required; it may be created by any language showing the intention of the parties to bind themselves (*Marshall v. Craig, 1 Bibb, 279, 4 Am. Dec. 647; Sampson v. Easterby, 9 Barn. & C. 505; Rigby v. Great Western R. Co. 14 Mees. & W. 311; Jackson v. Swart, 20 Johns. 85*); and is to be 6 L. R. A.

construed, as nearly as possible, by the obvious intentions of the parties, which must be gathered from the whole instrument. *Wadlington v. Hill, 10 Smedes & M. 560, 562.*

Covenants and conditions distinguished. *Smith v. Niagara F. Ins. Co. 1 L. R. A. 216, 7 New Eng. Rep. 82, 60 Vt. 632.*

To constitute a breach of covenant of warranty, there must be a union of acts of disturbance and lawful title. *Barry v. Guild, 2 L. R. A. 334, note, 123 Ill. 439. See also Huyck v. Andrews, 3 L. R. A. 789, note, 113 N. Y. 81.*

Covenants of seisin; when broken; remedy for breach. *Clement v. Rutland Nat. Bk. (Vt.) 4 L. R. A. 425, note.*

Eviction under covenant.

When the covenantor purchases from the true owner, it will be considered a sufficient eviction to constitute a breach. *McGary v. Hastings, 39 Cal. 380, 386, 2 Am. Rep. 456, citing Sugd. Vend. 745, and note; Loomis v. Bedel, 11 N. H. 74; Hamilton v. Cutts, 4 Mass. 349, 3 Am. Dec. 222; Turner v. Goodrich, 26 Vt. 709; Sprague v. Baker, 17 Mass. 336; Rawle, Cov. 278; Noonan v. Lee, 67 U. S. 2 Black, 507 (17 L. ed. 280); Funk v. Creswell, 5 Iowa, 86; Brady v. Spurek, 27 Ill. 478; Stewart v. Drake, 9 N. J. L. 199; 2 Devlin, Deeds, 238.*

Where to prevent a suit the purchaser paid the amount of an outstanding mortgage, for his own security, it is a breach of the covenant of quiet enjoyment. *Sprague v. Baker, 17 Mass. 336. See also Harding v. Larkin, 41 Ill. 422; McConnell v. Downs, 48 Ill. 271. But see Waldron v. McCarty, 3 Johns. 471.*

ing interest on the purchase money from the date of the deed, as no mesne profits were recovered.

Bennett v. Jenkins, 18 Johns. 50.

Messrs. Davis & Bullock, for appellees:

Recent decisions in many States hold an eviction not necessary when constructive dispossession has taken place.

Kansas Pac. R. Co. v. Dunmeyer, 19 Kan. 589; *Whitney v. Dinsman*, 6 Cush. 124; *Jones v. Warner*, 81 Ill. 846; *McGary v. Hastings*, 89 Cal. 360, 2 Am. Rep. 456.

A judgment in ejectment is sufficient breach without actual eviction.

Drury v. Shumway, 1 D. Chip. 110, 1 Am. Dec. 704; *Cummins v. Kennedy*, 8 Litt. 118, 14 Am. Dec. 45; *Williams v. Wetherbee*, 1 Aikens, 238; *Brodie v. Watkins*, 81 Ark. 819.

A disturbance of title and disturbance of the land by reason of a suit in equity is a breach of the covenant for quiet enjoyment.

Martin v. Martin, 1 Dev. L. 418; *Calthorp v. Heyton*, 2 Mod. 54; Rawle, Cov. 4th ed. 143. Appellant's deed contains such a covenant. 8 Washb. p. 469, par. 18.

Per Curiam:

A judgment against a covenant in possession upon foreclosure of a lien created prior to the covenant, rendered after notice to the warrantor to appear and defend, is conclusive of the existence of an outstanding paramount in-

cumbrance. It is a constructive eviction, and he is entitled to his action upon the covenant. Where the covenantee buys in the outstanding incumbrance to protect his estate, he is entitled to recover the sum expended in so doing, provided such sum does not exceed the amount paid to the warrantor for the property, with the legal interest on such sum from the date of the extinguishment of such incumbrance.

Boyd v. Whitfield, 19 Ark. 447; Rawle, Cov. §§ 143-146.

When paramount title is asserted, and maintained by judgment in ejectment, the recovery of interest prior to eviction, upon the sum paid the warrantor, will depend on whether or not there has been a recovery of mesne profits by the plaintiff in ejectment. Interest on the money and mesne profits are regarded as the equivalent of each other. Rawle, Cov. § 195 *et seq.* and cases cited.

In this cause plaintiffs, through their mother, purchased the land at a sale under I. C. Jones, decreed on January 14, 1886, and are entitled to recover the \$274.69 of purchase money paid Collier with interest at 6 per cent from January 14, 1886, to this date, amounting to \$64.83.

The decree of the circuit court, in so far as it awarded interest from November 20, 1884, is reversed. In all other things it is affirmed, and judgment will be entered here in accordance with this opinion.

It is so ordered.

MINNESOTA SUPREME COURT.

Re Joseph DALPAY, Appt.

(....Minn.....)

*1. As a general rule an assignment of personal property, valid by the laws of the State or country where made, is valid everywhere. But the rule is subject to exceptions; and

*Head notes by VANDERBURGH, J.

a transfer, giving preferences to certain creditors, made in another State, will not be upheld in this State, as to property situated therein, if in contravention of the policy and laws of the State.

2. In proceedings in insolvency, debts due an insolvent who has his domicile in this State will be deemed to have a *situs* therein.

(October 29, 1890.)

NOTE.—Insolvency defined.

"Insolvency," in Laws 1881, chap. 143, means inability to pay one's debts in the ordinary course of business. *Daniels v. Palmer*, 35 Minn. 347; *Daniels v. Zumbrota Bank*, Id. 351; *Levan's App.* (Pa.) 2 Cent. Rep. 571; *Anderson*, Dict. 552; *Buchanan v. Smith*, 83 U. S. 16 Wall. 808 (21 L. ed. 287); *Wager v. Hall*, 88 U. S. 16 Wall. 599 (21 L. ed. 506); *Dutcher v. Wright*, 94 U. S. 537 (24 L. ed. 131); *May v. LeClaire*, 18 Fed. Rep. 166; *Re Bininger*, 7 Blatchf. 264.

With reference to persons not engaged in trade and commerce, the term may have a less restricted meaning. *Toof v. Martin*, 80 U. S. 13 Wall. 47 (20 L. ed. 433); *Clarion Bank v. Jones*, 88 U. S. 21 Wall. 338 (22 L. ed. 545); *Cunningham v. Norton*, 125 U. S. 90 (31 L. ed. 629).

Law of place governs construction and validity of contract.

The nature, the obligation and the interpretation of a contract are to be governed by the law of the place where it is made, unless the parties at the time of making it have some other law in view. *Liverpool & G. W. Steam Co. v. Phoenix Ins. Co.* 129 U. S. 397 (32 L. ed. 788).

So the assignment of a policy of life insurance is governed by the law of the place where the policy 6 L. R. A.

was issued, or where it is payable. *Prentice v. Steele* (Super. Ct.) 4 Mont. L. Rep. 819.

A contract of affreightment made in one country between citizens or residents thereof, and the performance of which begins there, must be governed by the law of that country, unless the parties, when entering into the contract, clearly manifest a mutual intention that it shall be governed by the law of some other country. *Ibid.*; *Liverpool & G. W. S. Co. v. Phoenix Ins. Co.* 129 U. S. 397 (32 L. ed. 788).

That the law of place governs the construction and validity of the contract, see, further, *Bacon v. Horne*, 2 L. R. A. 365, note, 123 Pa. 452; *Drucker v. Wellhouse* (Ga.) 2 L. R. A. 323, note; *Woodward v. Brooks*, 3 L. R. A. 702, 128 Ill. 222.

Insolvent statutes construed.

Under the Georgia Act of 1881, an insolvent corporation may make an assignment for the benefit of its creditors. *Albany & R. Iron & Steel Co. v. Southern Agr. Works*, 76 Ga. 135.

While preferences in assignments are allowed under the Georgia law, they are tolerated rather than encouraged. *Ibid.*; *Turnipseed v. Schaefer*, 76 Ga. 109.

The latter part of Ga. Code, § 1953, prohibiting a debtor to prefer one creditor over others by any

APPEAL by defendant from an order of the District Court for Marshall County in favor of petitioners in a proceeding to obtain the appointment of a receiver of property belonging to a person alleged to be insolvent and to have made an assignment for creditors giving unlawful preferences. *Affirmed.*

The motion for the appointment of the receiver was considered upon the facts set out in the following stipulation:

"It is hereby stipulated and agreed by and between the parties to the above-entitled proceeding that the motion of said petitioners for the appointment of a receiver of the property of said debtor may be heard and considered upon the statement of the facts following, which said parties do hereby stipulate and agree upon: That the petitioners Burbank, Bloomingdale and Campbell were and are copartners, and that Kellogg, Johnson & Company was and is a corporation, as in their petition alleged. That Joseph Dalpay has been for two years last past, and now is, engaged in doing business as a general merchant at Argyle, in the State of Minnesota, and now has and has had there his place of residence. That up to December 5, 1888, Dalpay was a member of the firm of M. D. Allard & Company, which firm was then composed of M. D. Allard and said Dalpay, and that said firm was engaged in business as general merchants at Auburn, in the Territory of Dakota, but not elsewhere. That on or about December 5, 1888, said firm of Allard & Company was dissolved, and that Dalpay succeeded to the business of the firm,

took and received the assets, and assumed the liabilities thereof. That said M. D. Allard & Company became indebted to the petitioners as in their petition alleged, and that Joseph Dalpay became individually indebted to the several petitioners as in their petition alleged, and that said indebtedness remains unpaid, except as therein stated. That said indebtedness of M. D. Allard & Company, alleged in said petition, is for merchandise sold and delivered to said firm at Auburn aforesaid; and the indebtedness by Dalpay individually incurred is for merchandise sold and delivered to him at Argyle, in the State of Minnesota. That an indebtedness was contracted by M. D. Allard & Company to Wyman, Mullin & Company, a copartnership, for merchandise sold and delivered to said Allard & Company, at Auburn aforesaid, in the sum of about \$4,500, and that an indebtedness was contracted by J. Dalpay to Wyman, Mullin & Company for merchandise sold and delivered to him, at Argyle, in the sum of \$2,700; all of which remains unpaid, except as herein stated. That Dalpay is now insolvent, and that he has not at any time since the 27th day of December, 1888, been possessed of assets sufficient to pay in full his debts. That on or about the 27th day of December, 1888, a fire occurred at Auburn, Dak., whereby the stock of goods there situate was destroyed by fire. That Dalpay held policies of insurance thereon aggregating \$4,750,—\$3,000 of which was in the Syndicate Insurance Co. of Minneapolis, Minn.; \$2,000 in the Huron of Huron, Dak.; and \$750 in the Mitchell of Mit-

transfer of property, is repealed by the Act of February 23, 1886. *Powell v. Kelly* (Ga.) 8 L. R. A. 129.

The Georgia Acts of 1881 and 1885 providing for a complete inventory and schedule, by an assignor for creditors, of all his assets, which shall be sworn to, are remedial Statutes and should be construed strictly as against the assignor and his assignee, and liberally in favor of his creditors. *Turnipseed v. Schaefer*, 76 Ga. 109; *Albany & R. Iron & Steel Co. v. Southern Agr. Works*, Id. 185.

Assignment for benefit of creditors, validity.

An assignment for the benefit of creditors, if valid by the law of place of domicile of assignor, will pass all his personal property wherever situated, unless restrained by some local law or state policy of the State where the property is situated. 2 Kent, Com. 455; *Trasher v. Everhart*, 3 Gill & J. 234; *Pickering v. Fisk*, 6 Vt. 102; *Hanford v. Paine*, 32 Vt. 442; *Story*, Conf. L. 201.

But when declared fraudulent or invalid at the place where the property is situated they will not be sustained even if valid in the State where made (*Zipcey v. Thompson*, 1 Gray, 243; *Boyd v. Rookport Mills*, 7 Gray, 406; *Bryan v. Brisbin*, 26 Mo. 423; *Varnum v. Camp*, 18 N. J. L. 329; or where a different law exists. *Edgerley v. Bush*, 81 N. Y. 199; *Green v. Van Buskirk*, 74 U. S. 7 Wall. 189 (19 L. ed. 109). See *Howard Nat. Bank v. King*, 10 Abb. N. Cas. 346; *Atherton v. Ives*, 20 Fed. Rep. 898.

The situs of a debt follows the creditor; and where the debtor and creditor reside in different States, the law of the domicile of the creditor prevails. *Birdseye v. Baker* (Ga.) 2 L. R. A. 99.

A note dated and made payable at Boston, by a resident of that place in favor of a resident of New York, in pursuance of an agreement made by the maker's agent in New York, is to be governed by 6 L. R. A.

the laws of New York. *Holmes v. Manning* (Mass.) 19 N. E. Rep. 25.

Under the Georgia Statutes, the omission, by an assignor for creditors from his schedule attached to the deed of assignment, of a right of redemption which he has in the premises which he has conveyed as security for a debt, invalidates the assignment. *McMillan v. Knapp*, 76 Ga. 171.

An affidavit under these Statutes verifying an assignor's schedule attached to his deed of assignment for creditors, is not sufficient where it does not state that the schedule is a full and complete inventory of all assets of every kind held, claimed or owned, whether in his possession or not. *Ibid.* So in Tennessee. *Scheibler v. Mendinger*, 86 Tenn. 674.

But in order to fix the criminal liability of the affiant in such case, there must be either a willful violation of the law, or criminal negligence. *Turnipseed v. Schaefer*, 76 Ga. 109.

The difference between a schedule of an assignor's assets which is not full and complete, and no schedule at all, is a difference in degree only, and will not vary the application of the rule prescribed by the statutes requiring such schedule to be attached to the assignment. *Ibid.*

Minnesota Laws 1887, chap. 208, in terms declaring assignments for creditors invalid as to real estate until recorded in the office of the register of deeds, is a mere registry law; and an unrecorded assignment is valid as between the parties, and as to others having actual notice thereof. *Faulson v. Clough*, 40 Minn. 494.

The provision of the Tennessee Act of 1881, requiring that "the debtor making a general assignment shall annex thereto a full and complete inventory or schedule, under oath, of all his property of every description," must be strictly complied with, or the assignment will be invalid. *Lookout Bank v. Noe*, 86 Tenn. 21.

chell, Dak.;—the home offices of which companies were of the places named. That none of said policies contained any provisions as to a particular place of payment in case of loss. That all said companies had local agencies at Grafton, Dak. That on or about the 29th day of December, 1888, at Auburn, Dak., Dalpay assigned said policies of insurance to Wyman, Mullin & Company, and then and there delivered to them possession thereof, and that they now have the same, or the avails thereof, save the sum of \$1,100, collected shortly after said assignment, and returned to Dalpay at his instance and request, and pursuant to agreement, to enable him to repay an overdraft of town funds, of which he had been the custodian. That said policies were so assigned to secure said Wyman, Mullin & Company's indebtedness, as aforesaid, owing them. That on the 28th day of January, 1889, pursuant to a verbal agreement theretofore made between said Wyman, Mullin & Company and Dalpay, at Auburn, Dak., the said Dalpay, at Minneapolis, Minn., executed an instrument wherein and whereby he assigned, transferred, set over and delivered at Auburn, Dak., to said Wyman, Mullin & Co., as collateral to and to secure the payment of their said indebtedness, certain notes and accounts then in his possession at Auburn, Dak., which said notes and accounts arose out of transactions as follows, to wit: The sale of goods and merchandise upon credit, and in the usual course of busi-

ness, by said M. D. Allard & Company to persons then and now residents of the Territory of Dakota. That the notes and accounts aforesaid were each and all of them due and owing from citizens of the Territory of Dakota, residing in and about Auburn, Dak. That the same, or the bulk thereof, had been given to, or charged by, the firm of Allard & Company, to said persons, in the usual and ordinary course of business, and upon credit sales. That after the purchase by Dalpay of Allard's interest, on December 5, the notes and accounts, excepting those in the bank hereinafter referred to, remained in the possession of Allard, as the agent of Dalpay, who continued to act there as the agent of Dalpay until the 27th day of December, when the fire occurred. That after the fire they were turned over and remained in the possession of one Calvin Morck, who was the agent of Dalpay, at Auburn, Dak., and continued in his sole possession and charge until the transfer to Wyman, Mullin & Company. That the notes were all made payable at Auburn, Dak. That the books were the sole evidence of the accounts. That Dalpay had no knowledge of the accounts, except as shown by the books. That Dalpay did not know the names of the persons owing, or the amounts owing, only that the books showed debits to a certain amount. That Dalpay would have required the books in order to settle or adjust any account. That said accounts were of the estimated value of \$1,100, and said notes of

Any member of a firm may verify the schedule of assets annexed to its general assignment. It is not necessary that all the members join in the affidavit thereto. *Ibid.*

In Tennessee registration of a general assignment is essential as against attaching creditors of assignor. *Ibid.*

The following description of a stock of goods is sufficient in the schedule annexed to a general assignment, viz: "All hardware goods in my store, No. 206 Main Street, Taxing District Shelby County, and fixtures;" and referring for "itemized description of said hardware goods" to the assignor's books and invoices in said store, included in the assignment. *Scheibler v. Mendinger*, 36 Tenn. 674.

An insufficient description of the property in the schedule is not aided by the provision of Tenn. Act 1881, chap. 121.

The purpose of that Act is to prevent the more particular description of the schedule from restricting the general description contained in the body of the deed. *Ibid.*

Under the Tennessee Statute property of the assignor held, at the date of assignment, under levy of execution, should be described in the schedule "by a direct and clear reference to the proceedings and the officer's levy." *Ibid.*

As to foreign bankrupt and insolvent laws, see, further, *Cramton v. Valido Marble Co.* 1 L. R. A. 120 note, 60 Vt. 291; *Birdseye v. Baker* (Ga.) 2 L. R. A. 99, note.

A simple contract creditor, under S.C. Gen. Stat., § 2016, can maintain an action to set aside an assignment for creditors, not only on the ground of preferences, but on any ground whatsoever. *Regenstein v. Pearlstein*, 30 S. C. 192.

As to sufficiency of schedule and affidavit, see, further, *Powell v. Kelly* (Ga.) 3 L. R. A. 139.

Conflict of laws.

The rule that contracts made out of the State, which contravene the policy of the State, will be 6 L. R. A.

held void, does not make void an assignment for creditors merely because it does not have annexed to it the schedule required in such cases by the laws of the State, as such schedules are not parts of the contract. *Birdseye v. Baker* (Ga.) 2 L. R. A. 99. See *Drucker v. Wellhouse* (Ga.) 2 L. R. A. 338.

The law of comity in enforcement of rights.

Comity will enforce rights not in their nature local, and not contrary to the policy of the government of the tribunal, no matter where arising, and without regard to whether they are of common-law or statutory origin. *Usher v. West Jersey R. Co.* 4 L. R. A. 261, 128 Pa. 206, 24 W. N. C. 57.

A voluntary assignment in one State, where it is valid, will be upheld, as against the citizens of that State, by the courts of another State. *Woodward v. Brooks*, 3 L. R. A. 702, 123 Ill. 222.

A deed of trust made by a citizen of one State, of securities of foreign corporations, for the benefit of a citizen of another State, if valid by the law of the State where it was made and of the State where it is enjoyed, will not be held invalid because of the mere fact that the trustee is a corporation of a State where such trusts are invalid. *Fowler's App.* 125 Pa. 388, 23 W. N. C. 500.

A deed of trust executed in another State on property in Louisiana, to secure the payment of promissory notes, will be enforced as a conventional mortgage. *Pickett v. Foster* (La.) 36 Fed. Rep. 514.

This rule is, however, never adopted when it would contravene our criminal laws, or would sanction vice or immorality, or is against a positive prohibition of law. *Mumford v. Cauty*, 60 Ill. 370.

What is injurious to the rights of citizens should be the subject of positive legislation. *Guillander v. Howell*, 35 N. Y. 667.

For force and effect of foreign statutes, see *Cramton v. Valido Marble Co.* 1 L. R. A. 120, note, 60 Vt. 291.

the estimated value of \$3,900, but had been pledged, and were, and still are, in possession of the bank at Grafton, Dak., as security for the payment by Allard & Company of a note for about \$2,000 money borrowed. That on the 26th day of January, pursuant to the verbal agreement hereinbefore recited with reference to a transfer of the notes and accounts at Minneapolis, Minn., Dalpay executed deeds of conveyance to Wyman, Mullin & Company of three lots in Auburn, Dak., of the estimated value of \$300; also one house and lot in Auburn, Dak., of the estimated value of \$300; and a parcel in Cavalier County, Dak., of the estimated value of \$500,—which said parcels of land were so deeded to Wyman, Mullin & Company to further secure the payment of the indebtedness aforesaid owing them. That there was no present consideration for said several transfers hereinbefore mentioned, but the same were made to secure the pre-existing indebtedness, as aforesaid, owing to Wyman, Mullin & Company by said Allard & Company and Dalpay. That, excepting as aforesaid, no property has been transferred to said Wyman, Mullin & Company. That the business at Auburn, Dak., was entirely distinct from the business at Argyle, Minn. That after the transfer by Allard the business at Auburn was conducted without change, and was kept entirely distinct from the business at Argyle. That Dalpay owns personal property in Minnesota of the estimated value of at least \$7,000. That there is no insolvent or other law in Dakota whereby the securing or giving of a preference by an insolvent debtor is prohibited, or can be annulled. That under the laws of Dakota a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another. That nothing here stipulated shall be used or offered in evidence by or against the parties hereto as an admission whereby to estop or prejudice them in any other proceeding, case or trial growing out of the matters and things to this proceeding pertaining. Further testimony may be produced by either party hereto of any matter of fact not inconsistent with those herein stipulated."

The court below appointed a receiver of the property as prayed for, and defendant appealed to this court.

Mr. Fred B. Dodge for appellant.

Messrs. Alf. E. Boyesen and Richardson, Markham & May for respondents.

Vanderburgh, J., delivered the opinion of the court:

The facts upon which the court made the order appealed from appear in the stipulation of the parties in the record. The appellant's contention is that no case was made for the appointment of a receiver in these proceedings, on the ground that the property transferred to certain creditors by him, and securing to them a preference, was situated in Dakota Territory, where the assignment thereof was made, and that by the laws of that Territory such transfer is recognized as lawful. Among the assigned property, however, was a policy of insurance issued to the appellant by the Syndicate Insurance Company of Minneapolis, in this State, covering property owned by appellant in

Dakota, which had previously been destroyed by fire; so that the claim due, or to become due, under such policy, passed to the creditors so preferred, being the firm of Wyman, Mullen & Co. of Minneapolis. At the time of this alleged transfer, the appellant resided and had his domicile in this State. The insurance company is a local corporation, doing business in the same State; and the debt or claim in question is subject to be reached by judicial proceedings here. The petition in the insolvency proceedings is made by and on behalf of other creditors residing in and doing business in this State, and is rested upon the alleged preference so given to Wyman, Mullen & Co.; and it is claimed that the transfer was fraudulent, under the Insolvency Act, and that the order appointing a receiver herein was therefore justified. As between the parties to the assignment, if valid by the *lex loci contractus*, it would be upheld here. It would also be sustained against creditors, if valid where made, and not in contravention of our laws, both as to property situated in the foreign jurisdiction and property within this State. But the courts of this State cannot be required to give effect to an assignment or transfer of property within it, or of debts due to its citizens, which is found to be contrary to the policy and laws of the State. To uphold the opposite doctrine would be to encourage fraudulent contrivances to defeat the operation of our insolvent or collection laws. *Zipcey v. Thompson*, 1 Gray, 245; *Foster v. Goulding*, 9 Gray, 52, 53.

A different rule, which has no application in this case, is suggested as to citizens of the jurisdiction where the assignment is made, who are seeking a remedy against property in another State. *May v. Wannemacher*, 111 Mass. 209.

As a general rule, a debt or chose in action, being incorporeal, is deemed to follow the person of the owner, and to be present with him, but for some purposes the courts treat such property or interests as having a *situs* at the place of the owner's domicile. It is so for the purposes of taxation, and, for reasons already stated, in insolvency or other proceedings by creditors. *Smith v. Chicago & N. W. R. Co.* 23 Wis. 269; *Wharton*, Conf. L. § 363.

The facts in the case are therefore sufficient to support the order appointing a receiver, which is accordingly affirmed.

KETTLE RIVER R. CO., *Resp.*,

v.

EASTERN R. CO. of Minnesota *et al.*,
App.

(....Minn....)

- *1. An agreement which by its terms gives the exclusive right of way to a railway corporation in or through a certain tract of land, in so far as it attempts to exclude other railway corporations from acquiring a right of way over the same tract upon land not appropriated or required for its use by the covenantee, is against public policy and void.
2. A third party, not interested in lands taken

*Head notes by, VANDERBURGH.

for a right of way by a railway company, cannot raise the objection that the corporation has no power under its charter to acquire the specific lands for railway purposes.

3. Where land is taken for its use by a railway corporation having the right to exercise the power of eminent domain, the question whether the use is public or private depends upon the right of the public to use the road and to require the corporation, as a common carrier, to transport freight or passengers over the same, and not upon the amount of business.
4. A covenant by a land owner, by which he agrees that the products of a stone quarry shall be transported to market exclusively over one line of railroad, is not a covenant real, and does not run with the land.
5. A purchaser is bound to inquire into the title of his vendor, and is affected with notice of any equities which appear upon the same. And, in equity, covenants relating to land or its mode of use or enjoyment are frequently enforced against grantees with notice, though there is no privity of estate, and they are not such as, in strict legal contemplation, run with the land. But they must be such as relate to or concern the land or its use. It is not enough that a covenant affects the use of the land or its mode of enjoyment in a collateral way.
6. A class of covenants, falling within the equity rule, considered, and,—Held, not to include an agreement for the exclusive transportation of the products of land by a railway company extended to or built over it.

(October 4, 1899.)

APPEAL by defendants from an order of the District Court of Pine County overruling a motion to dissolve a temporary injunction restraining the building of a railroad over certain land. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Lusk & Bunn and George L. Bunn, for appellants:

If the contract be construed so as to confer on the plaintiff Company the exclusive right to build railway tracks upon these lands, such contract is void as against public policy.

Greenhood, Pub. Pol. p. 672; *Pensacola Teleg. Co. v. W. U. Teleg. Co.* 96 U. S. 1 (24 L. ed. 708); *W. U. Teleg. Co. v. Am. U. Teleg. Co.* 19 Am. L. Reg. N. S. 173; *W. U. Teleg. Co. v. Am. U. Teleg. Co.* 65 Ga. 160; *W. U. Teleg. Co. v. Chicago & P. R. Co.* 86 Ill. 246; *Sharp v. Whiteside*, 19 Fed. Rep. 150, 173, note; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600.

The Eastern Railway Company having power to locate this line delegated to it by the Legislature, and also the power in the first instance to determine the necessity for the taking, its location and determination is valid and binding in this case.

Weir v. St. Paul, S. & T. F. R. Co. 18 Minn. 165, 167; *Colton v. Mississippi & R. R. Boom Co.* 22 Minn. 372.

A public use means simply a right of the public to use the property.

See *West River Bridge Co. v. Dix*, 47 U. S. 6 How. 547 (13 L. ed. 251); *Bloodgood v. Mohawk & H. R. Co.* 18 Wend. 18; *Re Eureka B. W. & Mfg. Co.* 96 N. Y. 42; *Weir v. St. Paul, S. & T. F. R. Co.* 18 Minn. 168; *Miller v. Troost*, 14 Minn. 865; *State v. American & E. C. News Co.* 6 L. R. A.

48 N. J. L. 381; *Lumbard v. Stearns*, 4 Oush. 60; *Re Dransville Cemetery Asso.* 66 N. Y. 569; *Sholl v. German Coal Co.* 8 West. Rep. 94, 118 Ill. 427; *Memphis Freight Co. v. Memphis*, 4 Coldw. 419; *Lewis, Em. Dom.* §§ 159, 163–165.

If a public use means use or the right of use by the public, the enterprise will still be a public use though only a few of the public are directly interested or benefited.

Wood, Railway Law, § 226; *Lewis, Em. Dom.* §§ 161, 167; *Denham v. Bristol Co.* 108 Mass. 202; *Hays v. Risher*, 32 Pa. 169; *Byrd v. Negley*, 40 Pa. 377; *Brown v. Corey*, 48 Pa. 495; *New Central Coal Co. v. George's Creek Coal & Iron Co.* 87 Md. 537; *Dietrich v. Murdock*, 42 Mo. 279; *Phillips v. Watson*, 63 Iowa, 28; *De Camp v. Hibernia R. Co.* 47 N. J. L. 42, affirmed, 47 N. J. L. 518.

The covenant purporting to give the plaintiff Company the exclusive right to transport all the stone to be quarried on said premises, over its railroad, does not run with the land and is not binding upon the Northern Land Company or the defendants.

As to privity of estate, no covenant, no matter how much it may "touch and concern" the land, can run with it, unless this "privity" of estate existed between the parties to the covenant at the time it was entered into. Privity of estate is an essential feature of covenant running with the land.

1 Smith, Lead. Cas. 8th ed. 168, 178, 179; *Thursby v. Plant*, 1 Wms. Saund. 240; *Webb v. Russel*, 3 T. R. 893; 2 Washb. Real Prop. 5th ed. 297, 300; 4 Kent, Com. 480, note, 12th ed.; *Cole v. Hughes*, 54 N. Y. 444; *Hurd v. Curtis*, 19 Pick. 459; *Keppell v. Bailey*, 2 Myl. & K. 517.

A covenant which imposes a charge upon the land of the covenantor for the benefit of land held by the covenantee may be enforced by those claiming under the latter, but will not be binding upon the assignees of the former unless the relation between covenantor and covenantee is that of landlord and tenant, or of lessee for life and reversioner.

Van Rensselaer v. Smith, 27 Barb. 104; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Plymouth v. Curver*, 16 Pick. 188; *Wheelock v. Thayer*, Id. 68; *Taylor v. Owen*, 2 Blackf. 301. See also *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 600; *Lynn v. Mount Savage Iron Co.* 34 Md. 603.

However clearly and strongly may be expressed the agreement of the parties that a covenant shall run with the land, yet if it be of such a character that the law does not permit it to be attached it cannot be attached by the agreement of the parties, and the assignee would take the estate clear of any such covenant.

Masury v. Southworth, 9 Ohio St. 841, 848. An unusual burden or one that is foreign to the land cannot be charged upon it.

See *Keppell v. Bailey*, 2 Myl. & K. 517; *Ackroyd v. Smith*, 10 C. B. 164; *Lynn v. Mt. Savage Iron Co.* 34 Md. 603; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* supra; *Blount v. Harvey*, 6 Jones, L. 186; *Norcross v. James*, 1 New Eng. Rep. 327, 140 Mass. 188; *Brewer v. Marshall*, 19 N. J. Eq. 537; *Newburg Petroleum Co. v. Wear*, 7 West. Rep. 783, 44 Ohio St. 604.

Not being a contract capable of running with the land, and because of the peculiar nature of the covenant, a court of equity will not enforce it as against a purchaser of the land, even although such purchaser took with notice of the covenant.

See generally *Tulk v. Moxhay*, 2 Phill. Ch. 774; *Haywood v. Brunswick P. B. Bldg. Society*, L. R. 8 Q. B. Div. 408; *London & S. W. R. Co. v. Gomm*, L. R. 20 Ch. Div. 582.

Mr. Julian T. Davis, with **Messrs. James Smith, Jr., and W. A. Barr**, for respondent:

The covenants made by the Kettle River Sandstone Company ran with the land, and therefore their successors in title, the defendants Ring & Tobin, are bound by them. The law corresponds with common sense and annexes a covenant to land when it is made with the intention of benefitting the land, and the covenant is personal, *e. g.*, when it is for the benefit of a particular person who now happens to be owner of certain lands, and will not benefit him after he ceases to be such owner. The most conspicuous class of covenants that run with the land are covenants for quiet enjoyment.

Noke v. Auder, Cro. Eliz. 436; *Rawle*, Covenants for Title, §§ 203, 205, 213; *Middlemore v. Goodale*, Cro. Car. 508.

Other covenants that concern land are: covenants to repair (*Spencer's Case*, 5 Coke, 16 (a); *Williams v. Earle*, L. R. 8 Q. B. 739); to put in repair and leave possession peaceably and not to underlet (*Martyn v. Clue*, 18 Q. B. 661; *Northfleet v. Oromwell*, 64 N. C. 1); to reside on the premises (*Tatem v. Chaplin*, 2 H. Bl. 183); to use as a dwelling-house (*Wilkinson v. Rogers*, 10 Jur. N. S. 6); to insure where the insurance money is to be used to rebuild or repair (*Masury v. Southworth*, 9 Ohio St. 840); to convey during the term (*Hagar v. Buck*, 44 Vt. 285); to pay for buildings erected (*Hunt v. Danforth*, 2 Curt. 592, 608; *Keteltas v. Pensfold*, 4 E. D. Smith, 122); to pay assessments (*Post v. Kearney*, 2 N. Y. 394); covenants between co tenants not to partition the land for a reasonable time (*Hunt v. Wright*, 47 N. H. 896; *Coleman v. Coleman*, 19 Pa. 100); to lay out land as a street (*Thomas v. Poole*, 7 Gray, 83); to keep land unbuilt upon (*Watertown v. Coven*, 4 Paige, 510; *Scott v. Burton*, 2 Ashm. 812; *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400); to fence (*Haslett v. Sinclair*, 78 Ind. 488; *Purbank v. Pillsbury*, 48 N. H. 475; *Easter v. Little Miami R. Co.* 14 Ohio St. 48; *Huston v. Cincinnati & Z. R. Co.* 21 Ohio St. 235; *Bronson v. Coffin*, 108 Mass. 175; *Ky. Cent. R. Co. v. Kenney*, 82 Ky. 154); to build a mill. *Sampson v. Easterby*, 9 Barn. & C. 505; *Easterby v. Sampson*, 1 Crompt. & J. 105.

All these cases consider important, if not decisive, the point that the covenant gives value to the land that passes from the grantor to the grantee.

Pyrian v. Arthur, 1 Barn. & C. 410; *Dunbar v. Jumper*, 2 Yeates, 74.

If the covenant is merely the means of procuring payment for the land conveyed, it will run with the land.

Goudy v. Goudy, Wright (Ohio) 410. See also *Parker v. Whyte*, 1 Hem. & M. 167; *Clements v. Welles*, L. R. 1 Eq. 200; *Nat. Union* 6 L. R. A.

Bank v. Segur, 39 N. J. L. 173; *Hooper v. Clark*, L. R. 2 Q. B. 200; *Norman v. Wells*, 17 Wend. 186; *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569; *Rome, W. & O. R. Co. v. Ontario S. R. Co.* 16 Hun, 445; *Hemingway v. Fernandes*, 18 Sim. 228.

The present covenant is not a personal covenant merely.

Congleton v. Pattison, 10 East, 130.

There is a sufficient privity of estate between the plaintiff and the assignees of the Sandstone Company to enable the former to take advantage of all covenants that concern the realty.

See *Hannen v. Ewall*, 18 Pa. 9; *Herbaugh v. Zentmeyer*, 2 Rawle, 159; *Royer v. Ake*, 3 Penr. & W. 461; *Ingersoll v. Sergeant*, 1 Whart. 398; *Van Rensselaer v. Bradley*, 8 Denio, 135; *Van Rensselaer v. Smith*, 27 Barb. 104; *Van Rensselaer v. Hays*, 19 N. Y. 68; *Van Rensselaer v. Read*, 26 N. Y. 558; *Van Rensselaer v. Barringer*, 39 N. Y. 9; *Nicoll v. New York & E. R. Co.* 12 Barb. 460; *Tyler v. Heidorn*, 46 Barb. 439; *McMurphy v. Minot*, 4 N. H. 251.

The grant of an easement from one to another constitutes a sufficient privity of estate to make the covenant bind the assignee of the covenantor.

Morse v. Aldrich, 19 Pick. 449; *Carr v. Lowry*, 27 Pa. 257.

The relationship between the parties need not be that of landlord and tenant to establish that privity of estate which the law requires in order that the covenants may run with the land.

Gilmer v. Mobile & M. R. Co. and *Van Rensselaer v. Read*, *supra*.

Covenants will run with incorporeal hereditaments as well as with corporeal.

Bally v. Wells, 3 Wils. 25; *Hooper v. Clark*, L. R. 2 Q. B. 200; *Fitch v. Johnson*, 104 Ill. 111.

The right conveyed by this covenant granting to the plaintiff the exclusive right to transport all the stone quarried on the Sandstone Company's land constituted an easement or a quasi easement, which is in reality an estate carved out of the perfect dominion over said land possessed by the Sandstone Company; and of course the assignee always takes land subject to existing easements. The right to take seaweed from a particular beach is an easement (*Phillips v. Rhodes*, 7 Met. 323), or a right to a profit *a'prendre*.

Hill v. Lord, 48 Me. 83.

The right to take coals from another's land is an easement.

Huff v. M'Cauley, 58 Pa. 209.

The right to shoot, kill or take game is an incorporeal hereditament.

Hooper v. Clark, *supra*; *Wickham v. Hawker*, 7 Mees. & W. 63.

So is taking water from a spring or well on another man's land.

Washb. Easem. 4th ed. 144, 145, § 20; *Manning v. Wasdale*, 5 Ad. & El. 758; *Race v. Ward*, 7 El. & Bl. 384.

Whether this covenant will run with the land at law or not, a court of equity will enforce it against the assignees of the covenantor because they have taken the land with full knowledge of the covenant.

See *Phoenix Ins. Co. v. Continental Ins. Co.* 87 N. Y. 400; *Tulk v. Moxhay*, 11 Beav. 571;

Coles v. Sims, 5 De G. M. & G. 1; *Piggott v. Stratton*, 1 De G. F. & J. 53; *Mann v. Stephens*, 15 Sim. 877; *Whatman v. Gibson*, 9 Sim. 196, 206; *Western v. MacDermot*, L. R. 1 Eq. 499, L. R. 2 Ch. 72; *Wilson v. Hart*, L. R. 1 Ch. 463; *Bristol v. Wood*, 1 Collyer, Ch. 480; *Richards v. Revitt*, L. R. 7 Ch. Div. 224; *De Mattos v. Gibson*, 4 De G. & J. 282; *Whitney v. Union R. Co.* 11 Gray, 359; *Clark v. Martin*, 49 Pa. 289; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Winsfield v. Henning*, 21 N. J. Eq. 188; *Greene v. Creighton*, 7 R. I. 1; *Willoughby v. Lawrence*, 8 West. Rep. 472, 116 Ill. 11; *Stines v. Dorman*, 25 Ohio St. 580.

Vanderburgh, J., delivered the opinion of the court:

The plaintiff was incorporated under the General Laws in 1886, and, as is alleged, possesses the usual powers and franchises of railway corporations, and is authorized to build and operate a railway, with one or more tracks, from a point on the line of the St. Paul & Duluth Railroad in the County of Pine, in township 42, north of range 20, extending thence to a point on the right bank of Kettle River, in the same township, with extensions to reach any or all industries that are or may be hereafter established in said township, and localities adjoining the same, with all necessary and convenient tracks, side tracks or track extensions, grounds, etc., and with the right to locate a branch southerly to another point on Kettle River, and another to the east line of the State, with all necessary side tracks, etc., it being the declared purpose of the Company to operate such line or lines in connection with the St. Paul and Duluth Railroad. Prior to the incorporation of the plaintiff, the Kettle River Sandstone Company had been incorporated, and had become possessed of the title in fee to the lands in township 42, which are particularly described in the complaint, and upon which are large and valuable deposits of merchantable sandstone, which, it is alleged, could not be quarried and transported to market without the construction of a railroad to reach the same; and thereupon negotiations for such purpose were entered into between the plaintiff and the Sandstone Company, which finally resulted in the execution by them of the following indenture, with mutual covenants, and which forms the basis of this action:

"This indenture, made and concluded this first day of November, 1887, by and between the Kettle River Sandstone Company, a corporation existing in the State of Minnesota, party of the first part, and the Kettle River Railroad Company, also a corporation existing in said State, party of the second part, witnesseth: That whereas, the first party is the owner in fee simple of the following real estate situate in the County of Pine and State of Minnesota, described as follows, to wit: The southwest quarter, and the south half of the northwest quarter, and the southwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter, of section three (3); also the east half of the northwest quarter, and the east half of the southwest quarter, and the west half of the southwest quarter, and the southeast quarter of the northeast quarter, of section ten (10); and the

northwest quarter of the northeast quarter, and the northwest quarter of the southeast quarter, and the west half of the southwest quarter, and the northeast quarter of the southwest quarter, and so much of the east half of the northwest quarter of section fifteen (15) as is not included or embraced in the town site of Sandstone, as the same is surveyed and platted, and the plat thereof recorded in the office of the register of deeds of Pine County,—all in township forty-two (42) north, of range twenty (20) west, according to the government survey thereof, upon which premises the said second party has, for the purpose of affording railroad facilities for the said first party, constructed its line of railroad, extending from a point of junction with the main line of the St. Paul & Duluth Railroad Company, in section eighteen (18) in said township and range, in said County of Pine, to a point on or near the right bank of Kettle River, in said section ten (10), town and range aforesaid, with side tracks and other railroad structures in and upon the premises of the said first party, above described, so as to afford facilities for the transportation of sandstone from the quarries of said first party now opened.

"And whereas, the principal value of the lands and premises of the said first party hereto consists of large and valuable deposits of marketable sandstone, and it is desirable for the said first party to secure the present and additional facilities to transport its marketable stone from said quarries, and other points of said premises, by having the second party extend its tracks and other connections from time to time, as hereinafter specifically provided; and such quarries may be opened and worked upon said real estate; and in consideration thereof, and to secure the said second party the right of way, and the right of transporting all of the said stone over its said line of railroad and extensions, upon the payment to said second party, its lessees, successors and assigns, of a reasonable compensation for transporting the same: Now, therefore, the said first party, in consideration of the premises aforesaid, and of \$1 to it paid by the said second party, the receipt whereof is hereby acknowledged, does, by these presents, grant, bargain, sell and convey to said second party, its successors, lessees and assigns, forever, so much of said real estate and premises as may be necessary and convenient for the maintenance and operation of its line of railroad as the same is now constructed, or as the said second party may hereafter, from time to time, desire to relocate and construct the same, with all the necessary or convenient buildings, depots, engine-houses, water-tanks, turn-tables and other structures, with all necessary and convenient turn-outs, yards and side tracks; and also to construct thereon, and forever maintain and operate, a line of railroad from some convenient point on its said main line, to be selected by said second party; running thence to a point on the west bank of Kettle River, in said section ten (10); with all such portions of said real estate as said second party, or its successors and assigns, may require for additional tracks, side tracks, depots, and standing ground, and other structures, at such point and localities as said second party or its successors may, from time to time, select

or designate. And also grants to said second party, its successors or assigns, the exclusive right of way, for railroad purposes, of such reasonable width as said second party, from time to time, require and designate, so as to extend, operate and use the same, so as to reach all stone quarries that may hereafter be opened or worked at any point, place or locality within the limits of the real estate hereinbefore first described, and to connect such track or tracks with the tracks now or hereafter to be constructed by said first party, with the right also to bridge Kettle River at such points or places as may be designated by said second party from time to time, in order to reach the quarries that may be opened on the easterly side of said river: To have and to hold the above-granted premises, rights and privileges to the said second party, its successors and assigns, forever, subject, however, to the right of the said first party, its successors, its lessees and assigns, to quarry and remove the stone from said premises for transportation as aforesaid; and for that purpose the tracks of said second party on said premises, other than that of its main line, shall, from time to time, be adjusted and extended so as to enable said first party, and its lessees, successors and assigns, to quarry and remove stone from any of said premises for transportation as aforesaid.

"And the said second party, for itself, its successors and assigns, covenants with said first party, its successors, lessees and assigns, that it will from time to time, as said first party, or its successors or lessees, shall open any quarry or locality upon said premises hereinbefore described, and to which said first party shall properly grade and provide a suitable roadbed for such track, or its extension, the said second party will, upon reasonable notice thereof, tie, iron and operate such track or extension in connection with its main or its other tracks, and so from time to time, as such track extension is graded and required, will tie, iron and operate the same as above provided, and will transport all stone so reached by its said tracks, when loaded upon its cars by said first party, its lessees or assigns, over its said line of railway, in connection with the railroad of the St. Paul & Duluth Railroad Company; and for that purpose it will, upon request, from time to time, and within a reasonable time, furnish to said first party, its successors, lessees and assigns, upon its said tracks, convenient for loading, all cars necessary for the transportation of such stone.

"It is further agreed that, in case the said first party, or its successors, lessees or assigns, shall construct suitable railroad track or tracks from any of its quarries, or from the main or side tracks of the said second party, to its dumping grounds, for the removal of offal and unmarketable stone and other material, the said second party will, on reasonable notice, furnish cars therefor, and transport such material, provided the same is loaded and unloaded by said first party, or its successors, lessees and assigns, for which said transportation said second party shall be paid a reasonable compensation. And the said first party covenants, for itself and its successors, that all marketable stone hereafter to be quarried, removed and transported by rail, from the lands or premises

hereinbefore first described, shall be worked, quarried or transported over, and in connection with, the tracks of the said second party, and that the track of the said second party shall be extended to the same as aforesaid, so as to secure to the said second party, and its successors and assigns, the exclusive right to transport the same upon the terms and conditions aforesaid. It is further expressly and mutually agreed and covenanted that all and singular the grants and provisions hereinbefore set forth shall be and continue to be binding and obligatory upon the respective parties hereto, their respective successors, lessees and assigns."

This instrument, duly executed and acknowledged by both parties, was recorded in the office of the register of deeds of Pine County, where all the lands lie, on November 26, 1887. And it also appears that the plaintiff has constructed its line of road from a point on the main line of the St. Paul & Duluth Railroad, through several sections, into and through several subdivisions of section ten (10) in township 42, with an extension and spur track in and through the stone quarries referred to, and with proper side tracks, so as to accommodate the business thereof, and "transport all stone and other freights requiring transportation over its said road and its connections."

The plaintiff also alleges that it has fully kept the agreement on its part, and furnished all necessary cars and rolling stock, and transported the stone quarried on the premises, and has procured, "from its connection with the St. Paul & Duluth Railroad Company, the perpetual right to transport, or have transported, all stone quarried or to be quarried upon said premises, from the quarries aforesaid, to St. Paul, Minneapolis, Stillwater, and all other points and connections reached by said lines of railway of said St. Paul & Duluth Railroad Company, at and for a reasonable compensation." It also appears that the right of way through certain portions of sections 10 and 15 referred to in the deed has been duly designated and appropriated. The main line of the defendant corporation, Eastern Railway Company, passes through the northeastern quarter of section 10. Subsequent to the record of the indenture above referred to, and on the 30th day of November, 1887, the Sandstone Company entered into an agreement for a lease of certain of the lands in question, owned by them in sections 10 and 15, with the defendants Ring & Tobin, for the term of ten years, under which they were to work the quarries, and market stone quarried from the same, for a royalty to be paid to the Sandstone Company, and which lease "was made subject to all of the rights and privileges; and the said second parties (Ring & Tobin) hereto are entitled to all the benefits which may accrue to either of the parties hereto, by virtue of the contract" with the plaintiff, being the indenture referred to. The lease was recorded April 17, 1888.

In the month of July, 1888, the Kettle River Sandstone Company conveyed the lands, embracing the quarries in question, by deed of bargain and sale to a corporation known as the "Northern Land Company." And on the 8th day of September, 1888, the Kettle River Sandstone Company, by an instrument under seal, released and discharged the lessees, Ring &

Tobin, from all obligations and liabilities under the lease to them previously executed.

A tripartite agreement bearing date August 20, 1888, was entered into between the Northern Land Company of the first part, defendants Ring & Tobin of the second part, and the defendant Eastern Railway Company of the third part. Under this agreement the Northern Land Company leased to Ring & Tobin lands in sections 10 and 15 in question, thereby giving them the exclusive right to occupy the leased premises, and to quarry and transport stone therefrom, and to operate necessary machinery thereon, for the business of quarrying stone and loading it onto cars. And the lessees, Ring & Tobin, on their part, agree that they will ship all stone to be transported from the demised premises by the line or lines of railway of the party of the third part, to all points reached by the same, and beyond said lines will, so far as reasonable and practicable, ship said stone over the line of the St. Paul, Minneapolis & Manitoba Company, "provided that the foregoing covenant shall not be binding until said third party shall have constructed a suitable line of railway into said premises." The agreement also contains proper covenants for the grant of such right of way to the party of the third part, for its tracks, as may be necessary for its business in connection with such quarries. And the Eastern Railway Company, party of the third part, covenants and agrees to construct a branch or extension of its road into and upon the premises so leased, and to transport all the stone quarried by the lessees to points reached by it. The plaintiff obtained a temporary injunction on the ground that the defendants were threatening to grade and extend the line of the Eastern Railway over the tracks, premises and property of the plaintiff, and to destroy the tracks, and divert and destroy its business, and render its line of no practical value.

The facts as above stated are substantially admitted by the defendants in their answer, and they admit that, at the commencement of this action, the Eastern Railway Company was constructing a railroad from its main line into the said stone quarries, upon the location indicated by the map annexed to the answer, for the purpose of reaching the quarries in question, in order to transport over its road the products thereof; and that it has acquired the right of way therefor, by deed, from the Northern Land Company; and they deny that the construction of their tracks has or will injure the tracks, side tracks or property of the plaintiff, as alleged in the complaint; or that the construction of the said road will in any manner hinder or interfere with the said road of the plaintiff, except that, by legitimate competition, the Eastern Railroad expects to secure all or a portion of the traffic originating in the quarry; and they deny that the Eastern Railway Company has graded or built its railroad upon or touching any property of the plaintiff. They allege that only a part of its proposed line has as yet been built, and that if built as proposed, it will touch the track or property of the plaintiff at one point only, and involve but one crossing thereof, and will result in no substantial injury or inconvenience to plaintiff's property except through the diversion of traffic.

6 L. R. A.

1. The stipulation in the lease of the Sandstone Company to Ring & Tobin, which makes the lease subject to the contract between plaintiff and the Sandstone Company first above referred to, was binding only during the continuance of the lease. The plaintiff was not a party to it, and there was no privity between Ring & Tobin and the plaintiff. The lease might be terminated by their failure to comply with certain conditions therein specified, or by the voluntary act of the parties thereto, as was done. Ring & Tobin assumed no personal obligation or liability, and are not bound by the covenants in that contract, unless their present lessors, the Northern Land Company, are so bound. *McMillan v. Scott*, 76 N. Y. 141-144. And upon this point counsel do not appear to disagree.

2. It will be observed that the indenture or contract with the plaintiff, which was made, among other things, "to secure a right of way" for its road, assumes to grant so much of said real estate and premises as may be necessary and convenient for the maintenance and operation of its line of railroad as is now constructed, or as the said second party may hereafter, from time to time, desire to relocate and construct, with all necessary buildings, side tracks, etc. And also "grants to said second party, its successors or assigns, the exclusive right of way for railroad purposes of such reasonable width as said second party may, from time to time, require and designate, so as to reach all stone-quarries that may hereafter be opened or worked at any point or place within the limits of the real estate hereinbefore described." This grant, being in derogation of common right, should receive a strict construction; but we think, taking the several covenants together, it was manifestly the purpose of the parties to exclude other railways from access to the quarries, and from any share in the transportation of the stone quarried therein. But the plaintiff did not, and could not, under the terms of its grant, acquire title to its right of way, or other lands necessary for its business, until the same was actually selected, located and designated. Prior to such location, its grant was a mere "float," and no title passed to any definite portion of the premises. There was nothing, then, to prevent any other railroad company from acquiring by condemnation a right of way over any portion of the territory in question not already actually appropriated by the plaintiff. The plaintiff has no ground, therefore, upon which to base legal proceedings against the Eastern Railway Company, except for an injury or interference, actual or threatened, to its right of way, and grounds actually selected and designated for its use; for it is not apparent that it would ever want the particular land taken or occupied by the Eastern Company. And, in respect to the continuance of the injunction against the latter Company, this presents the only practical question to be considered here on this branch of the case. The question as to that Company's corporate authority, under its charter, to acquire a right of way over these particular lands for a branch or extension cannot be raised by a third party, who has no interest in the land taken, and whose legal rights are not affected. Should it attempt to take or cross the plaintiff's right of way under condemnation

proceedings, the plaintiff will then be in a position to raise that question. But neither of these corporations can enter into a contract which courts will recognize as valid for such exclusive rights in the territory in question as the plaintiff claims. Neither could altogether exclude the other from the premises, or prevent land not already appropriated or shown to be required for its own corporate use from being taken or acquired in any lawful way by another corporation for a use which is recognized as public. Such contracts are against public policy, and void. *Greenhood*, Pub. Pol. 672, and cases cited; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 22 W. Va. 626.

It is insisted, however, by the plaintiff, that the proposed branch lines to these quarries, which are the property of private owners, are for the accommodation of private interests only, and not for a public use, and hence that the power of eminent domain cannot be exercised; and that the contract must be deemed to relate to private interests only, and is not, therefore, subject to this obligation. But these corporations are each quasi public corporations, and are, under their charters, authorized to exercise the right of eminent domain; and the question whether the use is public or private does not depend upon the amount of business, or the number of persons who have occasion to use either road, but upon the right of the public to require the corporations to carry their freight. *De Camp v. Hibernia R. Co.* 47 N. J. L. 47.

If all the people have a right to use the road, it is a public use or interest, though the number who have business requiring its use may be small. *Phillips v. Watson*, 63 Iowa, 83; *Clarke v. Blackmar*, 47 N. Y. 156; *Lewis*, Em. Dom. § 166.

The cases cited fully illustrate and support the principle, and of its correctness there can be no doubt. And it will be time enough to determine the full extent of plaintiff's rights in the tract in question when it shall attempt to define the extent and limits of the right of way and grounds claimed to be reasonably necessary for its use.

3. But the most important question in the case is whether the burden of the covenant in the deed of the Sandstone Company, whereby that Company undertakes "that all marketable sandstone hereafter to be quarried, removed or transported from the lands or premises described in the deed shall be worked, quarried or transported over and in connection with the tracks of the plaintiff," rests upon the grantees of the Sandstone Company. The parties undoubtedly have very clearly expressed their intention that this covenant should bind the assignees and successors in interest of the parties. No mere form of words, however, is sufficient for such purpose; but the nature of the covenant and its relation to the estate must be such that the law will permit the intention to be effectual. *Masury v. Southworth*, 9 Ohio St. 348.

Strictly speaking, at law there must be privity of estate existing between the parties when the covenant is made, and it must concern the land or estate. "The covenant must respect the thing granted or demised. When the thing done or omitted to be done concerned the lands

or estate, that is the medium which creates the privity between the plaintiff and defendant," *Bully v. Wells*, 3 Wils. 29.

It must inhere in or be attached to the land, or relate to its mode of occupation or enjoyment. And it runs with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of the land. *Savage v. Mason*, 3 Cush. 505; *Shaber v. St. Paul Water Co.* 80 Minn. 182.

In some cases covenants in respect to lands are construed as equivalent to the grant of an easement or servitude, and as such held to attach to the land, and run with it regardless of change of ownership. *Weyman v. Ringold*, 1 Bradf. 54; *Bronson v. Coffin*, 108 Mass. 175.

Thus a covenant by a railway company to keep its right of way fenced, or a covenant by an adjoining owner for himself, and his heirs and assigns, to maintain a division fence, is construed to be a grant creating an easement. *Boyle v. Tamlyn*, 6 Barn. & C. 329; *Blain v. Taylor*, 19 Abb. Pr. 230; *Easter v. Little Miami R. Co.* 14 Ohio St. 51; *Hazlett v. Sinclair*, 76 Ind. 492.

In *Pittkin v. Long Island R. Co.* 2 Barb. Ch. 221, an agreement by the defendant with the owner of adjoining land to maintain a side track and depot at a particular point, and in *Gilmer v. Mobile & M. R. Co.* 79 Ala. 569, a similar agreement, with the grant of the right to cultivate certain portions of the right of way, were supported on similar grounds; the chancellor saying, in his opinion in the first-named case, that "it was, in substance, the grant of an easement or servitude, which was to be binding on the property of the railroad company, as the servient tenement for the benefit of the complainant and those who should succeed him in his estate." But in any event these were covenants that could have been upheld and enforced in equity against all subsequent purchasers or owners with notice.

But the covenant under consideration is, in substance, a traffic agreement, giving to the plaintiff the exclusive railway transportation of the product of the quarries. The track had been laid to the quarry when the agreement was made, and it contains provisions for its extension to other parts of the quarry at the joint expense of the parties. To secure this transportation was the consideration which induced the plaintiff to construct the road and enter into the contract. But it is not a covenant real, and does not run with the land as such. It is not of such a nature that it can be said to inhere in the land, nor does it grant any right or easement therein. As respects the land, plaintiff's grant is limited to its right of way, and the right to use and occupy such portions of the premises as it may require for its business. But it has no easement in the rest of the premises. It is to furnish track and cars for the transportation of stone, as it might, under other circumstances, to a lumber-yard or grain elevator, under a similar contract. It has no right to operate the quarry, and has no other interest in it. The quarried stone is personal property which the Sandstone Company covenanted should be transported as freight by plaintiff's railway. But conceding the personal liability of that company for the violation of that covenant, it is not binding on the Northern Land

Company, or its lessees, if it does not run with the land, or does not constitute a charge upon it.

The case of *Hemingway v. Fernandes*, 13 Sim. 228, cited and relied on by the plaintiff, is dissimilar in important particulars. In that case there was a lease, and a tenure was created, and the stipulation, agreeing to transport all the coal mined from certain land, and to pay a certain rate per ton for all the coal so conveyed, was in the nature of a covenant for the payment of rent. 1 Smith, Lead. Cas. 8th ed. 187.

4. The Northern Laid Company acquired its interest with notice of plaintiff's rights; for it is a general rule that a purchaser is bound to inquire into the title of his vendor, and is affected with notice of any equities that appear upon the title. Leake, Cont. 1236; *Haslett v. Sinclair*, 76 Ind. 488.

And here the deed containing the stipulation and covenants in question had been duly recorded. It is therefore very earnestly contended by the plaintiff that, since these parties have acquired their title and interest with notice, equity will not permit them to evade the covenant in relation to the transportation, but will enforce it by injunction. There is a growing tendency to incorporate equitable doctrines with common-law rules, and, in equity, covenants relating to land, or its mode of use or enjoyment, are frequently enforced against subsequent grantees with notice, though there is no privity of estate, and the covenants do not strictly run with the land.

Mr. Pomeroy (8 Eq. Jur. § 1295) states the rule broadly as follows: Where, in a deed, the grantor covenants concerning the land or its use, restricting certain specified uses, subjecting it to easements, servitudes or the like, and the land is afterwards conveyed, or passes to one who has actual or constructive notice of the covenant, the grantee or purchaser will take the premises bound by the covenant, and will be compelled, in equity, either to specifically execute it, or will be restrained from violating it. It is not material whether the covenant is or is not one which runs with the land. And in the leading cases of *Tulk v. Mozhay*, 2 Phill. Ch. 774, the doctrine is stated as follows: "A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice."

Under this rule, covenants are sustained and enforced against assignees with notice stipulating for a particular mode of improvement, occupation or use of lands; and it is especially applicable to restrictive covenants, thus: covenants in respect to the mode of building or occupying parts of a once common estate; certain stipulations made by the owners, or in deeds, as to the use of ways, for light and air, etc.; reserving premises exclusively for dwelling-houses; prescribing manner of improvement; not to carry on particular trades or business,—as, for instance, not to use premises for sale of intoxicating liquors, or for an inn, tannery, gas-house, etc. 2 Washb. Real Prop. 5th ed. 838; *Parker v. Nightingale*, 6 Allen, 841; *Barrow v. Richard*, 8 Paige, 851; *Trustees of Columbia College of N. Y. v. Lynch*, 70 N. Y. 447; *Hodge v. Sloan*, 107 N. Y. 244, 9 Cent. 6 L. R. A.

Rep. 878; *Whitney v. R. Co.* 11 Gray, 359; *Wilson v. Hart*, L. R. 1 Ch. 463; *Luker v. Dennis*, L. R. 7 Ch. Div. 227; *Middleton v. Newport Hospital* (R. L.) 1 L. R. A. 191; *Kirkpatrick v. Peahine*, 24 N. J. Eq. 214; *Appeal of St. Andrew's Church*, 87 Pa. 512; *Tulk v. Mozhay*, *supra*.

Such privileges or restrictions, which are sometimes called equitable easements, servitudes or amenities, are enforced by injunction irrespective of the question of privity of estate, or the nature of the tenure; but they must be such as relate to or concern the land or its use or enjoyment. It is not enough that a covenant affects the use of land, or the enjoyment of an easement therein, or the value or profitability of the use thereof, in a collateral way. *Congleton v. Pattison*, 10 East, 180.

That the plaintiff, as a common carrier, should have a monopoly of the transportation of the freight to and from the quarries is not a privilege affecting the land of either party to the covenant, except in a collateral way, though it might very seriously affect the amount and value of its freight business, and have been the chief inducement for constructing the road. In other words, equity follows the law in that it will not enforce a covenant as against the heir or assignee unless the obligation it imposes is one which attaches to or concerns the land or its use or mode of enjoyment. *Norcross v. James*, 140 Mass. 192, 1 New Eng. Rep. 327.

In *Keppell v. Bailey*, 2 Myl. & K. 517, the owners of the Beaufort Iron Works covenanted with the Trevil Railroad Company that they and their assigns would procure all the lime stone used in their iron works from the Trevil quarry, and carry it and the product of their furnaces over the Trevil Railroad to their works, paying a certain toll therefor. The Trevil Railroad was constructed in reliance upon this covenant. The iron works were assigned, and the assignees undertook the construction of another railroad to other quarries. The suit was brought for an injunction restraining the owners of the iron works from using the new road to transport the limestone. The chancellor refused the relief asked, holding that the covenant, which assumed to bind assigns, was essentially personal in its character.

"There can be no harm in allowing the fullest latitude to men in binding themselves and their representatives, that is, their assets real and personal, to answer in damages for breach of their obligations." But, in respect to burdens or servitudes to be imposed permanently on the land, "there are certain known incidents to property and its enjoyment, certain burdens wherewith it may be affected, . . . in favor of persons other than the owner, all of which incidents are recognized by the law. . . . But, it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner."

So in *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* 23 W. Va. 600, an agreement by a landowner that products of his land (in that case oil) should be transported exclusively by one company was not a real covenant, and would not be enforced against subsequent purchasers with notice, distinguishing (page 633 et

eq.) the covenant in that case from those which are held to create equitable easements or servitudes or interests in land such as to bring them within the equitable doctrine of notice.

Keppell v. Bailey, has, in several instances, been referred to in the books as having been overruled, and it is said that the propositions of the chancellor therein laid down are not sustained by the courts of chancery. Whether all that is said in that case is or is not strictly accurate we need not now consider, but we are unable to find that any court has ever undertaken to say that it was not correctly determined. And, in so far as the application of the equitable doctrine is concerned, we think that the cases of *Keppell v. Bailey* and *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* are not distinguishable from the case at bar. And, referring to *Keppell v. Bailey*, the learned American editor of Smith's *Leading Cases* (vol. 1, p. 198) says, justly, we think, that "the covenant in that case failed to run with the land not so much because it imposed a burden, or from the want of privity of estate, as because the rights and restrictions which are imposed on the one hand or conferred on the other went beyond the limits of any estate or interest in land known to the law, or which it will permit to be invested with the capacity for assignment or transfer; and sound policy will not allow an end to be attained by a covenant which cannot be directly effected by a grant." And, as before indicated, though a covenant is made by one for himself and assigns, yet, if the thing to be done is merely collateral, and does not affect the land itself, though its use or enjoyment may thereby be rendered more valuable, an assignee is not bound at law or in equity. *Blain v. Taylor*, 19 Abb. Pr. 230; *Congleton v. Pattison*, 10 East, 130.

The tendency of the later decisions, both in this country and in England, is, we think, to restrict rather than to extend the equitable doctrine of notice we have referred to. *Brewer v. Marshall*, 19 N. J. Eq. 546; *West Virginia Transp. Co. v. Ohio River Pipe Line Co.* *supra*; *Norcross v. James*, 140 Mass. 192, 1 New Eng. Rep. 327; *Haywood v. Brunswick P. B. Bldg. Society*, L. R. 8 Q. B. Div. 408; *London & S. W. R. Co. v. Gomm*, L. R. 30 Ch. Div. 562; *Austerberry v. Oldham*, L. R. 29 Ch. Div. 750; *Grigg v. Landis*, 21 N. J. Eq. 502.

The order appealed from is reversed, and the injunction directed to be dissolved as to the defendants Ring & Tobin, and modified and limited as to the Eastern Railway Company so as to restrain any interference with the lands, right of way, and property of the plaintiff.

Motion for reargument denied.

STATE OF MINNESOTA, *Resp't.*,

v.

Geert A. VANDERSLUIJ, *Appt.*

(....Minn.....)

*Chapter 19, Laws 1889, entitled "An Act to Regulate the Practice of Dentistry in the State of Minnesota," is constitutional.

(November 30, 1889.)

*Head note by the Court.

6 L. R. A.

APPEAL by defendant from a judgment of the Municipal Court of St. Paul convicting him of the offense of practicing dentistry within the State without a license. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Davis, Kellogg & Severance*, for appellant:

The test of the right to practice a profession which affects the health and safety of the people must be one of learning and qualification, and the Legislature has no right to provide for any other.

See *Dent v. West Virginia*, 129 U. S. 114 (32 L. 628).

When the natural and reasonable effect of a statute is to violate the Federal Constitution, it will be held void in whatever language it may be framed.

See *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 548); *Chy Lung v. Freeman*, 92 U. S. 275 (23 L. ed. 550); *Neal v. Delaware*, 103 U. S. 370 (26 L. ed. 567); *Cooley, Const. Llm.* 5th ed. 712, *577.

The Supreme Court of the United States in the case of *Yick Wo v. Hopkins*, 118 U. S. 356 (30 L. ed. 220), declared void certain ordinances of the City of San Francisco, prohibiting any person from carrying on the laundry business in the City or County of San Francisco without having first obtained the consent of the board of supervisors, the ordinance having been so administered by the board that no Chinaman could obtain such consent, while it was granted to every Caucasian.

The Supreme Court of New Hampshire, in *State v. Hinman*, 18 Atl. Rep. 194, held unconstitutional the Dental Law of that State because of an arbitrary discrimination.

Messrs. Moses E. Clapp, Atty-Gen., J. J. Egan, County Atty., and M. D. Munn, Asst. County-Atty., for respondent.

Gillilan, Ch. J., delivered the opinion of the court:

That the Legislature may prescribe such reasonable conditions upon the right to practice medicine or law as will exclude from the practice those who are unfitted for it, is so well settled by decisions of the courts as to be no longer an open question. The power rests on the right to protect the public against the injurious consequences likely to result from allowing persons to practice those professions who do not possess the special qualifications essential to enable the practitioner to practice the profession with safety to those who employ him. The same reasons apply with equal force to the profession of dentistry, which is but a branch of the medical profession. That, in the exercise of that power, the Legislature may require, as a condition of the right to practice, that the person shall procure a license; may designate some officer or board to issue the license, and to determine whether an applicant possesses the qualifications required to entitle him to it; and may prescribe, so far as can be done by a general law, what qualifications shall be required, and how the possession of them by the applicant shall be ascertained,—necessarily follows from the power itself. It is for the Legislature, and not for the courts, to determine those things.

The only limit to the legislative power in

prescribing conditions to the right to practice in a profession is that they shall be reasonable. Whether they are reasonable,—that is, whether the Legislature has gone beyond the proper limits of its power,—the courts must judge. By the term "reasonable" we do not mean expedient, nor do we mean that the conditions must be such as the court would impose if it were called on to prescribe what should be the conditions. They are to be deemed reasonable where, although perhaps not the wisest and best that might be adopted, they are fit and appropriate to the end in view, to wit, the protection of the public, and are manifestly adopted in good faith for that purpose. If a condition should be clearly arbitrary and capricious; if no reason with reference to the end in view could be assigned for it; and, especially, if it appeared that it must have been adopted for some other purpose,—such for instance, as to favor or benefit some persons or class of persons,—it certainly would not be reasonable, and would be beyond the power of the Legislature to impose.

In 1885 the Legislature passed an Act to regulate the practice of dentistry. Chapter 199, Laws 1885. This Act continued in force until it was superseded and repealed by chapter 19, Laws 1889. The latter Act is assailed as unconstitutional. Though the Act of 1885 is not called in question, we think it well to refer to some of its provisions. Section 1 made it unlawful for any person not at the passage of the Act engaged in the practice of dentistry in the State to commence such practice without a certificate as in the Act provided. Section 5 provided for the certificate, which was to be issued by the board of examiners provided for in the Act, upon a satisfactory examination. Section 4 made it the duty of every person at the time engaged in the practice of dentistry in the State to, within six months after the passage of the Act, cause his name and residence or place of business to be registered with the board, in a book to be kept by it for that purpose, and provided that every person so registered as a practitioner of dentistry might continue to practice as such.

Chapter 19, Laws 1889, § 1, provides that from and after September 1, 1889, it shall be unlawful for any person to practice dentistry in the State, unless he shall first have obtained a certificate of registration, and filed the same, or a certified copy thereof, with the clerk of the district court of the county of his residence, as in the Act afterwards provided. Sections 2 and 3 provide for a board of examiners. Section 4 makes it the duty of the board to transfer to a register to be kept by it for that purpose, within ten days after the second Tuesday in July, 1889, the name, residence and place of business of each and every person who on the second Wednesday in July, 1889, pursuant to the Act of 1885, shall be qualified to practice dentistry in the State, and who shall then be duly registered on the books of the board created by the Act of 1885, and makes it the duty of the board to send to each of such persons a certificate of his registration.

It will be seen from these various provisions that those qualified to practice dentistry under the Law of 1885 continued to be so qualified under the Act of 1889, including both those

who were in practice at the date of the former Act, and registered as it required, and those who became qualified by the examination and certificate provided by it.

Section 5 of the Act of 1889, the provisions of which furnish one of the grounds on which appellant assails the Act as unconstitutional, provides that any person who shall desire to begin the practice of dentistry in the State after September 1, 1889, shall make application for examination to the board of examiners, paying a fee of \$10, and shall undergo an examination. The section further enacts: "In order to be eligible for such examination, such person shall present to said board his diploma from some dental college in good standing, and shall give satisfactory evidence of his right to the possession of the same: Provided, also, that the board may in its discretion admit to examination such other persons as shall give satisfactory evidence of having been engaged in the practice of dentistry ten years prior to the date of the passage of this Act. Said board shall have the power to determine the good standing of any college or colleges from which such diplomas may have been granted." It then goes on to prescribe the manner, extent and subjects of the examination. What the particular objections of a constitutional character the appellant makes to this section are, it is somewhat difficult to tell from his brief. We infer, however, that he claims the section to be objectionable because, no matter how well qualified by learning and skill or experience one may be, he has no absolute right to be examined by the board unless he has a diploma from a dental college in good standing, such good standing to be determined by the board; and this he claims to be discrimination between the rich and poor, because one may be peculiarly able, and another not able, to attend a dental college.

The mere fact of discrimination in such a law is no objection to it. Requiring a certain degree of learning and skill as a condition of being allowed to practice is discrimination between those who have and those who have not that degree of learning and skill,—between those who are able and those who are not able to acquire it. If there were discrimination between persons or classes upon any matter not pertinent to the legitimate purpose of the law, to wit, to secure fitness and competency in those who shall be permitted to practice, it would be objectionable. As, for instance, if it were as to place of birth, color or religious belief. The requirement of a diploma from some college or learned society, in order to practice medicine, has been inserted in the laws of many States, and questioned in but few. In Massachusetts a law required the practitioner to have been licensed by the Medical Society, or been graduated a doctor in medicine at Harvard University. This was held constitutional in *Hewitt v. Charier*, 16 Pick. 356.

The Statute of Nevada (1875) required a medical education, and a diploma from some regularly-chartered medical school. This was held constitutional in *Ex parte Spinney*, 10 Nev. 324.

As the fact of having graduated at and received a diploma from a school or college devoted to teaching the particular science

medicine, surgery or dentistry, bears directly upon the person's qualifications to practice, we have no doubt the Legislature might have made that the sole test. That this Statute allows, in the discretion of the board, ten years' practice prior to the passage of the Act as a substitute for the diploma of a college, furnishes no objection, on constitutional grounds, to the Act. True, it is asked why ten years' practice after the passage of the Act ought not to entitle one to the same right as ten years' practice before its passage. A sufficient answer to this is that such practice after the Act, if in this State, would be in violation of law, and the Legislature surely may provide against inviting violations of the law, and for that purpose withhold all benefit from its violators.

It is objected that it is left to the discretion of the board to determine whether ten years' practice, instead of a diploma, shall admit one to examination. On the score of expediency, some question might be made upon it. But, as the Legislature might have left that provision out altogether, and made no exception to the requirement that an applicant for examination should have a diploma, we do not see that any question can be made of the power to fix the period of ten years, nor of the power to leave it for the board to determine in each particular case whether the extent and character of the applicant's practice during the period has been such as to be equal, as evidence of his qualifications, to the possession of a diploma.

Section 7 reads: "All persons shall be said to be practicing dentistry within the meaning of this Act who shall, for a fee or salary, or other reward, paid either to himself or to another person for operations or parts of operations of any kind, treat diseases or lesions of the human teeth or jaws, or correct malpositions thereof. But nothing in this Act contained shall be taken to apply to acts of bona fide students of dentistry, done in the pursuit of clinical advantages, under the direct supervision of a preceptor or a licensed dentist in this State, during the period of their enrollment in a dental college, and attendance upon a regular, uninterrupted course in such college." It is claimed that this shows the law to be an arbitrary measure for the benefit of dentists, by giving them a monopoly to practice a branch of surgery which has heretofore been largely carried on by regular physicians and surgeons. It was proper, in order to give precision to the law, to define what was meant by

practicing dentistry. It is not, however, to be supposed the Legislature intended to enlarge the sphere of the profession. There may be diseases of, hurts to and operations upon the jaws that are within the legitimate profession both of the general surgeon and of the dentist. We do not know how this is. But, if it be so, the licensed surgeon would be protected by his license in treating such. The Act before us could hardly be so construed as to limit the right of the surgeon under his license. It is claimed, also, that it discriminates between students of dentistry, by allowing them to operate upon the teeth and jaws during the period of their enrollment in a dental college and attendance upon a regular, uninterrupted course in such college, and excluding others. The purpose of this provision of the law is apparent. It is to permit to actual, bona fide students the benefits of practical work under an instructor. But, to prevent evasions of the law by persons practicing the profession under the pretense of being students, the Act very properly defines who shall be regarded as students, within the clause allowing them to perform operations, or parts of operations. It is open to every student to bring himself within the definition.

The interpretation of the clause under consideration, upon which appellant argues that it was intended to prefer schools of dentistry within the State, as against those out of it, is too narrow. We see no reason why a student in such a school in another State may not, during vacation, pursue his studies here under a licensed dentist, and be within the meaning of the clause. By "regular, uninterrupted course," the Act does not mean a course in which there are no vacations, such as all schools have. To hold that it does would lead to this unreasonable result,—that the student, even in a school in this State, might during the term have the benefit of practice in operations under a licensed dentist, but would have to suspend as soon as the term should close. The provisions and requirements of the law are undoubtedly rigorous. They ought to be, in any law aiming to protect the public against ignorance and incompetency in so important a profession as the medical profession, in any of its branches. We see nothing in the provisions of this law that was not clearly inserted by the Legislature, in good faith, to effect the end in view. The law is valid.

Judgment affirmed.

WISCONSIN SUPREME COURT.

James MCKINNON *et al.*, *Repts.*,
v.

F. VOLLMAR *et al.*, *Appts.*

(.....Wis.....)

1. An action for money had and received will lie to recover the consideration paid for land where the purchaser is entitled to rescind the contract and has tendered a sufficient reconveyance.
 2. If the wrong land is pointed out to a purchaser by the vendor's agent, inducing him
- 6 L. R. A.

to purchase a tract erroneously believing it to be that shown him, he is entitled to rescind the contract; but the case is otherwise if the person pointing it out is not the vendor or his agent.

3. Showing land to a prospective purchaser is a mere executive or ministerial act which an agent for the sale thereof may employ another to perform.
4. Lack of knowledge on the part of one making statements as an inducement to a contract, that such statements are false, is immaterial.

(November 5, 1889.)

A PPEAL by defendants from a judgment of the Circuit Court for Wood County in favor of plaintiffs in an action to recover money had and received by defendants to plaintiffs' use. *Affirmed.*

Statement by Lyon, J.:

The action is for money had and received by the defendants for the use of the plaintiffs McKinnon and Deraus, and of James Redmond, now deceased, the intestate of the plaintiff Helen Redmond. The complaint is in the usual form of complaints in actions for money had and received. No particulars of the claim are stated therein, and no bill of particulars was given or demanded. Except as to the allegations of the copartnership of the defendants, the death of James Redmond, and the appointment of the plaintiff Helen Redmond as administratrix of his estate, the answer is a general denial. The cause was tried before a jury, and a special verdict returned.

The transactions out of which the alleged cause of action arose, as the same were disclosed on the trial, are as follows: The defendants were the owners of 200 acres of land in Ashland County, Wis. They purchased the same in 1884 on the faith of the sworn statement of one Greeves and one Goodwin to the effect that they had personally examined the lands, and estimated there were thereon 2,000,000 feet of pine, and that such estimates were true and correct to the best of their knowledge and belief. Soon after the purchase, the defendants authorized one Seibert, who resided at Marshfield, Wis. (where the defendants also resided), to sell the land for them, and agreed to pay him a commission for doing so. Seibert thereupon opened a correspondence on the subject with the plaintiff Deraus, who, together with the plaintiff McKinnon and James Redmond, the intestate of the plaintiff Helen Redmond, resided at Chippewa Falls. Several letters passed between Seibert and Deraus on the subject of a sale of the property; to the latter, after which Deraus visited Marshfield, and had interviews on the subject with Seibert and the defendants. The latter showed him the estimates of the amount of pine on their land made by Greeves and Goodwin, and, as he and Seibert testified, assured him that there were at least 2,000,000 feet of pine thereon. The defendants denied the latter statement. Deraus went from Marshfield, in company with Greeves, to examine the land. The defendants furnished Deraus a correct description thereof. On the way there, Deraus and Greeves were joined by one Kirwin, whom Greeves hired to accompany them. They went into camp before reaching the land, and Greeves, having to examine other lands, sent Kirwin to show Deraus defendants' land. Greeves instructed Kirwin to show Deraus a particular parcel of land. Kirwin took Deraus upon the land Greeves directed him to show, and showed it to him as the land of the defendants. The land thus showed was not the land of the defendants, but was one mile distant therefrom, and was heavily timbered with pine. Neither Kirwin nor Deraus knew they were upon the wrong land. Deraus thereupon returned to Marshfield, and

contracted with defendants, on behalf of himself, the plaintiff McKinnon, and James Redmond, to purchase the land for \$1,800, and paid the defendants \$25 on account of the purchase. Soon thereafter, pursuant to an arrangement then made, one of the defendants went to Chippewa Falls, and delivered to the plaintiffs a conveyance, duly executed by the defendants, of the land so purchased. Such conveyance was made to the plaintiff McKinnon and James Redmond, pursuant to an arrangement between the purchasers. Thereupon the purchasers paid such defendant \$1,775, being the balance of the purchase money. Soon afterwards the purchasers went upon the land to make preparations for logging thereon, and then ascertained for the first time that there was little or no merchantable pine timber on it, and that Kirwin had shown Deraus the wrong land. Immediately after making this discovery, the grantees in the conveyance above mentioned, McKinnon and Redmond, and their respective wives, executed a conveyance of the land in due form to the defendants, tendered the same to them, and demanded that they refund the \$1,800 thus paid for the land. Defendants refused to accept the deed or refund the money. On the trial, the plaintiffs brought the conveyance thus tendered into court, and deposited it with the clerk for the defendants, and subject to their order.

The special verdict and proceedings thereon are as follows: "(1) Did the defendants or George Seibert employ Greeves to show Deraus the lands? *Answer.* Yes. (2) If you answer the first question 'Yes,' state which of them so employed Greeves. *A.* Seibert. (3) If you answer the first question 'Yes,' then did Greeves employ Martin Kirwin to show Deraus the land? *A.* Yes. (4) Did Kirwin show Deraus the land actually sold by defendants to plaintiffs, or other lands? *A.* Other lands. (5) If you answer the fourth question that Kirwin showed Deraus lands not purchased,—the wrong lands,—then did Deraus, on the faith of information received at that time, purchase the lands? *A.* Yes. (6) If Kirwin showed Deraus the wrong lands, did he do so intentionally or by mistake, which? *A.* By mistake. (7) Did Greeves direct or induce Kirwin to show Deraus the wrong lands? *A.* Yes. (8) Did the plaintiffs purchase the lands in question of defendants, believing that they were the same lands shown to Deraus by Kirwin? *A.* Yes. (9) Did plaintiffs pay defendants \$1,775 for the lands, under a mistake on the part of the plaintiffs as to the location of the lands? *A.* Yes. (10) Did the defendants make any statement to Deraus, before the sale was made, as to how much pine timber there was on the lands, on which plaintiffs relied in making the purchase? *A.* Yes. (11) If you answer the last question, 'Yes,' then were such statements true or false? *A.* False. (12) Did defendants furnish Deraus with a correct description of the lands before he went to Marshfield to examine them? *A.* Yes. (13) How much pine timber was there at the time of the purchase on the lands described in deed from defendants to plaintiffs,—*Ex. A?* *A.* None. (14) Was the sale of the lands in question made under a mistake on the part of both plaintiffs and defendants that Deraus had been shown

the lands conveyed by the deed,—Ex. A? A. Mistake of both parties.”

On receipt of said verdict, defendants' counsel moved the court to set the same aside as being contrary to the evidence, which motion was denied. Defendants' counsel then moved the court for judgment for the defendants upon said verdict, which motion was denied, and an exception then and there taken to the denial of each of said motions. Counsel for plaintiffs then moved the court for judgment upon said verdict, which motion was granted, and judgment rendered in favor of the plaintiffs, and against the defendants, accordingly, to which ruling defendants excepted. Judgment was thereupon entered upon said verdict in favor of the plaintiffs, from which this appeal is taken by the defendants.

Messrs. Cate, Jones & Sanborn, for appellants:

It has never been the practice of courts of law to cancel or rescind contracts for mistake only; those matters have been left solely to the jurisdiction of courts of equity.

Hill v. Durand, 50 Wis. 354; 1 Pomeroy, Eq. Jur. §§ 171, 188.

An agent appointed to perform a specific act cannot delegate his authority to another, and bind his principal by the sub-agent's act.

Sheldon v. Sheldon, 8 Wis. 699; 1 Am. & Eng. Encycl. of Law, 368, and authorities cited.

The rule that if a man makes statements of facts, as of his own knowledge, which are false, he is liable to an action for deceit, though he believed them to be true, is confined to cases where a man states as of his own knowledge facts which are susceptible of personal knowledge.

Tucker v. White, 125 Mass. 344.

In a matter of opinion, judgment and estimate, if one states a thing of his own knowledge, if he in fact believes it and it is not intended to deceive, it is not a fraud although the matter there stated is not in fact true.

Page v. Bent, 2 Met. 371.

The defendants according to the findings have done nothing which would warrant a cancellation or rescission of the conveyance.

Hunt v. Blanton, 39 Ind. 88; *Law v. Grant*, 37 Wis. 543.

Messrs. Jenkins & Jenkins, for respondents:

An action for money had and received is maintainable whenever the defendant retains money which in equity and good conscience he ought to pay the plaintiff; and this court sustains the position that it makes no difference whether the evidence shows a mistake of facts, fraud or failure of consideration.

See *Ela v. American M. U. Express Co.* 29 Wis. 617; *Wells v. American Express Co.* 49 Wis. 230; *Grannis v. Hooker*, 29 Wis. 65; *Potter v. Taggart*, 54 Wis. 395; *Tucker v. Grover*, 60 Wis. 241; *Western Assur. Co. v. Towle*, 65 Wis. 248; *Tollensen v. Gunderson*, 1 Wis. 112, and *Vilas & Bryant's note*; *Wells v. Brigham*, 6 Cush. 6, 52 Am. Dec. 751; *Kennedy v. Baltimore Ins. Co.* 3 Har. & J. 367; *National Mechanics Bank v. National Bank of Baltimore*, 36 Md. 26; *Blair v. Blair*, 39 Md. 573; *McCrea v. Furmort*, 16 Wend. 460; *Western Assur. Co.* 6 L. R. A.

v. Towle, 65 Wis. 248; *Cornfoot v. Fouske*, 6 Mees. & W. 359.

“In order to rescind a contract by a purchaser when a ground for rescission exists, it is not necessary to make any formal tender of the property held by the purchaser. It is sufficient to offer to make return of the same; and if the vendor refuses to accept it back, and retains the purchase money, no formal tender of the property is necessary. The right to a formal tender is waived by a refusal to accept in advance.”

Potter v. Taggart, 54 Wis. 395.

“A purchaser may, after conveyance, bring an action on the case for a fraudulent misrepresentation of the property or title, or may recover the purchase money, if the circumstances of the case entitle him to rescind the contract.”

Kerr, Fraud and Mistake, pp. 326, 327; *Concord Bank v. Gregg*, 14 N. H. 331.

“When an agent is employed to perform ministerial or mechanical and not judicial act or acts, which do not require any exercise of discretion or judgment in respect of acts other than such as are ministerial, he may appoint a deputy.”

Ewell's Evans, Agency, p. 58, *43; *Mallory v. Mariner*, 15 Wis. 174; *Lyon v. Jerome*, 28 Wend. 485.

“The principal is liable for the fraud, deceit or other wrongful act of his agent in the course of his employment.”

Locke v. Stearns, 1 Met. 560; *Fitzsimmons v. Joslin*, 21 Vt. 129.

“A party cannot avail himself of an advantage that has been obtained through the misrepresentation of a third person, although such person is not his agent.”

Kerr, Fraud and Mistake, 114, note; *Pilmore v. Hood*, 5 Bing. N. C. 97.

“The vendor of land is responsible for the material misrepresentation in respect to its location and quality, made by his agent without express authority, and in the absence of any actual knowledge by either the agent or principal, whether the representations were true or false.”

Bennett v. Judson, 21 N. Y. 238. See *Bigelow, Fraud*, 362, 366, 367.

If one without knowledge of its truth or falsity makes a material misrepresentation, he is as much guilty of fraud as if he knew it to be untrue.

Bennett v. Judson, 21 N. Y. 238; *Miner v. Medbury*, 6 Wis. 295; *Risch v. Von Lillienthal*, 84 Wis. 250; *Fitzsimmons v. Joslin*, 21 Vt. 129; *Spurr v. Benedict*, 99 Mass. 463; *Kyle v. Kavanagh*, 108 Mass. 356.

In a suit to recover on a total failure of consideration, the measure of damage is the money paid, with interest.

Tyler v. Bailey, 71 Ill. 85.

Lyon, J., delivered the opinion of the court: I. At the close of plaintiffs' testimony, the defendants moved for a nonsuit. The motion was denied. This ruling is claimed to be erroneous for the alleged reason that the only remedy of the plaintiffs is by a suit in equity, and that, under the facts of the case, an action for money had and received, to recover the consideration paid for the land cannot be

maintained. The reason thus assigned is unsound. It might be otherwise were this an action to rescind a conveyance of land, or to compel the execution of one. But this is not such an action. The only conveyance involved has already been rescinded, so far as the plaintiffs could rescind it, by the tender to the defendants of a sufficient conveyance of the land in question, and the deposit of such conveyance in court for the defendants. The plaintiffs have done all they can do to place the parties *in statu quo*; and all the defendants have to do to accomplish that result is to accept such conveyance, and refund the purchase money. There is nothing in the case which calls for the exercise of the peculiar and extraordinary jurisdiction of a court of equity. The controlling question in the case is whether the defendants ought to refund the consideration they received for the land. If they ought, such consideration can be recovered in an action for money had and received. *Ela v. American M. U. Express Co.* 29 Wis. 611. We conclude, therefore, that, if the plaintiffs are entitled to recover such consideration, they may recover the same in this form of action.

II. We now proceed to consider whether the findings of the jury are supported by the testimony. That there is sufficient testimony to support most of the findings is too clear for argument. A few of them only may be open to some doubt as to whether the testimony sustains them. These will be briefly noticed. The sixth and seventh findings are to the effect that Greeves directed Kirwin to show Derfus the wrong land, and that he did so by mistake,—that is to say, in the belief that he was showing defendants' land. The finding is not that Greeves was mistaken in that particular, and it is quite evident from the testimony that he was not. In this view of the findings, they are supported by the testimony. The thirteenth finding is that there is no pine timber on the lands sold by defendants to plaintiffs. This manifestly means no merchantable pine timber. There is considerable testimony that such is the fact. The fourteenth finding is that the purchase and sale of the land was made under a mistake on the part of all the parties, in that they supposed Derfus had been shown the land conveyed by defendants to McKinnon and Redmond. It seems to us that this is the unavoidable inference from all the testimony. It certainly was a mistake on the part of plaintiffs; and, if not so on the part of defendants, it was something worse. It is proper to say, however, in this connection, that the evidence casts no imputation of actual fraud upon the defendants. It contains no suggestion that they knew, when they made the conveyance and received the consideration, that the wrong lands had been shown Derfus; and they are not to be censured because they refuse to refund the consideration until their liability to do so shall be determined judicially. Our conclusion on this branch of the case is that all of the material findings are supported by the testimony.

III. The only remaining question to be determined is, do the facts found by the jury, and the undisputed facts not so found, support the judgment? We understand the law of this case to be that if the wrong land was pointed

out to Derfus, whether intentionally or not, by an agent of the defendants, and the plaintiffs purchased, believing that the right land had been shown Derfus, they may recover back the consideration paid therefor, although the defendants did not know, when the consideration was paid, that Derfus had been shown the wrong land, and although they made no representation to the purchasers of the amount of pine on the land; but if the person so showing the land was not the agent of the defendants, all other circumstances being as above supposed, the defendants are not liable in this action. This is the doctrine of *Law v. Grant*, 37 Wis. 548. Hence it becomes important to ascertain whether the person who showed Derfus the wrong land was or was not the agent of the defendants in that behalf. The jury did not find that Seibert was the agent of defendants to sell their land, but the undisputed evidence establishes the fact that he was. The jury found that Seibert employed Greeves to show Derfus the land. Was Greeves the agent of the defendants? The answer depends upon the question of Seibert's authority to employ a sub-agent for that purpose. The rule is that an agent in whom is reposed some trust or confidence in the performance of his agency, or who is required to exercise therein discretion or judgment, has no authority to intrust the performance of those duties to another, and thus bind the principal for the acts of the latter without the consent of his principal. Numerous cases illustrating this rule will be found cited in 1 Am. & Eng. Cyclop. Law, 368, note 4. On the other hand, an agent may appoint a sub-agent to do acts in the course of the agency which do not call for the exercise of judgment or discretion, but which are purely executive or ministerial, and the principal is bound by the acts of such sub-agent. *Renuick v. Bancroft*, 56 Iowa, 527; *Lyon v. Jerome*, 26 Wend. 485; *Ewell's Evans*, Ag. *43, and cases there cited. In this case the showing of the land to Derfus was a mere executive or ministerial act, requiring no exercise of judgment or discretion, and it was therefore entirely competent for Seibert to employ Greeves to perform it. It may be observed here that the defendants knew that Greeves had been selected by Seibert to show Derfus the land, and made no objection thereto. Indeed, it seemed to be a very proper appointment, for Greeves had been upon the land, and estimated the timber thereon, and of course knew the location thereof, while it does not appear that Seibert ever saw the land. For the above reasons it must be held that Greeves was the agent of the defendants for the purpose of showing the lands to Derfus, and the defendants are responsible for the manner in which he performed the duties of such agency. Greeves did not in person point out the land to Derfus, but he did so just as effectually as though he had gone upon the land in person, and told Derfus that it was the defendants' land, for the purchase of which he was negotiating. He told Kirwin what particular tract of land he was to show Derfus, and Kirwin showed him such tract as he was directed to do. Thus Kirwin was the mere instrument of Greeves, and his act in thus pointing out the land was, in substance and legal effect, the act of Greeves, the agent of

the defendants. Hence there is no question in the case as to whether Kirwin was or was not the agent of the defendants in what he did. Literally obeying the orders of Greeves, as he did, his acts were the acts of Greeves. An agent who, because of the trust and confidence reposed in him by his principal, cannot bind his principal by the acts of a sub-agent, may still employ another to do some specific act in the business of his agency; and, if such other do that act as directed, the principal is liable, not because the person performing the act is his agent, but because the act is the act of his agent, who directed it to be done. It follows from the foregoing views that the defendants are liable for the act of their agent in thus showing Derfus the wrong land, although he did so through the instrumentality of Kirwin.

IV. But the judgment may be upheld on another ground. The jury found that the de-

fendants made a statement to Derfus before the sale as to how much pine timber there was on the land, that the plaintiffs relied upon such statement in making the purchase, and that the same was false. The only statement on that subject mentioned in the testimony is that there were at least 2,000,000 feet of pine timber on the land; hence it must be inferred that this is the statement which the jury found was made by the defendants to Derfus. Under the circumstances of the case, the plaintiffs are excusable for not verifying the accuracy of such statement by actual inspection of the land; and under the above finding, without regard to the question of agency, the plaintiffs are entitled to recover. And it is quite immaterial that the defendants did not know at the time that such statement was false. *Miner v. Medbury*, 6 Wis. 295.

The judgment of the Circuit Court must be affirmed.

CONNECTICUT SUPREME COURT OF ERRORS.

[STATE OF CONNECTICUT

v.

Jacob SCHWEITZER, *Appt.*

(....Conn.....)

1. **A proceeding against a man for neglecting and refusing to support his wife**, under Gen. Stat. § 3402, is a criminal prosecution.
2. **A complaint which charges in the words of the Statute the offense of neglecting and refusing to support a wife** under Gen. Stat., § 3402, without alleging a marriage to her, is sufficient.
3. **Parol evidence of an alleged wife is admissible on the question of marriage.**
4. **A certificate purporting to be an original marriage certificate** is admissible in connection with the testimony of the alleged wife to prove marriage.
5. **Evidence of cohabitation is admissible as tending to prove a marriage.**
6. **The fact of cohabitation as man and wife raises a presumption of legal marriage.**
7. **A confession of a man that he has been married to a certain woman is admissible as evidence of the marriage.**
8. **The adultery of a wife is a sufficient defense to a charge of unlawfully neglecting and refusing to support her**, under Gen. Stat., § 3402.
9. **The burden of proof as to a distinct defense in a criminal prosecution is on the defendant.**
10. **Whenever a defense in a criminal prosecution is so proved that a reasonable doubt is caused as to any part of the case, the defendant is entitled to the benefit of that doubt and should be acquitted.**
11. **The presumption is that the neglect or refusal of a husband to support his wife is unlawful, and the burden is on him, when charged therewith, to prove its lawfulness by a preponderance of evidence, in order to have such defense considered by the jury in deter-**

mining whether or not the prosecution has proved its case beyond a reasonable doubt.

(September 2, 1889.)

APPEAL by defendant from a judgment of the Court of Common Pleas for New Haven County entered upon a verdict of guilty after trial of a prosecution under Gen. Stat., § 3402, for neglect and refusal of defendant to support his wife, which had been appealed from a justice of the peace. *Reversed.*

The case is fully stated in the opinion.

Messrs. E. P. Arvine and C. A. Harrison, for appellant:

The complaint does not allege that Schweitzer had any wife. In criminal pleading nothing shall be taken by intendment.

State v. Thurstin, 35 Me. 206.

The complaint should have alleged to whom, when and where he was married.

2 Bishop, Crim. Proc. §§ 881, 886; *Davis v. Com.* 13 Bush (Ky.) 818; *State v. LaBore*, 26 Vt. 765; *Dinninger v. State*, 52 Ind. 326; *Zook v. State*, 47 Ind. 463; *Jester v. State*, 14 Ark. 552; *People v. Hall*, 19 Cal. 425; *Groner v. State*, 6 Fla. 39; *Lewellen v. State*, 18 Tex. 538.

It is insufficient to allege the offense in the words of the statute, where the statutory description does not complete it.

State v. Jackson, 39 Conn. 230.

The certificate of marriage should not have been admitted without proof of the signature of the person by whom it purported to be signed, and that he was a clergyman.

State v. Dooris, 40 Conn. 145.

The admission of the accused that he was married, and proof of reputation and cohabitation, were inadmissible.

State v. Roswell, 6 Conn. 449; *Com. v. Littlejohn*, 15 Mass. 163.

The court erred in charging the jury that the accused must prove his defense of adultery beyond a reasonable doubt.

Mead v. Husted, 52 Conn. 59.

Mr. William B. Stoddard, with Mr. George M. Gunn, Pros. Atty., for the State:

This is substantially a civil proceeding to compel the accused to perform his duties as husband.

Fenn v. Bancroft, 49 Conn. 218.

Therefore the strict rules of criminal procedure should not be enforced to their full extent as in indictments for bigamy and adultery.

Hammick v. Bronson, 5 Day, 238; *State v. Roswell*, 6 Conn. 448.

The evidence offered by the State to prove marriage was admissible.

Bishop, Mar. and Div. §§ 125, 126; 2 Greenl. Ev. § 463; *Hayes v. People*, 25 N. Y. 890; *State v. Ransell*, 41 Conn. 440.

The charge of the court that where the defendant excuses himself in refusing to support his wife, upon the ground that she was guilty of the crime of adultery, even if we admit that the charge throws the burden of proving the crime beyond a reasonable doubt upon the defendant, was correct.

Brig Struggle v. United States, 13 U. S. 9 Cranch. 71 (8 L. ed. 660); *McConnell v. Delaware Mut. S. Ins. Co.* 18 Ill. 228; *Lexington F. Ins. Co. v. Paver*, 16 Ohio, 381; *Strader v. Mullane*, 17 Ohio St. 626; *Bissell v. Wert*, 35 Ind. 60; *Wonderly v. Nokes*, 8 Blackf. 589; *Ellis v. Lindley*, 38 Iowa, 461; *Fountain v. West*, 23 Iowa, 9; *Polston v. See*, 54 Mo. 291; *Clark v. Dibble*, 16 Wend. 601; *Berckmans v. Berckmans*, 17 N. J. Eq. 454; *Taylor v. Morris*, 25 N. J. Eq. 607; *Steinman v. McWilliams*, 6 Pa. 170; *Gorman v. Sutton*, 32 Pa. 247; *Freeman v. Freeman*, 31 Wis. 235; 2 Greenl. Ev. § 428; *Blacker v. Milwaukee Mut. Ins. Co.* 37 Wis. 38, *Com. v. McKie*, 1 Gray, 63.

The defendant was not entitled to the defense that the adultery of his wife excused his non-support, so long as she remained his wife.

Bishop, Mar. and Div. § 578; Tyler, Infancy and Coverture, 2d ed. pp. 369, 370.

The complaint is sufficient. The offense is charged in the language of the Statute.

State v. Cady, 47 Conn. 46; *State v. Lockbaum*, 38 Conn. 400; *State v. Pierce*, 27 Conn. 319.

Andrews, Ch. J., delivered the opinion of the court:

The defendant was prosecuted before a justice of the peace in the Town of Milford, under section 3402 of the General Statutes, for unlawfully neglecting and refusing to support his wife, and was convicted. He appealed to the criminal side of the Court of Common Pleas in New Haven County. In the latter court he demurred to the complaint, on the ground that it merely charged the defendant with neglecting and refusing to support his wife, and did not allege a marriage to her. The demurrer was overruled, and the defendant was tried to the jury upon the plea of not guilty. He was convicted and has now appealed to this court.

The attorney for the State suggests at the opening of his argument that this is in substance a civil proceeding, although criminal in form, analogous to proceedings under the Bastardy Act. We are of opinion that this is a criminal prosecution. The reasons given in *State v. Keenan*, 57 Conn. 286, are decisive. See also *State v. Ransell*, 41 Conn. 440.

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There are twelve reasons of appeal, the first nine of which may be very briefly disposed of.

The demurrer was properly overruled. The offense is charged in the words of the Statute. *Whiting v. State*, 14 Conn. 487; *State v. Pierce*, 27 Conn. 319; *State v. Lockbaum*, 38 Conn. 400; *State v. Cady*, 47 Conn. 46.

The evidence of Mary Schweitzer, the alleged wife, that she was married to the defendant, was admissible. Marriage is a fact that may be proved by parol. Wharton, Ev. § 84; *Hayes v. People*, 25 N. Y. 890; *Fenton v. Reed*, 4 Johns. 52.

Even in cases where an actual marriage is required to be proved in contradistinction to an implied one, as in criminal conversation, or bigamy, or incest, the marriage may be proved by the testimony of any competent witness who was present at its celebration. *Morris v. Miller*, 4 Burr. 2057; *Ree v. Hassall*, 2 Car. & P. 434, note; *State v. Roswell*, 6 Conn. 446.

The certificate was admissible. It was offered as and purported to be the original marriage certificate. It was clearly admissible in connection with the testimony of Mrs. Schweitzer. *Northrop v. Knowles*, 52 Conn. 522; *Swift*, Ev. 5.

The evidence of cohabitation was admissible. The fact of cohabitation as man and wife raises a presumption of a legal marriage. Wharton, Ev. §§ 84, 1297.

Cohabitation does not make a marriage, but it is evidence from which a jury have a right to find an actual marriage. *Campbell v. Campbell*, L. R. 1 H. L. Sc. 193.

In this case Lord Cransworth said: "By the law of England, and I presume of all other Christian countries, where a man and a woman have long lived together as man and wife, and have been so treated by their friends and neighbors, there is a prima facie presumption that they really are and have been what they profess to be."

We see no reason why the confession of the defendant that he had been married to Mary was not admissible against him. It was a fact peculiarly within his knowledge.

The sixth, seventh, eighth and ninth reasons of appeal are but repetitions of the same thought. The court could not properly instruct the jury that there was no sufficient evidence of a marriage when there was before them evidence tending to prove a marriage, and from which they had the right to find a marriage in fact. The claim presented by the twelfth reason of appeal was not made on the trial.

The defendant, for the purpose of showing that he was not liable to the prosecution, offered evidence tending to show, and claimed that he had proved, that his wife had committed adultery previous to the time he turned her out of doors and refused to support her. Upon this evidence he requested the court to charge the jury "that if they believed Mrs. Schweitzer to have been guilty of adultery prior to the separation, their verdict should be for the accused." The court charged that "he" (the defendant) "must support her unless there is some legal reason, and a lawful reason assigned by the defense is adultery. The defense claim that this woman had been guilty of adultery, and they have introduced evidence to sustain

that claim, and I would say to you that the burden of proof is as absolute and as binding upon them as upon the State. Their evidence in that case must not be enough simply to raise the suspicion of adultery. They must have more than simply thrown a shadow of doubt over the virtue and chastity of the woman; they must go further on their part of the case and show you beyond a reasonable doubt that the woman has been guilty of adultery. If they have satisfied you that the woman has been guilty of adultery, then that is a sufficient legal excuse and your verdict should be not guilty." The tenth and eleventh reasons of appeal are predicated upon the request and the charge.

We think the court was correct in charging that adultery, if proved, was a sufficient defense. A husband may lawfully refuse to support an adulterous wife. 1 Selwyn, Nisi Prius, Wheat. & Whart. ed. 205-207; *Gill v. Read*, 5 R. I. 343; *Hunter v. Boucher*, 8 Pick. 259; Schouler, Dom. Rel. 91; 1 Bishop, Mar. and Div. § 578.

In criminal cases the general rule is that before a conviction can be had the jury must be satisfied upon all the evidence beyond a reasonable doubt of the affirmation of the issue presented by the State; to wit, that the accused is guilty in manner and form as charged in the information. In criminal jurisprudence the law itself holds an uneven balance; it imposes upon the State the burden of proving the case set forth in the information, in all its parts, beyond a reasonable doubt, and commands juries that if the case is not so proved to acquit the accused. In a criminal trial upon the plea of not guilty, the main issue is—and there is strictly but one—"Is the prisoner guilty or not guilty of the crime charged against him?" Upon that issue the burden of proof is on the State from the beginning to the end of the trial; it never shifts; and the jury in their ultimate analysis of the entire evidence in the case must find, in order to convict, that all the conditions of guilt against the prisoner have been proved beyond a reasonable doubt. If the case is not so proved in every material part, then it is the duty of the jury to acquit. If the defendant relies upon some distinct substantive ground of defense not necessarily connected with the transaction on which the information is founded, as insanity, or self defense, or an alibi, or, as in the case at bar, the adultery of the wife, he must prove it as an independent fact. As to such fact he presents a subordinate issue upon which he goes forward with his evidence and the State rebuts. And as the purpose of such a defense is to subvert or to render doubtful some material part of the case necessary to be proved in order to convict him, it is incumbent upon the defendant to establish the fact, or facts, which constitute his defense, by such a weight of evidence as will be sufficient to accomplish that purpose.

The cases differ as to what that weight of evidence is. Some of them hold that the defense must be proved beyond a reasonable doubt; others that the jury should be governed by the preponderance of the evidence, and still others seem to hold that the prosecution must substantially disprove the defense. Some of the difference is apparent rather than real and arises from using the term "burden of proof,"

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and the term "reasonable doubt," without clearly discriminating whether the term is applied to the defense or to some part of the prosecution.

All authorities agree that the burden is upon the State to make out its accusation in a criminal case beyond all reasonable doubt. It seems to be agreed with substantially the same unanimity that when a defendant desires to set up a distinct defense, such as is above mentioned, he must bring it to the attention of the court; in other words, he must prove it. A fact controverted before any tribunal can hardly be said to be proved at all unless there is more evidence in its support than there is against it. If the evidence for and against it is of precisely equal weight the fact is not proved. If the evidence in support is of greater weight than the opposing evidence, then the fact is proved. If the excess in weight is slight, then the fact is proved only by a preponderance of the evidence. But if the excess of weight is so great as to exclude all reasonable doubt as to the existence of the fact, then the fact is proved beyond reasonable doubt. Between the line where a fact is proved by only a preponderance of the evidence and the line where it is proved beyond all reasonable doubt, there may be quite a wide field.

The defendant must prove his defense,—that is, he must produce more evidence in support of it than there is against it. When he has done this by a preponderance of the evidence the defense becomes a fact in the case of which the jury must take notice in making up their verdict and dispose of it according to the rule before stated, that the burden is upon the State to prove every part of the case against the prisoner beyond a reasonable doubt. It might happen in some cases that the defense would itself have to be proved to a moral certainty before it would create a reasonable doubt as to any of the conditions of guilt. In other cases it might so happen that when the defense was proved by no more than a preponderance of the evidence it would cause such a doubt as to some material fact in the prosecution. But whether a greater or a less weight of evidence be required, whenever the defense is so proved that a reasonable doubt is caused as to any part of the case, the defendant is entitled to the benefit of that doubt and should be acquitted.

This we think is the true rule upon principle, and it is in accordance with the later and better considered cases. *State v. Hoyt*, 46 Conn. 530; *State v. Johnson*, 40 Conn. 186; *State v. Lawrence*, 57 Me. 574; *State v. Jones*, 50 N. H. 369; *Brotherton v. People*, 75 N. Y. 159; *O'Connell v. People*, 87 N. Y. 877; *Walker v. People*, 88 N. Y. 81; *Com. v. Eddy*, 7 Gray, 583; *Com. v. York*, 9 Met. 93; *People v. Garbutt*, 17 Mich. 9; *State v. Marler*, 2 Ala. 43; *State v. Nixon*, 32 Kan. 205; *Hopps v. People*, 31 Ill. 385; *Dacey v. People*, 116 Ill. 555; *Ortwein v. Com.* 76 Pa. 414.

In the case of *Brotherton v. People*, 75 N. Y. 159, cited above, the court, speaking by Judge Church, used the following language: "Crimes can only be committed by human beings who are in a condition to be responsible for their acts, and upon the general proposition the prosecutor holds the affirmative and the burden of proof is upon him. Sanity being the normal and usual condition of mankind the law pre-

sumes that every individual is in that state. Hence a prosecutor may rest upon that presumption without other proof. The fact is deemed to be proved *prima facie*. Whoever denies this or interposes a defense based upon its untruth, must prove it; the burden, not of the general issue of crime by a competent person, but the burden of overthrowing the presumption of sanity and of showing insanity, is upon the person who alleges it; and if evidence is given tending to establish insanity, then the general question is presented to the court and jury whether the crime, if committed, was committed by a person responsible for his acts; and upon this question the presumption of sanity and the evidence are all to be considered, and the prosecutor holds the affirmative, and if a reasonable doubt exists as to whether the prisoner is sane or not, he is entitled to the benefit of the doubt and to an acquittal."

In *People v. Schryver*, 42 N. Y. 1, the prisoner was indicted for manslaughter. On the trial he claimed that he acted in self defense and that the killing was justifiable. It was held that he must produce the same degree of proof that would be required if the blow inflicted had not produced death and he had been sued for an assault and battery and had set up a justification. He must make it appear to the jury that he was justified. It is not sufficient for him to raise a reasonable doubt, neither is it necessary for him to establish his justification beyond a reasonable doubt. He must make his defense appear to the jury, availing himself of all the evidence in the case on either side.

In *Com. v. Choate*, 105 Mass. 451, the defendant was indicted for burning a barn. The defense was an alibi. On the trial the defendant offered evidence tending to show where he was before, at and after the time of the fire, and that he was so situated that he could not have committed the crime. The judge in-

structed the jury "that when the defendant sought to establish the fact that he was at a particular place at any given time, and wished them to take it as an affirmative fact proved, the burden of proof was upon him, and if he failed in maintaining that burden the jury could not consider it as a fact proved in the case; that the burden was, however, upon the government to show that the defendant was present at the time of the commission of the crime, and as bearing upon that question the jury were to consider all the evidence offered by the defendant tending to prove an alibi; and if upon all the evidence the jury entertained a reasonable doubt as to the presence of the defendant at the fire they were to acquit." The charge was held to be correct. See also *State v. McCracken*, 66 Iowa, 569; *State v. Hamilton*, 57 Iowa, 596.

In the present case the defendant was charged with having unlawfully neglected and refused to support his wife. There was evidence tending to prove the marriage, and the refusal to support was not denied. The burden of proof to show the unlawfulness of the neglect was upon the State as fully as to show the neglect itself. Ordinarily the conduct of married women is such that when any husband neglects or refuses to support his wife the law itself presumes such neglect to be unlawful. Having shown the marriage and the neglect, the attorney for the State could safely rest upon that presumption. The unlawfulness was deemed to be proved *prima facie*. And when the defendant interposed a defense based upon such misconduct of his wife as made it lawful for him to refuse to support her, it was incumbent upon him to prove such misconduct as he set up, that is, her adultery, and to prove it, as before stated, by a preponderance of evidence.

There was error in the charge of the court upon this point, and a new trial must be granted.

In this opinion the other Judges concurred.

NEW YORK COURT OF APPEALS.

PEOPLE OF the State of NEW YORK,
Respt. and Appt.,

v.

John ANDREWS, *Appt. and Respt.*

(.....N. Y.....)

1. Although exclusive jurisdiction is given to the court of special sessions by Code Crim. Proc., § 56, subd. 32, as amended by chap. 873, Laws 1884, over prosecutions for violations of the Excise Law, in which complaints are

made to a committing magistrate, yet, if during the preliminary examination for the purpose of determining whether a warrant shall issue, the case is withdrawn from the magistrate with his consent, it may be subsequently presented to the grand jury and tried in the court of sessions.

2. Where a number of persons purchase and store liquor and appoint an agent to manage it, and he, without a license, upon the application of one of the number, separates a small quantity of the liquor from the general mass, fixes its value, delivers it to the applicant,

NOTE.—*Social clubs; evasion of liquor law by.*
A club properly organized in good faith under Act No. 22 of the Public Acts of 1883 cannot purchase liquors by the quantity and distribute them among its members, receiving pay by the glass, without being liable, under the Laws of Michigan, to pay a retail tax for selling such liquors and exhibit the tax receipt. *People v. Soule* (Mich.) 2 L. R. A. 404.

Where the steward of a social club furnished liquors to the members at a fixed price sufficient to cover the cost, but not for the purpose of profit, it was held a sale, and in violation of the Local Option Act. *State v. Lockyear*, 95 N. C. 683.
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Where an incorporated association purchases beer outside of the State of Kansas, and brings it into the State, and then sells chips to its members, each chip representing a drink or glass of beer, the member of the association who sells these chips, and the member of the association who delivers the beer on the return of the chips, and the president of the association, who is present at the time, and knows of these things, may be prosecuted, convicted and punished for selling intoxicating liquor in violation of law. *State v. Horacek* (Kan.) 8 L. R. A. 687.

The officers of a social club, whose steward furnishes the members with food, and with beer by the glass, at a fixed price, to be consumed at the

and receives its value or price in money, all the persons being dealt with on a cash basis and receiving no other consideration than is accorded to ready-money customers at a public bar, the transaction is a sale and subjects the agent to prosecution for violation of the Excise Law, and the fact that he claims to be acting as steward for a social club which owns the liquor is immaterial.

(October 8, 1889.)

CROSS APPEALS from a judgment of the General Term of the Supreme Court, Fifth Department, the People appealing from so much of the judgment as reverses the judgment of the Cayuga Court of Sessions convicting defendant for violating the Excise Law, and defendant appealing from so much of the judgment as grants a new trial. *Reversed.*

The facts sufficiently appear in the opinion of the court and in that of the general term, which is as follows:

HAIGHT, J.:

Information was first filed before a justice of the peace, who entered upon an examination of the persons designated in the information. Pending such examination, and before a warrant was issued, the attorneys for the complainant notified the justice that they had concluded to proceed no further before him, but had decided to take the matter before the grand jury of the county. The justice thereupon did nothing further in the case, but thereupon sent the papers to the district attorney. Subsequently the defendant was indicted by the grand jury of the county, and, upon the trial of the indictment, and after the evidence was closed, the defendant asked the court to instruct the jury to acquit the defendant, or that his discharge be ordered on the ground that it appears from the evidence that neither the grand jury that found the indictment nor the trial court had or has any jurisdiction of the subject matter, the complaint having been previously made to the court of special sessions of the county for the same offense charged in the indictment. The court denied the requests, and exception was taken by the defendant.

The provision upon which this motion is based is as follows: "Subject to the power of removal provided for in this chapter, courts of special sessions, except in the City and County of New York and the City of Albany, have, in the first instance, exclusive jurisdiction to hear and determine charges of misdemeanors committed within their respective counties, as follows: . . . When a complaint is made to or a warrant is issued by a committing magistrate for a violation of the law relating to excise and the regulation of taverns, inns and hotels;

or for unlawfully selling or giving to any Indian spirituous liquors or intoxicating drinks." Code Crim. Proc. § 56, subd. 82, as amended by chap. 879 of 1884.

The provision is so clear and explicit as to require no interpretation. When a complaint is made to a committing magistrate for a violation of the law relating to excise, the magistrate, subject to the power of removal provided for, obtains exclusive jurisdiction to hear and determine the charge.

In this case complaint in writing was filed with the magistrate, and under the provisions of this section he doubtless acquired exclusive jurisdiction of the case; but it appears that during the preliminary examination of the witnesses for the purpose of determining whether a warrant should issue, the attorney for the complainant decided to take the matter before the grand jury, and so notified the justice. There was no order of discontinuance entered, but the justice appears to have acquiesced in the proposition to lay the matter before the grand jury, for he thereupon sent the papers to the district attorney of the county. We are consequently of the opinion that what took place amounted to the withdrawal and discontinuance of the case before the magistrate, and that he acquiesced; and consented to such withdrawal and discontinuance, thus surrendering his jurisdiction of the case, and that the grand jury and court of sessions were subsequently invested with jurisdiction.

The defense was that the defendant was a steward of a social club; that the liquor sold by him was to members of the club. The court, in its charge to the jury, stated that it appeared from the evidence that friends of members of the association sometimes visited the clubhouse, and that such friends had been delivered liquor, upon the order of the members, which was paid for by the members; and then charged, in substance, that a delivery of liquors upon the order of a member to a party not a member, and the payment by the member to the steward, constitutes a sale of intoxicating liquors within the provisions of the Statute forbidding such sale without a license. Exception was taken by the defendant to this charge. It was the only question submitted to the jury, and the conviction must be deemed to have been made upon this theory.

Social clubs, for legitimate purposes, are authorized by the Statute, and when approved by a justice of the supreme court of the district in which the club is located, a certificate may be filed and the club incorporated. Under such organizations the property of the club becomes the joint property of its members, and the furnishing of liquors or wines to the members by

club, are not guilty within the Excise Law. *Selm v. State*, 55 Md. 568, 30 Am. Rep. 419.

The rule that the police will be prevented from invading the precincts of a social club or interfering with its property does not apply to a ball given by it, tickets to which are sold to all persons, and at which wines and liquors are sold to all persons willing to pay therefor. *Cercle Francais de L'Harmonie v. French*, 44 Hun. 128.

A club properly organized in good faith, under Michigan Pub. Acts 1883, No. 22, cannot purchase liquors by the quantity and distribute them among its members, receiving pay therefor as they are
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distributed by the glass, the proceeds to go into the treasury of the club, to be used in purchasing other liquors or in paying expenses, without being liable, under the laws of Michigan, to pay a retail tax for selling such liquors, and exhibit the tax receipt. *People v. Soule* (Mich.) 2 L. R. A. 494.

Where liquor is sold on the club premises by the steward of the club to persons not members of the club, without a proper license, contrary to the orders of the trustees or managing committee, and without their knowledge or assent, the trustees are not responsible for the unlawful sale by the steward. *Newman v. Jones*, L. R. 17 Q. B. Div. 182.

the steward is not a violation of the Statute, and we do not understand that the entertaining of a guest or friend by a member with wines or liquor at the club-house would be any more a violation of the Statute than it would if such entertainment was given at his private residence. *Com. v. Ewig*, 145 Mass. 119, 5 New Eng. Rep. 177.

We are, consequently, of the opinion that the charge was erroneous and that the exception thereto was well taken.

It is contended, on the part of the district attorney, that the club was a fraudulent concern organized for the purpose of evading the Excise Law. The evidence tends to show that the defendant had previously been a saloon keeper occupying the same premises; that he was refused a license, and thereupon this club was organized, and a portion of the premises in which the bar was located was leased to the club; that the defendant became the treasurer and steward of the club; that he has made all the purchases of liquors in the name of the club and sold them to members, to be drank upon the premises, receiving the pay therefor, as such steward. Members on joining the club were required to pay 50 cents, which was returned to them upon their withdrawal. The club was not incorporated. A constitution and by-laws were prepared and introduced in evidence for the purpose of showing the organization of the club. Whilst, as we have stated, the Statute authorizes the formation of clubs for legitimate purposes, it does not authorize the formation of a club for the purposes of evading the laws of the State; and if, as is claimed, this club was organized for such a purpose, if it is merely a scheme and a device to continue the sale of strong and spirituous liquors without a license, thereby evading the laws relating to excise, it operates as no defense or shield to those engaged in the traffic, and it is the duty of the court and jurors to disregard the scheme or device and faithfully execute the law according to its true spirit and intent.

The difficulty with this case is, that the trial court did not submit to the jury the question as to whether this organization was a scheme or a device to evade the Excise Law. On the contrary, the court in its charge appears to have assumed that it was a valid and legitimate organization, and that the intoxicating liquors sold by the defendant were the property of the club. The question as to whether the organization was effected for an illegal purpose was one which should have been submitted to and determined by the jury.

For these reasons the judgment and conviction should be reversed and a new trial ordered, and for that purpose the proceedings are remitted to the Court of Sessions of Cayuga County.

BARKER, P. J., BRADLEY and DWIGHT, JJ., concurred.

Mr. A. P. Rich, Dist. Atty., for the People:

It is no defense to an indictment for retailing liquors that they were owned by other persons.

Laws 1857, chap. 628, § 13. See also *Martin v. State*, 59 Ala. 84; *United States v. Wittig*, 2 Low. 466; *State v. Mercer*, 32 Iowa, 405; *Rickart v. People*, 79 Ill. 85; *Marmont v. State*, 48 Ind. 21; *Com. v. Smith*, 103 Mass. 144.

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These liquors were not the property of a legally organized club, and the delivery of liquors by Andrews to third persons, and which were paid for, constituted a sale, and it makes no difference who paid for them.

Code Crim. Proc., § 56, subd. 32, must be construed to apply to cases where the filing of the information is followed up by the arraignment and trial.

See *People v. Westbrook*, 12 Hun, 646.

Mr. H. Greenfield, for Andrews:

The complaint having been made to the committing magistrate, the oyer and terminer had no jurisdiction to indict, or the sessions to try the defendant; and upon the reversal of the judgment herein, the defendant should have been discharged.

Code Crim. Proc. § 56, subd. 32; *People v. Starks*, 17 N. Y. S. R. 234; *People v. Palmer*, 43 Hun, 397, 6 N. Y. S. R. 341.

The magistrate's duty, after complaint is made, is to issue a warrant, if he is satisfied that the crime complained of has been committed.

Code Crim. Proc. § 150.

He has no power to allow the committee, or the complainant, to withdraw or discontinue the proceedings. That can only be done in certain specified cases.

Code Crim. Proc. § 663.

The undisputed evidence showed no sale of intoxicants by defendant, and for that reason the judgment of reversal was proper and the defendant should have been discharged.

Com. v. Ewig, 5 New Eng. Rep. 177, 145 Mass. 119; *Seim v. State*, 55 Md. 566.

Danforth, J., delivered the opinion of the court:

The defendant was accused of violating the Excise Law (Laws 1857, chap. 628). The charge is that on the 10th of July, 1887, at Moravia, in the County of Cayuga, he sold by retail to various persons strong and spirituous liquors in quantities less than five gallons, without having a license therefor. He was convicted. The General Term of the Supreme Court has reversed the conviction and ordered a new trial. The plaintiff appeals from the order of reversal, and the defendant appeals from the order directing a new trial.

Two questions are presented: (1) as to the jurisdiction of the court; (2) whether, within the meaning of the Statute (*supra*), there was any sale of liquor by the defendant.

The first question was properly disposed of by the general term. 50 Hun, 591.

As to the second we are unable to agree with that court.

Upon the trial one S., describing Andrews' place, says: "Before the 1st of May, 1887, Andrews occupied the premises as a saloon. The front room is used for a fruit, confectionery and tobacco store. Back of that and partitioned off is a room with a bar, table and chairs." He also says: "I got whisky and ale of Andrews in the back room and paid him for it. Some I drank there and some I took home and drank. Paid him 10 cents for that I drank there and a shilling for that I took home."

C., a minor attending school, was often at this place and drank both ale and whisky and paid for it. Bought it for others and paid for it.

J., had ale and whisky there, and on one occasion bought half a pint of whisky for which he paid 25 cents and carried it away.

Chase drank there several kinds of liquor—gin, whisky and beer—and paid for it, 10 cents for gin and whisky, and 5 cents for beer.

Jones says the place was a saloon soon after it was built and Andrews has always run it. Jones frequently drank there, bought whisky by the glass and paid Andrews or Keeler for it.

Keeler testified that he was employed by the defendant at this place and paid by him. He says: "I wait on customers for cigars, fruits and confectionery, and also wait on members of the club. Since July 10 last I have delivered both ale and whisky to members of the club there by the drink and took pay therefor in cash. Have done this a good many times. . . . The sales that have been made by me have all been made by Andrews' direction."

Upon cross-examination by defendant of these witnesses, they described themselves as members of the "Valley Social Club," and it appeared that when persons not members came in with a member and called for liquor it was supplied, but payment made by the member. It was shown that neither Andrews nor the club had a license.—It was refused to Andrews in May, 1887, and on the 1st of June, 1887, the club was organized.

At the close of the plaintiff's case the defendant asked to be discharged upon the ground that there was no proof of a sale of intoxicating liquors, ale or wines by him, and, being refused, went into evidence.

Andrews, the defendant, testified that the description of the place by witness S. was correct: that in the front room he had cigars, tobacco, fruit and confectionery, and that was his own private business; that the room back of that was leased to the "Valley Social Club" by himself and wife for the term of one year from the 23d of May, 1887. He was steward of that club. He said, "I have heard the witnesses sworn on the part of the People. Heard them testify that they were members of the club and procured drinks at that place. That I do not deny in any way. None of the drinks had by any of the witnesses was my property, nor did I receive any pay of my own therefor whatever. The liquors did not belong to me, they belonged to the men that drank them. They were not bought in my name but in the name of the Valley Social Club, and bills were rendered to that organization for them. The club was organized about the 1st of June, 1887, with William D. Harris as president, and six trustees."

It further appeared that he was treasurer, and that all the moneys of the club came to his hands and had done so since its formation. The club was not incorporated. Twenty or twenty-five men met together and made the arrangements. Others subsequently joined, so that the present number is 600. Andrews took the rent and paid the wages of himself and Keeler. This he said was in pursuance of a standing order of the officers of the club. The matter of dividends has been considered by the club, and it was, upon motion, decided to use the money on hand to defend this suit and make a dividend of what is left when the suit is ended.

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The trial judge, in submitting the case to the jury, assumed that the liquors belonged to the club, and, waiving the question as to the liability of the defendant for liquors sold or delivered to the members of the club, said, in substance, "that where any person, acting as agent or steward of such an association, does, upon request of a member, deliver to a person not a member liquors belonging to that association, and takes pay for it, although from that member, the transaction constitutes a sale within the meaning of the Statute, and the offense charged in the indictment is complete." In that we find no error. The liquor belonged to the association, not a legal entity as a corporation, but as joint owners or tenants in common. I do not say that circumstance distinguishes this case from one where the liquor is owned by an incorporated club; that need not be considered. It is the character in which they act. Five hundred men buy a quantity of liquor; they store it and appoint an agent to manage it. On the application of one of the 500 the agent separates a small quantity from the mass of liquor, fixes its value, delivers the quantity so separated, as directed, and receives its value or price in money. What is that but a sale? It is not an evasion of the Statute, it is a violation of it. We have before us the scheme of the association and its by-laws, and can see that the transaction was not in conformity to either. We are therefore not called upon to say whether, if it had been, it would or would not have relieved the defendant. The scheme as declared in the eighth by-law is that "the expenses of this club shall be sustained by voluntary contributions to its funds by the members, and the refreshments furnished shall be enjoyed by the members in proportion to the amount contributed by each. Such contribution shall be receipted for by the treasurer by certificates, and, as a means of adjusting the expenses equitably between the members, such certificates shall be surrendered to the employés of the club as such refreshments are consumed by such members."

In the case before us no certificates were given and none of course surrendered: Nothing was done by means of which the equities between the members could be adjusted. Nothing remained to be done. The transactions were on a cash basis; the purchasing money went into the hands of the treasurer, with no other ceremony than attended a similar purchase, when, instead of filling that character, he stood behind the same bar as a saloon keeper. Liquor was purchased; liquor was paid for by money. The occurrence was not exceptional, but the members were dealt with on a cash basis, and, whether men or boys, received no other consideration than is accorded to ready-money customers at a public bar. Whatever may be the merit of the scheme prescribed by the organization, it has no effect here. It did not control or govern the parties.

We are referred to the case of *Com. v. Ewig*, 145 Mass. 119, 5 New Eng. Rep. 177, as an authority to sustain the defendant's appeal. In that case the defendant was convicted because the scheme on which he relied was deemed an evasion of the License Law. We do not regard that question as before us; and if there are observations in the course of the opinion of the

learned court below at variance with those already expressed, we cannot yield to them. We put our decision upon the sole ground that the acts of the defendant were, as charged in the indictment, in violation of our law, and that upon the evidence he was rightfully convicted.

The judgment of the General Term should therefore be reversed, the defendant's appeal dismissed, and the judgment of the Court of Sessions affirmed.

All concur.

NEW YORK COURT OF APPEALS (2d Div.).

Bainbridge S. CLARK, as Trustee of Jennie P. Fosdick, *Respt.*,

v.

C. Baldwin FOSDICK *et al.*, *Appts.*

(.....N. Y.)

1. A provision in an agreement for separation of husband and wife, that the husband shall pay to a third party who signs the agreement as surety for the wife, a certain sum yearly towards her support, which sum is to be in full satisfaction of any claim upon the husband for support or alimony, constitutes such third party a trustee of an express trust, and requires an action to enforce or execute the trust to be brought in his name.
2. A valid agreement for an immediate separation between husband and wife, and for a separate allowance for her support, may be made through the medium of a trustee.
3. The provision for an annual payment of money for the maintenance of the wife, in an agreement for separation, is not affected by a subsequent decree of divorce in her favor, which makes no provision for alimony.

(*Follett, Ch. J., dissents.*)

(December 10, 1889.)

A PPEAL by the defendants, with the permission of the court, from a judgment of

the General Term of the Court of Common Pleas for the City and County of New York, affirming a judgment of the city court of said city in favor of plaintiff in an action to recover money alleged to be due by the terms of certain articles of separation between husband and wife. *Affirmed.*

The articles stated that they were made between C. Baldwin Fosdick and Jennie P. Fosdick, his wife, as principals, and Charles B. Fosdick and Bainbridge S. Clark as sureties, and were signed by all the parties.

Statement by **Potter, J.:**

Jennie P. Fosdick intermarried with the defendant C. Baldwin Fosdick on the 11th day of April, 1878, and they thereafter lived together as husband and wife until the 14th of February, 1888. Then, unhappy differences having arisen between them, it was agreed between them that they should live separately, and to effectuate that agreement articles of separation were entered into, bearing date the 14th of February, 1888, reciting that such differences had arisen between them, and that for that reason they agreed to live separately, and immediately upon the execution of said agreement separated in fact and continued to live separately thereafter. The articles of separation provided that C. Baldwin Fosdick, the husband, and Charles B., the husband's father, covenanted that they

NOTE.—Husband and wife; agreement of separation, when valid.

It has long since become the settled law of England, and followed in this country, that a valid agreement for an immediate separation between husband and wife, and for a separate allowance for her support, may be made through the medium of a trustee. *Loud v. Loud*, 4 Bush. 457; *Calkins v. Long*, 22 Barb. 103; *Sayles v. Sayles*, 21 N. H. 312; *Mercein v. People*, 25 Wend. 77; *Rex v. Mead*, 1 Burr. 542; *Rodney v. Chambers*, 2 East, 297; *Bettie v. Wilson*, 14 Ohio, 257; *Nurse v. Craig*, 2 Bos. & P. N. R. 148; *Todd v. Stoakes*, 1 Salk. 116; *Hindley v. Westmeath*, 6 Barn. & C. 200; *Westmeath v. Westmeath*, 1 Dow & C. 519.

A husband and wife may contract with each other when the contract is not precluded by public policy. *Randall v. Randall*, 37 Mich. 572.

In articles of separation between husband and wife, through the intervention of a trustee, the covenant on the part of the husband to pay a stipulated sum for her support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy. *Dupre v. Rein*, 56 How. Pr. 230, 7 Abb. N. C. 258; *Heyer v. Burger*, 1 Hoffm. Ch. 6.

When a separation has actually taken place or been fully decided on, and articles containing suitable provisions for the wife and children are fair and equal and not the result of fraud or coercion, no principle of public policy is disturbed, and such

agreement may be sustained. *Squires v. Squires*, 53 Vt. 211; *Randall v. Randall*, 37 Mich. 572; *Compton v. Collinson*, 2 Bro. Ch. 377; *Worrall v. Jacob*, 3 Meriv. 256; *Jee v. Thurlow*, 2 Barn. & C. 547; *Jee v. Thurlow*, 4 Dow. & R. 11; *Blaker v. Cooper*, 7 Serg. & R. 500; *Hutton v. Hutton*, 3 Pa. 100; *Dillinger's App.* 35 Pa. 357; *Nichols v. Palmer*, 5 Day, 47; *Chapman v. Gray*, 8 Ga. 341; *Wells v. Stout*, 9 Cal. 494; *Gaines v. Poor*, 8 Met. (Ky.) 508; *Walker v. Walker*, 76 U. S. 9 Wall. 743 (19 L. ed. 814).

Where they had actually separated, and were living apart at the time such agreement was made, the agreement is valid. *Magee v. Magee*, 67 Barb. 490.

But where the instrument, no matter what the inducing cause may have been, did not contemplate an immediate separation, it was void as against the policy of the law. *Gould v. Gould*, 29 How. Pr. 458; *H. V. W. 3 Kay & J. 382*; *Durant v. Titley*, 7 Price, 577; *Florentine v. Wilson*, Hill & D. 303; *Friedman v. Bierman*, 43 Hun, 390; *Morgan v. Potter*, 17 Hun, 405; *Mercein v. People*, 25 Wend. 77; *Allen v. Affleck*, 10 Daly, 512, 64 How. Pr. 331; *Nurse v. Craig*, 2 Bos. & P. N. R. 143.

In *Galusha v. Galusha*, 27 N. Y. S. R. 733, hereafter to be reported in this series, it is held that where there is a valid agreement for separation between husband and wife, making provision for the wife, no additional allowance can be given as alimony in a suit for divorce; and further that such an agreement is not affected by the divorce suit where it is not successfully impeached.

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would pay to the plaintiff Bainbridge S. Clark for the support and maintenance of Jennie P. Fosdick, the wife, and their two children, \$3,500 per annum, payable quarterly during the period of her natural life, unless she should remarry, in which case the allowance was to cease, and that in case of the death of both of their two children the allowance should be reduced to \$2,000.

The agreement contained the further provision that the trustee, Bainbridge S. Clark, should indemnify the husband against the support of his wife and the children; that he would pay the same over to her for her support and that of the children. The articles further provided that the husband, C. Baldwin Fosdick, should not interfere with his wife, and that she should have the custody, management and control and education of the children, but that the husband and Charles P. Fosdick, his father, and his wife were to have access to the children at all reasonable times and places.

After the execution of the agreement, and the separation of the parties in pursuance of the provisions in the same, and the payment of the allowance, made a number of times, the wife went to reside in the State of Rhode Island, and after residing there for the period of one year commenced an action for divorce against her husband, C. Baldwin Fosdick. He appeared in the action and litigated the same to a decree, which decree adjudged that "the prayer of the said petitioner be and the same is hereby granted; that the bonds of matrimony existing between the said Jennie P. Fosdick and said C. Baldwin Fosdick be and the same are hereby dissolved, and that the said Jennie P. Fosdick have the exclusive custody of her two children, Clark Fosdick and Pauline Fosdick, until the further order of the court."

This decree or so much of it as above recited, together with the agreement thereto annexed, formed part of the complaint in this action. This action was brought to recover an installment of said allowance due on the first day of December, 1885.

The purpose of the pleader in setting out the decree obtained in the courts of the State of Rhode Island was to present the whole matter by means of a demurrer on the part of the defendant, and thus make a final disposition of all the questions in the case.

The defendant demurred to the complaint, assigning as grounds of demurrer:

1. That the plaintiff has not the legal capacity to sue, for that the trust has ceased and the plaintiff has no longer any interest, the only party in interest at the time of the commencement of the action being Jennie P. Fosdick.
2. That said complaint does not state facts sufficient to constitute a cause of action.
3. That there is a defect of parties plaintiffs, in that Jennie P. Fosdick is not named therein as a party plaintiff therein.

Messrs. George W. Lyon and H. M. Whitehead, for appellants:

The agreement sued upon is in violation of § 10, article 1 of the Constitution of the State of New York, which provides that "no divorce shall be granted otherwise than by due judicial proceedings."

Gardner v. Astor, 3 Johns. Ch. 54; *Gouverneur v. Titus*, 1 Edw. Ch. 480; *Heyer v. Burger*, 1 Hoffm. Ch. 1; *Rogers v. Rogers*, 4 Paige, 517; *St. John v. St. John*, 11 Ves. Jr. 526; 2 Story, Eq. Jur. §§ 1427, 1428.

The agreement sued upon is void on the ground of public policy, which forbids that parties should be permitted to make agreements for themselves to live separate.

Westmeath v. Salisbury, 5 Bligh, N. R. 367, 375, 381; *Morgan v. Thomas*, 2 Dowl. P. C. 382; *Scholey v. Goodman*, 1 Car. & P. 86; *Rodney v. Chambers*, 2 East, 283; *St. John v. St. John*, *supra*; *Cooper v. Clason*, 3 Johns. Ch. 521; *Gouverneur v. Titus* and *Heyer v. Burger*, *supra*; *Pidgin v. Cram*, 8 N. H. 350; *Elworthy v. Bird*, 2 Sim. & Stu. 872; *Statter v. Statter*, 1 Younge & C. (Exch.) 23; *Rogers v. Rogers*, *supra*; *Cropey v. McKinney*, 30 Barb. 47; *Morgan v. Potter*, 17 Hun, 403; *Beach v. Beach*, 2 Hill, 260; *Calkins v. Long*, 22 Barb. 108; *Griffin v. Banks*, 37 N. Y. 623.

The decree of divorce estops the plaintiff from maintaining this action. After a divorce the parties have no claim upon each other growing out of the former relations of husband and wife except such as may be given to them by the decree of divorce.

Kamp v. Kamp, 59 N. Y. 212; *Crimmins v. Crimmins*, 28 Hun, 200.

The divorce put an end to the marriage relation and ended the obligations of the husband to support the wife, other than as the judgment of divorce itself may have provided.

Kamp v. Kamp and *Crimmins v. Crimmins*, *supra*; *McQuien v. McQuien*, 61 How. Pr. 280; *Supreme Council Am. Legion of Honor v. Smith* (N. J.) 17 Atl. Rep. 770.

The contract for a separation must be deemed to be superseded by the judgment of the court in an action for divorce.

Squires v. Squires, 53 Vt. 208; *Sheithar v. Gregory*, 2 Wend. 422.

Articles of separation recognize the continued liability of the husband to support the wife and thus provide for fulfilling it. This obligation is at an end upon a divorce.

Charrnaud v. Charrnaud, 1 N. Y. Legal Obs. 184. See *Wells v. Stout*, 9 Cal. 479; *Behrley v. Behrley*, 93 Ind. 255.

In *Muckenburg v. Holler*, 29 Ind. 139, it was said: "All questions of property between the parties, like that in controversy here, are thus in litigation in a suit for divorce and must there be settled."

See also *Fischli v. Fischli*, 1 Blackf. 360; *Lang v. Scott*, 1 Blackf. 405, 12 Am. Dec. 257; *Williams v. Williams*, 13 Ind. 523; *Sullivan v. Learned*, 49 Ind. 252; *Moon v. Baum*, 58 Ind. 194.

And a provision under an antenuptial contract, which is plainly intended as a substitute or an equivalent for dower in case the wife survives the husband, is barred by their divorce. It makes no difference for whose fault the divorce is granted.

Calame v. Calame, 24 N. J. Eq. 440; *Gleason v. Emerson*, 51 N. H. 405; *Hunt v. Thompson*, 61 Mo. 148.

A trust for a married woman's benefit ceases upon her discovery by divorce or the death of her husband.

Koenig's App. 57 Pa. 352; *Dodson v. Ball*, 60 Pa. 493; *Wood's App.* (Pa.) 9 Cent. Rep. 376.

If the agreement ended with the divorce, her reliance would not revive it.

Johnson v. Johnson, 65 How. Pr. 517.

There is a defect of parties plaintiff.

Code Civ. Proc. § 449; *Dupre v. Rein*, 7 Abb. N. C. 256.

Messrs. Jabish Holmes, Jr., and Horace Russell, for respondent:

The plaintiff has legal capacity to sue, and Mrs. Fosdick is not a necessary party. Bainbridge S. Clark is the trustee of an express trust, and can maintain this action without joining the beneficiary.

Code Civ. Proc. § 449; *Dupre v. Rein*, 7 Abb. N. C. 256.

One to whom money is payable for the benefit of another is the "trustee of an express trust," although not named as such.

Greenfield v. Mass. Mut. L. Ins. Co. 47 N. Y. 430; *Slocum v. Barry*, 38 N. Y. 46, affirmed 84 How. Pr. 320; *Cummins v. Barkalow*, 4 Keyes, 514; *Considerant v. Brisbane*, 22 N. Y. 389.

It is not necessary for the "trustee of an express trust" to have any interest in the performance of the trust to enable him to maintain the action.

Code Civ. Proc. § 449; *Greenfield v. Mass. Mut. L. Ins. Co.* *supra*; *Hughes v. Mercantile Mut. Ins. Co.* 44 How. Pr. 351.

Articles of separation executed between husband and wife, with the intervention of a trustee for the wife, are valid, and will be enforced so far as they relate to the payment of the allowances for the wife's support, when the parties have actually separated.

Carson v. Murray, 8 Paige, 488; *Rogers v. Rogers*, 4 Paige, 516; *Allen v. Affleck*, 64 How. Pr. 380; *Dupre v. Rein*, *supra*; *Carpenter v. Osborn*, 3 Cent. Rep. 804, 102 N. Y. 552; *Pettit v. Pettit*, 107 N. Y. 677, 10 Cent. Rep. 265.

Articles of separation, reciting simply: "Whereas divers unhappy differences have arisen," are those in universal use.

Abbott, Clerk's and Conv. Asst. Form 929, p. 465; Dunlap, Book of Forms (1886), 132; Curtis, Conveyancer, pp. 235, 288; Jenkins, New Clerk Assistant (1884), 332; McCall, Clerk's Assistant (1885), 294; Jones, Forms in Conveyancing, 707; 2 Humphrey, Practical Forms, 1288.

The only grounds for avoiding the payment of an allowance, under articles of separation, are failure of consideration (that is, no separation, or a reconciliation) and the events the parties have stated in the contract; and divorce, even for the wife's adultery, is not a bar to an action on the articles.

Clark v. Fosdick, 13 Daly, 500; *Fosdick v. Fosdick*, 1 New Eng. Rep. 38, 15 R. L. 180; Stewart, Mar. and Div. § 191; *Grant v. Budd*, 30 L. T. N. S. 319; *Charlesworth v. Holt*, 43 L. J. N. S. Exch. 25; *Goslin v. Clark*, 12 C. B. N. S. 681; *Jee v. Thurlow*, 2 Barn. & C. 547; *Kremelberg v. Kremelberg*, 52 Md. 553; *Blaker v. Cooper*, 7 Serg. & R. 500; *McGrath v. Pennsylvania Ins. Co.* 8 Phila. 113; *Wright v. Miller*, 1 Sandf. Ch. 126; *Carpenter v. Osborn* and *Pettit v. Pettit*, *supra*.

As the agreement estopped Mrs. Fosdick from demanding alimony on a divorce, so it estops defendants from setting up the divorce, 6 L. R. A.

granted without alimony on the faith of the articles, as a bar to this action.

Wallace v. Bassett, 41 Barb. 97.

Potter, J., delivered the opinion of the court:

The questions to be decided upon this appeal are presented by demurrer to the complaint. The complaint alleges the facts which ordinarily give an action to recover the money promised to be paid the plaintiff as trustee under the agreement; but it also alleges a decree of divorcement obtained by the wife after the making of the agreement of separation, and which the defendant contends defeats the plaintiff's action. The purpose of thus pleading was to obtain a final judgment upon the rights of these parties in a more speedy and less expensive way.

It will be more orderly to consider first the ground of demurrer strictly applicable to the right of the plaintiff as trustee to bring the action.

By the express terms of the agreement of separation, the defendant C. Baldwin Fosdick agrees to pay to the plaintiff for and towards the support and maintenance of his wife, the said Jennie P. Fosdick, and their children, the yearly sum of \$2,500 for and during the period of her natural life, unless she remarries, etc., and the plaintiff and said Jennie agree that said sum so paid shall be in full satisfaction of the support and maintenance of said Jennie P. Fosdick and children, and all alimony whatsoever. This clearly constitutes the plaintiff the trustee of an express trust, and requires that an action to enforce or to execute the trust should be brought in his name. Code Civ. Proc. § 449; *Calkins v. Long*, 22 Barb. 97; *Greenfield v. Mass. Mut. L. Ins. Co.* 47 N. Y. 430; *Slocum v. Barry*, 38 N. Y. 46; *Hughes v. Mercantile Mut. Ins. Co.* 44 How. Pr. 351.

The next question to be considered is the validity of the agreement itself. I think it is to be assumed in the consideration of this appeal that at the time of executing the instrument which forms the basis of this action, the defendant C. Baldwin Fosdick and Jennie P. Fosdick were husband and wife, and were living together as such.

The first inquiry should be to learn whether the courts of this State have decisively passed upon that question (and if so to follow such holding). It was reluctantly held by the chancellor in *Carson v. Murray*, 8 Paige, 500, and then only upon the principle of *stare decisis* as evinced by *Baker v. Barney*, 8 Johns. 73, *Shelthar v. Gregory*, 2 Wend. 422, following the English decisions prior to the Revolution, that "a valid agreement for an immediate separation between husband and wife and for a separate allowance for her support, may be made through the medium of a trustee."

The case of *Carson v. Murray*, 8 Paige, 488, was upon a bill in equity by the wife against the executors of her husband, based upon an agreement of separation, for its enforcement out of the estate of the deceased husband.

The case of *Baker v. Barney*, 8 Johns. 73, was an action to recover of the husband the price of suitable goods sold to the wife after the separation of husband and wife under an

agreement making provision for the support of the wife.

And the case of *Shelthar v. Gregory*, 2 Wend. 432, was an action upon the bond and agreement to separate, and the defense was that after the bond was given and before the installment or sum fell due by the terms of the agreement, the wife returned to and was living with the husband, and was supported by him. In these cases, the husband and wife were living together when the agreement of articles of separation were executed, and separated immediately thereafter. The ruling of the court was to the effect that such articles of separation, considered under these various aspects, were valid. These holdings were based upon decisions made in the English courts, and I am not aware that the English or our own courts have departed or receded from the principle thus laid down. While the husband and wife in *Calkins v. Long*, 22 Barb. 98, had actually separated before the agreement of separation was executed, the court, in holding that the agreement was valid, cites numerous decisions with approval, in England and several of the States of the Union, to the effect that such agreements are valid and will be enforced where the separation had taken place before, or takes place immediately after, the execution of the agreement of separation; and this case is said (in a note upon page 110) to have been affirmed by the court of appeals.

Judge Davis, in delivering the opinion of the court in *Walker v. Walker*, 76 U. S. 9 Wall. 743 [19 L. ed. 814], while regretting, upon the score of public policy, that the courts of England and of this country had gone so far, was, as was the chancellor in *Calkins v. Long*, *supra*, constrained to hold that, "a covenant by the husband for the maintenance of the wife, contained in a deed of separation between them, through the medium of trustees, where the consideration is apparent, is valid, and will be enforced in equity, if it appears that the deed was not made in contemplation of a future possible separation, but in respect to one which was to occur immediately, or for the continuance of one which had already taken place."

The validity of such agreements is recognized and enforced in numerous cases decided by the courts of this and other States. *Carpenier v. Osborn*, 102 N. Y. 552, 8 Cent. Rep. 804; *Pettit v. Pettit*, 107 N. Y. 677, 10 Cent. Rep. 255; *Carson v. Murray*, 3 Paige, 483; *Rogers v. Rogers*, 4 Paige, 516; *Allen v. Affleck*, 64 How. Pr. 380; *Dupre v. Rein*, 7 Abb. N. C. 256.

We come now to consider the question whether the divorce granted upon the application of the wife affected the agreement of separation. Ordinarily that question would be presented by an answer to the complaint by way of defense. That matter is now presented upon behalf of the plaintiff and as a part of the complaint, and the defendant demurs to it. Of course, the defendant admits the truth of the allegations of the complaint and just as stated in the complaint. The defendant is confined to that statement and is not at liberty to resort to any doubtful inferences of fact arising from the circumstances or motives leading to the making of the agreement or to any doubt-

ful intendments from the language or construction of the agreement or the decree of divorce, unfavorable to the plaintiff.

The complaint, after setting forth the agreement of separation, dated February 14, 1883, alleges that on the 23d day of September, 1885, the said Jennie P. Fosdick obtained a decree of absolute divorce from a court of the State of Rhode Island, having power to grant the same, and having jurisdiction of the parties,—of the plaintiff by reason of a *bona fide* residence in that State for a year, and of the defendant by reason of his appearance in that court, and the interposition of his defense to the action.

The decree, or a portion of it, is set forth in the complaint in this action, from which it appears "that the bonds of matrimony now existing between the said Jennie P. Fosdick and the said C. Baldwin Fosdick be and the same are hereby dissolved, and that the said Jennie have the exclusive custody of her two children, Clark Fosdick and Pauline Fosdick, until the further order of the court."

The complaint alleges that no alimony was asked or granted in said action, and that the wife relied upon the covenant contained in the agreement of separation in that regard.

It is contended upon behalf of the defendant that this decree estops the plaintiff from maintaining this action. There is nothing in the complaint in this action or in the decree showing the ground upon which such divorce was granted, or when the ground on which it was granted began, or ceased, to exist. And as the estoppel must depend upon the matters set forth in the complaint and the decree, the estoppel cannot prevail unless such decree, upon whatsoever grounds it may have been granted, as matter of law nullifies the agreement of separation. I say as matter of law, for the reason that there is nothing in express terms that conditions the payment of the money upon her not applying for or obtaining a divorce from her husband. The question is, therefore, whether such decree rendered the article or agreement of separation, or its provisions for the payment of the money in suit, of no further effect. It may be here remarked that the agreement in question is to be considered and adjudicated in view of its provisions and the rules applicable to agreements generally. It is to be assumed in the construction of this agreement that it contains all that the parties intended to agree to, and that their minds met upon it.

By the terms of the agreement under consideration the defendant agrees to pay to the plaintiff, for and towards the support and maintenance of his wife, Jennie P. Fosdick, and their children, the yearly sum of \$2,500 for and during the period of her natural life, unless she remarries; and that in case of the death of the two children the amount to be paid shall be reduced to \$2,000; and that in case of the death of either said husband or wife the agreement was to be at an end and have no further force or effect.

Thus it will be seen that an application for, or the obtaining of, a divorce by the wife was not by the agreement made a condition of the payment of the money, or in any manner to affect the defendant's obligation to pay it.

It seems to me very clear, both upon princi-

ple and authority, that the defendant's contention that the divorce granted to the wife, Jennie P. Fosdick, is not a bar to this action to recover the money stipulated in the agreement.

As we have seen, the law sanctions agreements in certain circumstances between husbands and wives for separate living and providing the means for the support and maintenance of the wife and children through the medium of a trustee to receive and disburse the same. Such agreements take the place, as far as they extend, of the duties and obligations of the law in relation to husband and wife and their children. But they do not supersede or render inoperative other duties and obligations imposed by law upon husband and wife toward each other and toward their children. They are still husband and wife, but living apart from each other and bound to observe all the other domestic duties resting upon them as husband and wife and parents, not provided for in the agreement of separation. Neither of them can marry nor commit adultery without incurring the consequences and the penalty prescribed by law to husbands and wives who commit those offenses. Hence we find numerous decisions of the courts in nearly all civilized countries holding that either husband or wife may, notwithstanding the existence of such agreement between them, maintain against the other the ordinary action for divorce, limited or absolute, according to the ground and the jurisdiction, and whether the ground therefor accrued before or after such agreement was entered into. The following authorities I think

sustain the proposition: *Stewart, Mar. and Div. § 191; Grant v. Budd*, 80 L. T. N. S. 819; *Charlesworth v. Holt*, 43 L. J. (N. S.) Exch. 25; *Wright v. Miller*, 1 Sandf. Ch. 103; *Carpenter v. Osborn*, 102 N. Y. 559, 8 Cent. Rep. 804; *Pettit v. Pettit*, 107 N. Y. 687, 10 Cent. Rep. 255; *Jes v. Thurlow*, 2 Barn. & C. 547; *Kremelberg v. Kremelberg*, 52 Md. 553.

With these views and authorities, it seems very clear to me that the agreement of separation is valid and has not been in any wise rendered ineffectual by the decree of absolute divorce granted to the wife.

This case is free from the question often involved in this class of cases arising from the allowance of a greater or less amount in the decree of divorce than the amount provided in the article of separation. The decree of divorce made no provision for alimony. Nor did the decree change the provision in the article of separation in relation to the custody and control of the children, as I do not apprehend that the omission of the privilege of visiting the children by the father and grandfather, from the decree, changes at all that right as provided in the agreement.

The agreement remains unaffected in that and other respects, capable of enforcement by any of the parties to it by all proper means.

Judgment absolute should be granted, with costs, in favor of the respondent.

All concur, except Follett, Ch. J., dissenting, and Haight, J., not sitting.

For dissenting opinion see *Galuska v. Galuska*, *post*, p. —.

VIRGINIA SUPREME COURT OF APPEALS.

John E. ROLLER, *Appt.*,
v.

D. M. BEAM, Admr. of James H. Moore,
Deceased, *et al.*

(.....Va.....)

1. An assignment of a life insurance policy to a person who has no insurable interest is void.

NOTE.—*Insurable interest in the life of another.*

Whether a policy is assigned during the life of the assured or not, the assignee must have an insurable interest; and in an action brought by him on the policy, he cannot recover without proof of such insurable interest. *Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co.* 81 Ala. 323; *Mo. Valley L. Ins. Co. v. McCrum*, 86 Kan. 146.

To create an insurable interest in the life of another, there must be a reasonable ground, founded in the relations of the parties, — either pecuniary, or of blood or affinity, — to expect some benefit or advantage from the continuance of his life. *United Brethren Mut. Aid Society v. McDonald*, 122 Pa. 824.

An insurable interest in the life of another arises from the relation of the party taking the insurance to the insured, so that from the relation thus established there may be some expectation of benefit or advantage in the continuance of the assured life. *Keystone Mut. Ben. Assn. v. Norris*, 7 Cent. Rep. 204, 115 Pa. 446.

A wife and children have an insurable interest in the life of the husband and father. *Washington Cent. Bank v. Hume*, 123 U. S. 196 (32 L. ed. 370).
6 L. R. A.

2. A creditor who takes an assignment of a life insurance policy as security for a loan can hold the proceeds of the policy only to the extent of the sums actually advanced by him.

(November 7, 1890.)

A PPEAL by defendant, Roller, from a decree of the Circuit Court of Rockingham County, entered in a creditors' suit brought for

A contract with a beneficial order, by a member, to furnish support, medical attendance and burial to another member, who is a charge upon the order, is an insurable interest in the life of the latter. *McArthur v. Chase* (Pa.) 6 Cent. Rep. 566.

Who has insurable interest and who has not.

A creditor has an insurable interest in the life of his debtor. *Am. L. & H. Ins. Co. v. Robertshaw*, 23 Pa. 189; *Cunningham v. Smith*, 70 Pa. 450; *Corson v. Garnier*, 4 Cent. Rep. 309, 113 Pa. 438; *Rittler v. Smith*, 7 L. R. A. 844, 70 Md. 261.

It is not necessary to prove a continuance of the relation of debtor and creditor until the maturity of the policy. *Corson v. Garnier*, 4 Cent. Rep. 307, 113 Pa. 438.

The sum insured by a policy of insurance on the life of a debtor must not be disproportionate to the interest the holder of the policy has in the life insured. *Grant v. Kline*, 7 Cent. Rep. 623, 115 Pa. 618.

A creditor for \$302 took out a policy for \$3,000 on the life of his debtor, who was sixty-five years old. He had insured the debtor's life twice before and had paid the premiums, but abandoned the policies on account of the insolvency of the companies.

the purpose of subjecting the real and personal estate of a deceased debtor to the payment of debts, in which said defendant was compelled to account for and pay over the proceeds of a certain policy of life insurance, which had been collected and were retained by him. *Affirmed.*

The facts fully appear in the opinion.

Messrs. Strayer & Liggett and George M. Cochran for appellant.

Messrs. John T. Harris, Jr., and William B. Compton, for appellees:

The assignment to Gen. Roller is unlawful, because it is totally lacking in a lawful subject matter of contract. Gen. Roller had no insurable interest whatever in the life of James H. Moore. As an original transaction, he could not take out a policy upon his life for his own benefit. The existence of an insurable interest is an absolute prerequisite to support a policy of insurance upon the life of another. This principle is applicable, not only to parties to the transaction, but to assignees as well, the law wisely prohibiting the accomplishment by indirection of that which it forbids to be done directly.

May, Ins. § 898, p. 599; Cammack v. Lewis, 82 U. S. 15 Wall. 643 (21 L. ed. 244); Page v. Burnstine, 103 U. S. 669, 670 (26 L. ed. 270); Conn. Mut. L. Ins. Co. v. Luchs, 108 U. S. 498 (27 L. ed. 800); Conn. Mut. L. Ins. Co. v. Schaefer, 94 U. S. 457 (24 L. ed. 251); Warnock v. Davis, 104 U. S. 775 (28 L. ed. 924); New York Mut. L. Ins. Co. v. Armstrong, 117 U. S. 597 (29 L. ed. 999); Mo. Valley L. Ins. Co. v. McCrum, 36 Kan. 146; Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601; Price v. Supreme Lodge K.

of H. 68 Tex. 861; Bursinger v. Bank of Watertown, 67 Wis. 75; Gilman v. Curtis, 66 Cal. 116; Stoner v. Line, 16 W. N. C. 187; Wegman v. Smith, 16 W. N. C. 186; Meily v. Hershberger, 16 W. N. C. 186; Singleton v. St. Louis Mut. Ins. Co. 66 Mo. 68; Guardian Mut. L. Ins. Co. v. Hogan, 80 Ill. 35; Franklin L. Ins. Co. v. Sefton, 58 Ind. 381; Franklin L. Ins. Co. v. Hazard, 41 Ind. 116.

This assignment is unlawful, because it is against public policy, coming within the scope of transactions prohibited by law for sound reasons of public policy.

Cammack v. Lewis, 82 U. S. 15 Wall. 643 (21 L. ed. 244); May, Ins. § 898, p. 599; Price v. Supreme Lodge K. of H. 68 Tex. 861.

Lacy, J., delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of Rockingham County, rendered on the first day of August, 1887.

The case is as follows: James H. Moore having died, the appellee, Herod Homan filed a creditor's bill against the appellee D. M. Beam, his administrator, his widow and heirs, to have an account of the debts, and to subject the real and personal assets to the payment of the debts.

The administrator, Beam, answered, and claimed that among the assets of the decedent, Moore, was a policy of insurance for \$5,000 in the Equitable Life Assurance Society of the United States, which had been collected by the appellant, John E. Roller, under an alleged assignment, asking that the answer be treated as a cross-bill, and that said Roller be made a

He paid premiums on the last policy to the amount of \$238. The insured died within a year. It was held there was no disproportion of which the debtor's administrators could take advantage. *Ibid.*

The insurance of the life of a debtor for the sum of \$2,000, in favor of a creditor, where the amount of indebtedness was uncertain when insurance was effected, but afterwards ascertained to be between \$300 and \$750, was held, under the facts of the case, to be no evidence of bad faith, or that the contract was a wager. *Corson v. Garnier, supra.*

A person has an insurable interest in his own life, and has a right to procure a policy thereon, and make it payable, in case of his death, to any person whom he may desire. *Bloomington Mut. L. Ben. Assn. v. Blue, 3 West. Rep. 642, 120 Ill. 121.*

Act 1862, chap. 9, amendatory of Code, art. 45, § 8, provided that a husband might insure his life for the sole use of his wife, and assign to her any policy on his life. There is no restriction, qualification or provision excepting from its operation the case of a husband who is unable to pay his debts. *Elliott v. Bryan, 1 Cent. Rep. 491, 64 Md. 393.*

A young unmarried woman without property, who for several years has been supported and educated by her brother, who stood to her *in loco parentis*, was held to have an insurable interest in his life. *Corson v. Garnier, supra.*

A stepson has no insurable interest in the life of his stepfather. *United Brethren Mut. Aid Society v. McDonald, 123 Pa. 324.*

A son-in-law has no insurable interest in the life of his mother-in-law, who has no visible means of support and whom he keeps and maintains. *Stambaugh v. Blake (Pa.) 22 W. N. C. 407.*

A grandchild has not an insurable interest in the life of a grandfather merely by virtue of the relationship. *Burton v. Conn. Mut. L. Ins. Co. 119 Ind. 377.*

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Wagering policies are void.

An insurable interest is not necessarily a definite pecuniary interest, such as is recognized and protected at law; it may be contingent, restricted as to time, or indeterminate in amount, but it must be actual, and not merely to put a wager upon human life. *Corson v. Garnier, 4 Cent. Rep. 307, 113 Pa. 438; Amick v. Butler, 9 West. Rep. 843, 111 Ind. 678.*

The essential point is that the transaction be bona fide, and not a device to evade the law. *Amick v. Butler, supra.*

Where one procures insurance on the life of another in whom he has no insurable interest, the policy is void. *Ibid.; Lamont v. Grand Lodge Iowa Legion of Honor, 31 Fed. Rep. 180.*

A person who has no insurable interest in another's life cannot recover upon a policy on such life, which is purchased during the lifetime of the insured, as the policy so obtained is a mere wager, and void. *Mo. Valley L. Ins. Co. v. McCrum, 36 Kan. 146.*

Policies held by one not a relative or creditor are speculative; and the proceeds, over expenditure, cannot be held by such persons against representatives of the insured, notwithstanding assignment by heirs. *Ruth v. Katterman, 2 Cent. Rep. 776, 112 Pa. 251.*

A policy taken upon the life of another for speculative purposes is regarded as nothing more than a wager. *Amick v. Butler, supra.*

A life insurance policy for \$3,000 as security for a \$100 debt is a wager. *Cooper v. Shaeffer (Pa.) 9 Cent. Rep. 601, 20 W. N. C. 123.*

In the absence of any insurable interest of the beneficiary, the law will presume that a policy was taken out for the purpose of a wager or speculation. *United Brethren Mut. Aid Society v. McDonald, 123 Pa. 324.*

party defendant and required to answer, the oath being waived. And it is concerning this policy of insurance that this controversy is before this court.

The administrator of Moore claims that the assignment of Moore, although absolute on its face, was intended to be only conditional, and that the interest of Roller was confined to the four premiums which he had paid quarterly, of \$62.50 each, and \$1 fee.

The policy was taken out by Moore with Messrs. Lupton Bros., general agents of the company at Harrisonburg, the county seat of Rockingham County; but not having the money to pay the premium, he gave his note to Lupton Bros. for \$63.50—the premium, \$62.50, and \$1 fee. This note Lupton Bros. carried to Roller and sold at 20 per cent discount, and handed the policy, made out in the name of Moore, to Roller, as a further security for the debt of Moore for \$63.50. This policy and note of Moore were carried to Roller because Lupton knew that Roller had business transactions with Moore. This transaction, in its origin, was simply the purchase by Roller of the note of Moore at 20 per cent discount and the holding of the policy as collateral security. Moore failing to pay the note, Roller began to press him for the money, and then to insist upon an assignment of the policy, drawing up a paper to that effect and authorizing Roller to collect the policy with the proviso: "Provided that in the mean time this assignment and power be not canceled and annulled." Moore held, but did not execute, this paper, this paper being dated March 31, 1884.

On the 10th of June following Roller wrote to Moore a letter urging the matter and referring to the paper of March 31, 1884, thus: "I sent you a paper showing the contract under which I paid the first premium for you—that is, as long as I paid the premiums the policy was to be mine and you were to assign it to me."

The second quarterly premium was due on the 10th of June. Lupton, the agent, not hearing from Moore about it, collected it of Roller, and Moore, not noticing the agent, paid the premium directly to the company in New York and Lupton received the company's receipt for it.

In the mean time Moore, on the 12th of May, had applied for a second policy of \$5,000 in the same company, and Lupton applied the receipt for the premium paid by Moore on the first policy to the first premium on this second policy, and had it issued, he having received payment of Roller of the second premium on the first policy as stated. After this Roller wrote the letter referred to of that date, saying further as to the paper of March 31: "You have never returned that paper to me. I do not like that way of doing business, and write now to say that it must be attended to at once. You must not fail to attend to this at once." On the 27th of June following Roller sent an absolute assignment to Moore, without any proviso. This not being replied to by Moore, Roller wrote again on the 4th of August: "You have never signed that assignment to me of that insurance policy. It must be done without delay. You are not treating me right in this matter." On the 10th of September Roller paid the third

premium, and on the 12th of August the second policy lapsed. And on the 20th of September following Roller obtained the assignment of the policy, which is absolute in its terms. Roller paid the fourth premium, and on the 12th of February following Moore died. And on the 25th of May Roller collected the policy and claims it as his own.

The circuit court held that the assignment was not a new contract on the 20th of September between the parties and an absolute assignment, but that it bore the impress of the original transactions, and stood merely as a security for the advances made by Roller; and, following the case of *Page v. Burnstine*, 102 U. S. 664 [26 L. ed. 268], required Roller to account to the administrator of Moore for the policy, after deducting the premiums paid by him. And also, as this policy made Moore's estate solvent, Roller was allowed to retain another debt which Moore's estate owed him, all the debts of Moore being amply provided for.

From this decree Roller appealed. He insists that under the assignment the policy was his, and that it vested in him the absolute ownership; that he had, as the creditor of Moore, an insurable interest in his life, and that the policy was not therefore a wager policy.

The case of *Page v. Burnstine*, *supra*, relied on by the circuit court and followed in its decision, is very similar to this case.

From the opinion in that case we find that the transactions between Page and Burnstine had their origin in a loan of money by Burnstine to Page. To secure that loan an assignment was made of Page's interest in the policy to the extent of the sum borrowed. Each subsequent assignment showed upon its face a similar arrangement until that of January 7, 1878, was executed. The latter assignment by itself imputed an absolute transfer to Burnstine of all the right, title and interest of the assured in the policy, and to the payments made therefor, and all benefits and advantages to be derived therefrom. "But," says the opinion, "the circumstances disclosed in the record indicated with reasonable certainty that the real and only object of the execution of the assignment of January 7, 1878, was to invest Burnstine with the entire control of the policy, to the end that thereafter the company might deal directly with him, and, upon the death of the assured, that he might be invested with full authority to receive the proceeds of the policy and apply them in repayment of such sum or sums as he had loaned to Page upon the security of the policy."

"In other words, the last assignment may be construed as simply appointing Burnstine, upon the death of the assured, to receive from the company such sum as would then be due on the policy, and, after reimbursing himself to the extent of his loan to Page, to pay the balance to the persons entitled thereto. A different construction of that instrument would place Burnstine in the position of being pecuniarily interested in the death of Page. Unless compelled to do so, we should not suppose that he had any desire or purpose to speculate upon the life of Page, or to do more than secure the repayment of the money actually loaned by him to the assured."

It is certainly true in this case, if not conced-

ed, that the original assignment prepared by Roller was an absolute assignment, and authorizes Roller to collect the policy with due proviso, "provided that in the mean time this assignment and power be not canceled and annulled." This was all that Roller asked at first.

In the 10th of June note, as stated, Roller claimed that this was the original agreement, as he believed, saying: "I sent you a paper showing the contract under which I paid the first premium for you—that is, as long as I paid the premium the policy was to be mine, and you were to assign it to me." Subsequently Roller, in a personal interview, procured an assignment absolute on its face.

The circuit court held that this assignment bore the impress of the original transaction, and stood merely as a security for the advances made by Roller.

If the assignment was absolute, as it appeared upon its face to be, and was so intended to operate between the parties, we must consider whether Roller held such an insurable interest in the life of Moore as would render such an assignment valid. The policy as taken out by Moore was a valid contract, and as such was assignable by the assured to Roller as security for any sums lent to him or advanced for the premium and assessments upon it. But was it assignable to Roller for any other purpose?

As was said by Mr. Justice Field in a similar case (*Warnock v. Davis*, 104 U. S. 779, 26 L. ed. 926): "The association had no insurable interest in the life of the deceased, and could not have taken out a policy in its own name. Such a policy would constitute what is termed a wager policy, or a mere speculation contract upon the life of the assured, with a direct interest in its early termination. It is not easy to define with precision what will, in all cases, constitute an insurable interest. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation, for a parent has an insurable interest in the life of his child, and a child in the life of his parent; a husband in the life of his wife, and a wife in the life of her husband. The natural affection in cases of this kind is considered as more powerful, as operating more efficaciously, to protect the life of the insured, than any other consideration. But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary, or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured."

The foregoing was approved in the subsequent case of *Conn. Mut. L. Ins. Co. v. Luchs*, 108 U. S. 508 [27 L. ed. 801], and again in *N. Y. Mut. L. Ins. Co. v. Armstrong*, 117 U. S. 597 [29 L. ed. 999], the same learned justice saying in that case, as to an assignment: "A policy of life insurance, without restrictive words, is assignable by the assured for a valu-

able consideration equally with any other chose in action when the assignment is not made to cover a mere speculative risk, and thus evade the law against wager policies, and payment thereof may be enforced for the benefit of the assignee."

The assignment of a policy, however, to a party not having an insurable interest, is as objectionable as the taking out of a policy in his name. To the extent in which the assignee stipulates for the proceeds of the policy beyond the sums advanced by him, he stands in the position of one holding a wager policy. The law might be readily evaded if the policy, or an interest in it, could, in consideration of paying the premiums and assignments upon it, and the promise to pay upon the death of the assured a portion of its proceeds to his representatives, be transferred, so as to entitle the assignee to retain the whole insurance money. *Warnock v. Davis*, *supra*; *Franklin L. Ins. Co. v. Hazard*, 41 Ind. 116; *Stevens v. Warren*, 101 Mass. 564; *Cammack v. Lewis*, 82 U. S. 15 Wall. 643 [21 L. ed. 244]; *Cooper v. Shaeffer* (Pa.) 9 Cent. Rep. 601; *Corson v. Garnier*, 118 Pa. 438, 4 Cent. Rep. 307; *Lamont v. Hotel-Men's Mut. Ben. Assn.* 80 Fed. Rep. 817; *Baldorff v. Fehler* (Pa.) 8 Cent. Rep. 230; *Shugar v. Garman* (Pa.) 8 Cent. Rep. 558; *Ruth v. Katterman*, 112 Pa. 251, 2 Cent. Rep. 776; *Price v. Supreme Lodge K. of H.* 68 Tex. 361; *Mo. Valley L. Ins. Co. v. McCrum*, 36 Kan. 146, and cases cited.

While the foregoing is in accordance with the weight of authority, the decisions are not uniform, and we are referred to numerous decisions to the contrary as to assigned policies. *St. John v. Am. Mut. L. Ins. Co.* 13 N. Y. 31; *Valton v. Nat. Fund L. Assur. Co.* 20 N. Y. 32; *Ashley v. Ashley*, 3 Sim. 149.

The New York Court of Appeals holds that a valid policy of insurance effected by a person upon his own life is assignable like an ordinary chose in action, and that the assignee is entitled, upon the death of the assured, to the full sum, payable without regard to the consideration given by him for the assignment, or to his possession of any insurable interest in the life of the assured. But we are of opinion to follow the decisions on this subject of the Supreme Court of the United States, and those of other courts in accord therewith. And we are of opinion that if there be any sound reason for holding a policy invalid when taken out by a party who has no interest in the life of the assured (which will not be denied), it is difficult to see why that reason is not as cogent and operative against a party taking an assignment of a policy upon the life of a person in which he has no interest. The same ground which should invalidate the one should invalidate the other, so far, at least, as to restrict the right of the assignee to the sums actually advanced by him.

In the conflict of decisions on this subject we are free to follow those which seem more fully in accord with the general policy of the law against speculative contracts upon human life. Justice Field, in *Warnock v. Davis*, *supra*. Of the dangerous and pernicious tendencies of such policies, where one person is enabled to hold a money interest in the death of another, and, for gain, to desire and

bring about the death of another by felonious means, is forcibly illustrated by the case of *N. Y. Mut. L. Ins. Co. v. Armstrong*, *supra*, where Hunter induced his friend Armstrong to insure his life in his own name and assign the policy to him, and within six weeks waylaid him on the highway at night, and slew him with blows, inflicted from behind, for which he was afterwards hanged.

The decision of the circuit court is, we

think, without error. The transactions between the parties were rightly considered as a whole, each supporting the other; but, if the assignment is absolute in the first place, the decree is still right, because Roller had no greater insurable interest in the life of the assured than is decreed him.

The decree of the Circuit Court of Rockingham appealed from here must, therefore, be affirmed.

ALABAMA SUPREME COURT.

Otto STOELKER, *Appt.*,
v.
Claude S. THORNTON *et al.*

(....Ala....)

1. A sale for a valuable consideration of certificates of a mutual benefit society insuring a member's life, made by such member during his life, is void, not only by force of the society's regulations, where they prohibit such sales, but also as against public policy.
2. The next of kin of a person who has sold his benefit certificates by a contract which is void as against public policy cannot compel a purchaser to account to them for the proceeds, where the society recognized the sale and issued new certificates to the assignee, and paid over the money to him on the death of the insured.
3. The disposal by will of benefit certificates insuring testator's life is not invalid because of his previous attempt to transfer them to the legatee by a sale which is void as against public policy.
4. If the omission to enter a testamentary direction disposing of the beneficial interest in benefit certificates insuring testator's life "upon the record of the supreme master of exchequer," as required by the certificates, is material, no one but the society can object thereto.

(November 7, 1889.)

APPEAL by defendant from a decree of the Montgomery City Court in favor of plaintiffs in a suit to bring an executor to a settlement of testator's estate, and to have certain described funds distributed among his next of kin. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. Tompkins & Troy, for appellant:
The unquestioned right of a party to bequeath the proceeds of his benefit certificates to anyone he sees fit has been frequently decided.

Williams v. Corson, 2 Tenn. Ch. 269; *Weil v. Trafford*, 3 Tenn. Ch. 108; *Rison v. Wilkerson*, 3 Sneed, 565; *Tennessee Lodge v. Ladd*, 5 Lea, 716; *Highland v. Highland*, 18 Bradw. 510, 109 Ill. 366.

Very clear and binding provisions must be shown to deprive a person of the right given him by the laws of the land to dispose of such a fund by will.

Catholic Mut. Ben. Assn. v. Priest, 46 Mich. 429; *Williams v. Corson*, 2 Tenn. Ch. 269.

Where a member of a benevolent order has a benefit certificate issued to him, and names at 6 L. R. A.

the time the person who is to receive the benefit thereof at his death, and the rules of the order permit him to change the beneficiary, or dispose of the fund by will, and such member in the exercise of this right disposes of the same by will to others than those named in the certificate, the first designation is void either as regards the order or the first-named beneficiary.

Clark v. Durand, 12 Wis. 228; *Gamble v. Conn. Mut. L. Ins. Co.* 50 Mo. 44; *Swift v. Railway Pass. Assn.* 96 Ill. 809; *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671; *Bickerton v. Jaques*, 28 Hun, 119. See *Weil v. Trafford*, 8 Tenn. Ch. 108.

The power of selection is unlimited as to persons and is limited in time only by the death of the member; the right of the free exercise of the power of appointment given to the member requires its continuance until death, and over that power no other person has any control.

Barton v. Providence Mut. Relief Assn. 63 N. H. 585, 1 New Eng. Rep. 856; *Bacon, Benefit Societies*, § 806, note 1; *Highland v. Highland and Catholic Mut. Ben. Assn. v. Priest*, *supra*; *Gentry v. Supreme Lodge K. of H.* 23 Fed. Rep. 718, 20 Cent. L. J. 393; *Splawn v. Chew*, 60 Tex. 532; *Holland v. Taylor*, 111 Ind. 121, 9 West. Rep. 606.

The right to change the beneficiary is not affected by the fact that the first beneficiary paid the assessments of the member and the change was made without his consent.

Bacon, Benefit Societies, 806; *Masonic Mut. Ben. Assn. v. Burkhart*, 110 Ind. 189, 9 West. Rep. 92; *Fisk v. Equitable Aid Union (Pa.)* 9 Cent. Rep. 408; *Splawn v. Chew*, 60 Tex. 534; *Barton v. Providence Mut. Relief Assn.* 63 N. H. 535, 1 New Eng. Rep. 856.

At the time of Watson's death the certificate in that order provided for the payment of the fund to Stoelker; so if Stoelker is not entitled to the excess over the sum due him, appellees are entitled to no part of it.

See *Turner v. Stetts*, 28 Ala. 420.

The substitution by Watson of the appellant as the beneficiary in the certificate issued by the United Workmen, instead of his "estate," was a legitimate transaction, and not intended as a cover for speculation and wager; and the disproportion between the amount due at the time of the transfer and the amount called for by the certificate will not render it invalid.

Grant v. Kline, 115 Pa. 618, 7 Cent. Rep. 626; *Baldorf v. Fehler (Pa.)* 8 Cent. Rep. 230; *Bacon, Benefit Societies*, § 249, and authorities cited.

Messrs. Watts & Son, for appellees:

Stone, Ch. J., delivered the opinion of the court:

The present bill seeks to bring Stoelker, the executor, to a settlement of the estate of Charles J. Watson, deceased, and to have certain described funds distributed to complainants, who are next of kin to Watson. Stoelker resists the recovery, and insists that the entire funds in controversy are his property. This is \$5,000; \$2,000 of it being a benefit secured to Watson in a benevolent society known as the "Ancient Order of United Workmen," and the other \$3,000 being the sum of two like benefits or policies due to Watson from the society known as the "Knights of Pythias." Each of these sums was payable on the death of Watson, with certain provisos, which were complied with. After the death of Watson and the probate of the will, the two societies severally paid to Stoelker the amounts called for in the policies. Stoelker was the only creditor, and his claim, exclusive of the funeral and administration expenses, was a little less than \$1,000.

The one certificate declared that Watson was "entitled to all the rights and privileges of membership in 'Ancient Order of United Workmen,' and to participate in the beneficiary fund of the order to the amount of \$2,000," payable to his estate at his death, with conditions which, as we have said, we need not state here. The other two certificates or policies, aggregating \$3,000, were issued by the society or order known as the "Knights of Pythias." These, also, had conditions not necessary to be noticed here. They severally secured the sums of \$1,000 and \$2,000, to be paid "to the estate of the said Charles J. Watson, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by will or otherwise, and entered upon the records of the supreme master of the exchequer, upon due notice and proof of death and good standing in the rank at the time of the death."

These several certificates or policies were issued in 1880; and by their terms, and by the rules of said societies, the member holding them was bound to make certain payments when called on, as a condition of keeping them alive. It is neither averred nor shown that Watson, when he made his application for membership in the society known as "Knights of Pythias," directed or designated therein any person to whom the benefit money was to be paid at his death, nor is it averred or shown that any direction, given by will or otherwise, was ever "entered upon the records of the supreme master of the exchequer."

Until 1883, Watson paid all the calls made upon him, and kept each of said policies alive. At that time, his health having failed, and desiring to travel as a means of restoring it, he entered into the following agreement with Stoelker: He owed Stoelker over \$400, and, in payment of said indebtedness, and in consideration of other \$500, paid, and agreed to be paid, by Stoelker to him, he agreed to sell said three policies or benefit certificates to Stoelker, he (Stoelker) assuming to pay all calls that might thereafter be made on said policies or benefit certificates. Pursuant to this agreement, Watson petitioned the two societies to have Stoelker substituted as the beneficiary in each of the policies.

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The society known as the "Ancient Order of United Workmen" conformed to Watson's directions, and substituted Stoelker as the beneficiary in the policy it had issued. The Knights of Pythias had a regulation that policies issued by that society could not become the subject of sale for a valuable consideration, but could pass to a beneficiary for love and affection only. It refused to recognize the sale and transfer to Stoelker, and refused to substitute him as the beneficiary. In March, 1884, Watson executed his last will and testament, and therein bequeathed to Stoelker said two policies issued by the Knights of Pythias, describing him as a friend who had befriended him, and making no allusion to the debt, nor to the transfer. It appointed Stoelker executor; and, Watson dying in June afterwards, the will was proven and established. There is no averment or proof that Watson was not mentally capable of making a will, nor is there imputation of fraud or undue influence in its procurement. The assault made upon it will be stated further on. It is not charged or pretended that Stoelker did not perform all he promised, and did not pay the \$500 to Watson, and did not meet all calls that were made a condition on which the vitality of said policies was to be preserved. Each society paid the amount of the policies to Stoelker; and, as we have said, the present suit was instituted to obtain the distribution of the fund among Watson's next of kin. He died without lineal descendants.

The right of recovery in this case is based on the following propositions: That the benefit certificates are, in substance, life insurance policies on Watson's life; that a stranger, such as Stoelker was, has no insurable interest, and can neither sue out, nor lawfully acquire, insurance on his life, while he (Watson) was living; that, as a consequence, the attempted sale of the policies to Stoelker in 1883 was against public policy, and was void; and that the transaction shows on its face that the will of 1884 was executed simply as a means of carrying into effect the illegal agreement of sale made in 1883. On these grounds it is contended that Stoelker can only claim to the extent he was a creditor of Watson, for to that extent only had he an insurable interest. We will first consider this case on the agreement of sale made in 1883, and independently of the will.

It is very clear that the attempted contract of sale of the benefit certificate issued by the society of the Knights of Pythias was inoperative and void. It was against public policy for Stoelker to insure Watson's life, and it was equally so for him to purchase and hold such insurance while Watson was in life. An additional reason is found in that society's regulation, that its benefit certificates cannot be sold for a valuable consideration. So, if this controversy rested alone on the agreement of 1883, not recognized as valid by the Knights of Pythias, Stoelker had no valid claim which he could have asserted against that society. *Russ v. Mut. Ben. Ins. Co.* 28 N. Y. 516; *Stevens v. Warren*, 101 Mass 564; *Franklin L. Ins. Co. v. Hazzard*, 41 Ind. 116; *People v. Golden Rule*, 114 Ill. 84; *Mo. Valley L. Ins. Co. v. Sturges*, 18 Kan. 98; *Mo. Valley L. Ins. Co. v. McCrum*, 86 Kan. 146; *Warnock v. Davis*, 104 U. S. 775 [28 L. ed. 924]; *Helmetag v. Miller*, 76 Ala. 183;

Alabama Gold L. Ins. Co. v. Mobile Mut. Ins. Co. 81 Ala. 329.

The certificate issued by the Ancient Order of United Workmen stands on a different footing. It is not shown that that society has any regulation forbidding the transfer of its benefit certificates for a valuable consideration. As matter of fact, it did recognize the validity of the sale and conveyance made in 1888, and, in pursuance of Watson's request, issued a new benefit certificate, in which Stoelker was named as the beneficiary. Now, while it may be true that it was against public policy for Stoelker to own a benefit certificate or life policy on the life of Watson while the latter was living, that, as a mere matter of contract right, was a question between the society and Stoelker. The society waived the objection, if under its rules it could object, and, having paid the money, no other mere stranger or volunteer can gainsay its rightful payment. Nor was there anything unconscionable or unreasonable on the face of the transaction. Watson was combating disease, and was struggling to restore his health and prolong his life. He was without money, and was therefore without the means of travel, which he hoped might give him relief. Failing to meet calls, as without money he must have failed, the certificates and insurance would have become forfeited, and could have benefited no one. The length of his life could not have been foreknown; and hence it could not be reasonably conjectured to what extent Stoelker would be taxed to meet the society's calls. And the contract was not of Stoelker's seeking, but was brought about at the request and solicitation of Watson. There is no merit in this feature of the present suit.

Wills are ambulatory, and have no binding effect during the life of the testator. The public policy which forbids a mere stranger, having no insurable interest, to take out or otherwise acquire insurance on the life of another, does not prevent one holding life insurance from disposing of the benefit by will. There is no wager in this, any more than there is in testamentary disposition of any other species of property. *Rison v. Wickerson*, 8 Sneed, 565; *Weil v. Trafford*, 8 Tenn. Ch. 108; *Williams v. Corson*, 2 Tenn. Ch. 289; *Tennessee Lodge v. Ladd*, 5 Lea, 716; *Highland v. Highland*, 109 Ill. 366, 13 Ill. App. 510; *Catholic Mut. Ben. Asso. v. Priest*, 46 Mich. 429; *Clark v. Durand*, 12 Wis. 253; *Gamble v. Conn. Mut. L. Ins. Co.* 50 Mo. 44; *Swift v. Railway Pass. Asso.* 96 Ill. 309; *Bickerton v. Jaques*, 28 Hun, 119; *Union Mut. L. Ins. Co. v. Stevens*, 19 Fed. Rep. 671.

No authority has been cited, nor can we imagine any reason, why the illegal attempt made by Watson to sell the benefit certificates to Stoelker should, *per se*, disable him from afterwards making a will securing the same benefit. The agreement to sell was void, not because its effect was to pay a debt, but because it is against public policy that one man shall

hold insurance on the life of another, in whose life he has no insurable interest; and the regulations of the society made it unlawful to traffic in its benefit certificates. Neither of these objections can be urged against testamentary disposition. None of the ordinary grounds of contest are urged against the validity of Mr. Watson's will, such as want of mental capacity, undue influence, fraud in its procurement, etc. Stripped to its nakedness, the sole objection is that Watson owed Stoelker money; felt grateful to him for his kindness and indulgence; and bequeathed his property to him, a stranger, to the exclusion of his blood relations. Have we authority to set aside a will on this account?

In *Sherrod v. Sherrod*, 38 Ala. 537, 563, is this language: "A testator may give no reasons, or very foolish reasons, for his acts; yet, if he have testamentary capacity, his will must be carried into effect." And in *Manicault v. Deas*, 1 Bailey, Eq. 302, speaking of the capacity of a testator, it was said: "If he will, he may indulge his partialities and prejudices, and exercise wisdom or folly, in the disposition of his estate."

We should be reluctant to hold that a will prompted by no known motive would be valid, while if it was the result, in whole or in part, of a sense of pecuniary obligation, that alone would require us to set it aside. The void attempt to sell the benefit certificates did not disable Watson to execute the will. He unquestionably had capacity to bequeath his property to any other stranger. He had equal capacity to bequeath it to Stoelker.

The benefit certificates provide that their several sums be paid "to the estate of the said Charles J. Watson, as directed by said brother in his application, or to such other person or persons as he may subsequently direct, by will or otherwise, and entered upon the record of the supreme master of the exchequer." It is contended that, because Watson's testamentary direction is not shown to have been "entered upon the record of the supreme master of the exchequer," Stoelker can claim no right under the will. It is difficult to see how this requirement can be complied with, if intended to be applicable to testamentary direction.

As wills take effect only at the death of the testator, it would seem that no time is allowed for entering the direction on the "record of the supreme master of exchequer." But we need not decide this question. If there is anything in it,—and we think there is not,—only the society could object to its omission; and it has not done so. It has acknowledged its liability and paid the money. The complainants show no right to the money sued for.

The decree of the chancellor is reversed, and the cause remanded, that the chancellor may make proper orders in the premises.

Reversed and remanded.

Clopton, J., did not sit.

PENNSYLVANIA SUPREME COURT.

Isaac N. DEAN, *Plf. in Err.*,
v.

PENNSYLVANIA R. CO.

(.....Pa.....)

1. The negligence of the driver of a private vehicle cannot be imputed to one who is riding with him merely by invitation, so as to prevent the latter from recovering against a third party through whose negligence, concurring with that of the driver, he receives injuries.

2. One who might have seen the danger of a reckless attempt by the driver of a vehicle in which he was riding to cross railroad tracks, and who knew that a train was due about that time, but did not himself look or listen, or warn the driver, or ask to get out, is as guilty of negligence as the driver is, and cannot recover for injuries received in a collision with the engine at the railroad crossing.

(October 7, 1889.)

ERROR to the Court of Common Pleas, No. 1, of Allegheny County to review a judgment of nonsuit in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Edward Campbell, Thomas Patterson and David Q. Ewing*, for plaintiff in error:

The defendant Company was negligent in not giving the proper warning.

Louisville, O. & L. R. Co. v. Goetz, 79 Ky. 443, 14 Am. & Eng. R. R. Cas. 627; *Funston v. Chicago, R. I. & P. R. Co.* 61 Iowa, 452, 14 Am. & Eng. R. R. Cas. 640; *Nehrbas v. Central Pac. R. Co.* 62 Cal. 320, 14 Am. & Eng. R. R. Cas. 670; *Loucks v. Chicago, M. & St. P. R. Co.* 81 Minn. 526, 19 Am. & Eng. R. R. Cas. 305.

Plaintiff was a voluntary passenger and was injured through the negligence of his driver, which cannot be imputed to him.

Carlisle v. Brisbane, 4 Cent. Rep. 508, 118 Pa. 544; *Beach, Neg. § 36*; *Danville, L. & N. Turnp. Road Co. v. Stewart*, 2 Met. (Ky.) 119; *Bennett v. New Jersey R. & Transp. Co.* 86 N. J. L. 225; *Covington Transfer Co. v. Kelly*, 36 Ohio St. 86; *Albion v. Hetrick*, 90 Ind. 545; *Ouddy v. Horn*, 46 Mich. 596; *Robinson v. N. Y. Cent. & H. R. R. Co.* 66 N. Y. 11; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Masterson v. N. Y. Cent. & H. R. R. Co.* 84 N. Y. 247.

NOTE.—Negligence of one person cannot be imputed to another.

The negligence of a driver of a wagon is not imputable to a person riding with him as a mere guest, and who uses ordinary care to avoid the injury. *Galveston, H. & S. A. R. Co. v. Kutac*, 72 Tex. 643; *Nisbet v. Garner*, 1 L. R. A. 152, 75 Iowa, 314; *State v. Boston & M. R. Co.* 8 New Eng. Rep. 777, 80 Me. 490; *Knightstown v. Musgrove*, 116 Ind. 121; *Shemfeld v. Cent. Union Teleph. Co.* 36 Fed. Rep. 164; *Noyes v. Boscawen*, 5 New Eng. Rep. 70, 64 N. H. 261.

A passenger on a steam tug is not responsible for the negligence of its managers, and can maintain a 6 L. R. A.

Mr. George B. Gordon, with Messrs. William Scott and John H. Hampton, for defendant in error:

This case is governed by that of *Orcutt v. Anderson*, 6 Cent. Rep. 616, 114 Pa. 643.

It was plaintiff's imperative duty to stop, look and listen.

Carroll v. Pennsylvania R. Co. 12 W. N. C. 348; *Moore v. Phila. W. & B. R. Co.* 108 Pa. 353; *Lehigh Valley R. Co. v. Brandtmaier*, 5 Cent. Rep. 114, 118 Pa. 616.

Clark, J., delivered the opinion of the court:

The plaintiff, Isaac N. Dean, whilst crossing the tracks of the defendant Company's road at Frost Station, Fayette County, in a wagon, on the morning of the 25th of November, 1882, was struck by the locomotive of a passing train, and this suit was brought to recover damages for the injury sustained through the alleged negligence of the defendant on that occasion. The negligent act complained of is that, although the train was running at the rate of thirty or forty miles an hour, no sufficient warning of its approach to the crossing was given, either by blowing the whistle or ringing the bell.

On the part of the defendant it is contended that, assuming this to be so, the plaintiff, not only through the negligence of the driver of the wagon, but by his own negligence, contributed to the injury, and therefore cannot recover. William Fields was the owner of the horses and wagon, and was the driver. That he was guilty of negligence cannot be denied; it was his duty to anticipate the probable passage of trains on the railroad, and, before attempting to cross the tracks, to stop, look and listen for their approach; and this the plaintiff frankly admits Fields failed to do. When he left the corner of the Blackburn House, some three hundred feet distant from the crossing, he trotted his horses to the brow of the hill, a little more than half way, and checking them there a little, he started down the hill at a fast trot to the railroad, where the collision occurred.

Mr. Gilmore, an engineer, called by the plaintiff, testifies that the locomotive and cars on the track were plainly visible to a person riding in a wagon on the public road, at almost any point, for a distance of 1,300 feet, subject to such temporary obstructions as might exist from intervening buildings and trees; and it is conceded on all hands that at a point ten feet

joint action against the carrier and a third party by proving that both were negligent. *Markham v. Houston Direct Nav. Co. (Tex.)* 11 S. W. Rep. 181. See *Nisbet v. Garner*, 1 L. R. A. 152 and note, 75 Iowa, 314.

The negligence of the parent cannot be imputed to the child. *Cleveland Rolling-Mill Co. v. Corrigan*, 3 L. R. A. 335, 46 Ohio St. 233; *Chicago City R. Co. v. Robinson*, 4 L. R. A. 126, 127 Ill. 9.

Liability for injury in case of concurrent negligence. *Carterville v. Cook (Ill.)* 4 L. R. A. 721.

Proximate cause of injury at railroad crossing. *Hill v. Port Royal & W. C. R. Co. (S. C.)* 5 L. R. A. 849.

from the railroad the track itself was visible for a quarter of a mile or more.

Having failed to stop, look and listen, he undertook to cross the railroad tracks. Fields failed to perform a duty which the law plainly imposed upon him, and he was therefore guilty of negligence, which contributed to the injury.

But can the negligence of Fields be imputed to Dean?

In *Lockhart v. Lichtenthaler*, 48 Pa. 151, it was held that where a passenger in a carrier's vehicle is injured by a collision resulting from the negligence of those in charge of it and those in charge of another vehicle, the carrier only is answerable for the injury; and this case was followed by *Philadelphia & R. R. Co. v. Boyer*, 97 Pa. 91, where the same rule was applied. The decision in *Lockhart v. Lichtenthaler* was made by adopting the conclusion of the English courts in *Bridge v. Grand Junction R. Co.* 8 Mees. & W. 247 (1838), in the Exchequer; *Thorogood v. Bryan*, 8 C. B. 115, and *Catlin v. Hills*, Id. 123 (1849) in the Common Bench. These cases were followed in the Exchequer in *Armstrong v. Lancashire & Y. R. Co.* 44 L. J. N. S. Exch. 89 (1875), L. R. 10 Exch. 47.

The principle upon which all these English cases appear to have been determined is, that the passenger is so far identified with the carriage in which he is traveling that want of care on the part of the driver will be a defense to the owner of the other carriage that directly causes the injury.

In *Thorogood v. Bryan*, which is the leading case, a passenger alighting from an omnibus was thrown down and injured by the negligent management of another omnibus, and it was held that an action would not be maintained against the owner of the latter if the driver of the omnibus in which the passenger was riding, by the exercise of proper care and skill, might have avoided the accident which caused the injury. The rule asserted is one of general application, no matter whether the conveyances are public or private, or whether the party injured is conveyed at his own request or at the request of the driver.

In *Lockhart v. Lichtenthaler*, however, the rationale of the rule in *Thorogood v. Bryan* was not considered tenable; indeed, the reasons assigned for it in the English cases were expressly rejected, and the liability of the carrier was put upon different grounds, the grounds of public policy. "I would say," says the learned judge delivering the opinion of the court, "the reason for it is that it better accords with the policy of the law to hold the carrier alone responsible in such instances, as an incentive to care and diligence. The law fixes the responsibility upon a different principle in the case of a carrier, as already noticed, from that of a party that does not stand in that relation to the party injured; the very philosophy of the requirement of greater care is that he shall be answerable for omitting any duty which the law has defined as his rule and guide, and will not permit him to escape by imputing negligence of a less culpable character to others, but sufficient to render them liable for the consequences of his own."

It will be observed that, as the reasons assigned for the rule in *Lockhart v. Lichtenthaler* 6 L. R. A.

extend only to cases in which the party is injured by the joint negligence of his common carrier and another, the rule has no application to cases where the injured party's conveyance is private; and this was the ground upon which *Carlisle v. Brisbane*, 113 Pa. 544, 4 Cent. Rep. 508, was decided. In that case the conveyance was private, the party injured being carried without compensation, and both of the negligent parties held to the same degree of care and diligence; the doctrine of *Lockhart v. Lichtenthaler* was therefore not applicable.

The principle of *Thorogood v. Bryan* has been approved in some of the States, and in others it has been rejected as altogether indefensible. It has been recognized and sustained in Vermont (*Carlisle v. Sheldon*, 38 Vt. 440); in Wisconsin (*Houfe v. Fulton*, 29 Wis. 296; *Prideaux v. Mineral Point*, 43 Wis. 518; *Otis v. Janesville*, 47 Wis. 422); and in Iowa (*Payne v. Chicago R. I. & P. R. Co.* 69 Iowa, 523). On the other hand, the doctrine has been declared unsound and untenable by the Supreme Court of the United States in the very recent case of *Little v. Hackett*, 116 U. S. 886 [29 L. ed. 652]. The doctrine has also been disapproved and rejected in New York (*Robinson v. N. Y. Cent. & H. R. R. Co.* 66 N. Y. 11; *Dyer v. Erie R. Co.* 71 N. Y. 228; *Masterson v. N. Y. Cent. & H. R. R. Co.* 84 N. Y. 247); in New Jersey (*Bennett v. New Jersey R. & Transp. Co.* 36 N. J. L. 225; *New York, L. E. & W. R. Co. v. Steinbrenner*, 47 N. J. L. 161-171); in Maine (*State v. Boston & M. R. Co.* 80 Me. 430, 6 New Eng. Rep. 777, 88 Alb. L. J. 269); in Ohio (*Covington Transfer Co. v. Kelly*, 36 Ohio St. 86-91); in Illinois (*Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 864); in Kentucky (*Danville, L. & N. Turnp. Road Co. v. Stewart*, 2 Met. (Ky.) 119; *Louisville, C. & L. R. Co. v. Case*, 9 Bush, 728); in California (*Tompkins v. Clay St. R. Co.* 66 Cal. 168); in New Hampshire (*Noyes v. Boscacon*, 64 N. H. 361, 5 New Eng. Rep. 70); in Minnesota (*Follman v. Markato*, 35 Minn. 523); in Michigan (*Cuddy v. Horn*, 46 Mich. 596); and in Maryland (*Philadelphia, W. & B. R. Co. v. Hogeland*, 66 Md. 149, 5 Cent. Rep. 587); whilst in Pennsylvania, as we have already stated, the rule has been partially adopted, and the reasons given by the English courts have been expressly rejected. In some of the States, as in Wisconsin, Michigan and Iowa, a distinction would appear to have been taken between a public and a private conveyance; and, as an examination of the cases cited will show, it has been there held that when the injured person is riding in a private conveyance by invitation of the driver and without compensation, the driver will be regarded as his agent, and upon that ground the negligence of the latter is imputed to the former.

In Pennsylvania, New York, Ohio, Minnesota and other States this doctrine of agency is expressly repudiated, and it is held that in such cases the driver's negligence cannot be so imputed.

Thus it will be seen that the cases are conflicting; the rulings in England and in this country have been in the greatest confusion, which we think is attributable to the fact that the general rule of *Thorogood v. Bryan*, which for thirty-eight years was followed in England,

and in parts of this country was rested upon wholly indefensible ground. The vain effort to sustain a rule of law, which was at variance with reason and common sense, has given rise to these various conflicting views and decisions.

The English Court of Appeal, however, in a very recent case, *The Bernina (Armstrong v. Mills)*, L. R. 12 Prob. Div. 58, decided in January, 1887, expressly overrules the case of *Thorogood v. Bryan*, and holds that one who is a passenger in a public conveyance does not identify himself with the conveyance, or the persons in charge of it, and that their negligence, direct or contributory, can in no respect be imputed to him. In the judgment of the court, Lord Esher, *M. R.*, after an extended review of the English and American cases, said: "After having thus laboriously inquired into the matter, and having considered the case of *Thorogood v. Bryan*, 8 C. B. 115, we cannot see any principle on which it can be supported; and we think that, with the exception of the weighty observation of Lord Bramwell, though that does not seem to be a final view, the preponderance of judicial and professional opinion in England is against it, and that the weight of judicial opinion in America is also against it. We are of opinion that the proposition maintained in it is erroneously unjust, and inconsistent with other recognized propositions of law. As to the propriety of dealing with it, at this time, in a court of appeals, it is a case which, from the time of its publication, has been constantly criticised, and no one can have gone into or have abstained from going into an omnibus, railroad or ship on the faith of the decision. We therefore think that now that the question is for the first time before an English court of appeal, the case of *Thorogood v. Bryan*, 8 C. B. 115, must be overruled." See *Carlisle v. Brisbane*, 113 Pa. 544, 4 Cent. Rep. 508, 57 Am. Rep. 489-510.

In the case of *Little v. Hackett*, *supra*, in the Supreme Court of the United States, Mr. Justice Field, delivering the opinion, says: "The truth is, the decision in *Thorogood v. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or owner, without his co-operation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."

Quotations might be given from many cases in the different States, illustrating the very firm and emphatic manner in which the doctrine of this celebrated case has been denied. The authorities in England, and the great current of authorities in this country, are against it. Nor

can I see why upon any rule of public policy a party injured by the concurrent and contributory negligence of two persons, one of them his common carrier, should be held and the other released from liability; as to this, I speak only for myself; in my opinion there is no principle consonant with common sense, common honesty, or public policy, which should hold one not guilty of any negligence, either of omission or commission, for the negligence of another, imputed to him under such circumstances. Although in *Carlisle v. Brisbane* I may appear to have accepted that doctrine, I meant to merely state that the ground upon which this court had rested this rule was better than that taken by the English courts.

But if this were not so, Fields was not a common carrier. Dean was riding in the wagon merely by invitation of Fields, who happened to be going in the direction of Dean's home with a load of provisions. He was carried without compensation, merely as an act of kindness on the part of Fields, who had sole control of the team and of the wagon. The case is similar in this respect to *Carlisle v. Brisbane*, *supra*, and to the case of *Follman v. Mankato*, 35 Minn. 522.

We are clearly of opinion that if Dean himself was guilty of no negligence the negligence of Fields cannot be imputed to him; but it is in this respect this case differs from *Carlisle v. Brisbane*. In the case just cited Brisbane was a stranger, the accident occurred after night and after a fresh fall of snow. It was caused from a defect in the street. There was no evidence whatever that Brisbane knew that Cornman was a reckless or unskillful driver, or that he (Brisbane) saw, or by the exercise of reasonable care at the time could see, or ought to have seen, the dangerous condition of the street; indeed, the jury found that he was not personally aware of either, and no question was raised involving that view of the case.

Here, however, the facts are of a different character. Dean knew the locality well; he had crossed the tracks frequently at this point; he knew that a train was due about that time, and that he was approaching the railroad track at a fast trot; yet he took no precautions. He was certainly responsible for his own negligence; he sat with his back to the driver, and, although he might have seen his danger, he confesses that he did not look. He said nothing by way of warning to Fields, nor did he ask him to stop, to look and listen, or to permit him (Dean) to get out; and the danger was as obvious to Dean as it was to Fields. The testimony is wholly to the effect that the plaintiff committed himself voluntarily to the action of Fields; that he joined him in testing the danger, and he is responsible for his own act. The case is ruled by *Orescent Twp. v. Anderson*, 114 Pa. 643, 6 Cent. Rep. 616.

The judgment is affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Joseph DUBÉ, *per pro. Ami*,

v.

Theophile BEAUDRY.

(....Mass....)

The application, with a minor's consent, of part of his wages to the payment of a debt due from his deceased father's estate to his employer, will not be binding on him in a subsequent action on *quantum meruit*, although the employer's remedy against the estate has been lost in the mean time, where the minor had no pecuniary interest in the payment of the debt because he was not entitled to anything from his father's estate.

(January 2, 1890.)

ON report. *New trial ordered.*

This was an action of contract tried in the Superior Court, Essex County, without a jury. The court found for defendant.

The facts are stated in the opinion.

Mr. C. Sewall, for plaintiff:

Where a minor sells real estate, passes his deed, takes his money, and the grantee enters into possession, he can avoid that sale immediately upon arriving of age although the contract has been fully executed.

Chandler v. Simmons, 97 Mass. 514.

This case comes within the purview of the law as determined in—

Ganley v. Looney, 100 Mass. 362; *Brooks v. Prescott*, 114 Mass. 392; *Williams v. Nichols*, 121 Mass. 435.

Upon the question of the plaintiff's right to avoid such a contract, the decisions in *Vent v. Osgood*, 19 Pick. 572; *Chandler v. Simmons*, 97 Mass. 508, 514; *Gaffney v. Hayden*, 110 Mass. 187; and *Freeman v. Nichols*, 138 Mass. 813, are decisive of the matter.

Even in a case of an entire or special contract, a minor may avoid it and sue on a *quantum meruit*, and recover, although he has failed to perform the same.

Moses v. Stevens, 2 Pick. 332; *Gaffney v. Hayden*, 110 Mass. 187.

Mr. John M. Raymond, for defendant:

As an executed contract it cannot now be rescinded.

Stone v. Dennison, 13 Pick. 1; *Breed v. Judd*, 1 Gray, 455.

By the lapse of time and conveyance of the property of the father, the defendant cannot now be put in the same position as he stood when the contract was made.

Breed v. Judd, 1 Gray, 455.

The defendant in this action was made the agent of the plaintiff, to apply the payments to the father's debts, and, the money being so applied, there was an executed agency.

Welch v. Welch, 103 Mass. 562.

Field, J., delivered the opinion of the court: The plaintiff, a minor, with the assent of his

mother, agreed with the defendant to work for him for \$8 a week, one half to be paid to the plaintiff and the other half to be applied by the defendant to the payment of a debt due to the defendant from the estate of the deceased father of the plaintiff. The court, trying the case without a jury, found that the plaintiff's services were not worth \$8 a week for the first part of the time he worked, but "were worth \$3 a week for the whole time." The plaintiff's pay was raised from time to time, and after he had worked for the defendant eight weeks "his pay was raised to \$12" a week. The defendant paid him \$4 a week for the whole time he worked, and applied the remainder of his wages to the payment of the debt against the father's estate. At the end of twenty-six weeks, when the debt had been paid, the defendant discharged the plaintiff from his employment. The court also found that "the agreement was not so unreasonable as to raise any suspicion of fraud," "that the plaintiff had not been overreached," and ruled, "as matter of law, that the plaintiff was not entitled to avoid the contract, it having been fully executed."

It is clear that the court found that the whole amount of the wages agreed upon from time to time was as much as or more than the plaintiff's services were worth, but that the amount of money paid to the plaintiff was less than his services were worth. It is clear also that the plaintiff was not bound to pay his father's debts; that the contract made in this case was not for necessities, and was not necessarily beneficial to the plaintiff; and that by our decisions, in order to avoid such a contract, it is generally not necessary that the minor put the other party in *statu quo*, or return the consideration received. *Chandler v. Simmons*, 97 Mass. 508, 514; *Bartlett v. Drake*, 100 Mass. 174; *Walsh v. Young*, 110 Mass. 396; *Gaffney v. Hayden*, 110 Mass. 187; *Bradford v. French*, 110 Mass. 365; *Baker v. Stone*, 138 Mass. 405; *McCarthy v. Henderson*, 138 Mass. 810.

Gaffney v. Hayden, *supra*, shows that if the amount of the wages agreed upon had not been as much as plaintiff's services were worth, the fact that the plaintiff had received his pay while a minor would not prevent him from avoiding the contract and suing on a *quantum meruit*. In the opinion, the cases of *Stone v. Dennison*, 13 Pick. 1, and *Breed v. Judd*, 1 Gray, 455, which the present defendant cites, are considered and distinguished.

It is suggested that the plaintiff's agreement that the defendant should apply a part of the wages to the extinguishment of the father's indebtedness, makes the actual application of the wages by the defendant equivalent to a payment in pursuance of this agreement, and before it was revoked, of money by the plaintiff to the defendant for the purpose of extinguishing this debt. It is argued that if a minor voluntarily pays money under a contract

NOTE.—*Infant, recovery for services.*

An infant may avoid his contract for service and recover the value of the services rendered. *Whitmarsh v. Hall*, 3 Denio, 375; *Nashville & C. R. Co. v. Elliott*, 1 Coldw. 611; *Ray v. Haines*, 53 Ill. 6 L. R. A.

485; *Dallas v. Hollingsworth*, 3 Ind. 537; *Van Pelt v. Corwine*, 6 Ind. 363; *Gaffney v. Hayden*, 110 Mass. 187; *Vent v. Osgood*, 19 Pick. 572; *Nickerson v. Baxton*, 12 Pick. 110; *Derocher v. Continental Mills*, 58 Me. 217; *Tyler, Infancy*, 82.

he cannot recover the money he has paid when he has received any benefit from the contract or any part of the consideration, except by rescinding the contract; and that a contract cannot be rescinded unless the other party is put *in statu quo*, and that in the present case it does not appear that the defendant can be put *in statu quo* because he may have lost his remedy against the estate of the father. See *Shurtleff v. Millard*, 12 R. I. 272; *Robinson v. Weeks*, 56 Me. 102; *Sparman v. Keim*, 83 N. Y. 245; *Adams v. Beall*, 67 Md. 58, 7 Cent. Rep. 430; *Ex parte Taylor*, 8 De. G. M. & G. 254.

It does not appear that the plaintiff did or could receive any benefit directly or indirectly from paying his father's debts. It appears that the father died seised of real estate "which he devised to his widow," and which the widow conveyed to his eldest son, the brother of the plaintiff; but it does not appear that the plaintiff was entitled to receive any property from the estate of his father, and therefore it does not appear that the plaintiff had any interest in preventing the defendant from collecting the debt out of the estate of the father. The action is not to recover money paid. The contract, so far as it related to the payment of the father's debt, would, in ancient times, have been held absolutely void, if made by an infant.

We think that the principle contended for, whether it is consistent or not with our decisions, is not applicable to this case. It is necessary for the protection of an infant that he should not be bound by a contract to pay out of his earnings the debt of another person, and the defendant had no right to rely upon such a contract and forego any remedies he might have had against the estate of the father. The defendant cannot be said to have acted as agent of the plaintiff in paying the wages to himself within the principle declared in *Welch v. Welch*, 103 Mass. 562, because he still retains the benefit. It is not contended that the mother was entitled to the wages of the plaintiff.

By the terms of the report there must be a new trial.

So ordered.

Calvin H. WEEKS *et al.*

v.

John L. HOBSON, *Atty-Gen., et al.*

(....Mass....)

Land devised as the site of a city hospital may be sold by order of court and the

proceeds invested to provide for the current expenses of the hospital, by the application of the doctrine of *cy pres*, where the will which gives a sum of money also for such hospital does not indicate any intent to make the gift depend on the occupation of that particular site, and it, by reason of its location and other causes, is not a suitable site for a hospital, and the hospital has in the mean time received by gift from other parties all the real estate needed.

(January 1, 1890.)

APPEAL to the full court from a decision of the Supreme Judicial Court, Essex County, in equity, overruling a demurrer to a supplemental bill asking for the sale of certain land devised for a city hospital, and the use of the proceeds for current expenses. *Demurrer overruled.*

Mr. Wm. H. Moody, for plaintiffs:

It is within the power of the court, in the exercise of its equitable jurisdiction over charities, to grant the relief sought.

American Academy v. Harvard College, 12 Gray, 589; *Jackson v. Phillips*, 14 Allen, 539; *Atty-Gen. v. Vint*, 8 De G. & Sm. 704; *Atty-Gen. v. Orasen*, 21 Beav. 392; *Biscoe v. Jackson*, L. R. 35 Ch. Div. 460.

The bill does not ask for any change of the objects of the charity or of the agents by whom it is administered, and is therefore to be distinguished from the cases of—

Fellows v. Miner, 119 Mass. 541; *Winthrop v. Atty-Gen.* 128 Mass. 258.

Mr. Henry G. Nichols, for executors and trustees of Hale, testator:

If the mode of application is such an essential part of the gift that you cannot distinguish any general purpose of charity, but are obliged to say that that mode of doing a charitable act was the only one the testator intended or at all contemplated, and that he had no general intention of giving his money to charity, then the court cannot, if the particular mode of doing it fails, apply the money *cy pres*.

Biscoe v. Jackson, L. R. 35 Ch. Div. 463; *Atty-Gen. v. Bishop of Oxford*, 1 Bro. Ch. 444, note (q).

The doctrine that if the donees do not care to use the thing given for the purpose designated a different use may be ordered, even with relation to the same charity, is inconsistent with both English and Massachusetts application of *cy pres*.

Jackson v. Phillips, 14 Allen, 539; *Corbyn v. French*, 4 Ves. Jr. 424. See *Atty-Gen. v. Ironmongers Co.* 2 Myl. & K. 576; *Cherry v. Mott*, 1 Myl. & C. 123; *Clark v. Taylor*, 1 Drew. 642; *Russell v. Kellett*, 3 Smale & G. 264; *Re White's Trusts*, L. R. 33 Ch. Div. 449.

NOTE.—Mode of administering charity, cy pres.

Under the English doctrine of *cy pres*, if the bequest be for a charity, it matters not how uncertain the persons or the objects may be, or whether the persons who are to take are *in esse* or not; or whether the legatee be a corporation capable in law of taking or not, or whether it can be carried into execution or not, the court will sustain the legacy and give it effect according to its own principles. In such cases equity will substitute another mode of devoting the property to charitable purposes, although the formal intention as to the mode cannot be accomplished. *Moggridge v. Thackwell*, 7 Ves. Jr. 38.

6 L. R. A.

Where the gift is to trustees with general objects, or with particular objects pointed out, chancery takes upon itself the administration of the charity and executes it under a scheme to be reported by a master. *Moggridge v. Thackwell*, 7 Ves. Jr. 38; *Atty-Gen. v. Matthews*, 2 Lev. 167; *Atty-Gen. v. Wansay*, 15 Ves. Jr. 231; *Ommanney v. Butcher*, 1 Turn. & R. 260; *Paice v. Archbishop of Canterbury*, 14 Ves. Jr. 372; *Waldo v. Caley*, 16 Ves. Jr. 208; *Atty-Gen. v. Price*, 17 Ves. Jr. 371; *Atty-Gen. v. Painters-Stainer Co.* 2 Cox, Ch. 58.

Where no objects remain and the intention of the testator cannot be literally executed, the court will dispose of its revenues by a new scheme upon the

See also 2 Perry on Trusts (8d ed.), § 729, where the difference between the application of the *cy près* doctrine in England and America is illustrated by various examples,—as, for example, where a gift is made for an object which "is impossible before the administration of the charity begins;" and even in England it was long since said that the court is no longer "in the habit of deciding monstrous propositions in favor of charity."

Moggridge v. Thackwell, 7 Ves. Jr. 44.

A charitable gift must be accepted upon the same terms upon which it is given; and the trustees, whether individuals or corporations, cannot convert the funds to other uses so long as the uses declared by the donor are capable of execution.

2 Perry, Tr. 8d ed. § 733.

It is not contended that at the time of the transfer of the land to the trustees, in accordance with the will of the testator, it was impossible to use the land for a hospital, or that even now it is so; the only allegation is of inexpediency or the lack of necessity for so using it. It is submitted that this is insufficient.

2 Perry, Tr. §§ 733, 735; *Atty-Gen. v. Kell*, 2 Beav. 675; *Atty-Gen. v. Wilkinson*, 1 Beav. 370; *Harvard College v. Society for Prom. Theol. Education*, 3 Gray, 280; *Winthrop v. Atty-Gen.* 128 Mass. 258.

A gift in trust to charity is not altered *cy près* or the trustee changed because the original limitations are become inexpedient, even though a decided benefit would arise from the alteration.

McGrath, *Cy Près*, p. 89; *Harvard College v. Society for Prom. Theol. Education*, *supra*; *Fellows v. Miner*, 119 Mass. 541; *Winthrop v. Atty-Gen.* *supra*.

Expediency or greater benefit to the beneficiaries have never been considered grounds by any tribunal for applying the *cy près* doctrine.

Atty-Gen. v. Whiteley, 11 Ves. Jr. 251, and cases *supra*.

Knowlton, J., delivered the opinion of the court:

The will of Ezekiel J. M. Hale, late of Haverhill, deceased, contains the following provision: "It is my will, and I hereby direct, that my

executrix and executors and trustees shall convey to the corporation of the Haverhill City Hospital, when established, the lot of land with the buildings thereon, situated in said Haverhill in the County of Essex and Commonwealth of Massachusetts, between Kent and Moore Streets, adjoining the lands of J. B. Swett, and formerly owned by J. Howard Nichols, together with the sum of fifty thousand dollars (\$50,000) in money,—said lot of land to be used as a site for a hospital, and such portion of said \$50,000 to be used and expended as may be deemed necessary for the construction of such hospital buildings as the wants of the city may require, the remaining portion of said \$50,000 to be held in trust, and the income therefrom to be applied to defraying the current expenses of said hospital.

It also provides for the creation of a board of trustees to manage and control the hospital property, six of whom are to be chosen by the mayor and city council of Haverhill, each to hold office for life, and the seventh is to be the acting mayor of the city for the time being, who is to be chairman *ex officio*.

The trustees have been chosen and have since been incorporated by the Statute of 1888, chap. 856; the property has been conveyed to them, and they now hold both the real estate and the money, according to the directions of the will. About March 1, 1886, they filed a bill in this court, representing that the land, by reason of its location, its sloping surface, and from other causes, was not a suitable site for a hospital building, and praying for leave to sell and convey it free from all trusts, and to reinvest the proceeds in such manner as should best effect the objects for which it was given by the will. After due notice and a hearing, no one objecting, a decree was entered authorizing a sale of the real estate and an investment of the proceeds of the sale in other real estate in the City of Haverhill, to be held upon the same trusts as that to be sold. This decree remains in force, and no sale has been made under it.

The plaintiffs have now, by leave of court, filed a supplemental bill, in the nature of a bill of review, setting forth that since the entry of this decree, a deed of conveyance has been made to them as trustees of the Haverhill City Hospi-

Principle of the original charities *cy près*. See *Atty-Gen. v. Whitechurch*, 3 Ves. Jr. 141; *Atty-Gen. v. Stepney*, 10 Ves. Jr. 22; *Atty-Gen. v. Ironmongers Co.* 2 Mylne & K. 576; *Atty-Gen. v. Wilson*, 3 Mylne & K. 362.

The rule of equity seems to be clear, that when a definite charity is created, the failure of the particular mode in which it is to be effectuated does not destroy the charity; for equity will substitute another mode, so that the substantial intention shall not depend upon the formal intention. And this is the doctrine of *cy près*, so far as it has been expressly adopted. *Philadelphia v. Girard*, 45 Pa. 27, 28; *Atty-Gen. v. Jolly*, 1 Rich. Eq. 99, 2 Strobh. Eq. 395; *Gilman v. Hamilton*, 16 Ill. 231.

Equity takes jurisdiction to prevent abuses of the trust, but not to direct the management of the charity or the conduct of the trustees. *Philadelphia Baptist Assn. v. Hart*, 17 U. S. 4 Wheat. 1 (4 L. ed. 499), 28 U. S. 3 Pet. 486 (7 L. ed. 749); *Atty-Gen. v. Middleton*, 2 Ves. Sr. 323; *Cook v. Duckenfield*, 2 Atk. 567; *Atty-Gen. v. Foundling Hospital*, 4 Bro. Ch. 165, 2 Ves. Jr. 42.

The court will, in aid of charities, supply all defects in conveyances where the donor has capacity and a disposable estate, and his mode of donation does not contravene the statute. See *Christ's College Case*, 1 W. Bl. 90; *Atty-Gen. v. Tancred*, Amb. 551; *Damus' Case*, Moore, 822; *Collison's Case*, Hob. 136; *Atty-Gen. v. Rye*, 2 Vern. 453; *Atty-Gen. v. Burdet*, 2 Vern. 755; *Atty-Gen. v. Bowyer*, 3 Ves. Jr. 714.

It will go beyond this and seek grounds to sustain charitable bequests; so an appointment to charitable uses under a will utterly void was held to be made good by the Statute of Elizabeth (Smith v. Stowel, 1 Ch. Cas. 186; *Collison's Case*, Hob. 136; and one not within the Statute was decreed a charity and was administered in a manner different from that contemplated by the testator. *Atty-Gen. v. Combe*, 2 Ch. Cas. 18.

Although by the Statute of Wills of Henry VIII, devises of lands to corporations were not good, yet, when made for charitable purposes, they were held good as appointments under the Statute of Elizabeth. *Flood's Case*, Hob. 136; *Atty-Gen. v. Bains*, Prec. in Ch. 271; *Adlington v. Cann*, 3 Atk. 141.

tal, covering certain land and the buildings thereon, situated in Haverhill, to be held for the use of the Haverhill City Hospital, and upon the trust that the buildings thereon shall be used and occupied as the hospital buildings for said city hospital; that said conveyance was by way of gift, and that the land with the buildings thereon are adapted to the purposes of a hospital, and the buildings are now being used by them as hospital buildings, and the land is all that is needed as a site for a hospital. They pray that the suit may be revived, and that the decree may be reviewed and modified, and that they may have leave to sell the land devised by said Hale, and to invest the proceeds of the sale in proper securities, in trust to use them and the income of them for the general purposes of the Haverhill City Hospital.

The case comes before us on the demurrer of the defendants, and the only question argued is, whether, upon these facts, the court can properly grant the relief prayed for.

The will bears date February 8, 1880. The original bill alleges that the land devised is not a suitable site for a hospital building. We can think of causes which may have come into existence since the will was made, or even since the death of the testator, which, combined with other causes originally inherent in the land, make it now an unsuitable place for a hospital, even though the testator might well have thought it suitable when he made his will. We must treat this allegation, and the decree founded on the evidence in support of it, as establishing the proposition that it is now impracticable to carry out the purpose of the testator in the precise mode which he contemplated.

Since the trustees cannot properly build a hospital on the land devised, the question presented to the court is, whether the charity must fail, and the property revert to the residuary legatees, or whether the court can apply the doctrine of *cy pres*, and change the mode of disposing of the property so as to carry out the general purpose and intent of the testator. That depends upon what we find to have been his intent in making the devise. It is to be noticed, first, that he makes a single gift of land and money to be used for the establishment and maintenance of a hospital. The land is to be used as a site, and the money is to be

expended in the erection of buildings and in defraying the current expenses of the hospital. His obvious purpose was to provide, and, to the extent of his gift, to maintain, a hospital for the sick and maimed of the city of his residence. We cannot believe that he intended to make his gift dependent on the occupation of a particular lot as a site for the buildings, so that if it became impracticable or impossible to use that lot, he would utterly fail to accomplish his purpose. His language indicates that he had in mind a charitable scheme of great importance to the people of the neighborhood, which involved the occupation of a lot by hospital buildings, but to which the location of the buildings in the place named instead of some other proper place was of no consequence.

At the hearing on the original bill, the court, having found that the use of the land devised, in the manner intended by the testator, was impracticable, applied the doctrine of *cy pres*, so far as to hold that the erection of the hospital in the place named was not an essential condition of the gift, and that the land might be sold and the proceeds used for the purchase of a suitable lot in another place. We think that decree was well warranted by the terms of the will; and the principle then applied governs the case in its present aspect. If the use of that lot was only a mode in which the testator expected that his general purpose would be accomplished, and not of the essence of the charity, so that the court could properly allow a sale of that and a use of the proceeds in purchasing land elsewhere, it naturally follows, when the land becomes no longer available for the use for which it was intended, that the proceeds of it, if not needed for the purchase of another lot, may be saved for the charity, without being kept separate from the money which was a part of the same gift.

We are of opinion that the land may properly be sold, and the proceeds used in defraying the current expenses of the hospital. *Jackson v. Phillips*, 14 Allen, 539; *American Academy v. Harvard College*, 12 Gray, 582; *Loscombe v. Wintringham*, 18 Beav. 87; *Atty. Gen. v. Oraven*, 21 Beav. 392; *Biscoe v. Jackson*, L. R. 85 Ch. Div. 460.

Demurrer overruled.

MINNESOTA SUPREME COURT.

Logan M. BULLITT, *Appt.*,

v.

Frank W. FARRAR, *Respnt.*

(....Minn....)

*1. If one makes an untrue representa-

*Head notes by COLLINS, J.

NOTE.—Action for deceit; right of.

The right of one damaged by the false representations of another, made with intent to deceive, and known to be false, to have his action in the case for deceit notwithstanding the offender was not benefited and did not collude with the person benefited, must be regarded as established. *Pasley v. Freeman*, 8 T. R. 51, 2 Smith, Lead. Cas. *157; 6 L. R. A.

tion as of his own knowledge, not knowing whether it is true or false, it is a fraud. An unqualified affirmation amounts to an affirmation as of one's own knowledge.

2. A charge of fraudulent intent in an action for deceit may be maintained by proof of a statement, made as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate or

Endsley v. Johns, 9 West. Rep. 747, 120 Ill. 469; *Busterud v. Farrington*, 36 Minn. 820. See *Deming v. Darling*, 2 L. R. A. 743, note, 148 Mass. 504.

A person not a vendor of the thing, with reference to the sale of which he makes a false representation of the value, is responsible for such representation. *Busterud v. Farrington*, *supra*.

Plaintiff must show: (1) that the representation

judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make proof of an actual intent to deceive.

3. It is immaterial whether such statements are made innocently or knowingly. It is as fraudulent to affirm the existence of a fact about which one is in entire ignorance as it is to affirm what is false, knowing it to be so.

(November 6, 1889.)

APPEAL by plaintiff from an order of the District Court of Ramsey County granting a new trial in an action to recover damages for deceit in the sale of a certain city lot in which a verdict had been rendered in his favor. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Rogers, Hadley & Selmes* for appellant.

Mr. Henry C. James for respondent.

Collins, J., delivered the opinion of the court:

Action to recover damages for deceit in the sale of a city lot. As claimed by plaintiff, the

deceit consisted in false and fraudulent statements and representations made by the defendant—who made the sale as the agent or broker of another person—as to the grade of the lot. The plaintiff obtained a verdict, and his appeal is from an order granting defendant's motion for a new trial. There is nothing in the record tending to indicate that the court below did not consider each of the grounds urged in defendant's motion, viz., that the verdict was not justified by the evidence, and that error in law occurred upon the trial, which was duly excepted to; but it seems evident that a new trial was granted because the court was of the opinion that it had erred in refusing to charge the jury, upon defendant's request, as follows: "First. In order to entitle the plaintiff to recover in this action you must find that the defendant made to the plaintiff the representations alleged in the complaint, and that at the time of making such representations the defendant knew they were false, or, having no knowledge of their truth or falsity, he did not believe them to be true, or that, having no knowledge of their truth or falsity, he yet rep-

was untrue; (2) was known by defendant to be untrue; (3) was calculated to induce the act of plaintiff; and (4) that plaintiff, believing it, was induced to act accordingly. *Cox v. Highley*, 100 Pa. 249.

False representations will not support an action in the absence of an allegation that something was done in consequence of them. *Converse v. Hood*, 149 Mass. 471, 4 L. R. A. 521.

Representation, falsity, scienter, deception and injury must all be found to exist, and the absence of any of them is fatal to a recovery. *Brackett v. Griswold*, 112 N. Y. 487; *Arthur v. Griswold*, 55 N. Y. 400; *McKinnon v. McIntosh*, 98 N. C. 89.

False representations on which to base an action for deceit must be of some existing fact, and not a mere promise; must be made in reference to some subject material to the contract itself, and the injury from it must be direct. *Dawe v. Morris*, 4 L. R. A. 158, note, 149 Mass. 188.

To support an action for deceit plaintiff must show that the representations were untrue, were so known to defendant, were calculated to induce plaintiff to act, and did induce him to act. *Binney's App.* 8 Cent. Rep. 121, 116 Pa. 169, 19 W. N. C. 385; *Kerr's App.* 8 Cent. Rep. 423, 20 W. N. C. 95.

The party deceived must have acted with care and prudence. *Deming v. Darling*, 2 L. R. A. 743, 148 Mass. 564.

In an action on the case for fraud and deceit, evidence is admissible tending to prove the defendant's knowledge of the truth of the alleged representations. *Endsley v. Johns*, 9 West. Rep. 747, 120 Ill. 469.

The intent to deceive is conclusively presumed from defendant's knowledge of their falsity. *Hudnut v. Gardner*, 69 Mich. 345.

A person induced by fraud and deceit to enter into an executory contract for the purchase of personal property, accepting the property and using it after discovering the fraud, waives his right to maintain an action for damages for the fraud, or to recoup them in an action against him for the purchase price. *Thompson v. Libby*, 38 Minn. 287.

Misrepresentations made in ignorance of facts.

There can be no constructive *dolus malus*. A man who asserts what he does not know is guilty of duplicity, though he happen to assert the truth, and, whatever the motive, he is, none the less, dishonest. *Booke v. Walker*, 14 Pa. 129; *Dilworth v.* 6 L. R. A.

Bradner, 85 Pa. 238; *Duff v. Williams*, 85 Pa. 490; *Graham v. Hollinger*, 46 Pa. 55.

If, however, a person take upon himself to state as true that of which he is wholly ignorant, he will, if it be false, incur the same legal responsibility as if he had made the statement with knowledge of its falsity. *Hexter v. Bast*, 125 Pa. 52, 23 W. N. C. 456; *Chatham Furnace Co. v. Moffatt*, 7 New Eng. Rep. 135, 147 Mass. 403; *Wells v. McGeech*, 71 Wis. 196; *Middleton v. Jerdee*, 73 Wis. 39; *Mooney v. Davis (Mich.)* 42 N. W. Rep. 802; *Swayne v. Waldo*, 73 Iowa, 749, 5 Am. St. Rep. 712; *Mohler v. Carder*, 73 Iowa, 582.

If he ought to have known the truth, it is a fraud at law. *Binney's App.* 8 Cent. Rep. 122, 116 Pa. 169, 19 W. N. C. 385.

But a recent English case holds that an action for deceit will not lie for statements honestly believed to be true. *Derry v. Peek (H. L. Cas.)* 6 R. R. & Corp. L. J. 423.

Knowing statement to be false.

If a person makes an untrue statement to another, knowing it to be untrue, and the person to whom it was made had no knowledge of its untruth, but relied upon it as true and acted upon it, the person making such statement is liable for the damages accrued. *Endsley v. Johns*, 9 West. Rep. 747, 120 Ill. 469; *Busterud v. Farrington*, 36 Minn. 320.

Where a party intentionally or by design misrepresents a material fact or produces a false impression, in order to mislead another or to obtain an undue advantage of him, there is a positive fraud in the fullest sense of the term. *Barnard v. Roane Iron Co.* 85 Tenn. 139.

A representation of what is known to be false may be none the less a fraud because it is made without any corrupt motive or intent. *O'Donnell v. Clinton*, 5 New Eng. Rep. 433, 145 Mass. 461.

To knowingly conceal a material fact in matters where it is a legal duty to make it known, would be a fraud. *Gee v. Moss*, 68 Iowa, 818.

Right to rely on representations.

Plaintiff has a right to rely upon the representation of defendant as to extent and boundary of property; and whether defendant's representations were fraudulently made is a question for the jury. *Schwenk v. Naylor*, 3 Cent. Rep. 665, 102 N. Y. 683.

The perpetrator of a fraud is liable for the injury caused by his falsehood to one who acted on the belief that the representation was true, although

resented them to be true of his own knowledge."

It will be seen, upon an examination of *Humphrey v. Merriam*, 82 Minn. 197, that the principal portion of this request was taken bodily from the opinion in that case, which, on the facts, was wholly different from the one at bar. There the deceit consisted, as claimed by plaintiff, in false and fraudulent representations made by defendant's agent making the sale of mining stock, as to the value, condition and productiveness of a mine, and as to the company's indebtedness. From the plaintiff's own showing, the agent had never been at the mine, and hence had no personal knowledge of its character or condition, but made his statements from reports received and information derived from others; all of which was known by the plaintiff. The testimony, in the judgment of the court, entirely failed to show that this agent knew the representations to be false, or that he did not honestly believe them to be true, or that he misstated the extent or sources of his information. Under such a

showing it was held that the plaintiff could not recover. Here, however, according to the allegations of the complaint, the deceit consisted of positive and unqualified statements made by the defendant, amounting almost to a warranty, that the lot in question was no more than seven feet below street grade in front, and was above said grade in the rear; and the plaintiff's proofs tended to support the unequivocal allegation of his complaint on this point. So far as the rules of law laid down in *Humphrey v. Merriam* were pertinent to the facts then in hand, they were correctly stated, but the one bearing upon the case now before us may appear somewhat narrow and misleading when applied to other and different circumstances. As was said, the intent to deceive must exist, and must be proved, in every case. If it is absent, there can be no fraud. In this case the defendant claims that he had no knowledge of the facts, and there was no testimony indicating that he had. Therefore he did not know his statements, assuming them to have been made as contended by plaintiff, to be false; nor was it

the latter might have ascertained the falsity of the representation by proper inquiry. *Labbe v. Corbett*, 69 Tex. 503.

A vendor of land who makes an absolute and unqualified representation as to its boundaries, which representation is false, and is relied on by the purchaser, is answerable in damages, although he believed the representation to be true, and had no intent to deceive. *Taylor, J.*, dissents. *Davis v. Nuzum*, 1 L. R. A. 774, 72 Wis. 439; *Bird v. Kleiner*, 41 Wis. 134; *Litchfield v. Hutchinson*, 117 Mass. 195; *Cotzhausen v. Simon*, 47 Wis. 103.

A vendor of land undertaking to point out to the purchaser the boundaries of his land is under obligation to point them out correctly and cannot make a mistake except under penalty of responding in damages. *Hennett v. Judson*, 21 N. Y. 233.

Investigation by purchaser.

Where the purchaser undertakes to make investigations as fully as he chooses, which the vendor does not prevent or hinder, the purchaser cannot afterwards allege that the vendor made misrepresentations. *Attwood v. Small*, 6 Clark & F. 232; *Jennings v. Broughton*, 5 DeC., M. & G. 123; *Tuck v. Downing*, 76 Ill. 71.

A purchaser making his own investigations, which the vendor does not prevent from being as full as he chooses to make, cannot afterwards allege that the vendor made misrepresentations. *Southern Development Co. v. Silva*, 123 U. S. 247 (31 L. ed. 573).

A vendee of land who has refused to resort to sources of information as to the value of the land to which vendor refers him, can obtain no relief upon finding the statements of vendee, as to value, to be false. *Herron v. Herron*, 71 Iowa, 423.

Mere suspicions of fraudulent intent on the part of the vendor are not sufficient to put the purchaser on inquiry or vitiate his purchase. *Tuteur v. Chase* (Miss.) 4 L. R. A. 332.

Statements, mere opinions or trade talk, not actionable.

Statements which are mere trade talk are not fraudulent in law, but are merely matters of opinion, which is allowable. *Gordon v. Butler*, 105 U. S. 553 (23 L. ed. 1106); *Mooney v. Miller*, 102 Mass. 217.

A promissory statement, though false, is not ordinarily actionable. *Dawe v. Morris*, 4 L. R. A. 139, note, 149 Mass. 133.

4 L. R. A.

Mere expressions of opinion are not actionable. *Deming v. Darling*, 2 L. R. A. 743, 148 Mass. 504.

Ordinarily, statements of an indefinite character, made by either party pending negotiations for sale of property, relating to its cost or value, or offers made to the owner for the property, will not, in the absence of special circumstances, afford any ground for avoiding the sale, although such statements be false, and are made with a fraudulent intent on the part of the seller. *Dillman v. Nadlehoffer*, 6 West. Rep. 761, 119 Ill. 567; *Noetting v. Wright*, 72 Ill. 390; *Walker v. Carrington*, 74 Ill. 448; *Allen v. Hart*, 72 Ill. 104; *Clement v. Boone*, 5 Ill. App. 109; *Fauntleroy v. Wilcox*, 80 Ill. 477; *Eames v. Morgan*, 37 Ill. 230; *Miller v. Craig*, 33 Ill. 109; *Banta v. Palmer*, 47 Ill. 99; *Kenner v. Harding*, 35 Ill. 234; *Bond v. Ramsey*, 39 Ill. 29; *Cooper v. Lovering*, 106 Mass. 77; *Mooney v. Miller*, 102 Mass. 217; *Hemmer v. Cooper*, 8 Allen, 334; *Holbrook v. Connor*, 60 Me. 578; *Jennings v. Broughton*, 5 De G. M. & G. 123.

Representations of purchaser's agent, which are not absolutely falsifications of fact, are merely expressions of opinion. *Carlton v. Rockport Ice Co.* 1 New Eng. Rep. 474, 79 Me. 49.

Expressions of opinion which are not statements of facts in respect to the value of property sold are not fraudulent in law to the extent that the sale will be set aside if they are untrue. *Southern Development Co. v. Silva*, 123 U. S. 247 (31 L. ed. 573); *State v. Paul*, 69 Me. 217.

A sale of land will not be set aside, at the instance of the vendee, on account of false representations by the vendor of mere matters of opinion as to its value and productiveness. *Rendell v. Scott*, 70 Cal. 514; *Allison v. Ward*, 5 West. Rep. 730, 63 Mich. 123.

But where a party, in making a contract for the sale of lands, falsely states the quantity of land contained in the tract sold, and its size and the character of the improvements situated thereon, such statements are more than the expression of mere opinions. *Ladd v. Piggett*, 1 West. Rep. 347, 114 Ill. 647.

One falsely representing to another the actual cost of property which he puts at its falsely alleged cost into a corporation they are forming as a part of the plant, is not relieved from liability for fraud on the ground that it is a mere opinion. *Teachout v. Van Hoesen*, 1 L. R. A. 664, 76 Iowa, 113.

shown that he did not believe them to be true, save as this might be inferred from the fact that he seems to have had no knowledge upon the subject. But, under the circumstances of this case, and from the plaintiff's testimony as to what was said by defendant when plaintiff bought the lot, which is considered by us as a positive and unequivocal assertion in regard to the grade, made as of the defendant's own knowledge, the request to charge, rejected by the court, which included the proposition that, having no knowledge of the truth or falsity of the alleged statements, a recovery could not be had unless the defendant represented the statements to be true of his own knowledge, might, if given, have misled the jury. It might have been understood as prohibiting a recovery unless it appeared that defendant had unqualifiedly declared himself possessed of knowledge,—had asserted in so many words that he knew his statements to be the truth.

Positive assertion of knowledge is not required. If a man makes an untrue representation of a material fact as of his own knowledge, not knowing whether it be true or false, it is a fraud. The falsehood is intentional. And an unqualified affirmation amounts to an affirmation as of one's own knowledge. *Stone v. Denny*, 4 Met. 151; *Wilder v. De Cou*, 18 Minn. 470 (Gil. 421).

The fraud is as great as if the party knew his statement to be untrue. It is, in law, a willful falsehood for a man to assert, as of his own knowledge, a matter of which he has no knowledge. *Kerr, Fraud and Mistake*, 54.

A charge of fraudulent intent in an action for deceit may be maintained by proof of a statement, made as of the party's own knowledge, which is false, provided the thing stated is not merely a matter of opinion, estimate or judgment, but is susceptible of actual knowledge; and in such case it is not necessary to make proof of an actual intent to deceive. *Chatham Furnace Co. v. Moffatt*, 147 Mass. 403, 7 New Eng. Rep. 185, and cases cited.

If the false representations are made as of one's own knowledge, or unqualifiedly, being such as might and did mislead, they are unjustifiable and fraudulent. *Merrim v. Pine City Lumber Co.* 28 Minn. 814.

As the language used in the request might have been construed by the jury as confining them to a consideration of statements whereby the defendant expressly represented that he knew the grade of the lot (of which there was no testimony), and eliminated all consideration of affirmations wherein the defendant, without asserting actual knowledge in express terms, assumed to have it and to speak from it, or intended to and did convey the impression that he had actual knowledge of the truth, though conscious that he had not, the court was right in declining so to instruct the jury.

Although the general charge might have been more explicit and exact, it fairly covered the law applicable to the testimony, and no part of it was erroneous. Among other matters, the court said, the defendant excepting, that if the jury found from the evidence that the statements and representations complained of were made as claimed by plaintiff,—that is, if they were positive and unequivocal assertions as to the grade of the lot,—it made no difference whether the defendant knew the real facts or not. This was correct. Whether the representations were made innocently or knowingly they would equally operate as a fraud upon the plaintiff, provided they were made unqualifiedly, or as of defendant's own knowledge. *Merrim v. Pine City Lumber Co. supra*.

It is fraudulent to affirm what is false, knowing it to be false. It is equally as fraudulent to affirm what is false knowing that the affirmation is of the existence of a fact about which one is in entire ignorance. *Wilder v. De Cou, supra*.

The remaining assignments of error need no special mention.

Order reversed

GEORGIA SUPREME COURT.

Benjamin F. O'SHIELDS, *Plff. in Err.*,
v.

GEORGIA PACIFIC R. CO.

(...Ga....)

*1. After a declaration has been amended, a motion to dismiss the action raises no question as to the right to amend, but only

*Head notes BLACKLEY, Ch. J.

touching the sufficiency of the declaration as amended.

2. The amendments made a good declaration under the Statute of Alabama.

3. Where a right of action for a tort is given by a statute of another State, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that State, the *lex fori*, not the *lex loci*, applies on the subject of limitation.

NOTE.—Actions for torts—*Statute of Limitations*,—*lex fori*.

The defense of the Statute of Limitations is a personal privilege and must be specially pleaded in bar. *Bank of Hartford Co. v. Waterman*, 26 Conn. 324; *Re Young's Estate*, 3 Md. Ch. 461; *Spear v. Griffin*, 28 Md. 418; *Partridge v. Mitchell*, 3 Edw. Ch. 180.

The statute of the forum is alone available. *Medbury v. Hopkins*, 3 Conn. 472; *Blackburn v. Morton*, 18 Ark. 334; *Thompson v. Tioga R. Co.* 36 Barb. 79; *Urton v. Hunter*, 3 W. Va. 88; *Seborn v. Beekwith*, 30 W. Va. 774.
6 L. R. A.

The defense may be especially pleaded, but this may be done by special exception when the bar of the Statute is disclosed by the petition. *Gathright v. Wheat*, 70 Tex. 740.

It must be pleaded either by alleging the facts, or by a general statement referring to the particular section of the Code relied on. *Manning v. Dallas*, 73 Cal. 420; *Stewart v. Budd*, 7 Mont. 573.

The statute of the forum is alone available unless otherwise specially provided by statute. *Worth v. Wilson*, *Wright (Ohio)* 162; *Horton v. Horner*, 14 Ohio, 437; *Cargile v. Harrison*, 9 B. Mon. 518; *Halsey v. McLean*, 12 Allen, 439; *Bryan v. Bouton*, 10 Tex. 62; *Thompson v. Berry*, 26 Tex. 263.

(November 11, 1889.)

ERROR to the Fulton County Superior Court to review a judgment dismissing the complaint in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Cox & Reed*, for plaintiff in error: The Statute of Limitations is governed by the *lex fori*.

Rorer, *Interstate Law*, 171, cf.; *Perkins v. Guy*, 55 Miss. 153; *Wharton*, Cont. § 537.

The defendant did not except to the amendment. If he had cause of exception he could have saved it only by urging it at the term when the amendment was made.

Life Assn of America v. Ferrill, 60 Ga. 414.

An order allowing the amendment is unnecessary.

Strange v. Barrow, 65 Ga. 25; *Swatts v. Spence*, 68 Ga. 500; *Carter v. Penn*, 79 Ga. 747.

This amendment not being objected to was properly received, and the consequence is that the amendments relate back to the filing of the original declaration.

Bower v. Thomas, 69 Ga. 50; *Akin v. Barton* Co. 54 Ga. 59; *Tift v. Towns*, 63 Ga. 237; *Rutherford v. Hobbs*, 63 Ga. 248; *Western & A. R. Co. v. Strong*, 52 Ga. 461. But see *South Carolina R. Co. v. Nix*, 68 Ga. 572.

Our action is given by the common law; that is, so far as our right is founded upon the defective draw-head and the lack of the chain.

Wood, *Master and Servant*, 1st ed. § 29; *Atlanta & C. A. L. R. Co. v. Ray*, 70 Ga. 674; *Central R. Co. v. Haslett*, 74 Ga. 59; *Central R. Co. v. Freeman*, 75 Ga. 332.

As to this ground of the action,—that is, the use by the railroad of defective appliances,—the Code of Alabama is but the common law. And as the same rule of the common law likewise prevails in Georgia, the presumption, always made, relieves from alleging the law of Alabama.

89 Am. Dec. 673.

The courts of Georgia will therefore presume that the law of Alabama gives the same right.

Mears. Jackson & Jackson, for defendant in error:

The declaration, as it originally stood, contained no cause of action. It alleged an injury in Alabama, and endeavored to support the claim for damages by averments which show that at common law there would be no cause of action. If the right to recover be based upon the statute of a foreign State, such statute must be set out, in order that the Georgia court may be fully informed.

Holmes v. Broughton, 10 Wend. 75; *Selma, R. & D. R. Co. v. Lacy*, 43 Ga. 461.

The statutes of Alabama show that actions for this class of injuries must be instituted within one year. The year had expired before the amendment was proposed. Therefore, the amendment could not be allowed.

Ala. Code, § 2619, par. 6; *Smith v. Ardis*, 49 Ga. 602; *Ayers v. Dady*, 56 Ga. 124; *Kimbro v. Virginia & T. A. L. R. Co.* 56 Ga. 185; *Parmelee v. Savannah, F. & W. R. Co.* 78 Ga. 239; *Exposition Cotton Mills v. Western & A. R. Co.* 10 S. E. Rep. 113.

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An amendment which introduces no new and distinct cause of action, but, nevertheless, makes an action good in law, where none previously existed, is not allowed.

Martin v. Gainesville, J. & S. R. Co. 78 Ga. 308; *Bell v. Central R. Co.* 73 Ga. 520. See also *Harris v. Central R. & Bkg. Co.* 78 Ga. 530.

Exposition Cotton Mills v. Western & A. R. Co. (Ga.) 10 S. E. Rep. 113, is conclusive on the question of amendment. Action under common law cannot be amended to action under statute.

Bleckley, Ch. J., delivered the opinion of the court:

The plaintiff was an employé of the defendant as a car-coupler. While on duty in the State of Alabama he received a personal injury, in consequence partly of the negligence of the engineer and conductor, his co-employés, and partly in consequence of the defective condition of a certain part of one of the cars, called a "draw-head." As the original declaration stood, it would seem that the defective draw-head was referred to, not as an independent cause of action, but as a circumstance relied upon to charge the engineer and conductor with a higher degree of diligence on their part than would otherwise have been requisite. The suit was commenced on February 14, 1888, returnable to the following March Term of the Superior Court. During the corresponding term of 1889 two amendments to the declaration were filed, and service of the same was acknowledged by defendant's attorneys. At the September Term, 1889, the case was called for trial, when the defendant moved orally to dismiss the same upon the ground that the declaration set forth no cause of action at common law, and because the right of action under the Alabama Statute was barred by limitation therein as to time. The court sustained the motion, and dismissed the action; and the plaintiff excepted.

1. The motion to dismiss was equivalent to a general demurrer, and, as the declaration had been amended and the amendments served at the preceding term, the demurrer was aimed, not alone at the declaration, as it stood originally, but as it became by the addition of the two amendments. In the argument here it was contended that inasmuch as the amendments, if objected to, ought to have been stricken or disallowed, the fact that they were made should count for nothing; but we think otherwise. Had the defendant desired to raise the question whether such amendments could be ingrafted on such a declaration, a motion should have been made to strike the amendments, or take them off the files. By not making that motion the defendant acquiesced in the amendments, and such acquiescence at the time the case came up for trial was equivalent to consenting to the amendments as a part of the pleadings duly before the court. The judgment rendered on the motion actually made, which, as we have said, was equivalent to a general demurrer, was rendered upon the plaintiff's pleadings as a whole, and, if left unreversed, would be a binding adjudication upon the merits of the declaration as made by the amendments, and would bar any future

action brought by the plaintiff as effectually as would a judgment rendered on the verdict of a jury. *Kimbro v. Virginia & T. A. L. R. Co.* 56 Ga. 185.

It would be quite unfair to give a defendant the benefit of a judgment on demurrer to the declaration as amended, and then allow him to uphold the judgment by insisting that the plaintiff had no right to amend. Surely, if a waiver of any objection whatever to an amendment would not result from demurring generally to all the plaintiff's pleadings, raising no question as to the right to amend, we know of nothing from which such a waiver would result.

2. Turning now to the amendments. One of these attributes the plaintiff's injury to the negligence of the defendant in not having a draw-head safe and in good repair, alleging that the chain from the coupling-pin was broken off, so that the plaintiff had to lay his hand upon the pin to do his duty, whereas, if the chain had been intact, he could have pulled out the pin by means of the chain, and would not have been injured. It proceeds to allege that this, together with the negligence of the engineer and conductor, caused the injury, without any fault on the part of the plaintiff. The other amendment sets forth a statute of Alabama embodied in the Code of 1886, § 2590, which renders the employer liable to answer in damages to an employé, as if he were a stranger, in several enumerated instances; among them, when the injury is caused by reason of any defect in the condition of machinery, or by reason of the negligence of any person in the service of the employer, who has the charge or control of a locomotive engine or train upon a railway, etc. If the declaration, as originally framed, had contained all the matter of these two amendments, there is no dispute but that a cause of action would have been set forth. From what has been said under the preceding head, it is manifest that in our opinion the declaration should be treated, on a motion to dismiss the action, as though it had in fact contained the matter of these amendments originally. Had there been an objection in due time to incorporating the amendments with the declaration, or a motion to sever them from the declaration, there may or may not have been a cause of action without them. Our present opinion is that the original declaration, standing alone, and tried by common law, was fatally deficient, but aided by the amendments brought in, and suffered by the defendant's acquiescence to remain in, it is not now to be tested by the common law, but by the Alabama Statute, and, so tested, it presents a cause of action which the defendant must meet and answer.

3. We have examined the Alabama Statute, both as set out in the Code and as it appears in the Acts of 1885, p. 115, and in neither is there any limitation as to the time within which the action based upon the statutory right is to be brought. The limitation prescribed is found alone in the General Limitation Law of Alabama (Code 1886, § 2619), which fixes the limitation at one year for various actions, such as malicious prosecution, crim. con., seduction, breach of marriage promise, libel, slander, etc., and concluding with "actions for any 6 L. R. A.

injury to the person or rights of another, not arising from contract and not herein specifically enumerated." As the amendment pleading the Statute was filed more than one year after the injury, this action, had it been brought in Alabama, might have been barred; but the Limitation Law of Georgia applicable to such actions is two years, and the amendment was filed within that period.

It follows that, without having recourse to the doctrine of relation, the amendment was not too late, provided the Limitation Law of the forum, and not that of the place of the injury, applies; and we think it does apply. Where torts are committed in foreign countries, or beyond the territorial jurisdiction of the sovereignty in which the action is brought, the *lex fori* governs, no matter whether the right of action depends upon the common law or a local statute, unless the statute which creates or confers the right limits the duration of such right to a prescribed time. This will appear from an examination of the following authorities: Pollock, Torts, 138 (Text-Book Series); Wood, Lim. p. 28, § 9; *Nonce v. Richmond & D. R. Co.* (N. C.) 33 Fed. Rep. 429; *The Harrisburg*, 119 U. S. 199 [30 L. ed. 358]; *Boyd v. Clark* (Mich.) 8 Fed. Rep. 849; *Eastwood v. Kennedy*, 44 Md. 563; *Pittsburg, C. etc. R. Co. v. Hine*, 25 Ohio St. 629.

The holding by Chief Justice Warner in *Selma, R. & R. Co. v. Lacy*, 49 Ga. 107, to the effect that the Alabama Statute giving a right of action for homicide, and prescribing a limit of one year for bringing the suit, would be applicable to an action brought in Georgia to enforce the statutory right, was doubtless correct, for the reason that the statute then in question (see Ala. Rev. Code 1867, § 2297), expressly limited the right to one year, the language being: "When the death of a person is caused by the wrongful act or omission of another, the personal representative of the former may maintain an action against the latter at any time within one year thereafter, if the former could have maintained an action against the latter for the same act or omission had it failed to produce death."

According to all the authorities, an action under such a statute as this could not be maintained anywhere after the bar had attached in the local jurisdiction, for the reason that after that time the right would be extinct as well as the remedy; but the Act of 1885, upon which the present suit is founded, contains no such terms, and there is no more reason for holding that the General Limitation Law of Alabama, which we have cited above, extinguishes the statutory rights of action to which it applies, than for holding that it extinguishes the common-law rights of action to which it is applicable. If the lapse of one year would not bar an action for malicious prosecution, crim. con., seduction, breach of marriage promise, etc., brought in Georgia, but founded upon a cause arising in Alabama, the lapse of one year would not bar the present action, the period for a like action brought here for causes arising in Georgia being two years. The court erred in sustaining the motion and dismissing the action.

Judgment reversed.

ILLINOIS SUPREME COURT.

ADAMS COUNTY, *Appt.*,
v.
CITY OF QUINCY.

(....Ill....)

1. The exemption from taxation of the property of a kind used solely for public purposes does not extend to a special tax for public improvements such as the paving of a street on which the premises front.
2. The levy of a local assessment or special tax for public improvements is not a taking of private property for public use under the right of eminent domain, but is an exercise of the taxing power.
3. An ordinance for the paving of certain streets is not insufficient because it does not state the width of the streets to be paved.
4. The same ordinance may legally provide for the paving of several streets, although one is wider than the others.

(October 31, 1889.)

APPPEAL by Adams County from a judgment of the Adams County Court confirming, against said County's objection, the report of commissioners appointed to levy a special tax for the improvement of certain streets in the City of Quincy. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Almeron Wheat for appellant.

Mr. J. Sibley, for appellee:

The objection that the ordinance passed by the City Council of Quincy June 6, 1887, is void because it did not fix the cost of the proposed improvement, or furnish any sufficient

data from which the commissioners appointed by the county court to assess and apportion the special tax against the property contiguous to and touching on the line of the contemplated improvement, is not well taken.

White v. People, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255; *Enos v. Springfield*, 118 Ill. 65; *Galesburg v. Scarles*, 114 Ill. 217; *Watson v. Chicago*, 1 West. Rep. 659, 115 Ill. 78; *Sterling v. Gall*, 4 West. Rep. 124, 117 Ill. 11; *Kankaake v. Potter*, 7 West. Rep. 443, 119 Ill. 324; *Springfield v. Green*, 9 West. Rep. 144, 120 Ill. 269; *Springfield v. Mathus*, 13 West. Rep. 855, 124 Ill. 88; *Wilbur v. Springfield*, 12 West. Rep. 598, 123 Ill. 895.

The ordinance is not void on the ground that it embraces more than one improvement, nor because Broadway Street is a few feet wider than Hampshire or Sixth Street. The improvement contemplated, although portions of these streets are included in the ordinance, evidently was intended as but one single improvement.

Prout v. People, 83 Ill. 155; *People v. Sherman*, 83 Ill. 187; *Ricketts v. Hyde Park*, 85 Ill. 110; *Murphy v. Peoria*, 8 West. Rep. 333, 119 Ill. 509; *Springfield v. Green*, *Wilbur v. Springfield* and *Springfield v. Mathus*, *supra*.

The objection that the report of the commissioners was never approved by the city council is not sustained by the evidence in the case. It was shown that the city council at its meeting July 5, 1887, did approve of this report, though the approval was not at the time entered upon the journal of the proceedings. If this was not sufficient, the city council had the right to order its journal amended according to the fact even after the trial had commenced.

NOTE.—Taxes and assessments for local purposes distinguished.

Taxes are distinguished from special assessments for local improvements,—the former being burdens imposed upon all persons and property alike, and compensated for by equal protection to all, while the latter are not burdens, but equivalents, and are laid for local purposes upon local objects, and compensated for in local benefits and improvements, enhancing the value of the property assessed to the extent of the assessment levied. 1 *Desty, Taxn.* 5.

An assessment for a supposed benefit is not a tax within the meaning of a law exempting property from taxation. *Dunleith & D. Bridge Co. v. Dubuque*, 32 Iowa, 427; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *Re New York*, 11 Johns. 77; *Brightman v. Kirner*, 22 Wis. 64.

The tax is imposed on the person of the owner; for though property is resorted to for the purpose of ascertaining the amount of the tax, yet the individual and not the property pays the tax; and herein lies another distinction between taxes and local assessments; for the latter proceeds upon the idea of increase in the value of real estate by a public improvement, and that a portion of the expense of the improvement should be borne by the property benefited. *Rundeh v. Lakey*, 40 N. Y. 517; *Green v. Craft*, 23 Miss. 70; *Crelighton v. Manson*, 5 Cal. 612; *Taylor v. Palmer*, 81 Cal. 240; *Neenan v. Smith*, 50 Mo. 525; *St. Louis v. Allen*, 58 Mo. 44; 1 *Desty, Taxn.* 8.

The liability of lands to assessments for local improvements springs from the construction of an § L. R. A.

authorized public work which confers a material special benefit upon the lands. *Re Adjustment Comrs. of Elizabeth*, 8 Cent. Rep. 818, 49 N. J. L. 488.

The property benefited by a local improvement may be assessed to the extent of the benefit, and the basis upon which the assessment was made must be shown. *White v. Stevens* (Mich.) 10 West. Rep. 861.

Exemption, not to apply to local assessments.

Exemption from taxation of every kind does not exempt from assessment for street improvement. See *Illinois Cent. R. Co. v. Decatur*, 1 L. R. A. 612, 126 Ill. 92.

Government agencies are only exempt from state taxation so far as it interferes with their efficiency in performing functions by which they serve the government. *W. U. Teleg. Co. v. Atty-Gen. of Mass.* 125 U. S. 530 (31 L. ed. 790).

Exemptions from taxation, being exceptions to the rule of taxation, are strictly construed. *Atlantic & P. R. Co. v. Lesueur* (Ariz.) 1 L. R. A. 244, 38 Alb. L. J. 323, 2 Inters. Com. Rep. 189; *Commonwealth's App. (Pa.)* 46 Phila. Leg. Int. 343, 24 W. N. C. 191.

The exemptions contained in Texas Const., art. 11, § 9, are to be construed as embracing all taxation, including special as well as general. *Harris Co. v. Boyd*, 70 Tex. 237.

The Virginia constitutional provision requiring taxation to be equal and uniform does not apply to special assessments by municipal corporations for local improvements. *Richmond & A. R. Co. v. Lynchburg*, 81 Va. 473.

Turley v. Logan Co. 17 Ill. 151; *Logans-port v. Crockett*, 64 Ind. 319; *McCormick v. Bay City*, 23 Mich. 457; *Loundes Co. Comrs. Ct. v. Hearne*, 59 Ala. 371; *Starr v. Burlington*, 45 Iowa, 87; *Dillon, Mun. Corp.* §§ 231, 234, note 1.

The objection that the appellant's property is exempt from the special tax in this proceeding rests upon no solid foundation in principle or reason. The exemption claimed applies only to general taxation for purposes of revenue, and not to special taxation for local improvements.

Illinois & M. Canal v. Chicago, 12 Ill. 403; *Higgins v. Chicago*, 18 Ill. 276; *Ottawa v. Free Church*, 20 Ill. 423; *Chicago v. Colby*, 20 Ill. 614; *Peoria v. Kidder*, 26 Ill. 352; *Scammon v. Chicago*, 42 Ill. 192; *Wright v. Chicago*, 46 Ill. 44; *Miz v. Ross*, 57 Ill. 121; *Cook Co. v. Chicago*, 103 Ill. 646; *McLean Co. v. Bloomington*, 106 Ill. 209; *Re New York*, 11 Johns. 77; *Buffalo City Cemetery v. Buffalo*, 46 N. Y. 506; *Roosevelt Hospital v. N. Y.* 84 N. Y. 108; *Boston Seamen's Friend Society v. Boston*, 116 Mass. 181; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *First Presby. Church v. Fort Wayne*, 86 Ind. 338; *Bridgeport v. N. Y. & N. H. R. Co.* 36 Conn. 255; *Brightman v. Kirner*, 22 Wis. 54; *Dunlieth & D. Bridge Co. v. Dubuque*, 82 Iowa, 427; *Sioux City v. Sioux City Ind. School Dist.* 55 Iowa, 150; *Northern Liberties v. St. John's Church*, 13 Pa. 104; *Paterson v. Society for Establishing Useful Manufactures*, 24 N. J. L. 385; *State v. Newark*, 35 N. J. L. 157; *State v. Newark*, 27 N. J. L. 185; *Lefevre v. Detroit*, 2 Mich. 586; *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Cooley, Const. Lim.* 207, note 3.

Article 9 in the Statute relating to the incorporation of cities and villages having been adopted by the city council of the City of Quincy, the ordinance in question was framed under its provisions, and the special tax required to be levied to pay the cost of the improvement differs from special assessment only in the mode of proceeding to accomplish the purpose of the law.

White v. People, 94 Ill. 604; *Craw v. Tolono*, 96 Ill. 255; *Enos v. Springfield*, 113 Ill. 65; *Galeburg v. Searles*, 114 Ill. 217; *Watson v. Chicago*, 1 West. Rep. 659, 115 Ill. 78.

Shope, Ch. J., delivered the opinion of the court:

The City of Quincy made application to the County Court of Adams County for an order confirming the report of commissioners appointed to levy a special tax upon lots, parts of lots, and tracts of land contiguous to and touching upon the line of certain streets proposed to be paved, in accordance with an ordinance of the City. The County of Adams owns a block in the City, bounded partly by the street ordered to be improved, upon which block is situated the court-house of the County. This block was assessed its proportionate share of the cost of the proposed improvement, according to its frontage upon the streets to be improved. The County appeared, and filed various objections to the report, all of which were overruled, and judgment of confirmation entered. The County brings the case to this court by appeal, and assigns for error the overruling

of such objections, and the rendition of the judgment.

The principal point urged upon our attention is that the property, being the property of the County, and used solely for public purposes, is exempt from taxation. All public buildings belonging to any county are, by the Statute, in terms exempted from taxation. Rev. Stat. chap. 120, § 2.

That the property here sought to be charged with the cost of this local improvement is exempted by the Statute from general taxation there can be no question; but does this exemption extend to and embrace special taxation of contiguous property to defray the expenses of such local improvement? This court has repeatedly held that special assessments for local improvements are not taxes, in the strict sense of that term; and that property held for a public use is not exempt from such assessment, although exempt from taxation for general purposes (see *Illinois & M. Canal v. Chicago*, 12 Ill. 403; *Higgins v. Chicago*, 18 Ill. 276; *Chicago v. Colby*, 20 Ill. 614; *Peoria v. Kidder*, 26 Ill. 351; *Scammon v. Chicago*, 42 Ill. 192; *Wright v. Chicago*, 46 Ill. 44; *Miz v. Ross*, 57 Ill. 121); and that other property exempted by statute from general taxation, such as church property, etc., may be specially assessed for local improvements. *Ottawa v. Free Church*, 20 Ill. 423; *Cook Co. v. Chicago*, 103 Ill. 646; *McLean Co. v. Bloomington*, 106 Ill. 209; and also *Boston Seamen's Friend Society v. Boston*, 116 Mass. 181.

Section 5, art. 9, of the Constitution of 1848 provided that "the corporate authorities of counties, townships, school districts, cities, towns and villages may be vested with power to assess and collect taxes for corporate purposes; such taxes to be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

A tax for the opening or improvement of a public street or other local improvement may be said to be a tax for a corporate purpose; and, while this clause of the Constitution authorized the Legislature to invest municipal corporate authorities with power to assess and collect taxes for corporate purposes, that power was limited and restricted in this: that such taxes must be uniform in respect of person and property. This prohibited the levy of special assessment upon property to be benefited by the proposed improvement when it should have to bear more than its proportionate share of the burden. It is plain that, under this provision, special assessments imposing unequal burdens upon property could not be sustained under the power of taxation given by the clause of the Constitution quoted. This court, however, sustained the power of cities and villages to make local improvements by special assessment, referring such power to the exercise of the right of eminent domain. *Chicago v. Larned*, 34 Ill. 278.

In that case this court said: "Entertaining no doubt that this grant of power to the city council is against the fundamental law regulating the subject of taxation, we are compelled by a sense of our own duty so to declare, and to hold an assessment for improvements made on the basis of the frontage of the lots upon the street to be improved invalid, as containing

neither the element of equality nor uniformity, if assessed under the taxing power; and if in exercise of the right of eminent domain, equally invalid, no compensation whatever being provided, or even contemplated, by the charter." Id. 252.

Charters conferring power to levy special assessments for local public improvements by cities and villages, for special benefits thereby conferred, were sustained under the power held to be properly exercised under the right of eminent domain. In that view the assessment upon a lot was not regarded as a burden or tax, in the strict sense, for the reason that the owner would receive benefits at least equal to the sum levied or assessed upon his property. Hence we find, in many cases arising under the old Constitution, the statement that special assessments are not taxes, etc. It is apparent that to have held them to be taxes would have been to deny their validity entirely. As the Constitution of 1848 did not require that the compensation for property taken for public use should be in money, the power to levy special assessments on contiguous property equal to the benefit conferred by the improvement might well be referred to the power of eminent domain, and thereby sustain the constitutionality of laws authorizing such levies and assessments. Under the present Constitution, property taken for public use cannot be compensated for in benefits. Benefits are only allowed as a set-off or reduction of damages to such parts of the property as are not taken. In cases where benefits are sought to be charged, the land owner must appear to be entitled to damages; otherwise, he cannot be charged with benefits. Here the County is claiming no damage of the City, and therefore it cannot be charged with benefits. It follows, therefore, that since the adoption of the present Constitution the power to make special assessments for local improvements cannot now be referred to and sustained under the right of eminent domain. Under the present Constitution, special assessments for local improvements must be regarded as a species of taxation.

In 2 Dillon, Mun. Corp., 8d ed., § 785, the author says: "And it is, as we shall presently see, by virtue of a branch of this great power [of taxation] that local assessments upon property benefited, or legislatively declared to be specially benefited, are imposed, in order to pay the expense of making local improvements of a public nature within the municipality, adjoining or near the property assessed."

The Constitution of 1870, art. 9, § 9, provides that "the General Assembly may vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments, or by special taxations, of contiguous property, or otherwise. For all other corporate purposes, all municipal corporations may be vested with authority to assess and collect taxes: but such taxes shall be uniform in respect to persons and property within the jurisdiction of the body imposing the same."

This clause of the Constitution is radically different from the clause in the Constitution of 1848, relating to the same subject matter, and hereinbefore quoted, and under which the former rulings referred to arose. As to such

special taxation of contiguous property for local improvements, there is in the present Constitution no limitation as to equality and uniformity; while for all other municipal purposes taxation is required to be uniform in respect to persons and property, as was provided in the prior Constitution. Taxation for general corporate purposes must be uniform, therefore, while for local improvements it may be by special tax, or by way of special assessment, upon the contiguous property. Thus, as a mode of municipal taxation, such special assessments are clearly recognized.

In the case of *McLean Co. v. Bloomington*, *supra*, this court says: "The distinction between taxation and special assessment is also clearly made in our present Constitution (§§ 1-5, 9, art. 9); and, while providing that the General Assembly may exempt the property of the State, counties and other municipal corporations from the former (§ 8, *supra*), makes no such provision in regard to the latter, but, on the contrary, by section 9, *supra*, authorizes the General Assembly to 'vest the corporate authorities of cities, towns and villages with power to make local improvements by special assessments,' without any restriction as to the property to be assessed." What is there said is equally applicable in respect to special taxation for local improvements. See *White v. People*, 94 Ill. 612; Rev. Stat. chap. 24, art. 8, § 5.

So in *Ill. Cent. R. Co. v. Decatur*, 126 Ill. 92, 1 L. R. A. 613, it was expressly ruled that the exemption of the Illinois Central Railroad from taxation had no application to special assessments of contiguous property imposed by the city for local improvements. Under this grant of power (§ 9, art. 9), the Legislature may authorize local public improvements to be made by special assessments to the extent the property assessed will be benefited, or by special taxation of contiguous property according to its frontage upon the proposed improvement, or according to its value, or by general taxation for corporate purposes, or partly by general taxation and partly by special assessment or special taxation. Either one of these modes involves taxation, either general or special. *White v. People*, 94 Ill. 617, 618.

The levy of such local assessment or special tax is not a taking of private property for public use under the right of eminent domain, but is an exercise of the taxing power. 2 Dillon, Mun. Corp. § 596; *Allen v. Drew*, 44 Vt. 175.

It is true that special taxation differs, in some respects, from special assessments, when made for the purposes of local improvement; but they are placed by the Constitution in the same category and class. They are both treated as a species of taxation for corporate purposes.

The question, however, remains, whether the Legislature, in the exercise of the power, has exempted the property held for county purposes from either special assessments or special taxation for local improvements. On this subject, it is said by Dillon (2 Mun. Corp. §§ 776, 777): "As the burden of taxation ought to fall equally upon all, statutes exempting persons or property are construed with strictness, and the exemption should be denied, unless so clearly granted as to be free from fair doubt. Such statutes will be construed most strongly against those claiming the exemption. Al-

though an 'assessment' is in the nature of a tax, and is authorized by, or is a branch of, the taxing power, yet a general statute exempting certain property—as, for example, churches—from 'taxation by any law of the State,' does not exempt it from liability for a street assessment. So the exemption of property of a cemetery company from 'any tax or public imposition whatever' does not exempt it from a paving tax for improving a street in front of the property; the court (in an opinion elaborately examining the subject) holding that the intent of the Legislature was to exempt the property from all taxes or impositions for the purpose of revenue, but not to exonerate it from charges inseparably incident to its location with respect to other property." See also *Jacksonville v. McConnell*, 12 Ill. 188; *Northwestern University v. People*, 80 Ill. 838; *People v. Brooklyn*, 4 N. Y. 419-432; *Sharp v. Speir*, 4 Hill, 76; *Re Second Avenue M. E. Church*, 66 N. Y. 395; *Boston Seaman's Friend Society v. Boston*, 116 Mass. 181; *Buffalo City Cemetery v. Buffalo*, 48 N. Y. 506; *Ottawa v. Spencer*, 40 Ill. 211; *McLean Co. v. Bloomington*, *supra*; *People v. Western Seaman's Friend Society*, 87 Ill. 246.

The Statute relied on as creating the exemption is not found in the law authorizing special taxation, but in the chapter relating to the general subject of revenue; and, while all are parts of the same revision, it was, we have no doubt, intended to apply to taxation for general revenue. The tax sought to be collected in this case is for a special purpose,—the improvement of certain parts of certain streets within the City upon which the particular property abuts. If collected, it will form no part of the general revenue of the City. If the Legislature had intended to exempt property used for public purposes from special taxation or assessment, very different language, it seems to us, would have been employed, so as to exclude all doubt upon the subject. The city authorities have determined that the property of the County will be benefited by the special tax levy; at least, they have exercised a power clearly delegated by the Legislature, and that is conclusive, in the absence of fraud or abuse of the power thus vested in it. We are of opinion that the property of the County is liable to special taxation as other property, and that there is no warrant for the exemption claimed.

This disposes of the principal question, but various minor objections are urged to the proceeding, and to the legality of most of the steps taken to make and confirm this assessment, some of which will be noticed. The Legislature, under ample constitutional authority, have by section 1, art. 9, of the Cities and Villages Act, vested the corporate authorities of cities and villages "with power to make local improvements by special assessments, or by special taxation, or both, of contiguous property, or general taxation, or otherwise, as they shall by ordinance prescribe." This power must be exercised by the passage of an ordinance prescribing the mode to be pursued, and whether the improvement "shall be made by special assessment, or by special taxation, of contiguous property, or general taxation, or both." The word "contiguous" is here used in its popular sense, and means "in actual or close contact;" "touching;" "adjacent;" or "near." If the

improvement is of a street or sidewalk, contiguous property is such as abuts upon the street or sidewalk, or is bounded by the street. When the ordinance provides that the improvement shall be made by general taxation, the cost thereof is added to the general appropriation bill of such city or village, and is to be levied and collected with, and as a part of, the general taxes of the city or village. When the local improvement is ordered to be made by special taxation, the method of its levy, assessment and collection is specially pointed out in the Act as being the same as prescribed for the making, levying and collection of special assessments. Sections 18-51.

The provisions relating to special assessments, so far as they may be applicable, are required to be observed in cases of special taxation. Section 19 of the Act provides that whenever such local improvements are to be made, wholly or in part, by special assessment, an ordinance shall be passed to that effect, specifying therein the nature, character, locality and description of such improvements. Provision is made by the 20th section for the appointment of a committee of the council or board of trustees, or three competent persons, to make an estimate of the cost of the improvement contemplated by the ordinance, including labor, material and all other expenses attending the same, and the cost of making and levying the assessment, who shall report the same in writing to the council or board of trustees. Upon approval of such report by the council or board of trustees, they may order a petition to be filed in the county court, etc. These several provisions are alike applicable to the proceeding by special assessment and by special taxation. It is manifest that in cases of special taxation the amount to be assessed against each particular tract or lot can be known only upon report of the cost of the improvements, etc., and must be ascertained and reported by the committee to the city council or board of trustees. The ordinance passed in this case specifies the nature, character, locality and description of the work fully and in sufficient detail.

As said in *Kankakee v. Potter*, 119 Ill. 328, 7 West. Rep. 443: "It is not expected that an ordinance of this kind should set forth the details and all the particulars of the work. Indeed, this is not contemplated, and the statute requires nothing of the kind. A substantial compliance with its provisions is all that is required." It is not necessary for the ordinance passed by the City to state the width of the streets to be paved, in order to enable the committee to estimate the cost of the proposed improvements. The width of the street was a matter of easy ascertainment. The ordinance required the paving of the street, and cannot, we think, be construed to require the paving of the then existing sidewalks. It was clearly not so understood by any of the city authorities, or by anyone acting for them. We are of opinion that the ordinance was in this particular sufficiently definite and certain. See *Jacksonville R. Co. v. Jacksonville*, 114 Ill. 562, 1 West. Rep. 376.

It is said by the appellant's counsel that, as one of the streets is ten feet wider than the rest, improvements to be paid for by special taxation

cannot legally be provided for in one and the same ordinance.

In *Springfield v. Green*, 120 Ill. 269, 9 West. Rep. 144, it was held that an ordinance providing for the paving of several streets and alleys, and parts of streets, with the same material, and in the same way, is not obnoxious to the objection that it embraces more than one improvement, although there may be a difference in the width of the streets proposed to be paved, and the cost of paving certain railway tracks is excluded from the assessment in respect of some of the said streets. We regard this, and the subsequent case of *Wilbur v. Springfield*, 123 Ill. 335, 12 West. Rep. 598, as determining the question here presented adversely to the contention of counsel.

It is also said that the application to the county court was made before the city council had approved the report of the commissioners appointed by them to make an estimate of the cost of the proposed improvement. The petition to the county court showed that the city

council had approved of the report of its committee, and there was evidence before that court tending to support this contention. This objection does not go to the merits, and we see no reason why the action of the city council in ordering the presentation of its petition to the county court was not of itself an approval of the action of the commissioners. However this may be, it was shown that the city council, at its meeting in July, 1887, approved said report. The right of the city council to amend the record of its meetings to make them accord with the fact is not questioned, and it is shown that the record was amended by order of the city council so as to show a formal approval of the report made by the committee appointed by the council to levy said special tax prior to the application to the county court.

Upon full consideration of the entire record, and of the points made by counsel, we find no substantial objection to the proceedings, and no error for which the judgment should be reversed, and it will therefore be affirmed.

INDIANA SUPREME COURT.

Annie E. NOWLIN *et al.*, Appts.,
v.
Luman O. WHIPPLE and Wife.

(....Ind....)

1. A prescriptive right to use a driveway is not established by continuing its use for more than thirty years under an agreement for a perpetual easement, made before the previous use had continued long enough to ripen into a right by prescription.
2. An irrevocable license to use a driveway exists where expense has been incurred in erecting and maintaining gates upon the faith of an agreement for a perpetual easement or right of way over the land, and for more than thirty years the use has been acquiesced in.

(November 6, 1889.)

APPEAL by plaintiffs from a judgment of the Circuit Court for Dearborn County in favor of defendants in an action to enjoin defendants from using an alleged private way over plaintiffs' land. *Affirmed.*

The facts are fully stated in the opinion.

NOTE.—Easement defined.

An easement is a right which one person has to use the land of another for a specific purpose. *Jackson v. Trullinger*, 9 Or. 397.

It is a liberty, privilege or advantage, distinct from ownership in the soil (*Jamaica Pond Aqueduct Corp. v. Chandler*, 9 Allen, 185); a service or convenience which a neighbor has over that of another, by charter or prescription, without profit. *Post v. Pearsall*, 22 Wend. 433; *Anderson, Dict.*

It is not a tenancy (*Swift v. Goodrich*, 70 Cal. 106); but a privilege in the lands of another, and which the servient owner upon whom the burden is imposed, is obliged to suffer for the advantage of the dominant owner to whom the privilege belongs. 3 Kent, Com. 419; *Laumier v. Francis*, 23 Mo. 181. 6 L. R. A.

Messrs. Roberts & Stapp for appellants.
Mr. Creighton Dandy for appellees.

Mitchell, J., delivered the opinion of the court:

This was an action by Annie E. Nowlin and others against Luman O. Whipple and his wife, Nancy Whipple, the purpose of the suit being to obtain a decree perpetually enjoining the defendants from using an alleged private way over a tract of land which the plaintiffs own as tenants in common. Nancy Whipple is the owner of a 50-acre tract of land, and she and her co-defendant assert a right to a driveway twelve feet wide, and about 1,000 feet in length, across the plaintiffs' land, in order to gain access to the above-mentioned tract, which they cultivate. The facts pleaded and proved are substantially as follows: Prior to 1836 both tracts of land involved in the present suit were the property of Ezekiel Jackson, who died about that time. The tract now owned by the plaintiffs was inherited by and set off to the decedent's son, Jeremiah, and that owned by Mrs. Whipple, who is a daughter of Ezekiel Jackson, was acquired by her in like manner. While the land was thus owned by Mrs. Whip-

An easement is an incorporeal right imposed upon corporeal property. 3 Kent, Com. 419; *Pierce v. Keator*, 70 N. Y. 421; *Parsons v. Johnson*, 68 N. Y. 62; *Tardy v. Creasy*, 81 Va. 556.

It is a right appurtenant to the land and passes by a conveyance of that land with appurtenances. *Huntington v. Asher*, 36 N. Y. 604; *Peck v. Conway*, 119 Mass. 548; *Kramer v. Knauff*, 12 Ill. App. 115; *Louisville & N. R. Co. v. Koele*, 104 Ill. 455; *Spensley v. Valentine*, 34 Wis. 154.

That equity will protect easements annexed to private estate, see *McBryde v. Bayre*, 3 L. R. A. 861, note, 86 Ala. 458.

Easement and license distinguished.

An easement implies an interest in the land in or over which it is enjoyed (*Rowbotham v. Wilson*, 9

ple and her brother the Whipples used the driveway in question. In 1853 the first-named tract became the property of Jeremiah Nowlin, who agreed with the Whipples that if they would erect and maintain gates at each end of the driveway, and look after the division fence, they might continue to use the way perpetually across his land in order to reach their tract. The gates were erected and the agreement otherwise complied with.

There was some evidence tending to show that Jeremiah Nowlin was one of the commissioners who made partition of the land between the Jackson heirs, and that in adjusting their shares a right of way had been given in favor of the 50-acre tract over that owned by the plaintiffs, and that the way in dispute had been used continuously, under a claim of right, for forty years or more prior to 1835, when the plaintiffs, the descendants of Jeremiah Nowlin, sought to prevent the further use of the way.

The question now is whether, upon the foregoing facts, the judgment of the court denying the injunction can be maintained. To establish an easement or private way by prescription over the land of another it must appear that the way was used continuously for a period of twenty years, adversely to the owner, under a claim of right, and that the owner acquiesced in such use. *McCardle v. Barricklow*, 68 Ind. 356; *Parish v. Kaspars*, 109 Ind. 586, 7 West. Rep. 869; *Hill v. Hagaman*, 84 Ind. 287.

Adverse user is such a use of the property as the owner himself would exercise, disregarding the claims of others entirely, asking permission from no one, and using the property under a claim of right. Such a use of property continued without interruption for a period of twenty years or more, is equivalent to a grant. *Roots v. Beck*, 109 Ind. 472, 7 West. Rep. 238; *Blanchard v. Moulton*, 68 Me. 484.

Where it appears that one has enjoyed a right of way over the land of another for a period of twenty years or more, such enjoyment, without evidence as to how it began, is presumed to have been in pursuance of a grant, and the burden of showing the contrary lies on the owner of the land. The presumption which arises from proof of uninterrupted adverse use for the required period is that there was a grant, and this presumption can only be overturned by proof that the use was by permission, or in some other way not inconsistent with the rights of the owner of the land. *Garrett v. Jackson*,

20 Pa. 381; *Pierce v. Cloud*, 42 Pa. 102; *McArthur v. Carrie*, 32 Ala. 75.

The answer shows affirmatively that the defendants, after having used the way for a period less than twenty years, continued to use it for more than thirty years afterwards under an agreement with the owner. This constituted a permissive use under a license. Such a use cannot be adverse, and will not serve as the basis of a prescriptive right. *Shellhouse v. State*, 110 Ind. 509, 9 West. Rep. 68.

A general right, as by prescription, cannot be maintained by alleging and proving a particular or permissive right. *Parish v. Kaspars*, *supra*; *Pentland v. Keep*, 41 Wis. 490; *Chestnut Hill & S. H. Turnp. Co. v. Piper*, 77 Pa. 432; 9 Am. & Eng. Cyclop. Law, 367.

The answer stated facts sufficient to show an irrevocable license. After the way had been used for a long time—less than twenty years, however—there was an agreement, founded on a valuable consideration, that the defendants should enjoy a perpetual easement or right of way over the land. While it is well established that a mere naked license to use the land of another is revocable at the pleasure of the licensee, yet where a consideration has been paid, or value parted with, on the faith that the license shall be perpetual, it cannot be revoked to the injury of the licensee. *Snowden v. Wilas*, 19 Ind. 10; *Robinson v. Thraillkill*, 110 Ind. 117, 8 West. Rep. 556, and cases cited.

An executed parol license may become an easement upon the land of another, and may impose a servitude on the tenant or estate in favor of another dominant estate. *Dark v. Johnston*, 55 Pa. 164; 6 Am. & Eng. Cyclop. Law, 142; Washb. Easem. 24.

Where a parol license has been executed and acted upon, and expense incurred in perfecting an easement over the land of another in reliance on the license, it cannot afterwards be revoked without placing the licensee *in statu quo*. *Woodbury v. Parshley*, 7 N. H. 287.

The defendants erected and maintained gates at their own expense, upon the faith of an agreement that they were to have a perpetual easement to pass over the plaintiffs' lands. This agreement having been fully executed and acquiesced in by the parties who made it for more than thirty years, a court of equity will not now permit the license to be revoked.

There was no error. The judgment is affirmed, with costs.

El. & Bl. 123; Washb. Easem. 6), while a license carries no such interest, and is revocable at the will of the owner of the servient estate. *Veghte v. Raritan Water Power Co.* 19 N. J. Eq. 153; *Ex parte Coburn*, 1 Cow. 503; *Wolfe v. Frost*, 4 Sandf. Ch. 72; *Foster v. Browning*, 4 R. I. 47. See *Kyle v. Texas & N. O. R. Co.* (Tex.) 4 L. R. A. 276, note; *Cooker v. Cowper*, 1 Crompt. M. & R. 418.

While this is the law in many of the States of the Union, there is an exception to the rule in some of them in the case of executed licenses, where the licensee has incurred expense in the execution of the same, equity in such cases holding, for purposes of remedy, that such shall be deemed an executed contract. Washb. Easem. 23; *Hulme v. Shreve*, 4 N. J. Eq. 116; *Veghte v. Raritan Water Power Co.* 19 6 L. R. A.

N. J. Eq. 153; *Snowden v. Wilas*, 19 Ind. 14; *Stephens v. Benson*, 19 Ind. 369; *Wickersham v. Orr*, 9 Iowa, 260; *Beatty v. Gregory*, 17 Iowa, 114; *Berick v. Kern*, 14 Serg. & R. 237; *Lacy v. Arnett*, 33 Pa. 169; *Huff v. McCauley*, 33 Pa. 205; *Thompson v. McElarney*, 32 Pa. 174. See also *Larg v. Horn*, 45 Conn. 415; *Butt v. Napier*, 14 Bush, 39; *Dempsey v. Kipp*, 61 N. Y. 462; *Wieman v. Lucksinger*, 84 N. Y. 81; *Cronkhite v. Cronkhite*, 94 N. Y. 223; *Meek v. Breckenridge*, 29 Ohio St. 642; *United States v. Baltimore & O. R. Co.* 1 Hughes, 128.

The terms of the contract, however, and the acts of part performance, must be clear, definite and certain in their object and design. *Wieman v. Lucksinger*, *supra*; *Wheeler v. Reynolds*, 66 N. Y. 227.

ILLINOIS SUPREME COURT.

PEOPLE, *ex rel.* Abraham BROKAW,
Appts.,
v.
 COMMISSIONERS OF HIGHWAYS of
 Bloomington Township.

(...ILL...)

1. The existence of another specific remedy is not a bar under Rev. Stat., chap. 87, § 19, to a writ of mandamus which will afford a proper and sufficient remedy.
2. The words "may remove any such fence or other obstruction," in Rev. Stat. 1880, chap. 121, § 71, authorizing commissioners of highways to remove obstructions therein, impose upon them the imperative duty of removing obstructions from the public highway, and the word "may" is to be construed as "shall."
3. The word "may" will be construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power of the performance of the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or a public duty is imposed upon public officers, and the public or third persons have a claim *de jure* that the power shall be exercised.
4. A writ of mandamus may be issued to compel highway commissioners to remove a fence from across a public highway that has been used as such for more than twenty years, which

makes it impossible to travel such highway, where the facts are conceded.

(October 31, 1890.)

A PPEAL by relator from a judgment of the Appellate Court for the Third District affirming a judgment of the McLean Circuit Court sustaining a demurrer to a petition for a writ of mandamus to compel the Highway Commissioners to remove an obstruction from a certain public highway. *Reversed.*

The facts are fully stated in the opinion.

Messrs. James S. Ewing and James S. Neville for appellant.

Messrs. Tipton & Beaver for appellees.

Baker, J., delivered the opinion of the court:

This is a petition filed in the McLean Circuit Court by Abraham Brokaw, to compel the Commissioners of Highways of Bloomington Township to remove an obstruction from a highway. The petition alleges that petitioner is the owner of the east half of section 27, township 28 N., range 2 E., in McLean County, and that there is a public highway running north and south on or near the center line of said section, which public highway has been in use for more than twenty years. The petition then proceeds as follows: "Petitioner further represents that someone

NOTE.—*Mandamus to compel performance of official duty.*

Mandamus lies only where there is a specific undoubted legal right, or a positive ministerial duty to be performed, and there is no other appropriate remedy. *State v. Colleton Co. (S. C.) 9 S. E. Rep. 62.*

To authorize the granting of a mandamus, the legal right must be clear. *State v. McCabe (Wis.) 4 N. W. Rep. 322.*

Where the object of a petition for mandamus is the enforcement of a public right, the People are regarded as the real party, and the relator need not show that he has any real interest in the result. It is enough that he is interested as a citizen in having the law executed and the right in question enforced. *People v. Board of Education, 127 Ill. 613.*

Mandamus lies to compel a party to do that which it is his duty to do without it. It confers no new authority, and the party to be coerced must have the power to perform the act. *Brownsville Taxing Dist. v. Loague, 129 U. S. 493 (32 L. ed. 780).*

A ministerial duty on the part of a public officer, the discharge of which may be compelled by mandamus, is some duty imposed expressly by law, not by contract, or which arises necessarily as an incident to the office, involving no discretion in its exercise, but mandatory and imperative. *State v. Whitesides, 3 L. R. A. 777, 30 S. C. 579.*

When executive officers refuse to act in a case at all, or when by special statute or otherwise a mere ministerial duty is imposed upon them, that is a service which they are bound to perform without further question, then, if they refuse, a mandamus may be issued to compel them. *United States v. Black, 126 U. S. 40 (32 L. ed. 354).*

To compel removal of obstructions from highway.

In mandamus to enforce a purely public duty, not due the government as such, any private person

may move as relator. *State v. Weld, 39 Minn. 426.*

The Arkansas Act of March 18, 1887, providing for civil proceedings against one obstructing a highway, gives a cumulative remedy, and does not repeal *Manaf. (Ark.) Dig., § 1865*, making such obstruction a misdemeanor. *St. Louis, A. & T. R. Co. v. State (Ark.) 11 S. W. Rep. 1035.*

An obstruction to a highway will not be excused on the plea of its being necessary for the carrying on of the party's business though such obstruction be only occasional. *State v. Chicago, M. & St. P. R. Co. (Iowa) 41 L. R. A. 203.*

The City of New Orleans, in the exercise of its police power, has the right to remove unused lamp posts erected without authority at the street corners; and it may delegate such power of removal. *New Orleans Gaslight Co. v. Hart, 40 La Ann. 474.*

A highway commissioner proceeding to remove an encroachment from the highway is justified only by the fact that the highway is encroached upon, and is liable for any trespass he may commit if it proves not to be a highway and an encroachment thereon. *Krueger v. Le Blanc, 62 Mich. 70.*

The decision of a district court that the erection and maintaining, by a corporation, of telephone poles and wires in a city street, the fee of which is in the adjacent proprietor, is an infringement of the property rights of the owner of the land, although the proper public authorities have consented to such use of the street,—affirmed by a divided court. *Willis v. Erie Teleg. & Teleph. Co. 37 Minn. 347.*

Under Miss. Acts 1888, p. 206, §§ 27, 28, the Board of Mayor and Aldermen of the Town of Biloxi has jurisdiction to order the removal of a fence across a street. *Nixon v. Biloxi (Miss.) 5 So. Rep. 621.*

Building a fence upon a line which the builder believes to be upon his own land, according to a survey which he has made, cannot make him guilty of the offense of obstructing the highway, under the

has built a stake-and-rider fence across said public highway, causing an obstruction therein, so that it is impossible to travel said highway. Petitioner is informed and believes that said obstruction was placed there by the permission of the said Highway Commissioners, and by reason of the said obstruction, and the failure of said Commissioners to keep said road in repair, the travel theretofore thereon has been directed and the most of it now passes through petitioner's land. Petitioner further represents that said Highway Commissioners have had full knowledge for at least six months last past of the existence of such obstruction in said public highway, and have taken no steps to cause the same to be removed. Petitioner further represents that he has notified said Commissioners, in writing, of the existence of such obstruction, and requested them to take steps to have said obstruction removed; that the said Commissioners have failed, refused and neglected, and now absolutely refuse, to act in the premises, or to take any action with reference to said road whatever." The prayer of the petition is for a writ of mandamus "ordering and directing the Commissioners of Highways to proceed to have said obstruction removed." Upon the demurrer of the Commissioners of Highways to the petition there was final judgment in the circuit court in their favor, and against the petitioner, and that judgment was subsequently affirmed in the appellate court for the third district. The case is now brought here by further appeal.

Prior to the revision of the Statutes in 1874, the doctrine, as held in this State, was that where a highway had been obstructed, after having been opened and traveled by the public, the proper remedy was by prosecution under the Statute against the party causing the obstructions, and not by mandamus to compel the Commissioners of Highways to remove the obstructions and open the road. *Hale Highway Comrs. v. People*, 78 Ill. 208; *Yorktown Highway Comrs. v. People*, 66 Ill. 839; *People v. Curryea*, 16 Ill. 547.

The ground upon which the doctrine was chiefly placed was that, there being a complete and adequate remedy by indictment, relief by mandamus was precluded; and another ground stated in some of the cases was that no statute expressly imposed upon the commissioners the duty of removing such obstructions. The ground that there is another remedy equally convenient and effectual, and therefore mandamus does not lie, is 'abrogated by section 9 of the Act to revise the law in relation to mandamus, in force July 1, 1874, which provides that "the proceedings for a writ of mandamus shall not be dismissed, nor the writ denied, because the petitioners may have another specific legal remedy, where such writ will afford a proper and sufficient remedy." Rev. Stat. chap. 87, § 9.

Whether or not mandamus will lie since the revision of 1874, and under the present road laws, against highway commissioners, to compel the removal of obstructions from a public

Texas Statute, which makes the crime consist necessarily in the fact that the act was wilful. *Parsons v. State*, 26 Tex. App. 192.

An encroachment upon a street, the dedication and acceptance of which is established, is nothing more nor less than a nuisance, which cannot be sided by lapse of time. *Yates v. Warrenton*, 84 Va. 337.

When a municipality has control of streets, it may proceed in its corporate name to prevent or remove obstructions therein by judicial proceedings. *Ibid.*

A fence which intrudes into or invades a highway, but does not necessarily prevent public travel, is an encroachment, under Wis. Rev. Stat., § 1880; but it is not an obstruction which creates a liability for a penalty, under § 1823. *State v. Pomeroy*, 73 Wis. 664.

A fence which has encroached on the street for seventeen years, but which does not incommode the public use of the street, and was not placed there intentionally, wilfully or maliciously, cannot be summarily removed. *Pauer v. Albrecht*, 72 Wis. 416.

Statute; the word "may" construed.

Whenever the rights of the public or of a third person are involved, the word "may" in a statute is to be construed as "shall" (*People v. Brooklyn*, 22 Barb. 404; as where the purpose is to provide for the doing of something for the sake of justice (*Ex parte Simonton*, 9 Port. (Ala.) 390, 38 Am. Dec. 320; *Ex parte Banks*, 28 Ala. 28; *People v. Otsego Co.* 51 N. Y. 401; *Phelps v. Hawley*, 52 N. Y. 23), or for the doing of which the public has a claim *de jure*. *Rock Island Co. v. U. S.* 71 U. S. 4 Wall. 435 (18 L. ed. 419); *Mason v. Fearson*, 50 U. S. 9 How. 243 (18 L. ed. 125); *Ralston v. Crittenden*, 3 McCreary, 332; *Kennedy v. Sacramento*, 19 Fed. Rep. 540; *Fowler v. Perkins*, 77 Ill. 271; *Galena v. Amy*, 72 U. S. 5 Wall. 706 (18 L. ed. 6 L. R. A.

560); *Schuyler Co. v. Mercer Co.* 9 Ill. 20; *Nave v. Nave*, 7 Ind. 122; *Bansemmer v. Mace*, 18 Ind. 27; *Seiple v. Elizabeth*, 27 N. J. L. 407; *Newburgh & C. Turnp. Co. v. Miller*, 5 Johns. Ch. 114; *People v. New York Co.* 11 Abb. Pr. 114; *Com. v. Marshall*, 3 W. N. C. (Pa.) 132; *Norwegian Street*, 81 Pa. 849; *Cutler v. Howard*, 9 Wis. 309.

"May" in a statute means "must" or "shall" in those cases only where the public is interested, and the public or third persons have a claim, *de jure*, to have the power exercised. *Malcom v. Rogers*, 5 Cow. 193, 15 Am. Dec. 466; *Medbury v. Swan*, 46 N. Y. 202; *Phelps v. Hawley*, 52 N. Y. 27; *Baldwin v. New York*, 2 Keyes, 411; *Re Goddard's Estate*, 94 N. Y. 552; *Phelps v. Hawley*, 3 Lans. 166; *People v. Livingston Co.* 6 Hun, 574; *Long Island R. Co. v. Conklin*, 32 Barb. 386; *New York & E. R. Co. v. Coburn*, 6 How. Pr. 224; *Buffalo & B. Pl. Road Co. v. Lancaster Highway Comrs.* 10 How. Pr. 239; *Grantman v. Thrall*, 81 How. Pr. 466; *Pumpelly v. Owego*, 45 How. Pr. 238; *Waller v. Thomas*, 42 How. Pr. 342; *People v. New York Co.* 11 Abb. Pr. 121; *New York v. Furze*, 1 N. Y. Leg. Obs. 247; *Ex parte Chase*, 48 Ala. 811; *Horst v. Moses*, 48 Ala. 148; *Vason v. Augusta*, 38 Ga. 545; *New York v. Furze*, 3 Hill, 615; *Mason v. Fearson*, 50 U. S. 9 How. 243 (18 L. ed. 125); *Lovell v. Wheaton*, 11 Minn. 101; *Leavenworth & D. M. R. Co. v. Platte Co. Court*, 42 Mo. 175; *Steines v. Franklin Co.* 48 Mo. 178, 8 Am. Rep. 90; *Van Wagoner v. Paterson Gas Light Co.* 23 N. J. L. 297; *Kellogg v. Page*, 44 Vt. 351, 8 Am. Rep. 387; *Rock Island Co. v. United States*, 71 U. S. 4 Wall. 445 (18 L. ed. 423); *Fisher v. Clark*, 41 Barb. 332.

So where it is something which concerns third persons, and for the doing of which they have a claim based upon existing rights, "may" in the statute means "shall." *Ralston v. Crittenden*, 13 Fed. Rep. 508; *Knox v. Lee*, 79 U. S. 12 Wall. 457 (20 L. ed. 287); *Kellogg v. Page*, 44 Vt. 356; *Monmouth v. Leeds*, 76 Me. 28; *Steines v. Franklin County*, 48 Mo. 167.

road, and, if so, under what circumstances it will lie, does not appear to have been passed upon by this court.

The second section of the Act of 1883, in regard to roads and bridges in counties under township organization (Ill. Rev. Stat. ed. 1889, chap. 121, § 2), provides that the commissioners of highways shall have charge of the roads and bridges of their respective towns.

Section 71 of the Act (Ill. Rev. Stat. ed. 1889, chap. 121, § 71), provides as follows: "If any person shall injure or obstruct a public road by felling a tree or trees in, upon or across the same, or by placing or leaving any other obstruction thereon, or encroaching upon the same with any fence, or by plowing or digging any ditch or other opening thereon, or by turning a current of water so as to saturate or wash the same, or shall leave the cuttings of any hedge thereon for more than ten days, they shall forfeit for every such offense a sum not less than \$3, nor more than \$10, and, in case of placing any obstruction on the highway an additional sum of not exceeding \$3 per day for every day he shall suffer such obstruction to remain after he has been ordered to remove the same by any of the commissioners; complaint to be made by any person feeling himself aggrieved; . . . and provided, further, that the commissioners, after having given reasonable notice to the owners, or person so obstructing or plowing or digging ditches upon such road, of the obstruction, may remove any such fence or other obstruction, fill up any such ditch or other excavation, except ditches necessary to the drainage of an adjoining farm emptying into a ditch upon the highway, and recover the necessary cost of such removal from such owner or other person obstructing such road aforesaid, to be collected by said commissioners before any justice of the peace having jurisdiction."

Section 74, Ill. Rev. Stat., ed. 1889, chap. 121, § 74, provides for the recovery of fines and penalties in the name of the town, and that it shall be the duty of the commissioners to reasonably prosecute for all fines and penalties under the Act, and that, "in case of a failure of said officer to so prosecute, complaint may be made by any person, provided said person shall, before bringing suit in the name of the town, give a bond for costs, as is provided for in the case of nonresidents. But, whenever any person shall enter complaint to any commissioner, it shall be the duty of such commissioner to at once proceed to investigate as to the reasons of such complaint, and, if such complaint is found to be just, he shall at once proceed to prosecution."

The averments of the petition are not based upon the failure of the Commissioners to sue for the fines and penalties imposed by section 71, but upon their neglect and refusal to remove the fence from the public road, and the only relief prayed for is a writ commanding them "to proceed to have such obstruction removed, as is their duty according to law." It is urged that, as the Commissioners have charge of the roads in their town, they have a discretion in respect to the matter of their management, and that the courts will not coerce them by mandamus in regard to matters that are placed under their control and left to their discretion. Many of the powers given to

the commissioners are discretionary, but, in our opinion, the power here in question is not of that character. By section 2 of the Act it is made their duty to keep the roads of their town in repair, and section 5 requires them to exercise such care and supervision over such roads as the public good may require. The language of section 71 is "that the commissioners, after having given reasonable notice, . . . may remove any such fence or other obstruction," etc. We think it was intended by the Statute to impose upon the commissioners the imperative duty of removing obstructions from the public highway, and that the word "may" is to be construed as "shall." The word "may" in a statute will be construed to mean "shall" whenever the rights of the public or of third persons depend upon the exercise of the power of the performance of the duty to which it refers; and such is its meaning in all cases where the public interests and rights are concerned, or a public duty is imposed upon public officers, and the public or third persons have a claim *de jure* that the power shall be exercised. *Kane v. Footh*, 70 Ill. 587; *Fowler v. Perkins*, 77 Ill. 271; *Gillwater v. Mississippi & A. R. Co.* 13 Ill. 1; *Schuyler Co. v. Mercer Co.* 9 Ill. 20.

In the Statute before us it is clear that a duty is imposed upon public officers, and that the rights and interests both of the public and of third persons are involved, and that they have a claim, as matter of right, that the Highway Commissioners should exercise the power given them, and the duty devolved upon them of keeping the public road clear and free from fences or other obstructions that render it impossible to travel thereon. It is to be noted that the Statute provides that the fences or other obstructions are to be removed by the commissioners after they have given the notice mentioned therein. The number of days' notice thus to be given is not designated, and it is only required that it shall be a reasonable notice. There is, then, necessarily, some discretion in the commissioners in this regard. The duty on them to act is imperative, and the discretion given them is merely in respect to a matter which is incidental to the performance of such duty. It is as much incumbent upon the commissioners to exercise this merely incidental discretion, for the public good, by determining what is a reasonable notice in the particular case, and by giving it, as it is to remove the obstruction from the road. When a discretion is abused, and made to work injustice, it is advisable that it shall be controlled by mandamus. *Glencoe v. People*, 78 Ill. 332; Tapp. Mand. Am. ed. 66.

The claim is made by appellees that the court cannot tell from the petition whether they, appellees, in removing the fence, would be trespassers or not, and that the case is like the case of *Yorktown Highway Comrs. v. People*, 66 Ill. 839. At the time of that decision there was no statute which expressly imposed upon commissioners of highways the duty of removing obstructions in a highway. Besides this, the obstructions in that case were of long standing, were maintained under a claim of right by land owners, and were believed by the road authorities not to be within the limits of the highway. Here the truth of all the averments in the petition is admitted by the demurrer, and the conceded facts are that the fence and ob-

struction are across an existing public highway that has been used as such for more than twenty years, and that such obstruction makes it impossible to travel such highway. It is not perceived how it is possible, under such circumstances, that the Commissioners, in proceeding to remove the fence in conformity with the provisions of the Statute, could be trespassers. The writ of mandamus ever since the revision of the Statute relating thereto, is only issued in a clear case, and in the discretion of the court. *People v. Weber*, 86 Ill. 283. If, therefore, another case should arise which is like the *Yorktown Case*, *supra*, where the alleged obstruction is maintained by a third person under a claim of right, and is believed by the commissioners not to be within the highway, perhaps the court might, under its discretionary power, refuse the writ of mandamus, and leave the petitioner to the remedy by indictment, without he had, by a writ prosecuted by him in the name of the town, under the privilege given him by section 74 of the Road and Bridge Act of 1883, first established, as against the person maintaining the supposed obstruction, that the *locus in quo* was in fact a part of the public highway. Various minor objections are made to the petition. Suffice it to say that we do not regard them as well made, and that, in our opinion, it shows a good prima facie case for the awarding of a writ of mandamus. Our conclusion is that it was error in the circuit court to sustain the demurrer to and dismiss the petition.

The judgments of the Circuit and Appellate Courts are reversed, and the cause remanded to the Circuit Court.

George SCHNEIDER *et al.*, Appts.,

v.

Valentine C. TURNER.

(.....ILL.....)

1. A contract reciting that for a certain consideration one agrees to sell to another certain stock for a certain sum "if taken on or before" a certain future day, is a contract to give the latter the option to buy stock at a future time.

NOTE.—Parol evidence of consideration.

The actual consideration which passes between the parties may be shown by parol testimony to be different from the consideration recited in a conveyance (*Howell v. Moores*, 127 Ill. 67), different in kind from that expressed in the deed. *Scoggin v. Schloath*, 15 Or. 380.

It is admissible to show that the true amount of the consideration which passed between the parties was different from that expressed in the deed. *Booth v. Hynes*, 54 Ill. 363.

It is admissible to show the circumstances under which an assignment of a judgment was made, and the actual consideration. *Wade v. Carter*, 76 N. C. 171.

Parol evidence is admissible to prove the consideration of the bond and the character of the contract. *Wrightman v. Bowyer*, 24 Gratt. (Va.) 433.

Parol evidence of the consideration of a written contract for the sale of a house and store may be given. *Fusting v. Sullivan*, 41 Md. 162.
6 L. R. A.

2. Parol evidence to prove want of consideration for a written contract reciting payment of a consideration cannot be admitted for the purpose of showing that the transaction was a mere offer and not an actual contract.

3. An agreement to satisfy a contract by adjustment of differences between the contract and the market price is not necessary to make an agreement void as an option contract under Crim. Code, § 130.

4. A contract for the sale of stock, "if taken on or before" a certain future day, is void as an option contract, under Crim. Code, § 130, although it would not be void at common law.

(October 21, 1889.)

APPEAL by plaintiffs from a judgment of the Appellate Court, First District, affirming a judgment of the Superior Court of Cook County which sustained a demurrer to the complaint in an action brought to recover damages for an alleged breach of contract. *Affirmed.*

The contract the non-performance of which constituted the cause of action was as follows:

"Chicago, Nov. 11th, 1885.

"In consideration of one dollar (\$1.00) and other valuable considerations, receipt of which is hereby acknowledged, I hereby agree to sell to George Schneider, Walter L. Peck and Ferd. W. Peck seventeen hundred and eighty-six (1,786) shares of the capital stock of the North Chicago City Railway at six hundred dollars (\$600) per share, if taken on or before the fifteenth day of December, 1885. V. C. Turner."

The ground of demurrer was that the contract was in violation of chap. 88, § 130, Rev. Stat., which forbids option contracts.

The other facts are stated in the opinion.

Messrs. Cooper & Gurley, with *Messrs. Smith & Pence*, for appellants.

Messrs. Goudy, Green & Goudy, for appellee.

Wilkin, J., delivered the opinion of the court:

The sufficiency of the fifth and seventh counts depends entirely upon the construction to be placed upon the instrument therein declared on; the eighth, whether or not that instrument can be aided by averment and parol

Where a note recites no particular consideration, the consideration may be shown by extrinsic evidence. *Martin v. Stubbings*, 126 Ill. 387.

Parol evidence is admissible to supply the omission on the consideration stated. *Nedvidek v. Meyer*, 46 Mo. 600.

The recital in a contract of a money consideration paid does not exclude parol evidence of an additional consideration. *Bolles v. Sachs*, 37 Minn. 315; *Laudman v. Ingram*, 49 Mo. 212.

It is admissible to prove additional considerations not inconsistent with those recited in a deed. *Laudman v. Ingram*, 49 Mo. 212.

Evidence of a verbal collateral promise is admissible to show an additional consideration for the execution of a written contract. *Raub v. Barbour*, 6 Mackey, 245, 11 Cent. Rep. 717; *Wood v. Moriarty*, 4 New Eng. Rep. 260, 15 R. L. 518; *Kiekland v. Menasha Wooden Ware Co.* 68 Wis. 34.

Parol evidence to show that an antenuptial contract was made in consideration of a note for \$1,000 in addition to the consideration specially named therein, which was a note of \$300 payable at the

proof. The question upon which doubt is expressed in the opinion of the appellate court, viz., whether or not the paper set out in the several counts should be regarded as an agreement or a mere proposition for a sale, is eliminated from the case as here presented; counsel for appellants, admitting the correctness of the decision below in that regard, contending, however, that, although a contract between the parties of the date it bears, it is not an option contract, but a contract of purchase and sale of the shares of stock specified. It is said to be "an executory contract of sale, the time of its performance being of the essence thereof, the nonperformance of which would authorize the vendor either to rescind the contract, or, standing upon it, sue for damages for the breach." In support of this proposition many authorities are cited, and among them *Andrews v. Pontue*, 24 Wend. 289; *Ives v. Hazard*, 4 R. I. 27; *Spalding v. Hallenbeck*, 80 Barb. 299; *Barton v. McLean*, 5 Hill, 256; and *Wain v. Warlters*, 5 East, 10,—all of which are referred to in the opinion of the appellate court as holding the instrument in question, though executed by only one of the parties, but delivered to, and accepted by, the other, a contract, and not a mere offer. A careful examination of these and other like cases cited will show that, while they sustain the position in support of which they were cited by the appellate court, they throw no light whatever upon the question as to whether that contract should be construed to be a contract for an option or one for sale and purchase.

Looking at the instrument itself, it seems impossible to give it the construction contended for by appellants without violating plain and well-settled rules of law applicable to all instruments in writing. It must first be determined that there is some uncertainty as to the meaning of the contract, otherwise there is no room for construction; but, if construction can be resorted to, then all parts of the instrument must be construed in such a way as to give force and validity to all of them, and to all of the language used where that is possible; also to give to the words their common and generally accepted meaning. Here, however, the construction contended for ignores the first

clause of the instrument entirely, and gives to the word "if" in the last sentence, an entirely different meaning from that ordinarily attached to it; thus making the contract read, in effect: "I hereby agree to sell to George Schneider, Walter L. Peck and Ferdinand W. Peck 1,786 shares of the capital stock of the North Chicago City Ry. stock at \$600 per share, to be taken (or they to take the same) on or before the 15th of December, 1885." So read it would undoubtedly, under the authorities cited, be an absolute contract of sale of the shares of stock; but, reading the entire instrument, the question arises, if appellee in fact meant by the language "I hereby agree to sell," that he then and there did sell the shares of stock, and if appellants, by accepting the instrument, thereby meant that they had then and there bought the same, where was the necessity of saying, "in consideration of one dollar," etc., "I hereby agree to sell?" Why not have said, "I have this day sold;" or, as was said in the *Hazard Case*, *supra*, "I agree to sell," etc., "at . . . \$15,000.00?" And if the parties did intend by the last clause to make time of the essence of the contract, why say "if taken" instead of using words showing a mutual agreement to take within a time limited? The plain, unambiguous meaning of the contract, treating it as such, is that appellants paid appellee a valuable consideration for the refusal or privilege to buy 1,786 shares of stock of the North Chicago City Railway Company, at \$600 per share, at any time on or before the 15th of December, 1885,—a contract heretofore of frequent occurrence in commercial transactions, perfectly legal and enforceable at common law. In the absence of section 130 (Rev. Stat. Ill. chap. 88, § 130), no one, it seems to us, would hesitate to pronounce this a contract to give to appellants the option to buy railroad stock at a future time.

The argument in support of the eighth amended count admits that such is its effect on its face, but it is insisted it is competent to vary its terms by allegation and proof that no consideration was in fact paid by appellants, or received by appellee, for the agreement to sell, and thus show the transaction a mere offer on the part of appellee, without

husband's death, and semi-annual payments of \$30 each, is admissible, *Arms v. Arms*, 22 N. Y. S. R. 755, 113 N. Y. 646.

Where a collateral agreement, whether oral or written, constitutes a condition upon which the performance of a written contract depends; or where a contemporaneous agreement of one party forms the consideration for the written agreement in question,—such collateral or contemporaneous agreement may be shown. *Singer Mfg. Co. v. Forsythe*, 6 West. Rep. 553, 108 Ind. 334.

Parol evidence is admissible to show that at the time the assignment was executed a contemporary agreement was the consideration of the assignment. *Barclay v. Wainwright*, 86 Pa. 191.

Where, in pursuance of a previous parol agreement, a debtor conveys his entire interest in a mine to his creditor, parol evidence is admissible to prove the consideration both of the deed and the parol agreement. *Adams v. Lambard* (Cal.) 22 Pac. Rep. 120.

The consideration of a mortgage may be proved by parol, but an agreement destroying the effect 6 L. R. A.

of covenants therein contained cannot be so proved. *Murdock v. Cox*, 118 Ind. 266.

Parol evidence to impeach consideration.

As between immediate parties, it is admissible to impeach the consideration of an instrument. *Farwell v. Ensign* (Mich.) 10 West. Rep. 564.

Such evidence ought not to be excluded merely because such consideration was expressed in a writing distinct from the contract. *Wolf v. Fletemeyer*, 83 Ill. 418.

Defendant, sued on an agreement by him to pay to plaintiff a balance due on notes given by a third party, may introduce evidence to show that the consideration of such agreement by him was an executory promise by plaintiff, and that such promise remains unfulfilled. *De Camp v. Scofield* (Mich.) 42 N. W. Rep. 363.

The consideration of a mortgage debt may be questioned by a third person having an interest, and he may make proof of simulation by parol evidence and by the testimony of a party to the act. *Mossop v. His Creditors* (La.) 6 So. Rep. 154. See *Ferguson v. Rafferty*, *ante*, 83.

consideration, which became an agreement only upon the acceptance and offer to perform on the part of appellants. The general rule excluding parol evidence offered for the purpose of contradicting or varying the terms of a written instrument is not questioned. The validity of this count is based exclusively on the provisions of section 9, chap. 93, Rev. Stat., entitled "Negotiable Instruments." That section provides that a defendant may plead want or failure of consideration to a suit on a note or other contract, for the purpose of defeating a recovery in whole or in part, where the same was given without consideration, or where the consideration has failed. No authority is found in this section for permitting a plaintiff to prove a want of consideration for the purpose of varying the terms of his contract. This proposition is too clear for argument. The parties must be held bound by the contract as they wrote it. 1 Greenl. Ev. § 275. The right to vary or explain the consideration expressed in a written contract, or to prove that it was never paid, does not authorize the introduction of such testimony to affect the terms or validity of the contract. *O'Brien v. Palmer*, 49 Ill. 72; *Morris v. Tillson*, 81 Ill. 607. Still it is most earnestly insisted that, notwithstanding the instrument sued on is, on its face, an option contract, and although it cannot be changed into a mere offer by parol proof, yet it is not violative of section 130 by proper construction of that section. To maintain this position it is insisted that, by the prohibition of the Statute, the Legislature only intended to make unlawful such option contracts as contemplate a settlement by differences; that to come within the inhibition of section 130 the contract must be a gambling contract; that the option here meant is the option or right to elect whether to accept or deliver the stock or other commodity, or pay the difference between the contract price and the market price when the same should be accepted or delivered under the terms of the agreement. The language of the section, so far as applicable to this question, is as follows: "Whoever contracts to have or give to himself or another the option to sell or buy at a future time any grain or other commodity, stock of any railroad or other company, . . . shall be fined, . . . and all contracts made in violation of this section shall be considered gambling contracts, and shall be void."

The first question which suggests itself in considering the construction of this Statute contended for by appellants is, If their construction is the true one, why was the Statute enacted at all? Nothing is more clearly and firmly established by the common law than that all gambling contracts are void. It is equally well settled that all contracts for the purchase and sale of property, with the understanding or agreement of the parties—whether that agreement is expressed on the face of the contract, or exists by secret understanding—that the property is not to be delivered or accepted, but the contract satisfied by an adjustment of the differences between the contract and market prices, are mere wagers or gambling contracts, and void. 3

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Am. & Eng. Cyclop. Law, 873, and cases cited, note 1; *Cothran v. Ellis*, 125 Ill. 496, 14 West. Rep. 574. Long prior to the passage of this Statute it had been repeatedly so decided by this court. Therefore the section, as construed by counsel for appellants, serves no purpose whatever. If their construction is correct, when the Legislature declared that all contracts made in violation of section 130 should be considered gambling contracts and void, it only condemned contracts which were already gambling contracts and void. Certainly more than this was intended. It must be presumed that the object of the Legislature was to declare that unlawful which theretofore had been lawful. Prior to this Act it was lawful to contract to have or give an option to sell or buy at a future time grain or other commodity. Such contracts were neither void nor voidable at the common law. The Statute makes them unlawful and void in Illinois. The case of *Bigelow v. Benedict*, 70 N. Y. 202, cited by counsel for appellant, in which the contract sued on is admitted to be substantially the same as the one before us, well illustrates the effect of our Statute upon option contracts of this character. In that case the language of the contract was as follows: "Know all men by these presents, that I, Charles B. Benedict, for and in consideration of the sum of two hundred and fifty dollars, good and lawful money of the United States, to me in hand paid, the receipt of which is acknowledged, do agree to receive from W. O. Bigelow, at any time within six months from date he may choose to deliver the same, \$2,500 in gold coin of the United States, for which I agree to pay to the said Bigelow ninety-five per cent premium on the dollar, or at the rate of one hundred and ninety-five dollars in good current funds for each and every one hundred of coin. The said Bigelow does not contract to deliver the coin, but pays the two hundred and fifty dollars for the privilege of delivery or not at his option."

In the absence of statutory provision on the subject of option contracts, the New York Court of Appeals held the Bigelow contract valid and binding on the parties. We can perceive no good reason why it should not have done so. As we have before said, such contracts are valid at common law. But, suppose the validity of that contract is tested by the foregoing section of our Statute, will it be seriously contended that a recovery could be had in this State? If that contract is not in the teeth of section 130 of our Criminal Code, we are at a loss to perceive how one could be drafted that would be. But it is said this court is committed to the construction insisted upon, and, in support of the statement, *Wolcott v. Heath*, 78 Ill. 437; *Pickering v. Cease*, 79 Ill. 330; *Pearce v. Foote*, 113 Ill. 228; and *Tenney v. Foote*, 95 Ill. 99,—are cited. We have carefully re-examined each of these cases, and are unable to discover anything in them inconsistent with the view here expressed. The only case in which it can be said that this court has given its approval to a definition of the word "option" as used in the Statute is that of *Tenney v. Foote*, 95 Ill. 99, *supra*. In that case a written opinion, rendered by the

late Judge McAllister on the trial in the Circuit Court of Cook County, was, on appeal to the Appellate Court of the First District, adopted as the opinion of the appellate court, and on a further appeal to this court the same opinion was approved. In that opinion Judge McAllister quotes the definition of the word "option," as used in the Stock Exchange, from Webster's Dictionary, ed. 1873, p. 917, as follows: "A stipulated privilege, to a party in a time contract, of demanding its fulfillment on any day within the specified limit;" and the judge proceeds to say: "In practice, on the Stock Exchange, it was often the intention of the parties that no stock should be delivered, but the transaction settled upon differences. These became common, and the English Statute was aimed at its repression, because it was, in effect, gambling. Our Statute is directed against the same evil, and extends to transactions in grain and other commodities as well as stocks. So that the word 'option,' as used in the Statute here, taken with the context, means a mere choice, right or privilege of selling or buying, and it is the contracting for such choice, right or privilege of selling or buying, at a future time, any commodity, the Statute was intended to prohibit, as contra-distinguished from an actual sale or purchase with the intention of delivering and accepting the commodity specified." 4 Ill. App. 599. The logic of this opinion is certainly against the position sought to be maintained. *White v. Barber*, 128 U. S. 392 (81 L. ed. 243), and *Osgood v. Bauder*, 75 Iowa, 550, are also authorities against the construction contended for. See also *Webster v. Sturges*, 7 Ill. App. 560.

We agree fully with counsel for appellants as to the object of the Statute. It manifestly is to break down the pernicious practice of gambling on the market prices of grain and other commodities. How is this object sought to be accomplished? There was and is nothing illegal or even immoral in an option contract within itself. The evil aimed at nevertheless grew out of such contracts. As said by Judge McAllister, in the opinion referred to in *Tenney v. Foote*: "In practice on the Stock Exchange it was often the intention of the parties that no stock should be delivered, but the transaction settled upon differences;" and by Judge Andrews in the *Bigelow Case*, *supra*: "Contracts of this kind may be mere disguises for gambling." In this case the parties might have intended, if appellants called for the stock, to settle on differences. The contract could have been made the disguise for gambling on the future price of stock of the North Chicago City Railway. The question is not, Did they so intend, but Did not the Legislature regard such contracts as lying at the root of the evil aimed at, and strike at them? The treatment is heroic, but the evil was most malignant.

We can neither read out of the contract language which the parties put in it, nor into the Statute expressions which the Legislature, for a manifest purpose, omitted. The contract, tested by the Statute, is void, and therefore each count of the declaration obnoxious to the demurrer interposed.

The judgment must be affirmed.

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Ruth CAMPBELL *et al.*, *Piffs. in Err.*,

George W. CAMPBELL *et al.*

(.....Ill.....)

1. The dismissal of a bill to set aside a will is proper as to a defendant named in the will as executor, and also appointed thereby as trustee, with legal title to certain lands, where he refuses to act either as executor or trustee, and files a disclaimer of any interest in the estate; and such action renders him a competent witness for either party to the suit.
2. Persons who are both heirs and devisees of a testator, and who are made defendants in a bill to set aside the will, should be permitted to testify in behalf of the contestants, unless their interest, upon being ascertained, proves to be with the contestants.
3. The impairment of the mind of a testator by age and disease need not amount to lunacy or absolute imbecility in order to make his will invalid.
4. The capacity sufficient to comprehend a few details and make a simple will may be insufficient to dispose of a large estate by a complicated will requiring a remembrance of many facts and the comprehension of many details.
5. A person is possessed of the sound mind and memory required by the Statute to enable him to make a will, if at the time of making his will he has such mind and memory as enables him to understand the business in which he is then engaged and the effect of the disposition made by him of his property; otherwise not. The question as to his mental capacity should be determined in view of the circumstances of the particular case, and is for the jury.

(October 31, 1889.)

ERROR to the Circuit Court of Jersey County to review a decree in favor of proponents in an action to set aside a certain will. *Reversed.*

The facts are fully stated in the opinion.

NOTE.—Capacity to make will.

The law does not require any particular degree of understanding to render a testator competent to make his will. He is simply required to be of sound mind, to manage his own affairs, and to know intelligently what disposition he is making of them. *Harvey v. Sullens*, 58 Mo. 377; *Delafield v. Parish*, 25 N. Y. 9; *Harwood v. Baker*, 3 Moore, P. C. 222; *Den v. Johnson*, 5 N. J. L. 454.

The reasonableness or unreasonableness of the will is a prime element for consideration. *Evans v. Arnold*, 52 Ga. 182.

Where a mistress made testator believe that she had been brought to bed with several children, which he was weak enough to suppose were his, and he gave legacies to them on the strength of this supposition, they were not entitled to take under the will. *Davis v. Calvert*, 5 Gill & J. 269, 25 Am. Dec. 298.

The opinions of witnesses should not be received as evidence when all the facts on which such opinions are founded can be ascertained and made intelligible to the court or jury. *Chicago v. McGiven*, 73 Ill. 349. See *New York v. Pentz*, 24 Wend. 668; *Linn v. Sigbee*, 67 Ill. 75.

The presumption of law is in favor of testamentary capacity; but after shifting the burden by

Messrs. William Brown and J. S. Carr, for plaintiffs in error:

Dr. C. W. Enos being the executor named in the will and being specifically charged in the bill with fraudulent action in obtaining the pretended execution of the will, was properly made a defendant.

Story, Eq. Pl. 76, 77 a.

He, being interested in the object of this suit, was a necessary party.

Story, Eq. Pl. 76 b.

Being originally a proper party defendant, he was not a competent witness.

Alexander v. Hoffman, 70 Ill. 114; *Hurlbut v. Meeker*, 104 Ill. 543.

The witnesses Rachel C. Williamson, Mary Sweeney and Genevieve Smith were each competent witnesses.

The true test of the competency of these witnesses was, Would they gain or lose by a decree sustaining the bill?

McClure v. Otrich, 6 West. Rep. 65, 118 Ill. 320.

Being defendants these witnesses were prima facie competent, and before excluding them the court should have ascertained their real interest.

Corderoy v. Hughes, 6 Ill. App. 404.

Messrs. Chapman & Slaten and Morrison & Whitlock, for defendants in error:

Dr. Enos was not a proper party.

Frye v. Bank of Illinois, 10 Ill. 336.

He was a competent witness.

McClure v. Otrich, 6 West. Rep. 65, 118 Ill. 320; *Walker v. Dement*, 42 Ill. 376.

What Mr. Neely may have said after the will was executed was not competent evidence to overthrow the instrument.

Brown v. Hurd, 41 Ill. 121; *Hurd v. Brown*, 25 Ill. 616; *Alexander v. Uroslivait*, 44 Ill. 359; *Bragg v. Geddes*, 98 Ill. 52; *Rutherford v. Morris*, 77 Ill. 397.

The fifth instruction given by the court for the defendants in error was correct.

Kimball v. Cuddy, 4 West. Rep. 224, 117 Ill. 282; *English v. Porter*, 109 Ill. 285; *Willemijn v. Dunn*, 93 Ill. 511; *Brown v. Riffin*, 94 Ill.

560; *Trish v. Newell*, 82 Ill. 196; *Roe v. Taylor*, 45 Ill. 485; *Rutherford v. Morris*, 77 Ill. 397; *Meeker v. Meeker*, 75 Ill. 285; *American Bible Soc. v. Price*, 8 West. Rep. 66, 115 Ill. 623.

Shope, Ch. J., delivered the opinion of the court:

This was a bill in chancery by Ruth Campbell and others, heirs at law of Joshua Neely, deceased, to set aside his will, upon two grounds,—want of testamentary capacity of the deceased, and that undue influence had been practiced by Charles W. Enos and others to induce the testator to execute the supposed will.

By the will, Dr. Enos was appointed executor, and also trustee in respect of some of the land devised, and given large discretionary powers in respect of the application of the proceeds of the estate devised to him in trust. He refused to qualify as executor, and after this bill was filed made and filed a written disclaimer of any interest in the estate, or any part thereof, which would be affected by or be dependent upon the maintenance or setting aside of such supposed will, and afterwards filed his motion in writing to dismiss the bill as to him, for the reason that the bill showed he had no interest in the subject matter in litigation, in this: that the bill stated he was appointed executor by said will, and that on probate thereof he refused to act in that capacity, and that thereupon one Bowman was appointed administrator of the estate of Joshua Neely with the will annexed; and for the further reason that he had filed his disclaimer setting forth that he had no interest in the matter in controversy. The motion was allowed, and the bill dismissed as to said Enos, and this action of the court is assigned for error.

If Enos had qualified as executor, he would have been a necessary party to the bill. His refusal to qualify, and the appointment of an administrator, removed his interest as executor. But being a trustee of certain lands, and taking the legal title thereto under the will, he

showing that insanity existed prior to making the will, proponents must show that its execution was during a lucid interval. *Elkinton v. Brick*, 1 L. R. A. 161, 12 Cent. Rep. 383, 44 N. J. Eq. 154.

Influence, to be undue, must destroy free agency and amount to mental or physical coercion. *Ibid.*

The attestation clause is prima facie evidence of facts recited in it. *Ibid.*

Where testator makes the witnesses understand that he desires them to know that the paper is his will, and that they are to witness it, it is sufficient. *Ibid.*

Old age and physical infirmity not incapacity.

Old age, failure of memory, or habitual drunkenness, will not, *per se*, constitute incapacity to execute a will. *Van Aist v. Hunter*, 5 Johns. Ch. 143, 1 N. Y. Ch. L. ed. 1038; *Cookrill v. Cox*, 65 Tex. 689; *Thompson v. Kyner*, 65 Pa. 378; *Mairs v. Freeman*, 3 Redf. 207; *Higgins v. Carlton*, 28 Md. 144; *Cauffman v. Long*, 82 Pa. 73; *Harrison's App.* 100 Pa. 458; *Combs and Hankinson's App.* 15 W. N. C. 247,—case where testator was over 101 years of age, was blind and partly deaf; *Eddy's App.* 1 Cent. Rep. 93, 109 Pa. 406.

If he has the competent possession of his mental faculties, "a man may freely make his testament, how old soever he may be." *Blecker v. Lynch*, 1 Bradf. 470; *Rutherford v. Morris*, 77 Ill. 408.

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If deceased had sufficient capacity to make a will, and if the codicil is his voluntary act, it must stand. *Clarke v. Davis*, 1 Redf. 352.

From the mere fact of her advanced age no inference can be drawn unfavorable to proponents. *Cornwell v. Riker*, 2 Dem. 366.

The want of recollection of names is one of the earliest symptoms of the decay of the memory, but this failure may exist to a very great degree, and yet "the solid power of the understanding" remain. *Wilson v. Mitchell*, 101 Pa. 503.

The will of an aged man ought to be regarded with great tenderness, when it appears not to have been procured by fraudulent acts, but contains those very dispositions which the circumstances of his situation, and the course of the natural affections, dictated. *Potts v. House*, 6 Ga. 355; 50 Am. Dec. 351; *Leeper v. Taylor*, 47 Ala. 224; *Cheatham v. Hatcher*, 30 Gratt. 70, 32 Am. Rep. 660; *Kingsbury v. Whitaker*, 32 La. Ann. 1032.

If a testator has memory and mind enough to recollect the property he is about to convey, and to know the manner in which he wishes to dispose of it, and to know and understand the business he is engaged in, he has testamentary capacity, whatever may be his age, weakness or bodily infirmity. *Guild v. Hull*, 127 Ill. 523.

was a proper party defendant before his disclaimer. By the will certain lands were devised to Enos in trust, to apply the net income therefrom to the support of John Harper for life, and after his decease for the support, education and comfort of Rebecca Welch, and her daughter, Nancy B. Welch, with power of sale; and also another tract of land, in trust to apply the net income among William H. Smith and four children, Mary Welch, Bridget Minard, Alexander Welch and Gallant H. Boswell, and \$50 per annum to William Richard Neely and Richard Quinn, Jr., as he might deem just and equitable. Enos, never having accepted the trust or assumed to exercise the power conferred, had the right to disclaim, the same as he did, and thereafter ceased to have any interest in the estate or the litigation concerning the will. Lewin, Trusts, 195, 197, Hill, Trustees, 221.

This view also disposes of the second error assigned, that Enos was permitted, against the objection of complainant, to testify as a witness. By his refusal to act either as executor or trustee under the will, he ceased to have any interest in the subject matter in controversy, and became a competent witness for either party.

It is next assigned for error that the court refused to allow contestants to examine as witnesses Rachel C. Williamson, Mary Sweeney and Genevieve Smith, who were each defendants to the bill, and had suffered the same to be taken as confessed as to them. It is said they were nieces of the testator, and sisters of some of the complainants. Rachel C. Williamson testified that she was at George Campbell's house, who was one of the proponents of the will, some time prior to the making of the will, and that said George then said, in reference to Mr. Neely's making the will: "I had better go on licking. I am going to have him make a will." That she asked him if he thought Neely was in condition to make a will, and he said he was. That she told said George that he had better make her equal with him, or she would swear that he was not. She was then asked whether or not, when the will was made, the testator had sufficient mental capacity to make a will. This was objected to by the proponents of the will, because she was an heir at law of said Neely, and a party interested adversely to the proponents, and the court sustained the objection. She further testified there were three heirs of the original branch of the Neely family; that she was a niece of Joshua Neely, and had four brothers and three sisters; that is, there were eight in her branch of the Neely family. She was then asked this question: "Do you remember the conversation you had at the house of Joshua Neely with Uncle Joshua Neely and your brother William Campbell, in March, after the making of the will?"—which was objected to, and the court sustained the objection, upon the ground of the incompetency of the witness to reply. It will be seen that this witness was a niece of the testator; that said testator, Joshua Neely, had three brothers and sisters; and that, upon his dying intestate, his estate would descend to such brothers and sisters or their children. This would entitle this witness, as heir at law of Joshua Neely, he having died without issue, to one twenty-fourth part of his estate, after the

payment of the debts and expenses of administration. It was stipulated that the debts of the estate amounted to between \$10,000 and \$12,000. By the will 100 acres of land was devised to this witness for life, with remainder to her heirs. The land thus devised is claimed to be worth \$4,500. The court, however, refused to permit any inquiry to be made as to her interest for or against the will.

In Stewart Rapalje on Law of Witnesses, p. 298, § 171, it is said: "It is a well-settled rule that the competency of one offered as a witness to testify in the case will be presumed, and the party objecting to his competency must state the grounds of his objections." And on page 299, § 177, it is said: "The presumption being in favor of the competency, the burden is upon the objector to prove that one offered as a witness is incompetent to testify by reason of interest or otherwise. Thus, to exclude a witness on the ground that his testimony, if admitted, will tend to protect him from claims against him, it must first be shown that there is at least a prima facie case of liability against him, and that he is exposed to certain danger from such claims. The objector must point out to the court the ground of incompetency. The witness will not be excluded on the ground of the interest, if the question of his interest is in doubt." In section 174 of the same work it is said: "Objections to the competency of a witness having been made, the question of competency must be decided, no matter how difficult it may be to determine as to his interest. To reject him in such a case without deciding the question is error, and to admit him is equally erroneous."

The law affords two modes of determining the interest of a witness in the result of a suit: *first*, by examining him on his *voir dire*; and *second*, by extrinsic evidence.

The true test of the competency of these three witnesses is to be determined by ascertaining whether they would gain or lose by a decree setting aside the will. Being defendants, they were prima facie competent to testify on behalf of the contestants, and before excluding them the court should have ascertained their real interest. It devolved upon the party objecting to show the court that their interest was with the party offering them as witnesses, if that fact did not otherwise appear. If they would not gain by having the will set aside, they were competent; otherwise they were not. The will, which was before the court, showed that they were devisees thereunder; and, without further evidence on the subject, their evidence at least would appear to be adverse to the contestants, and in favor of the proponents of the will. The fact, if conceded, that they were heirs at law of the testator, would not, of itself, establish their incompetency, or show that they would take a greater share as heirs than as devisees.

Mary Sweeney testified that there were seven of her family, representing one third of the estate as heirs at law of Joshua Neely, so that as heir at law she would be entitled to the one twenty-first part of the estate of the deceased. She also testified that the land she lived on, being a part of that devised to her, was worth from \$3,000 to \$4,000, and that another tract devised to her was worth \$1,000. Without any further inquiry as to her interest, the court

sustained the objection to her competency, and the same ruling was made substantially as to witness Genevieve Smith. The contestants, to show the real interest or competency of these witnesses, proved by Bowman, the administrator, that the value of the estate was from \$75,000 to \$80,000, and that the value of the land devised to Mary Sweeney was \$4,280. This and the other proofs showed that her share in the estate as heir was about \$3,480, which would indicate that she was called to testify against her interest, and therefore competent. After this proof, contestants recalled Mrs. Sweeney, and asked her if she wanted the will set aside or not; whether she had any conversation with Joshua Neely in the fall before the will was made; whether she had any conversation with him in reference to any fear of those that were around him; and whether in that connection he expressed any fear to the witness of his life. The court sustained objections to each of these questions, and refused to allow the witness to testify, on the ground of her interest. We think there was error in holding these witnesses incompetent to testify without proof that their interest was with the contestants. In other words, the court should have ascertained their interest, and, if they were called to testify against such interest, they should have been permitted to testify.

The giving of the fifth instruction for the proponents is also assigned as error. The portion of the instruction of which complaint is made is that part which states that the fact, if proved, that Joshua Neely was at the time of the execution of the paper physically unable to look after his affairs or property, or that his mind was impaired by age or disease, if not to the point of lunacy or absolute imbecility, did not take from his legal capacity to make said will.

By section 1 of the Statute of Wills (Rev. Stat. chap. 148, § 1) "every male person of the age of twenty-one years, and every female of the age of eighteen years, being of sound mind and memory," is given the power to dispose of his or her property by will. The expression "sound mind and memory" has been held by this court to mean nothing more than "sound and disposing mind," and is equivalent to the term "sanity." *Yoe v. McCord*, 74 Ill. 33-40; *Dickie v. Carter*, 42 Ill. 377; *Andrews v. Black*, 43 Ill. 256.

Competency to execute a will does not exist unless the alleged testator has reason and understanding sufficient to comprehend such act. *DeLafield v. Parish*, 25 N. Y. 22; *Swimb. Wills*, pt. 2, § 4; *Marquess of Winchester's Case*, 6 Coke, 28; *Combes' Case*, Moore, 759; *Herbert v. Louns*, 1 Rep. Ch. 22, 23; *Mountain v. Bennet*, 1 Cox, Ch. 353.

In the *Marquess of Winchester's Case* it is said: "It is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions, but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason, and that is such a memory which the law calls 'sane and perfect memory.'"

In *Mountain v. Bennet*, 1 Cox, Ch. 353, it is said: "If a dominion was acquired by any person over a mind of sufficient sanity to gen-

eral purposes, and of sufficient soundness and discretion to regulate his affairs in general, yet if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind."

In *Greenwood v. Greenwood*, 3 Curt. Eccl. 327, Lord Kenyon said, in his charge to the jury: "I take it a mind and memory competent to dispose of his property, when it is a little explained, perhaps, may stand thus: Having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wished to dispose of it. If he had the power of summoning up in his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will."

In *Marsh v. Tyrrell*, 2 Hagg. Eccl. 84, Sir John Nicholl said: "It is a great, but not an uncommon, error to suppose that because a person can understand a question put to him, and can give a rational answer to such question, he is of perfect, sound mind, and is capable of making a will for any purpose whatever; whereas, the rule of law, and it is the rule of common sense, is far otherwise. The competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case." See also *Blewitt v. Blewitt*, 4 Hagg. Eccl. 419; *Boyd v. Elby*, 8 Watts, 70; *McTaggart v. Thompson*, 14 Pa. 149; *Brown v. Torrey*, 24 Barb. 583; *Hall v. Hall*, 18 Ga. 40.

In *Shropshire v. Reno*, 5 J. J. Marsh. 91, the court said that "the testator had not a disposing mind, or that if he even had it was not in a disposing state. . . . He was not entirely superannuated, nor was he absolutely *stultus* or *fatuus*, but all the facts combined tend to show that he had not 'a sound memory,' nor sufficient mind, nor a mind in a proper state for disposing of his estate 'with reason,' or according to any fixed judgment or settled purpose of his own."

In *Clark v. Fisher*, 1 Paige, 171, Chancellor Walworth said: "The general principles of law in relation to the capacity of a person to make a will are well understood. He must be of sound and discerning mind and memory, so as to be capable of making a testamentary disposition of his property, with sense and judgment in reference to the situation and amount of such property, and to the relative claims of the different persons who are or might be the objects of his bounty."

The question presented by the fifth instruction is whether the mind of the testator, when impaired by age and disease, must be impaired to the point of lunacy or absolute imbecility to deprive him of testamentary capacity, or to render him of unsound mind and memory, or to deprive him of a disposing mind. Absolute imbecility implies a total want of reason and an utter loss of memory. The language of the instruction is to be understood in its ordinary sense and acceptance.

An "imbecile" is defined by Webster as one "destitute of strength, either of body or of mind; weak; feeble; impotent; decrepit." "Imbecility" is defined as "the quality of being imbecile; feebleness of body or mind." The word

"absolute," in respect of the sense in which it is used in the instruction, is defined as "completed or regarded as complete; finished; perfect; total;" and the synonyms are "perfect;" "total;" and "complete." There are many degrees in the weakness of mind before reaching total, or perfect or absolute, imbecility,—that is, before reaching utter and complete destitution of reason or rationality; and it must be apparent to everyone that a man, before reaching this point, may be incapable of comprehending the extent or nature of his property or of claimants upon his bounty, and of making a rational selection among them.

The rule stated in Buswell on Insanity, § 365, is that, "to constitute a sound and disposing mind, it is not necessary that the mind shall be unbroken, unimpaired, unshattered by disease or otherwise, or that the testator should be in full possession of his reasoning faculties. So, if the testator be in a dying state, he has capacity, if, when his attention is roused, his mind acts clearly, and with discriminating judgment, in respect of the act to be done and its relations. Thus it is held that one may be competent to make a codicil, changing in two or three particulars the dispositions previously made by him in his will, although he might be incompetent to perform acts requiring the exercise of greater intellect or judgment, as to make an entirely new disposition of his property."

In note 1, Jarman on Wills, 88, it is thus stated: "The question is not so much, What was the degree of memory possessed by the testator, as, Had he a disposing memory? Was he capable of recollecting the property he was about to bequeath, the manner of distributing it, and the objects of his bounty? In a word, were his mind and memory sufficiently sound to enable him to know and understand the business in which he was engaged at the time when he executed his will?" See authorities there cited.

The author from whom we have before quoted (Busw. Insanity), at section 363, says: "Thus it is evident that a correct understanding of the act done must include an intelligent comprehension of its surrounding circumstances, and of its direct consequences and probable results. So, to constitute a sound and disposing mind, the testator must be able, not only to understand that he is by his will disposing of his property, but he must also have capacity sufficient to comprehend the extent of the property devised, and the nature of the claims of others upon him."

In *Converse v. Converse*, 21 Vt. 168, it is held that if the testator, when he made his will, "was capable of knowing and understanding the nature of the business he was then engaged in, and the elements of which the will was composed, and the disposition of his property as therein provided for, both as to the property he meant to dispose of by his will, and the persons to whom he meant to convey it, and the manner in which it was to be distributed between them," then he possessed a sound and disposing mind.

The same rule has in many cases been substantially adopted by this court. In *Roe v. Taylor*, 45 Ill. 485, we said: "An understanding of the nature of the business about which

the testator was engaged, of the kind and value of the property devised, and of the persons who were the natural objects of his bounty, and of the manner in which he wished to dispose of his property,—all these are evidence of the possession of testamentary capacity, unless, as the court very properly said, the testator was affected with some morbid or insane delusion as to some one of those natural objects of his bounty." See also *Trish v. Newell*, 63 Ill. 196; *Yoe v. McCord*, 74 Ill. 88; *Carpenter v. Calvert*, 83 Ill. 62; *Am. Bible Society v. Price*, 115 Ill. 628, 8 West. Rep. 66; *Freeman v. Eustis*, 117 Ill. 817, 5 West. Rep. 160, where the same rule in effect is announced.

We also said in *Meeker v. Meeker*, 75 Ill. 260: "It is a rule of law that a person who is capable of transacting ordinary business is also capable of making a valid will." If he is capable of buying and selling property, settling accounts, collecting and paying out money, or borrowing and loaning money, he must usually be regarded as capable of making a will. See *Lilly v. Waggoner*, 27 Ill. 895; *Myatt v. Walker*, 44 Ill. 485; *Rutherford v. Morris*, 77 Ill. 897; *Trish v. Newell*, *supra*; *Brown v. Riggan*, 94 Ill. 560; *English v. Porter*, 109 Ill. 286; *Bice v. Hall*, 120 Ill. 597, 9 West. Rep. 757; *Schneider v. Manning*, 121 Ill. 376, 10 West. Rep. 183. As to the capacity to make a deed of land, see *Lindsey v. Lindsey*, 50 Ill. 79; *Wiley v. Ewalt*, 36 Ill. 26; *Willemin v. Dunn*, 93 Ill. 511; *Miller v. Orwig*, 86 Ill. 109.

In *Yoe v. McCord*, *supra*, we said: "In 1 Redfield on Wills, 123, 124, the author states that 'the result of the best considered cases upon the subject seems to put the *quantum* of understanding requisite to the valid execution of a will upon the basis of knowing and comprehending the transaction, or, in popular phrase, that the testator should, at the time of executing the will, know and understand what he was about.' This last mode of expression of the doctrine is intelligible to a jury, and embodies about the whole rule upon the subject, so far as it can be profitably given to a jury."

When a court undertakes to inform them what amount of mental capacity a man must have, to know and understand what he is about, it is futile, and tends rather to mislead than to afford any practical aid to a jury."

We have also given sanction to the doctrine that a man may not be competent to make a will of one kind, owing to the nature and extent of the estate, when he may be competent to make one less complicated. *Trish v. Newell*, 63 Ill. 196. See also Buswell, Insanity, §§ 362-365; Beach, Wills, 175.

It follows, as a natural consequence, that if a man may make a valid will which is simple and easy of comprehension, and yet be incapable of making one which involves, as here, a very large estate, and the consideration of the natural claims of a large number of relatives upon him, the rule laid down in the fifth instruction cannot be a correct exposition of the law. Absolute imbecility incapacitates the party from making any kind of a will, even the simplest in form. This court has condemned an attempt on the part of the trial court to inform the jury what *quantum* of mental capacity must be retained to enable the party to make a valid will.

In *Trish v. Newell*, *supra*, we said: "We are unwilling to adopt so low a standard [of the capacity to make a will] as that approved in *Stewart v. Lispenard*, 28 Wend. 255, that wills of persons of the lowest degree of mental capacity are to be sustained if there is a glimmer of reason."

It is true that in *Blanchard v. Nestle*, 8 Denio, 37, mainly on the authority of the *Lispenard Case*, the doctrine that mere imbecility, however great, would not invalidate the will of the testator, provided he was not an idiot or a lunatic, is affirmed. But it is to be remarked that the case of *Stewart v. Lispenard* was subsequently overruled in *Delafield v. Parish*, 25 N. Y. 9, and is no longer to be regarded as an authority. The capacity to comprehend a few simple details may, in one case, suffice to enable the party to intelligently dispose of his property by contract or will, while in another case, if the estate be large, requiring the remembrance of many facts, and the comprehension of many details, and the disposition to be made is complicated, the same mental capacity may be wholly insufficient to that intelligent understanding of the business requisite to the making of a valid will. If, in the latter case, the party, because of weakness of intellect, is incapable of understanding and remembering the nature and extent of his property and the disposition he wishes to make of it, he has reached that stage of imbecility which disqualifies him, in the particular case, to make a valid will, but his imbecility has not necessarily reached totality,—is not necessarily absolute; for although, from the complicated character of the business he is endeavoring to transact, he is unable to comprehend it, or the effect or result of his act, yet if his affairs were less complicated he might intelligently comprehend them, and make rational disposition of his property. As before said, absolute imbecility would necessarily mark a stage in the malady when there was perfect inanition, when all mental vigor was lost, and the person affected would be incapable of exercising memory, or the process of reason, however slight, and therefore incapable of making any will, however simple in its details. Something more is required to give tes-

tamentary capacity than mere passive memory.

The true inquiry in every case therefore is, Did the person whose testamentary capacity is questioned have, at the time of making his will, such mind and memory as enabled him to understand the business in which he was then engaged, and the effect of the disposition made by him of his property? If he did, he was possessed of the sound mind and memory required by the Statute. And all degrees of impairment of the mental faculties, or dementia, whether senile or produced by other causes, which destroys this testamentary capacity, will disqualify, whether it has reached the stage of absolute imbecility or not. The inquiry is to be made in view of the circumstances of the particular case, and a determination reached by a consideration of the nature and character of the business performed under all the attendant conditions and circumstances. In this view the question of the mental capacity of the testator to make the writing alleged to be his last will and testament should be submitted to the jury. *Yoe v. McCord* and *Trish v. Newell*, *supra*.

It is, however, urged that the doctrine of the instruction is justified by expressions used in argument in a late case determined in this court. This is probably true, but upon examination it will be found that the principle contended for was wholly unnecessary to the determination there reached. The case referred to by counsel does not profess to overrule or modify in the least the rule announced in the many cases previously decided by this court, and to which we have referred. It frequently happens that principles unnecessary to the decision of the case are announced, which may be proper in argument, but which, when embodied in an instruction to a jury, would be improper or misleading. We are of opinion, however, that the instruction under consideration, in the respect indicated, does not announce a correct rule, and especially is this so in view of the circumstances of this case, and that it was improperly given. For the error in this regard, and in excluding the testimony of witnesses called by contestants for the reasons before stated, *the decree of the Circuit Court must be reversed, and the cause remanded, which is done.*

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

Franklin ROLFE, *Libellant*,

v.

THE Steamship BOSKENNA BAY, Her Engines, etc., F. Baufield & Sons, *Claimants and Appts.*,

(40 Fed. Rep. 91.)

1. A condition in a bill of lading by which the consignee agrees to be ready to receive his

goods when the ship is ready to unload, that in default thereof the ship may "land, warehouse or place them in a lighter without notice to the consignee and at his risk and expense after the goods leave the deck of the ship," exempts the ship from the duty of giving him any notice, but not from the duty of exercising reasonable care to discharge them at a suitable time and place.

2. It is not unlawful to stipulate in a bill of lading, which requires a ship to use reason-

NOTE.—Shipping, unloading cargo.

Where there is no express stipulation as to the time of unloading, an implied promise only arises to discharge in the usual and customary time. *The Glover*, 1 Brown, Adm. 168; *The Mary E. Taber*, 1 Ben. 105; *Philadelphia & R. R. Co. v. Northam*, 2 Ben. 1; *Burmester v. Hodgson*, 2 Camp. 488.

There is no general usage in commercial law 6 L. R. A.

which forbids the unloading of a vessel and the tender of freight on a day set apart for a church feast, fast or holiday, in the absence of any local statute. *Richardson v. Goddard*, 64 U. S. 23 How. 28 (16 L. ed. 412); *Pierson v. Richardson*, 1 Cliff. 386; *Salmon Falls Mfg. Co. v. The Tangler*, 1 Cliff. 398.

The vessel is bound to deliver her cargo at a proper place; that is, at a place proper for the

able care in discharging goods at a proper time and place, that no notice of discharge need be given to the consignee.

3. Where a consignee stipulates that goods may be discharged without notice to him and at his risk after they leave the deck of the ship, there is no negligence on the part of the master which will render the ship liable for injuries to the goods after their discharge if they are discharged at a place and time, and in a manner to which the consignee if present could not have reasonably objected, and placed in proper custody.

(October 7, 1899.)

APPEAL by claimants from a decree of the District Court in favor of libelant upon a libel in admiralty to recover damages alleged to have arisen through the improper discharge of fruit from the steamship Boskenna Bay and its consequent injury by frost. *Libel dismissed.*

The facts are fully stated in the opinion.

Mr. E. B. Convers, for appellants:

Under the contract for a delivery "from the ship's deck, where the ship's responsibility shall cease," with the privilege, in default of consignee's readiness to receive on ship's readiness to unload, "to land [the goods], without notice to, and at the risk and expense of the said consignee, . . . after they leave the deck of the ship," the delivery made upon the dock terminated the ship's responsibility.

The Santee, 2 Ben. 519, 7 Blatchf. 186; *Willis v. The City of Austin*, 3 Fed. Rep. 412; *The Kate*, 12 Fed. Rep. 881; *MacKinnon v. Minchin*, 7 Madras, H. C. Rep. 858; Leggett, Bills of Lading, p. 281; *Petrocchino v. Bott*, L. R. 9 C. P. 355; *The Ashbrooke*, 1 Revue Int. du Droit Maritime, 109; *The Trinacria*, 3 Revue Int. du Droit Maritime, 205.

The libelant cannot vary the clearly expressed intention of the parties in their written contract by proof of any alleged custom.

amount which is to be landed. *Kennedy v. Dodge*, 1 Ben. 315; *The Majestic*, 12 N. Y. Leg. Obs. 100; *Vose v. Allen*, 3 Blatchf. 230.

The cargo may be landed at the usual wharf. He is not required to transport it to the storehouses of the merchant. *Salmon Falls Mfg. Co. v. The Tangler*, 1 Cliff. 396; *The Peytona*, 2 Curt. 21; *Richardson v. Goddard*, *supra*.

Discharge imports unloading, not delivery. *The Kimball*, 70 U. S. 3 Wall. 48 (18 L. ed. 68); *Certain Logs of Mahogany*, 2 Sumn. 599; *Sears v. 4,885 Bags of Linseed*, 1 Cliff. 63.

But the owner of the whole cargo may order the discharge at any suitable place within the port. *The Boston*, 1 Low. 465. And see *Chickering v. Fowler*, 4 Pick. 371.

The master must discharge the cargo with proper care and skill. *Vose v. Allen*, 3 Blatchf. 230; *Desty, Ship. and Admr.* 226.

The owners of the vessel take the risk of the weather during unloading, and the consignee takes the risks of the roads and means of transportation from the dock. *The Grafton*, Olcott, 43, 1 Blatchf. 173.

After discharge and separation of consignments, if the consignee refuse to receive the goods, the master cannot leave or abandon the goods. He should put them in a place of safety, to avoid further liability. *Richardson v. Goddard* and *Vose v. Allen*, *supra*; *The Grafton*, Olcott, 43; *Ostrander v. Brown*, 15 Johns. 39; *Chickering v. Fowler*, *supra*; *The Eddy*, 72 U. S. 5 Wall. 481 (18 L. ed. 436); *Kohn v. Packard*, 3 La. 234; *The Tangler*, 3 Ware, 119; *Price* 6 L. R. A.

Turnbull v. 87 Blocks of Marble, 9 Fed. Rep. 820; *Schouler*, Bailm. § 811; *The Delaware*, 81 U. S. 14 Wall. 606 (20 L. ed. 784); *The Reeside*, 2 Sumn. 567; *Lindsay v. Cusimano*, 12 Fed. Rep. 504; *Liverpool & G. W. Steam Co. v. Suttler*, 17 Fed. Rep. 695, affirmed, 22 Fed. Rep. 560.

Mr. Franklin Bartlett for libelant.

Wallace, J., delivered the following opinion:

The libelant sues to recover damages for injury to a consignment of fruit. The fruit was injured by its exposure to frost, after nightfall, and during the night of March 21, 1883, while remaining in an inclosed pier, No. 44, North River. It was part of a cargo shipped at Palermo to various consignees at New York, by the steamer Boskenna Bay, under bills of lading, which provided for a delivery in good order to the consignee or assigns, "from the ship's deck, where the ship's responsibility shall cease."

The bills of lading also contained this condition: "Simultaneously with the ship being ready to unload the above-mentioned goods, or any part thereof, the consignee of said goods is hereby bound to be ready to receive the same from the ship's side, either on the wharf or quay at which the ship may lie for discharge, or into lighters provided with a sufficient number of men to receive and stow the said goods therein; and, in default thereof, the master or agent of the ship, and the collector of the port, are authorized to enter the said goods at the custom house, and land, warehouse or place them in a lighter, without notice to, and at the risk and expense of the consignee of said goods after they leave the deck of the ship."

The steamer arrived at the Port of New York March 18, was berthed at pier 44 March 19, made preparations to discharge March 20, but,

v. Powell, 3 N. Y. 822; *Gatliffe v. Bourne*, 4 Bing. N. C. 814; *Miller v. Steam Nav. Co.* 15 Barb. 361, 10 N. Y. 481.

He should store them, and notify the consignee or owners that they are stored subject to the lien for freight and charges, to avoid further liability. *The Eddy*, 72 U. S. 5 Wall. 495 (18 L. ed. 489); *Richardson v. Goddard*, *supra*; *Hyde v. Trent & M. Nav. Co.* 5 T. R. 889; *Brittan v. Barnaby*, 62 U. S. 21 How. 527 (16 L. ed. 177); *The Defiance*, 6 Ben. 162; *The Santee*, 7 Blatchf. 186.

He should store them with some third party, subject to the order of the consignee or owner, on payment of freight and charges. *Fox v. Holt*, 4 Ben. 301, *note*; *Atlantic & P. Guano Co. v. The Robert Center*, U. S. D. C. S. D. N. Y. not reported, referred to in 4 Ben. 301; *The Convoy's Wheat*, 70 U. S. 3 Wall. 225 (18 L. ed. 194); *Arthur v. The Cassius*, 3 Story, 81.

Where the consignee had given the ship's agent instructions not to store the goods left on the wharf, the vessel is not liable for damage thereto, if ordinary care was used to preserve them. *Ellsworth v. The Wild Hunter*, 2 Woods, 815.

So if the consignee is absent, goods should be stored; or if the indorsee of the bill of lading cannot be found, he should retain the goods till claimed, or store them prudently, for and on account of their owner. *The Thames*, 81 U. S. 14 Wall. 98 (20 L. ed. 804), 7 Blatchf. 226, 3 Ben. 379; *The Peytona*, 3 Curt. 21; *The Harriman*, 76 U. S. 9 Wall. 171 (19 L. ed. 632); *Fisk v. Newton*, 1 Denio, 45.

owing to the coldness of the weather, deferred discharging the fruit until March 21, on which day, the weather being sufficiently mild, she commenced to discharge in the forenoon, and continued till about 5 o'clock in the afternoon. The libellant was not formally notified by the ship's agent or master of the intended time and place of discharge, but he knew of her arrival, and on March 20 made entry of his fruit at the custom house, and obtained a permit for its removal from the dock, and on the morning of March 21 he paid the freight on his consignment, and received his delivery order. In landing the cargo the several consignments were separated, each lot being placed by itself. A number of the owners of different consignments were present, but the libellant was not present. The building in which the fruit was left was a safe place, but was not sufficiently warm to protect the fruit from the weather at freezing temperature, and the fruit was placed in proper custody. None of the various consignees who were present removed their fruit, but all that was landed from the ship, including the fruit of the libellant, was allowed to remain in the building until the next day, without any special protection against frost. Succinctly stated, the facts are that the cargo was landed at a suitable place for temporary purposes, and at reasonable hours, and in weather suitable at the time, and if the libellant had been present he could have examined and removed his fruit before any risk from cold weather attached; but the state of the weather was such as to denote risk of injury to the fruit from frost if it was suffered to remain over night at the place where it was left.

Upon these facts the case turns wholly upon the effect which should be attributed to the special conditions of the bill of lading. That instrument was the contract between the parties, and its provisions, so far as they are valid, conclude the libellant. Were it not for these special conditions, the liability of the ship to answer for the loss would be unquestionable. The duty of a carrier by water towards an owner of goods is not satisfied until a proper delivery has been made to the owner; and, unless a valid substituted delivery has been made, the strict responsibility of the carrier as an insurer of the goods does not terminate until actual delivery. If he does not deliver to the consignee actually, he must justify his substituted delivery by showing that it was in accordance with the terms of the particular contract, or with the usage of the port, or with the course of business between the parties. On the other hand, the consignee is bound to watch for the arrival of the ship, and be ready to receive the goods at the time and place at which they are deliverable. If the consignee refuses or neglects to accept the goods, the carrier must, if practicable, give notice to him of the time of the intended discharge; and, when this has been done, and the goods are discharged in a usual and proper place, and at the proper time, the substituted delivery stands in the place of an actual delivery. These are familiar rules of the law of carrier and consignee. No notice was given in the present case, and, except for the special clauses of the contract, the discharge of the goods as made would not have been a delivery. The special conditions are plainly

intended to relieve the carrier of any obligation, either to make actual delivery of the goods to the consignee, or to give him notice of the time or place of their intended discharge. As they are explicit, they preclude resort to any usage to define the rights and duties of the parties. Neither the condition for delivery "from the ship's deck, where the ship's responsibility shall cease," nor the condition whereby the consignee is to receive the goods "simultaneously with the ship's being ready to unload," absolves the carrier from the duty of making a proper delivery, actual or substituted; and it would, nevertheless, be incumbent upon the carrier to give due and reasonable notice of the time of intended delivery, and put the goods in a suitable place, under proper care and custody, to constitute a good delivery in the absence of the consignee. *The Santee*, 7 Blatchf. 186; *The Middlesex*, 21 Law Rep. 14; *Gleadell v. Thomson*, 56 N. Y. 194; *Tarbell v. Royal Exchange Shipping Co.* 110 N. Y. 179, 13 Cent. Rep. 154.

But the further clauses by which it is conditioned that, in case the consignee is not ready to receive the goods when the ship is ready to unload, the master or agent of the ship may land the goods at the wharf where the ship lies to discharge, without notice to the consignee, and at the risk of the consignee after the goods leave the deck of the ship, have no significance whatever, unless they mean that the consignee is not to be entitled to notice of discharge of the goods, and that they are to be at his risk, when landed at the place specified, if he is not ready to receive them when the ship is ready to unload. Unless the clause dispensing with notice to the consignee is intended to permit the carrier to make a substituted delivery in place of an actual one, without previous notice to the consignee, it is wholly inoperative, because notice of landing or warehousing goods, or that the ship is ready to discharge, is unnecessary when notice of intended delivery has been properly given. According to the contract also, when the goods are thus landed on the wharf at which the ship lies for discharge, they are to remain there at the risk of the consignee after they leave the ship's deck. Taking all the clauses together, by the bill of lading the consignee has, in effect, said to the carrier: "If you will transport my goods to New York for the freight mentioned, I will waive notice of delivery, and be ready to receive them when the ship is ready to unload them; and, if I am not thus ready to receive them, I consent that they may be landed, and remain at my risk at the wharf where the ship may lie for discharge."

Although exemptive provisions in bills of lading intended to relax the obligations of carriers in essential matters are not favored, and will not be extended beyond the narrowest construction of which they are reasonably capable, the courts cannot refuse to give effect to their explicit and unequivocal meaning, unless they are void because contrary to public policy. The terms of the present contract would not justify the carrier in discharging the goods at an unsuitable time or place, so as to expose them to obvious danger of being injured. If an unfit wharf were selected, or unfit weather, or an hour of the night when the consignee could not have a fair opportunity to examine his goods

and remove them, the discharge would not be a good delivery within the proper interpretation of the contract. The language used is satisfied by placing upon it a more restricted meaning. It is not to be read so literally as to frustrate the beneficial objects of the transaction to which it relates, and it cannot be supposed that the parties intended to protect the carrier against responsibility for his willful misconduct. Nor would the rules of interpretation of contracts authorize it to be read as intended to shield the carrier from the consequences of his own negligence. It was declared in *Magnin v. Dinamore*, 56 N. Y. 168, that a contract with a carrier will not be deemed to except losses occasioned by his negligence, unless that be expressly stipulated. The authorities are unanimous that no exception, which is not contained in the contract itself, can be ingrafted upon it by implication, either to excuse its nonperformance or the exercise of ordinary care in performing it. It suffices to refer to *N. J. Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 844 [12 L. ed. 465]; *Mich. Cent. R. Co. v. Mineral Springs Mfg. Co.* 83 U. S. 16 Wall. 818 [21 L. ed. 297]; and *Bank of Kentucky v. Adams Exp. Co.* 98 U. S. 174 [23 L. ed. 873].

Construing the contract as one that authorizes a discharge of the goods without notice to the consignee, but not as one relieving the ship from the duty of exercising reasonable care to protect them so long as they are, or ought to be, under the control of the master, it hardly seems debatable that such a contract is lawful. Judge Story says: "However universal the custom may be to deliver the goods to the owner at the place of destination, still the parties may, by their contract, waive it, and if they do the carrier is discharged." Story, *Bailm.* § 541. It cannot be doubted that if after the arrival of a ship the consignee instructs the master that he will not require notice of discharge of his goods, but will be ready to receive them whenever the ship is ready to unload at the wharf whereshe may lie, and that if he is not ready the master may leave the goods upon the wharf, the latter would be justified in acting upon the instructions. Nor can it be doubted that if the goods were discharged under such circumstances, pursuant to the instructions, the consignee would be estopped from questioning the sufficiency of the delivery. He could be heard to complain in case the master should discharge the goods at an unreasonable time, or should fail in some other respects to exercise reasonable care in respect to them, but not otherwise. If it is competent for the carrier and the consignee to agree upon a particular mode of delivery after the ship has arrived at the port of destination, it is not apparent why it is not equally permissible to do so at the time the goods are shipped. It has been decided that a usage by a carrier, known to the consignee, to leave goods at his usual stopping places, without notice to the latter, is equivalent to an actual delivery of the goods. *Gibson v. Outter*, 17 Wend. 306; *McHenry v. Phila. W. & B. R. Co.* 4 Har. (Del.) 414; *Price v. Powell*, 8 N. Y. 822.

Indeed the whole doctrine respecting con-

structive delivery by carrier to consignee is founded upon usage so general that it has become a part of the commercial law. A special usage has the effect of an express stipulation, because the law implies that it is incorporated in the contract between the parties, and no usage which is contrary to public policy will be recognized. If a good substituted delivery may be had without notice to the consignee, because a special usage or the course of business between the two parties sanctions it, upon principle and analogy the same result must follow where the parties have consented to it by an express contract.

It follows from what has been said that the ship in the present case made delivery of the goods to the libellant according to the contract, and that the contract was a valid one. Undoubtedly there are cases in which the duty of a carrier to a consignee is not wholly satisfied by a valid substituted delivery of goods. The carrier, as in the case of the steamship lines or railway companies which have warehouses at the termini of their carrying points, may, pursuant to usage or the recognized modes of doing business, deliver to himself as warehouseman. He then becomes subject to the liabilities of a warehouseman. So, also, the carrier although he may not become a warehouseman, may become a bailee of some other description, and remain liable in the capacity in which he receives or deals with the goods. And under no circumstances is it conceivable that the carrier, in making a substituted delivery of goods, would be justified in abandoning them, or negligently exposing them to injury. Subject to these qualifications, the carrier discharges his whole duty to the consignee when he discharges the goods in conformity with the contract. The libellant's goods were discharged at the proper place, at a suitable time of day, in suitable weather, and placed in proper custody. It was at a season of the year when the weather is uncertain, and all that could reasonably be expected of the master was that he should select a day suitable at the time. Moreover, the other consignees who were present apparently were willing to take the chances of the weather during the coming night. The master had no reason to suppose that the libellant would have objected to taking the same chances if he had been present. It is not suggested that there was anything that the master or agent of the ship could have done to protect the fruit over night beyond placing it in the building. Nothing was done to this end by the other consignees. Negligence cannot be imputed to the master for acts done strictly pursuant to previous authority from the libellant. The injury that happened to the fruit was the consequence of a risk which the libellant had agreed in advance to assume. Negligence always rests upon a breach of duty, and there was no breach of duty on the part of the ship if the master discharged the libellant's property at the place and time, and in the manner, to which the libellant could not have reasonably objected had he been present.

The libel is dismissed, with costs of this court and of the District Court.

OREGON SUPREME COURT.

DAWSON, *Resp't.*,M. E. POGUE and Charles Nickell, *Appt.*

(....Or.....)

- *1. The acts and declarations of parties to an action are not competent evidence in their behalf, unless they constitute a part of a transaction which bars or disproves the claim made against them, or are a part of a material fact in the case.
2. In an action against a party, to charge him with a debt as a copartner, it is competent for him to prove that at the time the debt was contracted the partnership had been dissolved; but, in order to render the proof admissible, it must tend to show an actual dissolution of the partnership relation.
3. Where, in an action against one N. and P. for goods sold to the latter, the complaint alleging that they were copartners at the time, N. denied in his answer, and in his testimony upon the stand, that he and P. were ever partners at any time, and offered in evidence a writing, purporting to have been signed by himself and P. at a time prior to the sale of the goods, to the effect that all partnership that may have existed between them, either express or implied, was that day at an end, which he testified was signed by himself and P. at the time it bore date, but which P. denied ever having signed, or having been asked to sign, or that any conversation had ever been had upon the subject; and no evidence was offered showing that the writing was executed as corroborative of or as a part of any transaction between the parties, or in accordance with any mutual understanding between them.—*Held*, that the writing was not admissible as evidence "tending to show that no partnership in fact existed between N. and P. at the time the merchandise was sold, or that any partnership that might have existed between them had been dissolved."
4. *Held*, further, that the facts and circumstances of the case, together with N's testimony, to the effect that, having heard that P. had represented to several parties that he was interested with him as a partner, to protect himself, he prepared the writing, and had it signed, negatived any inference that it was intended as part of a transaction to dissolve a copartnership between them, or corroborative of any such transaction.

Per Strahan, J., dissenting.

1. A partnership is formed by contract entered into between two or more competent persons.
2. Inasmuch as a partnership is formed by the mutual consent of the parties, it may be dissolved in the same way. Hence a paper signed by the members of a firm, declaring, in effect, that any partnership that might theretofore have existed between them was at an end, is competent evidence in favor of a retiring partner, as tending to prove that the remaining partner had no power to bind him by contracts for goods, made after the date of such writing.
3. A paper signed by the members of a firm, declaring a dissolution, is competent and material evidence on the issue as to the non-existence of the partnership after that time. If made

*Head notes by *TRAYNE, Ch. J.*

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at the time, it is evidence of the highest character, tending to prove the fact of dissolution.

4. A person sued as a member of a firm at a particular time may deny that he was a member thereof at the time alleged, and prove upon the trial a dissolution of said firm prior to the time charged in the complaint, without alleging affirmatively in his answer the fact of such dissolution. The dissolution is not new matter, constituting a defense, but a fact which may be shown under the denial of plaintiff's allegations.
5. Upon the dissolution of a partnership having a dormant partner, such dormant partner need give no notice of his retiring, except to persons who knew of his previous connection with the firm. As to all others, he owes no such duty, and cannot be made liable for debts contracted by the remaining member of the firm after he had retired.

On Rehearing.

- *1. Where, on an issue whether a partnership did or did not exist, the record disclosed that one of the defendants, "having heard his co-defendant had reported that he was a partner with him, and, to protect himself, prepared a writing," to the effect that all partnership which may have existed between them, express or implied, was at an end, which was signed by them, and offered such writing as evidence tending to show a partnership dissolution.—*Held*, (1) that the writing was not prepared and executed on the assumption of the existence of any partnership, but as a contradictory statement by the author of such reports; and that it could only be used as evidence to affect the credibility of such co-defendant; *Held*, (2) that as the writing was prepared to protect the defendant from the declarations of his co-defendant, but that as such declarations could not bind him, or create the relation of partners, the writing could not operate as a dissolution agreement; *Held*, (3) that, within the purview of the facts for which the writing was prepared, it was not done to dissolve a partnership which was supposed to exist; but, to give it that effect, it would place the defendant in the position of preparing his own and co-defendant's written declarations to serve that purpose, which was inadmissible.

2. When a bill of exceptions states that the court "instructed the jury upon all the issues involved in the case, and upon matters properly for their consideration," but such instructions were oral, and no part of the same are incorporated therein, and certain instructions asked and refused are set out and excepted to, whether, upon such a record, the court will presume that the instructions asked and refused, if good law, and applicable to the facts, were covered by the instructions given, not decided; but suggested that the rule as to such presumptions ought to be confined in its operations to the case in which written instructions have been required and given by the trial court, and that then, if a party complains that instructions asked have been erroneously refused, and fails to bring the written instructions given, it is right that such presumption should be indulged.

(November 10, 1880.)

APPEAL by defendant, Nickell, from a judgment of the Circuit Court for Jackson County in favor of plaintiff in an action to re-

+Head notes by *LORD, J.*

cover the contract price for certain merchandise alleged to have been sold to defendants as copartners. *Affirmed.*

The facts are fully stated in the opinions.

Messrs. H. K. Hanna, E. B. Williams, J. R. Neil and P. P. Prim for appellant.

Messrs. Cox, Smith & Teal and H. Kelley for respondent.

Thayer, Ch. J., delivered the opinion of the court:

This case, in the circuit court, was an action brought by the said Dawson against said Pogue and Nickell, to recover for merchandise alleged to have been sold to them, as copartners, under the firm name of M. E. Pogue, by certain merchants doing business at the City of Portland, and the accounts therefor assigned to said Dawson. It was alleged in the complaint that at all times therein mentioned the defendants were partners, under said firm name; that the said merchandise was sold to them, by the several merchants referred to, as such partners; and that the claims therefor were assigned to said Dawson. Pogue made default, but Nickell filed an answer, in which he denied "that he was a partner of the said M. E. Pogue during any of the times stated in the said complaint, or at any other time, under the firm name of M. E. Pogue, or otherwise." Said Nickell also denied the alleged indebtedness to the several merchants, and denied that the plaintiff, Dawson, was the owner or holder of the said claims, or any portion thereof. The main issue in the case was in regard to the alleged copartnership between Pogue and Nickell. A trial by jury was had, and a verdict returned in favor of the plaintiff; upon which the judgment appealed from was entered.

The appellant's counsel claims that Dawson was not the owner of the accounts sued on, nor entitled to maintain an action therefor; also, that the circuit court committed error in refusing to allow a certain paper, purporting to have been signed by Pogue and Nickell on the 28th of February, 1884, to be introduced generally, as evidence in the action, and in giving and in refusing certain charges to the jury. The only proof of the assignment of the claims to Dawson seems to have been a stipulation upon the part of Nickell to the effect that they were assigned to him by the respective parties owning them, by written instruments executed in due form, at the times and places alleged in the complaint, but without any valuable consideration, and for the sole purpose of enabling Dawson to enforce collection of them by action in his own name. The stipulation was given as a condition for changing the venue of the action from the County of Multnomah to the County of Jackson, and intended to save the necessity of producing the witnesses to the assignment at the trial. I cannot perceive that it makes any difference whether there was any consideration for the assignment of the claims, or for what purpose they were assigned, if the title to them passed to Dawson. The execution of a written assignment of the claims to Dawson presumably vested the legal title to them in him, and made him the real party in interest. The transaction, however, may have been only a sham; but that must be established by the defendants before they can claim that he was not

the real party in interest. The stipulation itself does not prove it.

The ruling in regard to the admissibility of said paper seems to have been made under the following circumstances: The plaintiff submitted testimony tending to show the copartnership between the defendants, as alleged in the complaint. Thereupon Nickell offered himself as witness in his own behalf, and, after testifying to his having loaned to Pogue \$1,500 and taken his note therefor, and a mortgage to secure the same, stated that he and Pogue were never partners at any time; that he heard Pogue was behind; he went to him to get the mortgage and secure the note; that after he had obtained the note, and having heard that Pogue had reported to several parties that he was interested with him, as a partner in the business, to protect himself, he prepared an agreement, bearing date February 28, 1884, which is the paper referred to, and of which the following is a copy:

Jacksonville, Feb. 28, 1884.

Know all men by these presents: That for value received all partnership that may have existed between the undersigned, either expressed or implied, is this day at an end. And it is further understood that neither M. E. Pogue, nor his heirs or assigns, have any claim whatever against Charles Nickell, or his heirs or assigns, on any account. It is further understood that the only claim Charles Nickell has against M. E. Pogue, his heirs or assigns, at this date, is on account of a certain note, given Charles Nickell by M. E. Pogue, for \$1,500, and dated January 30, 1884, with whatever interest may have accrued. Signed and delivered on the date above mentioned.

M. E. Pogue,
Charles Nickell.

Said Nickell further stated that he drew up the document, and that the same was signed by M. E. Pogue and himself, in his office at Jacksonville in the presence of each other, on the 28th day of February, 1884. His counsel thereupon offered said document in evidence, as tending to show that no partnership in fact existed between said Pogue and Nickell at the time the merchandise was sold; that any partnership that might have existed had been dissolved, and as evidence tending to impeach the statement made by Pogue, that no dissolution of the partnership testified to by him had been had. The plaintiff's counsel objected to its admission on several grounds. The court sustained the objection, holding that said paper was not admissible under the pleadings; that it was not admissible generally, as to the nonexistence of a copartnership, because it was the act of the defendants, Nickell and Pogue, and could not therefore be introduced in evidence in favor of Nickell; and that it could not be received as evidence tending to impeach Pogue, because no foundation had been laid for its introduction. To this ruling the appellant's counsel excepted. The appellant, by permission of the court, then called his co-defendant, Pogue, as a witness, who testified that the name signed to the paper, purporting to be his, was his signature. Witness was then asked the following question: "Did you not, on the 28th day of February, 1884, sign the paper?" to

which he answered: "No, sir; I did not. I never signed such an agreement at any date." In reply to other questions put to him, he answered: "I never did sign any such paper at all,—never was asked to sign it," that he never had had any conversation with Nickell about any such paper; that he could not account for his signature being on the paper, otherwise than that he was in the habit of writing his name on blank pieces of paper, and that it was possible that such piece of paper, upon which he might have written his name, had been found, and the writing inserted above his signature. Nickell, upon being recalled, testified that Pogue signed the paper, in his office in Jacksonville, on February 28, 1884, in his presence. The court thereupon allowed the paper to be read to the jury as evidence tending to impeach Pogue, by showing that he had made statements out of court contradictory to his evidence in court, but instructed the jury at the time that it was admitted for that purpose only, and should not be considered by them for any other purpose; and subsequently, in its charge to the jury, the court instructed to the same effect; to which counsel for the appellant excepted.

Said counsel also excepted to the refusal of the court to give certain other instructions as requested by them; but they have only brought here detached portions of the charge which the court did give, and it would be unfair to the court to consider those exceptions without knowing what instructions were given. It appears from the bill of exceptions that after the evidence had been introduced, and argument of counsel concluded, the court proceeded to instruct the jury upon all the issues involved in the case, and upon matters proper for their consideration; and it is apparent that its instructions covered those asked, and refused by the court, to which reference has been made.

It is not unusual for counsel to request a trial court to instruct the jury in regard to matters covered by instructions already given. It seems to me that it is the better rule to require counsel to bring here the instructions which the court did give, or have the bill of exceptions state what instructions were given, if any, in reference to the matter covered by the instructions asked and refused, before they are allowed to complain in consequence of such refusal. Where an ordinary instruction, relating to the matters in issue, is shown to have been requested by counsel and refused by the court, it should be presumed, in the absence of a contrary showing, that the refusal was made upon the ground that it, in substance, had already been given.

The real question to be determined in this case is the admissibility in evidence of the paper referred to. Ordinarily, acts and declarations of parties to an action are not competent evidence in their behalf. There are exceptions, however, to the rule. One class of the exceptions is where a transaction is alleged to have been had which, if true, would bar or disprove the claim sued upon. In such a case the transaction may be shown by the acts and declarations of the parties, where such acts and declarations constitute the transaction. That, in fact, is the only way in which it can be shown. Thus, in proving a tender for a debt, payment, an accord and satisfaction, and many other de-

fenses, what the defendant did and said at the time is admissible, as part of the *res gestæ*; but, where the acts and declarations of the party are not a part of the transaction, they are incompetent proof.

In the case at bar it would have been entirely legitimate for Nickell, after the testimony of the plaintiff tending to show his copartnership with Pogue in the business was submitted, to prove that prior to the time the debts in question were created, the partnership had been dissolved. Such fact, if established, would have disproved the plaintiff's claim. But the dissolution of a copartnership must be proved by evidence showing that the parties mutually agreed to dissolve it, and performed certain acts in accordance therewith. The dissolution of a copartnership requires the performance of acts, as much as the formation of one does. It is not what the parties agree to do which creates or dissolves the relation; but it is what they do in fact. A copartnership does not begin until the parties commence to do business under the partnership articles, and it does not terminate until they cease to do business under their agreement of dissolution. In the former case, they must launch the partnership; in the latter they must stop it, with a view of winding up its affairs. The paper was offered in evidence as tending to show that no partnership in fact existed between Nickell and Pogue at the time the goods were bought, and that any partnership that might have existed between them had been dissolved; and the question is whether the refusal of the court to admit it for the purpose mentioned was error. The paper was not offered as corroborative evidence that the partnership had been dissolved, nor as part of a transaction between the parties to dissolve it; nor could Nickell, in view of the facts of the case, have consistently offered it as such evidence, or as a part of such transaction, as he emphatically disclaimed, both in his answer and testimony, the existence of any such partnership at any time. He could not, in the attitude he maintained, claim or pretend that any such dissolution in fact had ever been attempted. He said in his testimony that, "having heard that Pogue had reported to several parties that he was interested with him as a partner in the business at Gold Hill, to protect himself he prepared an agreement," etc., referring to said paper. This wholly negatives any inference that the paper could possibly have been a part of a transaction to dissolve the copartnership, or was corroborative of any transaction for such purpose; and Pogue testified that he never signed any such paper at all, never was asked to sign it, and never had had any conversation with Nickell about any such paper.

The case involves these queries: Can a party who apprehends that an attempt may sometime be made to charge him with liability as a partner, by merely securing from his supposed copartner an instrument purporting to be an agreement of dissolution, be able thereby to successfully defend against an action brought to establish such liability? Is such a document admissible as evidence of facts inferable from it, in the face of a denial by the party of their existence, and where it was not prepared or executed for the purpose implied by its terms? Is

such a writing a part of a transaction, or corroborative of a transaction, shown positively never to have occurred? Can it be successfully maintained that such a paper, standing alone, by its own force and vigor, dissolves a copartnership relation existing between the parties to it? And, finally, does an instrument or document of that character, executed under the circumstances shown, constitute a dissolution of the partnership, or a part of the transaction of its dissolution, or corroborative evidence of its dissolution, or anything more than a declaration of the non-existence of such a partnership?

I cannot understand how there could have been any agreement between Nickell and Pogue to dissolve the partnership found by the jury to exist between them, conceding that they both signed the paper, as Nickell claimed. The evidence shows conclusively that there was no talk between them about a dissolution, or understanding had in regard to a dissolution. How, then, can it be claimed that a proposition of dissolution was ever made and accepted, or that the minds of the parties ever met in regard to the matter? What more could said paper have been, under the circumstances, than a formal writing, given without any intention of accomplishing any object or purpose beyond that of preventing Pogue from claiming that Nickell was a partner with him in the business at Gold Hill? I doubt very much whether any case can be found which holds that a writing executed under such circumstances is admissible in proof to establish facts similar to those which this one was offered in support of. If said parties had orally agreed to dissolve their partnership relations, and reduced the agreement to writing, and acted upon it, a dissolution would undoubtedly have been accomplished. But where no such foundation is laid nor such act done in pursuance of the writing, and the evidence clearly shows that none was intended, I do not see how any such result could follow. The actual dissolution of the partnership,—the change of Pogue's and Nickell's relations as such partners,—was the ground of the defense; and, unless the paper established that fact, it was immaterial.

This case is clearly distinguishable from that of *Emerson v. Parsons*, 48 N. Y. 560. There the defendants, who claimed that the partnership had been dissolved, testified to its dissolution, and then offered the following writing in evidence:

"This is to certify that I have purchased the interest of M. H. Parsons and Levi S. Parsons in the firm of E. F. Baker & Co.; and I hereby agree to assume all liabilities of the said firm, and hold M. H. Parsons and Levi S. Parsons harmless. E. F. Baker."

This was objected to by plaintiff, but received by the court, and the ruling excepted to. The judge subsequently charged that this writing was evidence of the dissolution of the firm, together with the proof of parol dissolution. It is evident that in that case the minds of the parties met in the agreement of dissolution. The parties had agreed to a dissolution before the writing was executed, and it was so executed and delivered as evidence thereof; and no question was made as to the existence of a copartnership between the parties prior to that time. Church, *Ch. J.*, who delivered the opinion of
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the court, said: "The two members of the firm who defend this action testified, in substance, that the partnership was dissolved on the 3d of September, and that this paper was then executed and delivered by Baker as evidence of the dissolution. . . . I apprehend such a writing, in part fulfillment of the parol contract, would be competent upon the question whether such an agreement was in fact made, as corroborative of the alleged parol contract, and as a part of the transaction." Another feature in that case which gives the transaction more the character of a dissolution of a partnership is the disposition of the assets and provision for the payment of the debts. But the widest difference between the two cases is in the acknowledgment of the existence of the partnership in the one and in the positive denial of it in the other, except so far as logical rules enforce its confession. In this respect the appellant necessarily occupies an equivocal position. He cannot consistently maintain his attitude. He says, in effect, that he was not a partner with Pogue at any time, and that the partnership was dissolved on the 28th day of February, 1884. If he had interposed a plea as inconsistent as his attempted proof, it would not have stood a moment; and I do not see that he is any more entitled to prove his case hypothetically than he is to plead it in that manner. His defense, in that respect, involves as great a degree of absurdity as the old case of the hunter who aimed to kill the animal, if a deer, and miss it, if a calf. According to my view of the case, the judgment appealed from should be affirmed.

Strahan, J., dissenting:

The plaintiff brought this action against one M. E. Pogue and Charles Nickell, in the Circuit Court of Multnomah County, to recover for goods, wares and merchandise alleged to have been sold by plaintiff's assignors to the defendants, as partners doing business under the firm name of M. E. Pogue. The venue was changed to Jackson County on the ground of the convenience of witnesses. Pogue made default, but Nickell filed an answer denying every material allegation of the complaint. A trial before a jury resulted in a verdict and judgment in favor of the plaintiff against the defendant Nickell, from which he has appealed to this court. The principal question litigated upon the trial was whether or not a partnership existed between Pogue and Nickell at the time the goods mentioned in the complaint were sold. In other words, whether the said goods were sold to M. E. Pogue, or to M. E. Pogue and Charles Nickell as partners. The questions requiring our attention on this appeal are those arising on the rulings of the court below in the admission and exclusion of evidence, and the giving and refusing of instructions. The appellant denied that any partnership ever existed between himself and Pogue. On the contrary, Pogue testified that such partnership existed at the time of the sale of the goods, and that Nickell was a dormant partner. The defendant Nickell testified that such partnership was never entered into; that it was talked of between himself and Pogue, and that he prepared duplicate articles of agreement with a view of forming such a partnership, but that the same were

never executed; that he advanced to Pogue \$1,500, for which Pogue gave him a note and chattel mortgage. The defendant Nickell also testified, in substance, that after he obtained Pogue's note bearing date January 30, 1884, and having heard that Pogue had reported to several parties that he (Nickell) was interested with Pogue as a partner in the business at Gold Hill, to protect himself he prepared an agreement dated February 28, 1884. Said paper was produced and called "Exhibit D," and after the witness identified the same, and testified that it was executed by Pogue and himself, in his office at Jacksonville on the day it bears date, the same was offered in evidence, and is as follows:

Exhibit D.

Jacksonville, Feb. 28, 1884.

Know all men by these presents: That, for value received, all partnership that may have existed between the undersigned, either expressed or implied, is this day at an end. And it is further understood that neither M. E. Pogue, nor his heirs or assigns, have any claim whatever against Charles Nickell, or his heirs or assigns, on any account. It is further understood that the only claim Charles Nickell has against M. E. Pogue, his heirs or assigns, at this date, is on account of a certain note, given Charles Nickell by M. E. Pogue, for \$1,500, and dated January 30, 1884, with whatever interest may have accrued. Signed and delivered on the date above mentioned.

M. E. Pogue,
Charles Nickell.

The appellant then offered this writing in evidence as tending to show that no partnership existed between said Pogue and appellant at the time the goods mentioned in the complaint were alleged to have been sold, and that any partnership that might have existed between them before that time, either express or implied, had been dissolved by said writing. The respondent objected to the introduction of this writing in evidence, because it was in the nature of impeaching evidence,—it tended to impeach Pogue; and that no proper foundation had been laid for its introduction, and that it was not competent on the question of the dissolution of the partnership, for the reason that no foundation was laid in the pleadings for its introduction; and, further, it was incompetent for the purpose of proving that no partnership existed and said document was immaterial. The court excluded the paper from the jury, and this is the first assignment of error demanding our attention.

1. A partnership is formed by contract between two or more competent persons. *Kelley v. Bourne*, 15 Or. 476.

Its terms and purposes, as well as its duration, are all conventional, and are within the power of the parties. As the partnership is formed by mutual consent of the parties, it may be dissolved in the same way. 1 Collyer, Partn. § 105; Story, Partn. §§ 267a, 268; Parsons, Partn. *384.

If this paper was executed as it purports to have been, its legal effect was to dissolve whatever relations of partnership may have existed between the defendants at the time. It expresses the will of the parties that any partner-

ship relations that might theretofore have existed between them were at an end; and that is all that was necessary to accomplish that result, as between themselves. I think, therefore, that it ought to have been admitted in evidence, when offered by the appellant. If it is what it purports to be,—and of that the jury was to judge as a matter of fact,—it was material and competent evidence on the issue, as to the non-existence of the partnership, and the court erred in excluding it. *Emerson v. Parsons*, 48 N. Y. 560; *Oregler v. Durham*, 9 Ind. 375; *Skinner v. Tinker*, 84 Barb. 333; *Pine v. Ormabee*, 2 App. Pr. N. S. 875; *Carlton v. Cummins*, 51 Ind. 478; *Wood v. Gault*, 2 Md. Ch. 433; *Gardiner v. Bataille*, 5 La. Ann. 597; *Bank of Montreal v. Page*, 98 Ill. 109; *Boyd v. McCann*, 10 Md. 118.

In *Boyd v. McCann*, *supra*, it is held, in effect, that a notice of the dissolution of a partnership, published in a newspaper, though not *per se* sufficient to show either that the dissolution took place on a certain day prior to the publication, or that the parties dealing with the firm and others had notice of the dissolution on that day, is yet admissible in evidence as a circumstance tending to show these facts.

So, in *Bank of Montreal v. Page*, *supra*, it is held that where a partnership is entered into for one year it may be terminated, by mutual consent, at any time the parties may choose.

And in *Gardiner v. Bataille*, *supra*, it was held that, if a partnership could be established by parol, it was not easily to be perceived why it could not be avoided in the same manner. Such evidence no more contradicts the act than proof of payment by a witness contradicts a promissory note.

So, in *Carlton v. Cummins*, *supra*, it was held that, where no definite time for the continuance of a partnership had been agreed upon, it may be dissolved at any time, at the option of any member of the firm.

And in *Pine v. Ormabee*, *supra*, it was held that a partnership for no definite period is dissolvable by either party by mere notice; and such notice may be implied.

In *Skinner v. Tinker*, *supra*, it was decided that, where the partnership has no limit in respect to time, it may be dissolved by either partner at any time.

An in *Oregler v. Durham*, *supra*, it was said: "As tending to prove the fact of a dissolution of the partnership, the statements of the members of the firm, jointly made to third persons, of the fact, were admitted. This is objected to because the statements were not made in the presence of the plaintiff. Partnerships formed by parol may be dissolved by parol agreement. When so dissolved, how may the fact of dissolution be proved? There being no written evidence of it, we do not see how it can be shown, except by the declarations and acts of the parties. Had the parties published a notice in an Indianapolis newspaper of the fact of such dissolution, we suppose it might have been given in evidence, though the plaintiff had never seen it. Yet such a publication would have been but the parol declaration of the parties themselves. If such a publication would have been admissible evidence, why should not their joint declarations, orally made to the public, also be admissible? This plaintiff then

stood in no relation to the firm requiring notice. We do not say either of the above items of evidence would be sufficient. It certainly would not be conclusive, but would be admissible as tending to prove the fact. Their declarations and acts touching the subject are continuous *res gestæ*."

It was, in effect, insisted upon the argument that Nickell had precluded himself from proving a dissolution of the alleged partnership because he had denied its existence in his answer. If there never had been any partnership between Nickell and Pogue, then Nickell never became liable for the goods purchased by Pogue. If the partnership once had an existence, but was dissolved, by the mutual agreement of Pogue and Nickell, before the goods were purchased, and Nickell was unknown to the plaintiff's assignors as a partner, then he would not be liable for the purchase price of said goods. It is not, therefore, perceived upon what legal principle this objection can rest. Nickell was unknown to the plaintiff's assignors at the time the goods were sold. They did not rely upon his credit. He did not in any manner deceive or mislead them. Why, then, should he be precluded from proving that, if such alleged partnership ever existed, it had been terminated before the goods were purchased? It was argued that, logically, a partnership that never had any existence could not be dissolved. True; but it is sometimes difficult to determine, upon admitted facts, whether the relations of partners existed or not. When Nickell learned that Pogue had reported that he was a partner, I think he had the right, for his own protection, to enter into an agreement with Pogue dissolving such alleged partnership. If such partnership did exist, said agreement would discharge Nickell from its duties and responsibilities. If it never existed, the agreement could injure no one. Most of all, it could not injure the plaintiff's assignors, who did not hear of said alleged partnership, so far as appears from this record, until long after the sale of the goods. No authority was cited by respondent's attorney to support his contention on this point, and I have been unable to find any. On principle, and aside from authority, I am satisfied the rule is the other way. As a mere question of pleading, a defendant is required by the Code, after making such denials as his case will justify, to allege new matter constituting a defense, but not matter which merely controverts, or is inconsistent with the right set up by the plaintiff. The issue as to the existence of the partnership was already made by the denials in the answer. The defendant would not have been permitted to allege a dissolution, for the reason that such allegation would have been clearly redundant. On the issue, as formed, it was proper to introduce all competent evidence which either party desired, tending to prove or disprove the existence of the partnership at the time of the alleged sale.

2. The court, in excluding said Exhibit D, said "that it was not admissible generally, as to the existence of a copartnership, because it was the act of the defendants Nickell and Pogue, and could not, therefore, be introduced in evidence in favor of Nickell." This ruling seems somewhat obscure; but, however meant

by the learned circuit judge, as applied to the document in question, it was erroneous and misleading. It was offered to disprove, or as tending to disprove, the existence of a partnership between Nickell and Pogue at a particular time; and it was competent evidence for that purpose. It was original evidence on the very fact in controversy. It was the act of the defendants, but it was not for that reason incompetent. The partnership, if it ever existed, was formed by the agreement of these parties. It could have been formed in no other way. Why they could not dissolve it, and why the agreement of dissolution may not be shown, when proof of the fact became material, has not been in any manner explained to us.

3. The court refused the following instructions asked by the appellant Nickell; to which refusals, in each instance, an exception was taken: "(1) That a general partnership may be dissolved by the mutual agreement of the parties; and, if you find that M. E. Pogue and Charles Nickell did, on the 28th day of February, 1884, mutually agree that any partnership existing between them should cease, and no longer exist, then, and in that event, all partnership at that time existing between them was dissolved, and they were no longer partners. (2) If you find from the evidence that M. E. Pogue and Charles Nickell were not partners from and after February 28, 1884, the plaintiff cannot recover against Nickell in these actions, unless you further find that some or all of those parties with whom Pogue made these accounts knew at the time they furnished the goods and merchandise of a partnership existing between the said M. E. Pogue and Charles Nickell, prior to said dissolution of February 28, 1884."

The first of these instructions should have been given, for the reasons already given in considering the ruling of the court in excluding Exhibit D from the jury. I think the second instruction correctly stated the law applicable to the case of a dormant partner, when sued on account of the transactions of the remaining partners after he had retired from the firm. There was no proof that Nickell gave any notice that he had retired, or ceased to be a member of the alleged firm; nor was such notice necessary, if he was a dormant partner. *Newmarch v. Clay*, 14 East, 289; *Heath v. Sansom*, 4 Barn. & Ad. 179; *Carter v. Whalley*, 1 Barn. & Ad. 11; *Grosvenor v. Lloyd*, 1 Met. 19; *Philips v. Nash*, 47 Ga. 218; *Nussbaumer v. Becker*, 87 Ill. 281; *Cregler v. Durham*, 9 Ind. 375; *Scott v. Colmesnil*, 7 J. J. Marsh. 416; *Le Roy v. Johnson*, 27 U. S. 2 Pet. 186 [7 L. ed. 391]; *Magill v. Merrie*, 5 B. Mon. 168; *Kennedy v. Bohannon*, 11 B. Mon. 118; *Bernard v. Torrance*, 5 Gill & J. 883; *Boyd v. Ricketts*, 60 Miss. 62; *Kelley v. Hurlburt*, 5 Cow. 534; *Holdane v. Butterworth*, 5 Bosw. 1; *Davis v. Allen*, 8 N. Y. 168; *Vaccaro v. Toof*, 9 Heisk. 194; *Pratt v. Page*, 82 Vt. 18; *Benjamin v. Covert*, 47 Wis. 875; *Warren v. Ball*, 87 Ill. 76; *Cook v. Penrhyn Slate Co.* 86 Ohio St. 185.

4. The court refused the following instruction, asked by the defendant Charles Nickell: "That the duty of a retiring dormant partner to give notice of the dissolution of the partnership is a duty which he owes to those who before that time had some knowledge of the

connection with the firm. To strangers having no such knowledge, he owes no such duty. As to them, he can only be charged as a partner (when in fact he is not) by showing that he in some way misled them, as that he held himself out to the world as such or that he held himself out to them. If you find that a silent or dormant partnership existed between Nickell and the said Pogue, but that Nickell retired from said firm prior to the purchase of the said goods for which these actions were brought, the plaintiff cannot recover in said actions, unless you further find that Nickell in some way misled the parties by whom said goods were furnished, by holding himself out to the world as a partner, or to them, or knowingly allowing someone else to do so."

This instruction should have been given. It is plain elementary law; and it is difficult to suggest any plausible reason for its refusal. The authorities already cited abundantly show that a dormant partner, retiring from the firm, need give no notice of the fact of his retiring, except to those who had knowledge that he had been a member of it. Those persons who had no previous notice that such retiring partner had been a member of the firm could have no interest in knowing of the dissolution, for the reason that such retiring dormant partner could not be rendered liable to them for new debts contracted by the remaining members of the firm. This instruction should have been given, and its refusal was error.

There were some other points made upon the argument by the appellant, but their consideration is not deemed important at this time. What has been said is decisive on the present appeal, and requires that the judgment be reversed, and a new trial had in the court below.

A rehearing having been subsequently granted, after argument, *Lord, J.*, on November 10, 1889, delivered the opinion of the court:

The argument at the rehearing properly suggests two questions for our determination. These are: *first*, whether the writing purporting to be a dissolution agreement was properly excluded from the consideration of the jury, except for the purpose stated in the bill of exceptions; and *second*, whether, when a bill of exceptions states that the court "instructed the jury upon all the issues involved in the case, and upon matters properly for their consideration," but no part of such charge or instructions are incorporated therein, and certain instructions asked and refused are set out and excepted to, the court will presume, upon such a state of the record, that the instructions asked and refused were covered by the instructions given.

The facts have already been sufficiently set out in the preceding opinions, and a brief outline of the pleadings, and some of the evidentiary facts, will be all that is necessary to introduce the question involved in our first inquiry. By the complaint, the defendants were charged as copartners under the firm name of M. E. Pogue, and as liable for certain merchandise sold and delivered to them as such, at the times therein mentioned. Pogue made default, but the defendant Nickell answered, in which he denied that he was a partner during any of the times, as alleged, or at any other time, under the firm name of M. E. Pogue, or otherwise. The

object of the pleadings in an action is to arrive at a specific issue upon a given and material point; and here the existence of a partnership, as alleged, was the material point upon which the issue was joined. It constituted the main ground of contention. As outlined by his answer, the theory of the defendant Nickell's defense was that no partnership ever existed between the defendant Pogue and himself; and this theory he maintained and supported in the witness box, swearing "that he and Pogue were never partners at any time." While occupying this position before the court, his counsel undertook to show, by the writing, already sufficiently adverted to, that the alleged partnership, which the defendant had denied and sworn to never have existed, had been dissolved. This is the effect which they claimed for that writing, and which they insisted the jury was entitled to consider for that purpose, despite the illogical result that it involved, of placing the defendant in the awkward and embarrassing attitude of trying to prove that a thing which he had sworn never to have existed nevertheless did exist, and had been dissolved. As a partnership must be assumed to exist, at least, before it can be dissolved, the writing, to be operative to prove a dissolution, involved this hypothetical dilemma, and made the evidence for the defense somewhat like the answer in the Vermont precedent: "*first*, defendant never had the pail; *second*, if he ever had the pail, he returned it whole; and, *third*, if he did not return it whole, it was broken when he borrowed it."

It is apprehended, however, that when this dissolution writing, so styled, is examined in the light of the facts and circumstances in which the defendant Nickell testified it originated, it will repel any and every idea that it was taken to dissolve any partnership that existed, or which ever did exist, between the defendants Pogue and Nickell, or that it was taken by him or was admissible for any other purpose than that for which the court permitted it to be considered by the jury. This result, if it can be sustained by the record, will make the defendant Nickell's testimony consistent with the purpose for which the writing was taken and permitted to be used; but it will make the writing only admissible to affect the credibility of the defendant Pogue, and not as evidence tending to prove a partnership dissolution.

Now, turning to the record, it discloses that the defendant Nickell testified that, "having heard that Pogue had reported to several parties that he was interested with him, as a partner, in the business at Gold Hill, to protect himself, he prepared an agreement, Exhibit D," etc.; which is the writing already set out. This shows his version of how the paper or writing came to be taken by him, and the reason he assigned for it. "Thereupon," runs the record, "his counsel offered said paper in evidence, as tending to show that no partnership in fact existed between said Pogue and the defendant at the time the goods, for the price of which this action was brought, were sold by the assignors of the plaintiff, Dawson, and that any partnership that might have existed between them, express or implied, had been dissolved." It is sufficient to say that the court refused to allow the paper to be admitted as evidence, and con-

sided by the jury, for any of the purposes offered, other than as evidence tending to affect the credibility of the defendant Pogue; and counsel insist, in this ruling, that the court committed a "glaring error," upon a "vital point." To show by competent evidence that the alleged partnership did not exist was undoubtedly a point of vital importance to the defendant Nickell, and his own evidence was direct and positive that he and Pogue were never partners at any time; but do the facts, as disclosed by his evidence upon this record, justify the assumption that the paper was taken or executed to dissolve any partnership existing in fact, or in fancy, between them? On the contrary, do not the facts, interpreted in the light of his own testimony, absolutely negative the idea of the existence of any partnership which the paper could operate to dissolve? He says that, having heard that Pogue had reported that he was interested with him, as a partner (that is, without his knowledge or consent, and in his absence, that Pogue had been making declarations to parties that he was a partner), and he says, "to protect himself," he prepared the agreement, Exhibit D, etc.,—that is, to protect himself from the effects of Pogue's declarations, he prepared, and they executed, Exhibit D. In this view, unless the effect of Pogue's declarations was to bind him as a partner, and thereby create a partnership, the paper, whatsoever may be its phraseology, could not be operative as a dissolution agreement. Its effect, for this purpose, depends upon the legal effect of Pogue's declarations to bind him as a partner, under the facts indicated.

On an issue of partnership, as here, the principle is elementary that the declarations of one partner are admissible only to charge himself, and are incompetent to prove that any other person is a member of the firm. "In such cases," said Gilchrist, J., "the question is whether the defendants be jointly liable. Each one may admit his own liability, as far as he may choose; but, when the attempt is made to charge third persons with a debt, upon his mere declaration, the evidence is merely hearsay, and does not come within any of the exceptions which permit the introduction of such proof." *Grafton Bank v. Moore*, 18 N. H. 101.

So that it may be said, upon the question whether a partnership exist, the rule of evidence is well established that the declarations of one of the alleged partners, made in the absence of the other, cannot, as against him, be used to establish the controverted fact of partnership. *McPherson v. Rathbone*, 7 Wend. 216; *Cowan v. Kinney*, 83 Ohio St. 428.

It is evident, then, that the declarations of Pogue could not be used as evidence to establish a partnership liability against the defendant Nickell, or to create the relation of partners between them. They could not, therefore, have the effect to bind him as a partner,—much less, to establish a partnership between Pogue and himself, either in fact or hypothetically; and, as a consequence, it results that the paper, or Exhibit D, cannot be operative as a dissolution agreement, within the purview of the facts for which it was prepared and executed. To hold otherwise would expand its legal operation beyond the legitimate effect of the facts to which it owes its existence, and alien to the

purposes for which those facts authorize it to be used.

In brief, if the defendant Nickell prepared the paper for the purposes stated, then, as what Pogue had said could not have the effect to bind him, and create the relation of partners, it follows that the paper could not be used as evidence of a dissolution, as that is repugnant to the reason of the facts, and would have the effect to extend its protection to objects, and to use it for purposes, not contemplated by the facts, and beyond the reach of any legal liability growing out of them. In this view, it is clear that the writing was inadmissible as a dissolution agreement.

But again. From the standpoint of the defendant Nickell, the face of the facts shows that when he heard of these declarations, and prepared Exhibit D, he did not suppose or act upon the assumption that any partnership existed in fact or otherwise between the defendant Pogue and himself. Now, let it be noted that the disagreement in this case between the defendants does not arise out of any misconception as to what is their true relation upon some admitted state of facts, about which there might be a difference of opinion, as to whether they were partners or there was a partnership. Cases, no doubt, may occur where, upon a state of facts, the one may think he is a partner, and the other may think otherwise; and, in the end, their true relation can only be determined by the aid of the court. But this was no such case. The writing was not prepared because the defendants differed as to what was their true relation in respect to certain dealings or transactions between them, and executed to segregate, dissolve and settle their respective interests, and to avoid litigation. There is not the shadow of a pretense that the writing itself was followed, at the time of its execution or afterwards, by any act or acts of dissolution. Not a dollar or thing, not an iota of property, real or personal, was taken or relinquished in pursuance of it. Not a thing was done, or expected to be done, under it; and, so far as its operative force was concerned, as to any uses it served in separating and settling any joint transaction between them, it was as lifeless as a blank sheet of paper. What, then, was the object of the writing, and what was the protection it was intended to afford? To my mind, this is plain, for the only legal purpose to which it could be applied upon the facts. It was Pogue's unruly tongue, so to speak, that portended danger; and the object was to bridle it, or to impair its power for injury. As the mere declarations of Pogue that he was his partner were incompetent as evidence and could not bind him in an action on an issue of partnership, on the other hand, his testimony that such a relationship did exist was competent, and, if the jury believed him, would bind him. Now, as the defendant Nickell believed, as he has since sworn, that no partnership existed between them, he sought and obtained from Pogue what would serve as his written declaration of the non-existence of that fact; so that, in case of an action like the present, it might operate as a restraint or bridle on Pogue's tongue, or, if his declaration should take the form of testimony, he could confront him with his written statements to the contrary which

would destroy the value of his testimony, or affect his credibility, and thereby protect himself from injury. Within the facts, this explains the only legitimate object for which that writing could have been prepared, or the protection it could afford. It was to confront Pogue, in the event the issue should come as here, with his own written statements, and to condemn him out of his own mouth. For this purpose the court permitted it to go to the jury; and, in the light of the facts, it has performed the only mission it could have been designed to legally serve. Despite this, however, it is insisted that the writing was pertinent and relevant to the issue, and ought to have been allowed to go to the jury as evidence tending to show a partnership dissolution; and that the rule of law declared in excluding it was "new and novel," wrong in principle, and dangerous in practice. This argument amounts to saying that partners may prove in their own favor whatever they may state orally or in writing, without regard to the circumstances in which such statements originated; or, in other words, that they may prove each other's declarations disclaiming it, that they were not partners. All that is necessary when an issue of partnership is involved, no matter what may be the facts, is to formulate each other's statements, verbally or in writing, that they were not partners,—or, if a case is made against them, that it has been dissolved; and the court must admit them on the controverted facts of partnership. It makes no difference whether a partnership existed or not, or what may be their true relation. The declarations of the parties denying, or that it was dissolved, would be pertinent and admissible. Such a rule would be broad enough, if the parties were corrupt enough, to cover any emergency; and its establishment would be a reproach and a menace to the administration of justice. It is in violation of the just principle regulating the admissibility of declarations, and in practical operation would be likely to serve the unjust and punish the just. To admit such testimony would, as Ryland, J., said, "enable a crafty set of men to carry on an extensive operation as partners to the world; but when preparation was about to be made necessary to a failure, then one might withdraw, with all the funds and stock, and honest, confiding creditors be met with the assertion that they never were partners,—that there was no partnership,—and prove it, when sued for their just demands, by declarations made to and about each other during the time they were seemingly engaged as partners. No such declarations should have been received." *Young v. Smith*, 25 Mo. 846.

"Parties," says Mr. Bates, "cannot prove that they were not partners by proof of each other's declarations disclaiming it. Such declarations, unaccompanied by acts, are no more than the declarations of third parties." Bates, Partn. § 1143.

"Parties are not entitled to prove in their own favor," said Paine, J., "whatever they or their co-defendants may state." *Carlyle v. Plumer*, 11 Wis. 105.

Nor, as *Mr Justice Grier* said: "give their private conversations or correspondence with one another, . . . or show that they had not held themselves out to the public as partners."

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Freehorn v. Smith, 69 U. S. 2 Wall. 161 [17 L. ed. 923].

Judged by his own version, this paper was prepared by the defendant to protect himself against the declarations of Pogue, and not to dissolve any partnership he thought or supposed to exist; yet, to give this paper the effect claimed, it places Nickell in the unenviable attitude of preparing his own and Pogue's declarations, in the form of a writing contradicting or dissolving it, which, in the event of an issue of partnership, as here, he could use as evidence for that purpose. Self-serving declarations cannot be put in evidence; but what shall we say of such as are prepared? It is incontestible that this paper was not executed in pursuance of any dealings or transactions between the defendants, and therefore it could be no part of any transaction, or a part of a transaction, to dissolve a partnership; nor was it, or the declarations, accompanied by any act or acts of dissolution.

In *Phillips v. Purington*, 15 Me. 425, it is held, on the question whether a partnership did or did not exist, the declarations of the alleged partners, unaccompanied by acts and unconnected with any of their declarations proved by the other party, are inadmissible in their own favor. And so all the authorities speak, without a dissentient voice.

The cases cited by my Brother Strahan—with due deference I say it—do not touch the point involved in the issue here presented. It will be enough to advert to the principal ones relied upon to illustrate my meaning.

In *Emerson v. Parsons*, 46 N. Y. 560, the partnership was admitted, and the parties had testified to the fact of its dissolution, and then offered in evidence the writing of dissolution which was executed in pursuance of it, which was admitted. As Church, Ch. J., said: "It was a part of the transaction which was claimed to be a dissolution of the partnership."

In *Oregler v. Durham*, 9 Ind. 875, a partnership had existed, and had been dissolved; and it was sought to hold one of the defendants upon a subsequently created liability. As tending to prove the fact of a dissolution of the partnership, the statements of members of the firm jointly made to third persons of the fact, were admitted and excepted to, the court saying that "their declarations and acts touching the subject are continuous *res gesta*."

In these cases the writing and declarations were a part of a transaction. A partnership which had existed had been dissolved, and these were a part of the facts surrounding its dissolution and necessarily a part of the *res gesta*. Now, if there was a partnership, and it had been dissolved, these facts being admissible in evidence, the acts and declarations accompanying them likewise are,—are a part of the *res gesta*. But if there was no partnership, as is claimed, there could be no such transaction as a dissolution of it, and a paper prepared and executed to dissolve that which did not exist could be no part of the *res gesta*. There is no main act or transaction which such declarations or paper can accompany, and be a part of it, and, consequently, they are not admissible on that ground. And herein lies the difference between these cases and the case in hand. That such a paper, prepared and exe-

cated under such circumstances, should be used as evidence for the purpose claimed, cannot be sustained. It is subversive of the soundest principles of the law regulating the rules of evidence. On the other hand, to admit it for the reason allowed by the court, it serves the only legal purpose for which it could have been taken; is consistent with defendant's statement of the reasons for which it was prepared and executed; and is, likewise, consistent with the testimony and verified answer. There was no error.

The next question is whether, when a bill of exceptions states that "the court instructed the jury upon all the issues involved in the case, and upon matters properly for their consideration," but no part of such charge or instructions are incorporated therein, and certain instructions asked and refused are set out and excepted to, this court must presume, upon such a state of the record, that the instructions asked and refused were covered by the instructions given. The question arises out of the opinion of the chief justice, [*ante*, 178,] in which he said: "It is the better rule to require counsel to bring here the instructions which the court did give, or have the bill of exceptions state what instructions were given, if any, in reference to the matter covered by the instructions asked and refused, before they are allowed to complain in consequence of such refusal. Where an ordinary instruction relating to the matters in issue is shown to have been requested by counsel and refused by the court, it should be presumed, in the absence of a contrary showing, that the refusal was made upon the ground that it, in substance, had already been given." Upon this ground the majority of the court refused to consider the instructions asked for and refused by the court below; and this is claimed to be a "new rule of practice," which, if adhered to, will prove to be vexatious and cumbersome; and therefore a reconsideration of the opinion, in this particular, is demanded alike by a well-regulated practice and the defendant injured by it.

Mr. Thompson lays it down as elementary law that "it is not error for the judge to refuse requests for instructions upon propositions which have elsewhere been sufficiently covered, either in his general charge or in other special instructions given; and it is a principle, upon which appellate courts uniformly act, that the judgment will not be reversed for the refusal of instructions, if the court can see that the case was placed fully, fairly and properly before the jury by the instructions which were given, although the requests refused may have been correctly drawn in point of law, and in their application to the evidence,"—and cites numerous authorities in support of the principle. 2 Thompson, Trials, §2352, and *note* 3.

Among the various reasons assigned for the rule, one is "that courts will presume jurors to be men of average intelligence, and capable of understanding and bearing in mind a proposition of law once fully and clearly stated, without its repetition in subsequent instructions;" and it is also laid down that the repetition of instructions on particular points is a censurable practice, as it may tend to give undue promi-

nence to particular features of the evidence. *Ibid.* and *notes*.

It must then be regarded as settled law that, if the instructions asked are covered by the instructions given by the trial court, such court may refuse to instruct further, and such refusal is not error. Now, the record discloses affirmatively that the court "instructed the jury upon all the issues involved in the case, and matters, properly for their consideration," which must include the instructions asked and refused, or their substance,—assuming that such instructions were correct in law and applicable to the facts; and, under the elementary and familiar rule that error is never presumed, must we not presume that the instructions given covered the instructions asked and refused, unless the appellant made the instructions, or, at least, so much of them as may be necessary, a part of the bill of exceptions, and thereby show the fact to be otherwise, and thus rebut such presumption in favor of the trial court? It has been repeatedly held by this court that error will not be presumed, and that the party alleging its existence must make it affirmatively appear, and with a reasonable degree of certainty. Said Strahan, J.: "It does not appear from the record what instructions the court gave the jury. In such case, it cannot be assumed that the court instructed erroneously. On the contrary, the legal intentment is that proper instructions were given. To hold otherwise would be to presume error, which is never done. He who alleges error must make it appear affirmatively from the record." *Coffin v. Taylor*, 16 Or. 875; *Thompson v. Coffman*, 15 Or. 681.

This theory of the law, that all presumptions are in favor of the correctness of the action of the trial court in its rulings or decisions, necessarily makes it the duty of him who claims its actions in the premises to be erroneous to save and preserve in a bill of exceptions such alleged erroneous rulings and decisions in such form as will exclude the influence and operation of such presumptions. As the appellate court must act on the presumption—especially on a record like this—that the instructions given by a trial court fairly and correctly stated the law applicable to the facts, and as this presumption would inevitably include or cover the substance, at least, of the instructions asked which were correct in point of law, and applicable to the facts, and would justify their refusal on the ground of repetition, the defendant, to show error and exclude the effect of such presumption, would necessarily be compelled to include in the bill of exceptions the instructions given, or so much of them as was necessary for that purpose, so as to show affirmatively to the appellate court that they did not cover the instructions refused. The case stands, then, in this wise: The appellant claims that the instructions asked are good law, and applicable to the facts, and, therefore, that it was error to refuse to give them to the jury; but to this it may be answered that the record shows that the court did instruct the jury upon all the issues involved, and that in such case the presumption of law is that the jury was properly instructed upon the law applicable to the facts. And this being so, it follows that your instructions have been covered by those already given,

unless you can show by the instructions given, and those asked and refused, that such is not the fact. How can this be done, and the appellate court perform its office, unless the bill of exceptions contains the instructions given? How, on the basis of this presumption, and the duty of the appellant to show error, can the appellate court know with certainty that the trial court erred in refusing the instructions asked, when he has failed to furnish the data which would show the alleged error, viz., the instructions given?

In *Moody v. St. Paul & S. C. R. Co.* 41 Iowa, 284, the court says: "It is urged that the court erroneously refused certain instructions which are set out in the abstract. Should we concede that these instructions are correct, we cannot reverse the judgment for their refusal, upon the facts made to appear by the abstract before us. It is shown that the court instructed the jury; but the instructions given are not set out. We must, in the absence of error being made to appear affirmatively, presume in favor of the correctness of the court's rulings upon all questions. We will presume that the jury were correctly instructed, and, if any instructions were refused which announce correct rules of law, the refusal was on the ground that the instructions given presented the same doctrines."

In *Kennedy v. Anderson*, 98 Ind. 152, the record shows that certain instructions were asked by the defendant and refused, etc., and the court says: "The presumption is that the court instructed the jury fully upon the law as applicable to the facts in the case; and, unless we had before us all the instructions given, we cannot say but these instructions were refused for the reason that the court had substantially given the same in its own instructions."

In *Myers v. Murphy*, 60 Ind. 287, the same court thus stated the doctrine: "All the presumptions are in favor of the correctness of the decisions of the court below; and, where a party claims in this court that any of those decisions are erroneous, he must so save and present the alleged erroneous decision in the record as to exclude every reasonable presumption in favor of such decision. In this case, as the appellant failed to make the instructions of the court below to the jury a part of the record, it is impossible for us to know with any certainty whether or not the court erred in its refusal to give the jury the instructions asked for by the appellant; and therefore we are bound to presume that the court did not err in such refusal."

In *Brown Co. v. Roberts*, 22 Kan. 762, it is held that the court will not ordinarily reverse the judgment of the trial court for alleged errors in giving and refusing instructions, when all the instructions given in the case are not embraced in the record.

So also, in *Hahn v. St. Clair Sav. & Ins. Co.* 50 Ill. 526, it is held that a judgment will not be reversed merely because an instruction, though proper in itself, was refused, when it appears from the bill of exceptions that instructions were given which are not embodied in the record.

And finally, in *Elliott v. Rosenberg*, 17 Mo. App. 668, the court says: "The defendant asked the court to give certain instructions, which the court refused to give. We are not

at liberty to review the action of the court in refusing these instructions, because the record further shows that the court of its own motion gave certain instructions, and the instructions thus given by the court are not preserved in the record. As every reasonable intendment must be made against the appellant, and in favor of the validity of the action of the court, we are legally bound to assume that the instructions given by the court of its own motion were not only proper declarations of law applicable to the facts, but, further, that they may have covered the grounds properly embraced in the instructions asked by the defendant." *Greenbaum v. Millsaps*, 77 Mo. 474; *Connolly v. Davidson*, 15 Minn. 520 (Gil. 428); *Aldrich v. Palmer*, 24 Cal. 518; *Killips v. Putnam F. Ins. Co.* 28 Wis. 472; *Wolfe v. Tyler*, 1 Heisk. 818; *Jackson Ins. Co. v. Sturges*, 12 Heisk. 839; *Brown v. Forest*, 1 Wash. T. 201.

In several of these States the court is required to charge the jury in writing, at the request of a party, as in our State; and in some others the charge must be in writing. It would seem that the reason of the rule grows out of the fact that, as counsel draw their own instructions, and can require the instructions of the trial court to the jury to be in writing, and thus afford the appellate court an opportunity to consider all the instructions,—those given and those asked,—and to determine, upon the whole, whether the law has been fairly and correctly presented to the jury, it is but reasonable to require the parties who ask instructions which are claimed to be good law, and applicable to the case, to bring the instructions given. Otherwise, the appellate court will presume that the trial court has discharged its duties, and properly instructed the jury upon all the material facts. But I must confess I am not favorably impressed with so broad an application of the rule. Under a statute like our own, where the charge may be and usually is orally given, unless a party exercise his right, and require the trial court to put it in writing, it seems to me that such presumption ought not to prevail, but that it ought to be confined in its operation to the case in which written instructions have been required and given by the trial court; and then, if a party complains that instructions asked have been erroneously refused, and fails to bring the written instructions given, it is right enough that such presumption should be indulged. In this view, where the instructions given are oral, like the case at bar, the duty of the appellate court would simply be to determine whether the trial court ought to have given the instructions asked and refused, or either of them. In doing this, the appellate court is not to presume, because the instructions asked were refused, that no instructions on the point were given, or that those given were necessarily erroneous; but, if the instructions asked and refused contained a correct exposition of the law applicable to the facts, and which ought to govern and control the case, it ought to sustain the exception to their refusal, and reverse the case. This would necessarily require the appellate court to examine the instructions, to ascertain whether the trial court was bound to give them; and for this reason I shall refrain from deciding the question, and pass to an examination of the instruc-

tions asked and refused, with the remark that the object of the extended notice given to this subject has been to attract attention to it.

The instructions deemed necessary to pass upon are fully set out in the dissenting opinion of *Mr. Justice Strahan*, and by reference to them the application of what follows may be observed. It will be noticed that in some form or other they are all based on the idea that there was some evidence of partnership dissolution prior to the purchase of the goods for

which the action is brought. The record discloses there is not a scintilla of evidence on this point, except what is claimed as the effect of Exhibit D; and, as we have already shown, in view of what that writing was taken for, that it cannot operate as evidence of a partnership dissolution, it follows that the instructions asked and refused were not based on evidence in the case, and were properly refused.

The judgment must be affirmed.

IOWA SUPREME COURT.

Jane F. DOOLITTLE

v.

M. B. DOOLITTLE, *Appt.*

(---Iowa---)

1. A wife is entitled to a divorce for inhuman treatment where her husband, besides frequently abusing her and her children, habitually addressing her with profane and obscene language, and applying to her opprobrious epithets, has on several occasions treated her with physical violence, and once in the presence of her children has accused her of improper relations with another man, while he has not furnished her the necessities of life, has been indifferent to her in sickness, invited farm hands to sit in the same room she was occupying, with aggravating language and irritating manner, although no single act was sufficient to endanger her life.
2. The allowance of \$3,500 as permanent alimony to a wife who is nearly helpless,

requiring the constant attention of an assistant, and not likely to recover her health, is not excessive where her property is less than \$2,000 and that of her husband is worth not less than \$14,000.

3. The act of a woman in leaving her husband for cause is not desertion within the meaning of the law authorizing a divorce for desertion.
4. Appellee's additional abstract and argument will not be stricken from the files and appellee charged with costs of printing the same because not served within the time required by the rules, where the final submission of the cause was not retarded thereby.
5. A woman, in a suit for divorce, may be allowed a reasonable sum for an attorney's fee in prosecuting an appeal as appellee.
6. Where no intricate questions of law were involved, but a large amount of work was necessarily required of plaintiff's attorney in a divorce suit, a total allowance of \$300 for prosecuting an appeal was held reasonable.

NOTE—Cruelty and inhuman treatment a ground for divorce.

Legal cruelty is the willful and persistent causing of unnecessary suffering, whether in realization or apprehension. *Hoshall v. Hoshall*, 51 Md. 72, 75; *Wheeler v. Wheeler*, 53 Iowa, 511, 36 Am. Rep. 240; *Morris v. Morris*, 14 Cal. 76; *Carpenter v. Carpenter*, *Milward*, 159.

Personal violence or maltreatment of the person to the injury of health is legal cruelty (*Graham v. Graham*, 5 Sess. Cas. Sc. 4th ser. 1093, 1095; *Paterson v. Paterson*, 7 Bell, App. Cas. 337, 12 Eng. L. & Eq. 19; *Ford v. Ford*, 104 Mass. 198. See *David v. David*, 27 Ala. 222; *Powelson v. Powelson*, 22 Cal. 356; *Shaw v. Shaw*, 17 Conn. 186; *Beebe v. Beebe*, 10 Iowa, 123; *Thornberry v. Thornberry*, 2 J. J. Marsh. 322; *Coles v. Coles*, 2 Md. Ch. 341; *Kenley v. Kenley*, 2 How. (Miss.) 751; *Harratt v. Harratt*, 7 N. H. 196; *Beatty v. Beatty*, *Wright* (Ohio) 557; or conduct endangering life, limb or health. *Odum v. Odum*, 35 Ga. 393, 317; *Beyer v. Beyer*, 50 Wis. 254, 257, 36 Am. Rep. 843; *Beebe v. Beebe*, 10 Iowa, 133, 135; *Caruthers v. Caruthers*, 18 Iowa, 266.

Cruel treatment may consist of conduct other than blows. Mental anguish and wounded feelings constantly aggravated by repeated insults and neglect are as bad as actual bruises of the person, and that which produces the one is not more cruel than that which causes the other. *Glass v. Wynn*, 75 Ga. 319; *Myers v. Myers*, 53 Va. 806; *Sylvia v. Sylvia*, 11 Colo. 319.

The use of improper language by the husband to the wife, and his charging her with adultery, will not justify a divorce where she persists in receiving frequent visits from a physician of whom he

was jealous, as all parties knew, and who was not more skillful or accessible than others. *McKee v. McKee* (Iowa) 42 N. W. Rep. 372.

Repeated application of coarse epithets to a wife, accompanied once by actual bodily harm and once by a threat to take her life, was held to be cruelty. *Freeman v. Freeman*, 81 Wis. 235, 248, 249.

If a husband charges his wife with crime, maliciously, it is cruel treatment. *Kennedy v. Kennedy*, 60 How. Pr. 151, 73 N. Y. 390, 374; and see *Gale v. Gale*, 2 Robt. Ecol. 421; *Nogess v. Nogess*, 7 Tex. 533; *Wheeler v. Wheeler*, 53 Iowa, 511, 36 Am. Rep. 240.

In an action by a husband against his wife for separation, on the ground of abandonment, the wife, showing that her abandonment was caused by his violence and insulting language, is entitled to an affirmative judgment in her favor. *Waltermire v. Waltermire*, 13 Cent. Rep. 185, 110 N. Y. 183, 17 N. Y. S. R. 173.

Persistence in indecent acts not severally sufficient may be cruelty. *Briggs v. Briggs*, 20 Mich. 34, 45, 46.

Reasonable apprehension of injury sufficient.

A reasonable apprehension of injury is sufficient; the court is not to wait till the hurt is actually done. *Stewart, Mar. and Div.* 243, 244; *Tomkins v. Tomkins*, 1 Swab. & T. 168, 172; *Odum v. Odum*, 36 Ga. 236, 317; also *Graham v. Graham*, 5 Sess. Cas. Sc. 4th ser. 1093, 1095; *Paterson v. Paterson*, 7 Bell, App. Cas. 337, 12 Eng. L. & Eq. 19; *Hughes v. Hughes*, 44 Ala. 698; *Morris v. Morris*, 14 Cal. 76, 78; *Powelson v. Powelson*, 22 Cal. 358, 390; *Caruthers v. Caruthers*, 18 Iowa, 266; *Henderson v. Henderson*, 83 Ill. 248; *Ford v. Ford*, 104 Mass. 198; *Gibbs v. Gibbs*,

(October 28, 1889.)

APPEAL by defendant from a decree of the District Court for Howard County in favor of plaintiff in a suit for divorce and alimony. *Affirmed.*

Defendant answered denying the allegations of the petition, and by a cross-petition asked a divorce from plaintiff on the grounds of desertion and other causes, and also asked that a certain 40-acre tract of land owned by plaintiff be adjudged his and the title quieted in him. The District Court rendered a decree in favor of plaintiff, divorcing her from defendant, confirming her title to all the real and personal estate to which she held the legal title including the 40-acre tract claimed by defendant, and required him to pay her \$8,500 as permanent alimony.

Further facts appear in the opinion.

Mr. W. K. Barker for appellant.

Messrs. H. T. Reed and Frank Sayre, for appellee:

Cruel and inhuman treatment may consist in language and conduct as well as in personal violence.

Beebe v. Beebe, 10 Iowa, 188; *Caruthers v. Caruthers*, 18 Iowa, 286; *Cole v. Cole*, 28 Iowa, 438; *Sesterhen v. Sesterhen*, 60 Iowa, 801; *Sackrider v. Sackrider*, 60 Iowa, 397.

Persistent abuse of the wife in the presence of her children and others, applying epithets to her, imputing a want of chastity, must necessarily wound the feelings and utterly destroy her peace of mind and impair her health.

Wheeler v. Wheeler, 58 Iowa, 511.

A failure to furnish suitable clothing or nec-

essary medical aid when sick is cruelty within the meaning of the Statute.

Harnett v. Harnett, 55 Iowa, 45; 1 Bishop, Mar. and Div. 6th ed. §§ 726, 738.

Robinson, J., delivered the opinion of the court:

Plaintiff was married to defendant on the 8d day of February, 1857, and lived with him as his wife until the spring of 1886, when she left him. At the time of their marriage defendant owned a farm of 160 acres in Howard County, a small amount of personal property, and some money. Plaintiff also had about \$125 in money. They at once moved onto the farm, and continued to reside thereon most of the time, and to make it their home, until plaintiff left defendant as aforesaid. Both were economical and industrious, and they succeeded in accumulating considerable property, the title to the most of which was taken in the name of the husband. Six children were born to them, all of whom have reached their majority. A few years after their marriage the defendant caused to be conveyed to plaintiff 40 acres of his farm, to wit, the N. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of section 29, township 99, range 11, which is the tract now in dispute. Defendant claims that the conveyance was made as a precautionary measure to insure a living in case he should become financially embarrassed. In May, 1885, plaintiff was stricken with paralysis, and for a considerable time was confined to her bed, and is still suffering from that cause. Plaintiff seeks a divorce from defendant on the ground of inhuman treatment, and demands alimony. Defendant asks a di-

18 Kan. 419; *Goodman v. Goodman*, 26 Mich. 417, 418; *Harratt v. Harratt*, 7 N. H. 196; *Black v. Black*, 30 N. J. Eq. 215, 221; *Close v. Close*, 25 N. J. Eq. 523, 529; *Kennedy v. Kennedy*, 73 N. Y. 368, 374; *Little v. Little*, 63 N. C. 22; *Sowers' App.* 89 Pa. 173, 179; *Rhame v. Rhame*, 1 McCord, Ch. 197; *Latham v. Latham*, 30 Gratt. 307; *Freeman v. Freeman*, 31 Wis. 235, 249; *Evans v. Evans*, 1 Hagg. Const. 35, 4 Eng. Eccl. 310, 311; *Beebe v. Beebe*, 10 Iowa, 188.

Cruelty is such conduct in one of the married parties as, to the reasonable apprehension of the other or in fact, renders cohabitation physically unsafe to a degree justifying a withdrawal therefrom. 1 Bishop, Mar. and Div. § 717, p. 524.

Threats and menaces from which danger to health and life may be apprehended constitute cruel and inhuman treatment. *Kennedy v. Kennedy*, 60 How. Pr. 151, 73 N. Y. 369; *Powelson v. Powelson*, 22 Cal. 358, 360.

To entitle the wife to a divorce on the ground of cruelty, the acts complained of must be of such a nature as to justify a belief that the continuance of cohabitation would be dangerous to her life and health. *Vanduzer v. Vanduzer*, 70 Iowa, 614.

Insufficient ground for divorce.

Inhuman treatment must endanger life. *Whaley v. Whaley*, 68 Iowa, 647.

The causes must be grave and weighty, and such as show an absolute impossibility that the duties of married life can be discharged. See *Childs v. Childs*, 49 Md. 509, 514; *Close v. Close*, 25 N. J. Eq. 523, 529; *Latham v. Latham*, 30 Gratt. 307, 321.

A divorce will not be granted to a wife on the ground of inhuman treatment endangering her life, where the parties have been married more than 6 L. R. A.

twenty-five years and have raised a family, and both have been to some extent in fault, where the court is satisfied that plaintiff's life has not been endangered, and thinks it not probable that it will be. *Gilbertson v. Gilbertson* (Iowa) 41 N. W. Rep. 678.

No single act of cruelty, however severe, that comes short of endangering life, is sufficient to justify a divorce, especially if it is provoked by the other party. *Nye's App.* 126 Pa. 341, 24 W. N. C. 121; *Hoshall v. Hoshall*, 51 Md. 72, 75. See *Embree v. Embree*, 63 Ill. 364, 365; *Henderson v. Henderson*, 58 Ill. 248, 250; *Finley v. Finley*, 9 Dana, 52; *Cooper v. Cooper*, 10 La. 249; *Lauber v. Mast*, 15 La. Ann. 599; *Kempf v. Kempf*, 34 Mo. 211, 214; *Doyle v. Doyle*, 28 Mo. 545; *Cook v. Cook*, 11 N. J. Eq. 195, 196; *Graecen v. Graecen*, 2 N. J. Eq. 459; *Richards v. Richards*, 37 Pa. 225, 227.

But a single act will be sufficient if the court is satisfied it is likely to be repeated. In such case, the reasonable apprehension is the cause. *Lockwood v. Lockwood*, 2 Curt. Eccl. 281, 7 Eng. Eccl. 114, 125; *Dysart v. Dysart*, 1 Robt. Eccl. 108, 470, 543; *Holden v. Holden*, 1 Hagg. Const. 453, 4 Eng. Eccl. 452, 454; *French v. French*, 4 Mass. 597, 598; *Richards v. Richards*, 1 Grant. Cas. 389, 391; *Beyer v. Beyer*, 60 Wis. 254, 257, 36 Am. Rep. 848; *Johns v. Johns*, 37 Miss. 530, 531.

Under Iowa Code, § 2222, a divorce will not be granted for cruel and inhuman treatment, where the only evidence thereof is that of plaintiff, which is corroborated only by her daughter, who testified that plaintiff's health was injured by the treatment she received, and where the evidence is not clear as to which party began the trouble, and both admitted the use of insulting epithets against each other. *Potter v. Potter*, 75 Iowa, 211.

voice from plaintiff on the ground of desertion, and that his title to the tract of land herein described be quieted.

1. The parties to this action appear to have lived together in harmony for a few years after their marriage, but, as time passed, troubles arose between them, and, for fifteen years before their separation, quarrels were frequent, and they lived in a state of discord a large portion of the time. The children became involved, and were sometimes the occasion of the difficulties of the parents. The eldest, a son, appears to have taken the part of the father, while the others, one son and four daughters, espoused the cause of the mother. Plaintiff was not at all times without fault, but her conduct did not authorize or excuse that of defendant. He abused her frequently, and we think habitually, addressing her with profane and obscene language, applying to her opprobrious epithets, and on several occasions treating her with physical violence. On one occasion, in the presence of several of their children, he falsely accused her of improper relations with a farm hand. He denied her many of the necessities of life, failed to provide her with proper clothing, and directed merchants to refuse her goods. He refused to pay the physician for the services he rendered to plaintiff during her sickness of 1885, until after this action was commenced. He misused the children in her presence. He was indifferent to her in her sickness, invited farm hands to sit in the room which she was occupying, with aggravating language and irritating manner. At length his conduct became unendurable, and plaintiff left him. In this we think she was justified. It is true that no single act of defendant was sufficient to endanger her life, and many of them together might not have had that effect; but there is an intimate relation between the conditions of the mind and body, and the life of the body may be threatened, and even destroyed, through influences brought to bear upon the mind. A long-continued course of ill treatment, even without physical violence, may be made as effectual, in many cases, to destroy life as any deadly weapon would be. If the treatment of plaintiff by defendant, considered as an entirety, is of a nature to affect her mind, undermine her health, and thereby endanger her life, it is sufficient to entitle her to the relief she demands. See *Sackrider v. Sackrider*, 60 Iowa, 397; *Cole v. Cole*, 23 Iowa, 435; *Caruthers v. Caruthers*, 18 Iowa, 266; *Beebe v. Beebe*, 10 Iowa, 133; *Wheeler v. Wheeler*, 53 Iowa, 511; *Harnett v. Harnett*, 55 Iowa, 45.

The condition of plaintiff improved somewhat after she was stricken in May, 1885, and before she left defendant, the next spring; and it is therefore urged that her partial recovery is evidence that the treatment of defendant did not endanger her life. The evidence satisfies us that her health is much broken, and that, while she has partially recovered from the first attack of paralysis, yet her physical condition is such that she could not endure the treatment to which she has been subjected by defendant for many years, and which we are satisfied she would again have to suffer if she returned to

him. We are of the opinion that plaintiff has fully shown a sufficient ground for divorce.

2. Appellant contends that the amount allowed plaintiff as alimony is excessive. He claims that his property is worth, in the aggregate, less than \$10,000, and that plaintiff has a large amount of property in her own right. In his first answer, defendant fixed the value of his property at \$14,300. Making due allowance for depreciation in values, and expenses of litigation, including amounts paid to plaintiff as temporary alimony, we are satisfied that his property is worth not less than \$14,000. The property of plaintiff is worth less than \$2,000. She is nearly helpless, requiring the constant attendance of an assistant, and is not likely to recover her health. Her current expenses are necessarily somewhat burdensome, and will probably continue to be so. The decree of the district court was rendered on the 31st day of July, 1888, and provided for the payment of \$250 in thirty days, \$250 in six months, \$500 in one year, \$1,000 in two years, and \$1,500 in three years, with interest at 6 per cent per annum, payable annually. We do not think the amount allowed, in view of all the circumstances of the case, was in any sense excessive.

3. The act of plaintiff in leaving defendant, having been for cause, was not desertion within the meaning of the law. The preponderance of the evidence shows that the transfer of the 40-acre tract of land in controversy was absolute, without condition, and that defendant is not entitled thereto. Having failed to show himself entitled to relief, it was properly denied him by the district court.

4. Appellant filed a motion in this court to strike from its files the additional abstract and argument filed by appellee, and to tax the costs of printing the same to her, on the ground that they were not served on appellant within the time required by the rules of this court. The facts of this case bring it within the rule announced in *Thomas v. McDaniel* (Iowa) 41 N. W. Rep. 592, and, following that rule, the motion will be overruled.

5. Appellee asks the allowance by this court of a reasonable sum for an attorney's fee for the prosecution, on her part, of this appeal. We think she is entitled to such an allowance. *Clyde v. Peavy*, 74 Iowa, 48; *Preston v. Johnson*, 65 Iowa, 285.

The record of the case is voluminous, the transcript containing nearly 1,000 pages, the most of which was prepared with a typewriter, and the revival abstracts containing over 200 pages. No intricate questions of law were involved, but a large amount of work was necessarily required of plaintiff's attorney to prepare the case for submission in this court. One hundred dollars was allowed plaintiff at the last January Term of this court for the purpose of aiding to prepare the cause on her part for submission. We now make a further allowance of \$100. In addition, all costs of the appeal, including printing, will be taxed to appellant.

Affirmed.

Granger, J., took no part in the decision of this cause.

GEORGIA SUPREME COURT.

DARTMOUTH SPINNING CO., *Plff. in Err.*,
v.

ACHARD.

(....Ga....)

A machinist employed by a corporation in its factory, not to use machinery, but to keep it in good order, and having knowledge that some of it is imperfect, and that employes cannot be relied upon to prevent it from becoming dangerous for lack of oil, takes the risk of discovering the condition of the machinery at the time he attempts to repair it, such risk being incident to his vocation. The incompetency or negligence of other employes, or of officers or agents of the corporation, resulting in putting the machinery out of order and rendering it dangerous, will not make the corporation liable for an injury which he sustains in handling the machinery while engaged, without their assistance, in repairing it.

(December 2, 1889.)

ERROR to the Superior Court for Richmond County to review a judgment for plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The case is sufficiently stated in the opinion.

Messrs. J. S. & W. T. Davidson for plaintiff in error.

Messrs. M. P. Foster and Twigg & Verdery for defendant in error.

Bleckley, Ch. J., delivered the opinion of the court:

According to the declaration, the plaintiff, a skilled carpenter and machinist, erected and put up machinery for the defendant Company which he knew was unsafe, as to certain parts of it, for the lack of self-oilers. He knew that no employe could be relied upon to keep it oiled, and that the omission to oil it properly would render it dangerous. He admonished the Company of the danger, protested more than once against the omission to supply the needed self-oilers, and warned the Company, even down to the day he was injured, to have the oiling duly attended to. But the Company, though promising to heed his repeated notices and warnings, failed to do so. He nevertheless remained in its employment, and suffered himself to continue charged with the duty of giving such attention to the machinery from time to time, save as to oiling and running it, as might be needed, and of performing, in the capacity of carpenter and machinist, everything requisite to be done, or that he might be ordered to do. Twice on the same day his services became requisite in the spinning-room to make corrections or repairs in the machinery. The first time the trouble was caused by the want of oiling; and this he discovered, and made known to the boss. Later in the day he was again called upon, in a sudden emergency, by the boss, to look after the shafting, which was without self-oilers, and put it in order. He found the main belt had been taken off and

that the shafting had ceased running, and was still. For lack of oil, the end of the shaft and the hanger had become very hot; but he did not know that the oiling had been neglected, or that the babbitt had completely melted. While he was in the act of taking off the belts with extra care, the shaft and five pulleys, the whole weighing over 600 pounds, fell upon him, and he was severely injured. The melting of the babbitt was the immediate cause of the falling of the machinery. The declaration attributes the injury to the Company's negligence in not supplying the necessary self-oilers, in not properly oiling the machinery, and in employing incompetent and unfit persons for superintendent, boss and oiler. A demurrer, part of it going to the whole declaration, was overruled; and thus the question arises whether a cause of action is set forth.

The machinery was put up by the plaintiff himself, and was not afterwards to be used by him, but by others. His subsequent concern with it was only to repair it and keep it in order. Whatever defects it had, he knew; and the failure to oil it properly was foreseen and correctly predicted by himself. One instance of such failure had occurred on the very day he was injured, and this was brought to his attention. If he did not know of the second failure specifically, it was within his general knowledge, as something likely to occur; and when he saw that the machinery was stopped, and that the stoppage was because of something wrong where there were no self-oilers, he could and should have anticipated that it had again occurred. He was not ignorant that the end of the shaft and the hanger had become very hot. To what should he have ascribed the heating but a lack of oil? He did not know that the babbitt had completely melted, but he does not allege ignorance that it had melted in some degree; and the declaration avers that the complete melting of the babbitt was the immediate cause of the falling of the shaft.

While it is the duty of a master to furnish his servant with safe machinery for use, he is under no duty to furnish his machinist with safe machinery to be repaired, or to keep it safe while repairs are in progress. Precisely because it is unsafe for use, repairs are often necessary. The physician might as well insist on having a well patient to be treated and cured, as the machinist to have sound and safe machinery to be repaired. The plaintiff was called to this machinery as infirm, not as whole. An important part of his business was to diagnose the case and discover what was the matter. If he failed in this branch of his profession, it was either his fault or his misfortune. So far as appears, no one knew more of the state and condition of the machinery at the time than he did; and the object of calling him in the room was that he might ascertain the cause of the trouble, and apply the remedy. Unfortunately, he exposed himself before becoming fully aware of the extent to which the melting of the babbitt had gone; and it was the want of that information, and not the negligence or incompetency of anyone connected with the establishment, which brought about

the injury. The incompetency and inattention of the others gave him more to do in his vocation, somewhat as a sickly climate favors a physician's practice.

It is to the interest of those who use machinery for it to be always in good condition; but for it to fail often, and get out of order, is advantageous to the man whose business is to make repairs. True it is that the risk of con-

cealed dangers incident to the work of making repairs is upon him, but as the skilled machinist is best competent to discover and avert such dangers, he is the proper man to incur the hazard. It seems to us clear that the risk was upon the plaintiff in the present instance, and that he is without even the shadow of a cause of action for the calamity which befell him.

Judgment reversed.

INDIANA SUPREME COURT.

WASSON, County Treasurer, *Appt.*,

v.

Robert N. LAMB.

(.....Ind.....)

1. Where tax receipts are received by a bank in good faith as deposits, and credited as so much money, it becomes at once legally liable to the depositor as for so much cash deposited.

2. In determining the liability of a bank for fraudulent representations as to solvency, made for the purpose of inducing certain deposits in the form of tax receipts, where this depends on the question whether the depositor had checked out the whole amount deposited after such representations, the time of deposit of such receipts is the time when they were delivered and credited on depositor's pass book and the taxes marked paid by him on the tax duplicate, although he was not credited therewith on the books of the bank for five days thereafter.

(November 1, 1889.)

APPEAL by defendant from a judgment of the Circuit Court for Marion County enjoining him, as county treasurer, from enforcing an alleged lien for taxes. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Duncan, Smith & Wilson for appellant.

Mr. Ralph Hill for appellee.

Mitchell, J., delivered the opinion of the court:

This is an appeal from a judgment and decree of the Marion Circuit Court by which Wasson, as treasurer of Marion County, was perpetually enjoined from asserting or enforcing an alleged lien for taxes against certain real estate which had been transferred to Robert N. Lamb, as the assignee of Alfred and John C. S. Harrison. The question for decision arises upon the following facts: In April, 1884, Wasson was the treasurer of Marion County, and for some months prior thereto kept an account in Harrison's Bank, a private banking house owned and conducted by Alfred and John C. S. Harrison in the City of Indianapolis. With a view of inspiring confidence in the solvency of the firm, and to induce the appellant to believe that their bank was a safe place for the deposit of money, one of the partners, at divers times prior to the 23d day of April, 1884, falsely represented to him that the firm was solvent. These representations, although relied on by

the appellant, were known to be false by the member of the firm who made them.

On the date above mentioned, the appellant, as county treasurer, delivered to the partner above referred to receipts for taxes due from himself and the firm and others to the amount of \$2,086.65; that amount being at the same time entered as a credit on the pass book or bank book in which the appellant kept the account of his deposits and checks with the bank. At the time the receipts were delivered, and the credit entered, as above, the appellant marked the taxes as having been paid on the tax duplicate, and charged himself with the several amounts. This credit included the amount assessed and due as taxes, the collection of which was enjoined by the decree from which this appeal is prosecuted. It appears that the credit for the amount of the receipts was not entered on the books of the bank until the 28th day of April, 1884, five days after it was credited by a member of the firm on the appellant's pass book, at which time the balance to his credit was \$49,764.67. The appellant's bank book was balanced on the 10th day of May, 1884. The balance included the amount of the tax receipts. After that date the appellant made deposits, and drew checks against his balance, until in July, 1884, when the bank, being insolvent, suspended payment and made an assignment, with a balance standing to the credit of the appellant amounting to \$9,233.72. If the amount of the tax receipts is considered as having been deposited in the bank as of the date the credit was entered on the appellant's pass book, then he has drawn out more than he deposited since that date, including the \$2,086.65. If, however, it is not to be considered as deposited until it was entered on the books of the bank, no part of it has been since drawn out. The learned court below was of the opinion that the deposit should be considered as made when the appellant was credited with the amount of his pass book; and that having since that time checked out more than he has since deposited, including the amount credited for taxes, he was in no way injured by the misrepresentations concerning the solvency of the bank.

This conclusion is unquestionably correct. The general rule which governs in keeping the account between a bank and a depositor is that as money is paid in and drawn out, or other debts and credits are entered, by the consent of both parties, in the general banking account of the customer, a balance may be considered as struck at the date of each payment or entry on either side of the account. *National Ma-*

hasse Bank v. Peck, 127 Mass. 298; *Lamb v. Morris*, 118 Ind. 179.

Ordinarily, whenever a deposit is made, the amount and date thereof is entered by the cashier or teller in the bank book or pass book of the depositor; and such entries, when made by the proper officer, bind the bank as admissions. In some cases it has been held that they become conclusive upon the bank like an account stated, when the bank book is balanced. 1 Morse, Banks, 8d ed. § 291.

The settled rule is, where checks, drafts or other evidences of debt are received in good faith as deposits, if the bank credits them as so much money, the title to the checks or drafts is immediately transferred to the bank, and it becomes legally liable to the depositor as for so much money deposited. *Oragie v. Hadley*, 99 N. Y. 181; *Metropolitan Nat. Bank v. Loyd*, 90 N. Y. 530.

So, when a bank credits a depositor with the amount of a check drawn upon it by another customer, and there is no want of good faith on the part of the depositor, the act of crediting is equivalent to a payment in money. Nor can the bank recall or repudiate the payment because, upon an examination of the accounts of the drawer, it is ascertained that he was without funds to meet the check, though, when the payment was made, the officers labored under the mistake that there were funds sufficient. *Bolton v. Richard*, 6 T. R. 139; *City Nat. Bank v. Burns*, 68 Ala. 267; *Oddie v. National City Bank*, 45 N. Y. 735.

Where, therefore, the holder of a check or other genuine instrument representing a fixed sum delivers it to a bank, and receives an unqualified credit as for a definite sum of money, the transaction is equivalent to an actual deposit of so much cash as of the date of the credit. *First Nat. Bank v. Burkhardt*, 100 U. S. 686 [25 L. ed. 766].

Thus, in *Titus v. Mechanics Nat. Bank*, 35 N. J. L. 598, a dispute having arisen concerning the title of certain checks, the court said: "They were received and credited in a cash account as cash. . . . By such crediting the bank became the owners of these bills, as they do of legal tender notes or bank bills so deposited. And, had the defendants failed the next day, the plaintiffs could not have demanded these identical checks as their property, left for collection, against a receiver or an assignee in bankruptcy. The plaintiffs had received the price of these checks by having it credited on their over-drafts, and by drawing for it. *Hoffman v. First Nat. Bank*, 46 N. J. L. 604; 2 Morse, Banks, §§ 569, 570.

In like manner, according to the opinion of Lord Eldon, if bills are deposited and entered in the customer's account as cash, with his knowledge and consent, so that he becomes entitled to draw against the amount, he will thereby be precluded from claiming the bills. *Ex parte Sargeant*, 1 Rose, 158; *Ayres v. Farmers & M. Bank*, 79 Mo. 421; Story, Ag. § 228, note.

Upon principle, there can be no reason why, if parties choose to treat a deposit of paper or

other securities as cash, so that it is available to the depositor as cash, the transaction should not be regarded as equivalent to a deposit of money. Thus, as was said by Wallace, J., in *St. Louis & S. F. R. Co. v. Johnston*, 27 Fed. Rep. 243: "When a sight bill is deposited with a bank by a customer at the same time with money or currency, and a credit is given him by the bank for the paper, just as a like credit is given for the rest of the deposit, the act evinces unequivocally the intention of the bank to treat the bill and the money or currency, without discrimination, as a deposit of cash, and to assume towards the depositor the relation of a debtor, instead of a bailee of the paper. If the customer assents to such action on the part of the bank by drawing checks against the credit, or in any other way, he manifests with equal clearness his intention to be treated as a depositor of money." If, by mutual consent, the bank and the appellant choose to treat the tax receipts as so much cash deposited to the credit of the latter, the transaction must be regarded as according to the intention of the parties at the time.

The conclusion which follows from what has preceded is that when the appellant transferred the tax receipts to the bank, and received credit for the amount thereof, the transaction was, in legal effect, the same as if he had deposited the amount in cash. He had the right to draw his check against it the next moment after the credit was entered, precisely as if he had made the deposit in money. Moreover, the court finds that he did check against it so as to actually draw the amount out of the bank. This being so, the result is, assuming that there was no fraud in the transaction when the tax receipts were delivered, and the taxes marked paid on the duplicate, and the appellant was credited on his bank book with \$2,066.65 as cash, he in legal effect received the amount of the taxes in cash and the transaction was consummated and closed, precisely as if the bank had paid the taxes, and then received the money on deposit from the appellant on the 28d day of April, 1884. *First Nat. Bank v. Burkhardt*, *supra*.

We need not inquire whether or not the facts found present such a case as would have entitled the appellant to set the transaction aside on the ground of fraud, and obtain a preference over other creditors of the bank. It is enough to say that, having received credit as for so much cash deposited, and having checked out a sum of money after the credit was given him, which included the amount of the tax receipts for which he obtained credit, he is not in a situation to say that the taxes which he claims the right to collect were not in fact paid. He must stand precisely as any other depositor whose money was obtained by the false representations of the officers of the bank, since he has been content to let the transaction stand until, by the assignment, the rights of other creditors who may be in like situation with him have intervened. There was no error.

The judgment is affirmed, with costs.

INDIANA SUPREME COURT.

LOUISVILLE, NEW ALBANY & CHICAGO R. CO., Impleaded, etc., *Appl.*,
v.

Mary E. LUCAS *et al.*

(....Ind....)

1. The omission of mere formal statements will not vitiate a special verdict in which the facts are properly stated.
2. A railroad company must make it safe for passengers to leave its cars and stations, and to that end they may demand that the stations, approaches and accessories used by it shall be kept in a safe condition.
3. The company must light its stations and platforms if passengers are discharged after dark.
4. A railroad company is bound to keep in a safe condition a platform connecting its station with that of another company and used by both companies in transferring baggage and freight from one road to the other, and which passengers are likely to suppose was intended for their use in passing between the stations; and hence will be responsible for injuries resulting from its defective condition to one of its passengers who is using it for that purpose, without notice that such use is improper, although the defect which causes the injuries is in fact located

upon the portion of the platform belonging to the other company.

5. A carrier's negligent act, from which an injury results, will be deemed its proximate cause, unless the consequences were so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care, although the precise accident which occurred might not have been anticipated.
6. One negligent person cannot escape liability for his negligence because the negligence of a third person concurred in producing the injury.
7. The fact that one injured by another's negligence at the time of the accident did all that the most prudent person could well have done under the circumstances, will absolve him from the charge of contributory negligence.
8. It is competent, on cross-examination, to ask a medical witness his opinion as to the probable results of an injury to a person for the purpose of testing his skill.

(June 18, 1880.)

A PPEAL by defendant, the Louisville, New Albany & Chicago Railroad Company, from a judgment of the Circuit Court of Porter County in favor of plaintiff, and against it

Note.—Carrier of passengers; railroad company to keep its platforms and approaches in safe condition.

The words "care and diligence" mean the utmost care consistent with the carrier's undertaking with the passenger, and with a due regard for all the other matters which ought to be considered in conducting the business. *Dodge v. Boston & B. Steamship Co.* 3 L. R. A. 83, 148 Mass. 207, 80 Alb. L. J. 211.

A railroad company stopping a passenger car at a point where there is no platform owes a passenger, not only a reasonably safe appliance for enabling her to alight, but the safest that has been known and tested. *Missouri Pac. R. Co. v. Wortham*, 73 Tex. 25, 8 L. R. A. 388.

As a general rule, railroad companies are bound to keep in a safe condition all portions of their platforms and approaches thereto to which the public do or would naturally resort, and all portions of their station grounds, reasonably near to the platforms where passengers taking passage on their cars would naturally or ordinarily be likely to go. *Union Pac. R. Co. v. Sue*, 25 Neb. 772; *Reed v. Artell*, 84 Va. 231; *Central R. Co. v. Thompson*, 76 Ga. 770; *Green v. Pennsylvania R. Co.* (Pa.) 86 Fed. Rep. 66; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583.

The duty of keeping premises safe, even as against a mere licensee, may arise where affirmative negligence in management of the premises would be likely to submit persons exercising a privilege theretofore permitted to danger. *Larmore v. Crown Point Iron Co.* 3 Cent. Rep. 409, 101 N. Y. 851.

A less degree of care is required of a railroad company in regard to the condition of the approaches to its cars—such as platforms, halls, stairways, etc., than that of the roadbed, machinery, etc.; the rule being that, in regard to the former, the company is bound simply to exercise ordinary care in view of the dangers to be apprehended. *Kelly v. Manhattan R. Co.* 3 L. R. A. 74, 119 N. Y. 451.

To charge a defendant with negligence in failing
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to keep its premises in safe condition, whereby accident and injury have resulted to another, he must have done or omitted to do an act by which a legal duty or obligation has been violated. *Trask v. Shotwell* (Minn.) 42 N. W. Rep. 600.

The company is liable in failing to provide a proper platform, or to notify passengers going on the platform of the approach of a train. *Union Pac. R. Co. v. Sue*, 25 Neb. 772.

Where it leaves the platform of its depot in an unsafe condition it is liable for any injuries to a passenger, although precisely such an accident as actually occurred might not have been anticipated. *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583.

Where there is an unguarded hole left in a passageway, at its station, likely to be used by persons going to and from its cars, it is negligence. *Green v. Pennsylvania R. Co.* 86 Fed. Rep. 66.

Where a platform maintained jointly by two railroad companies for the purpose of enabling passengers to pass from the depot of one of the companies to that of the other is negligently left in an unsafe condition, both companies are liable to a passenger for injuries sustained while passing over such platforms. *Lucas v. Pennsylvania Co.* (Ind.) 21 N. E. Rep. 972; *Louisville, N. A. & C. R. Co. v. Lucas*, 119 Ind. 583.

Duty to light stations.

It is the duty of railroad companies to have their stations lighted for the accommodation and safety of passengers arriving or departing upon their trains during the darkness, and they are liable to them for injuries from the want of such lights, unless such injuries are contributed to by the passengers' own negligence. *Fordyce v. Merrill*, 49 Ark. 277; *Grimes v. Pennsylvania Co.* (Ohio) 86 Fed. Rep. 72.

A railroad company must, for the safety of its passengers, properly light its platform within a reasonable time before the arrival and departure of trains. *Grimes v. Pennsylvania Co.* *supra*; *Alabama G. & B. Co. v. Arnold*, 84 Ala. 159, 5 Am. St.

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in an action to recover damages for personal injuries in which it had been united as defendant with the Pennsylvania Company. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. George W. Friedley and George R. Eldridge* for appellant.

Messrs. H. A. Gillett and E. D. Crumacker, for appellee, Mary E. Lucas:

A passenger has a right to presume that a railroad company has performed the duty imposed upon it by law.

Cincinnati, W. & M. R. Co. v. Peters, 80 Ind. 168, 179; *Shearm. & Redf. Neg. § 31; Nave v. Flack*, 90 Ind. 205, 208.

The law "requires of railroad companies due regard for the safety of passengers, as well in the location, construction and management of the station buildings, platforms and means of egress, as in their previous transportation."

Gaynor v. Old Colony & N. R. Co. 100 Mass. 215.

The lights at the station of a railway company must be enough to guide and direct strangers who are wholly unacquainted with the locality.

Addison, Torts, § 245; *Buenemann v. St. Paul, M. & M. R. Co.* 83 Minn. 890, 18 Am. & Eng. R. R. Cas. 153; *Stafford v. Hannibal & St. J. R. Co.* 4 West. Rep. 790, 23 Mo. App. 333; *Peniston v. Chicago, St. L. & N. O. R. Co.*

Rep. 354. See *New York, C. & St. L. R. Co. v. Doane*, 1 L. R. A. 187, note, 15 West. Rep. 465, 115 Ind. 435.

Proximate and remote cause of injury.

Whenever one person is compelled by the act or omission of another to do some act from which injury to himself is reasonably and naturally to be apprehended, and injury does result from it, such injury should be regarded as a consequence of the act or omission of the other. *Handelun v. Burlington, C. R. & N. R. Co.* 73 Iowa. 709.

When one has violated a duty imposed upon him by the common law, he should be held liable to every person injured thereby whose injury is the natural and probable consequence of his misconduct. *Seale v. Gulf, C. & S. F. R. Co.* 65 Tex. 574.

The damage to be recovered must always be the natural and proximate consequence of the act complained of. *Vedder v. Hildreth*, 3 Wis. 427; *Walker v. Ellis*, 1 Sneed (Tenn.) 515; *Sedgw. Damages*, 65.

The result must be the natural and probable consequence of the act (*Shrgott v. New York*, 96 N. Y. 284; *Wiley v. West Jersey R. Co.* 44 N. J. L. 247),—one which could have been foreseen in the light of the attending circumstances,—if the act does not amount to wanton wrong (*Milwaukee & St. P. R. Co. v. Kellogg*, 94 U. S. 469 (24 L. ed. 255); *Scheffer v. Washington, C. M. & G. S. R. Co.* 105 U. S. 249 (26 L. ed. 1070); *Schmidt v. Mitchell*, 84 Ill. 195; *Binford v. Johnston*, 82 Ind. 423; *Campbell v. Stillwater*, 39 Minn. 308; *Rames v. Texas & N. O. R. Co.* 63 Tex. 660; *The Notting Hill, L. R. 9 Prob. Div. 105; Atkinson v. Goodrich Transp. Co.* 60 Wis. 141; *Vicars v. Wilcocks*, 8 East, 1; *Memphis & C. R. Co. v. Reeves*, 77 U. S. 10 Wall. 176 (19 L. ed. 909); *Cuff v. Newark & N. Y. R. Co.* 85 N. J. L. 17),—though it be not the necessary result. *Miller v. St. Louis, I. M. & S. R. Co.* 7 West. Rep. 123, 90 Mo. 399; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 74.

It is not necessary to a defendant's liability, after his negligence has been established, to show, in addition thereto, that the consequences of his negligence could have been foreseen by him; it is 6 L. R. A.

84 La. Ann. 777, 44 Am. Rep. 444; *Patten v. Chicago & N. W. R. Co.* 83 Wis. 524; *McKone v. Mich. Cent. R. Co.* 51 Mich. 601, 47 Am. Rep. 596. See *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124; *Stewart v. International & G. N. R. Co.* 53 Tex. 289, 37 Am. Rep. 753.

It is clearly a duty owing to passengers to either insist upon repairs or withdraw from all arrangements for joint use of the platform.

Peniston v. Chicago, St. L. & N. O. R. Co. 84 La. Ann. 777; *Beard v. Connecticut & P. R. R. Co.* 43 Vt. 101.

The test of proximate cause, where the act of a third person intervenes, is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Lane v. Atlantic Works, 111 Mass. 136; *Billman v. Indianapolis C. & L. R. Co.* 76 Ind. 166; *Harriman v. Pittsburgh, C. & St. L. R. Co.* 9 West. Rep. 438, 448, 45 Ohio St. 11.

The efficient and predominating cause, in producing a given event or effect, though there may be subordinate and dependent causes in operation, must be looked to in determining the rights and liabilities of the parties concerned.

Baltimore & P. R. Co. v. Reaney, 42 Md. 117, approved in *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 853. See *Winkler v. St. Louis, I. M. & S. R. Co.* 3 West. Rep. 433, 21 Mo.

sufficient if the injuries are the natural, though not the necessary or inevitable, result of the negligent fault,—such injuries as are likely, in ordinary circumstances, to ensue from the act or omission in question. *Miller v. St. Louis, I. M. & S. R. Co. supra.*

The law "contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." Bacon, Max. of the Law, Regula 1; Broom, Max. 165.

Damages which are the legal and natural result of the act done, though to some extent contingent, are not too remote to be recovered. *Taylor Mfg. Co. v. Hatcher* (Ga.) 3 L. R. A. 567, 39 Fed. Rep. 440.

If the wrong and the resulting damage are not known by common experience to be naturally and usually in sequence, and the damage does not, according to the ordinary course of events, follow from the wrong, then the wrong and the damage are not sufficiently conjoined or concatenated as cause and effect to support an action. *Haley v. Chicago & N. W. R. Co.* 21 Iowa, 15; *Marble v. Worcester*, 4 Gray, 386; *Anthony v. Slaid*, 11 Met. 290; *Silver v. Frazier*, 8 Allen, 383; *Dale v. Grant*, 34 N. J. L. 142; *Crain v. Petrie*, 6 Hill, 522.

When two causes co-operate to produce the damage resulting from the injury, the proximate cause is the originating and efficient cause which sets the other cause in motion. *Lapeine v. Morgan's L. & T. R. & S. Co.* 1 L. R. A. 373, 40 La. Ann. 651.

So, where, by the acts of omission or commission of defendants, their horses ran away and collided with a carriage, causing the horses attached thereto to be dashed down a depression in the road, throwing one of the occupants of the carriage to the ground and killing her, there was direct causal connection between the collision and the killing. *Belk v. People*, 15 West. Rep. 59, 125 Ill. 554.

And where a person traveling by night along a country road, in a wagon driven by a man known by him to be drunk, is overturned and injured by being precipitated down an unfenced bank at the side of the road, the drunkenness of the driver, and

App. 90; *Lewis v. Flint & P. M. R. Co.* 54 Mich. 55.

When a general subject is opened by an examination in chief, the cross-examining counsel may go fully into the details, and may put the case before the expert witness in various phases.

Louisville, N. A. & C. R. Co. v. Falvey, 1 West. Rep. 868, 104 Ind. 409, 421.

Elliott, C. J., delivered the opinion of the court:

The appellee in her complaint charges the appellant and the Pennsylvania Company with negligence in suffering a platform adjoining their stations at Wanatah to become unsafe, and avers that without fault on her part she fell through a hole in the platform, and was severely and permanently injured. The Pennsylvania Company was awarded judgment on the special verdict, and the appellant alone prosecutes this appeal. No objections have been urged to the complaint in argument, and we do not, therefore, give a synopsis of it.

The special verdict is not ill, although it does not contain the usual formal conclusion. When the facts are properly stated, the omission of mere formal statements will not vitiate a special verdict. The special verdict reads thus: "We, the jury, having been required to find a special verdict in this action, do find

the facts in the case to be as follows: That said defendants are, respectively, railroad corporations of and in the State of Indiana, and were such at the time of the injury hereinafter mentioned. That at the time of such injury, and for several years prior thereto, the said defendants were respectively controlling and operating railroads, the road of said Pennsylvania Company running through the State of Indiana from east to west, and through the Counties of La Porte and Porter, in said State; and the one of said defendant Louisville, New Albany & Chicago Railway Company running through said State from north to south, and through said County of La Porte. That said railroads, at the time of such injury, did and for twenty-five years prior thereto had crossed each other at grade, and nearly at right angles, at the Village of Wanatah, in said County of La Porte. That those in control of said respective railroads had during all of said twenty-five years solicited and invited an interchange of freight and passenger traffic at said point of crossing, and at the time of such injury said defendants were doing, and for five years prior thereto had been doing, a large business in the way of interchange of freight and passengers at said point, each maintaining a regular station, with passenger, ticket and freight offices at said point, and transferring freight and

not the defective condition of the road, is the proximate cause. *Hershey v. Mill Creek Twp. Road Comrs.* (Pa.) 8 Cent. Rep. 282.

Plaintiff's negligence, in order to bar a recovery, must have been a proximate cause of the injury. *Cornwall v. Charlotte, C. & A. R. Co.* 97 N. C. 11; *Horne v. Williams*, 100 N. C. 230; *Virginia Midland R. Co. v. White*, 84 Va. 408.

The contributory negligence of a driver is not imputable to a passenger, so as to defeat his right of action for personal injuries to which defendant's negligence directly contributed. *Sheffield v. Central U. Teleph. Co.* (Ohio) 36 Fed. Rep. 164.

The negligence of a responsible agent intervening between the defendant's negligence and the injury suffered breaks the causal connection between the two. But if the intervening act or negligence is a natural or probable result of the original negligence, the latter will be regarded as the proximate cause of the injury. *Mahogany v. Ward*, 18 R. I. —, Index DD, 158.

Where one paying toll breaks through a defective board of the bridge on a dark night and is precipitated into a river, the fact that he knew such defect and its location does not defeat his right of action against the bridge company. *Monongahela Bridge Co. v. Bevard* (Pa.) 10 Cent. Rep. 418.

Mere error in judgment in case of danger, not contributory negligence.

When the whole transaction is the occurrence of a moment, a man is not to be held responsible for contributory negligence if he errs in his estimate of the danger that confronts him. *Goodrich v. New York Cent. & H. R. Co.* 36 N. Y. S. R. 767.

If defendant has so acted as to induce plaintiff, acting with reasonable prudence, to incur the danger; or if plaintiff, by defendant's negligence, is placed in a situation of peril, to escape which he voluntarily incurs another danger, defendant is liable, although plaintiff may not in the emergency have pursued the course which ordinary prudence would have dictated. *Harris v. Clinton Twp.* 7 West. Rep. 683, 64 Mich. 447.

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Where a person is subjected to danger by the fault of another, the court cannot say that one course or the other taken to avoid the danger is the more hazardous, and was, under the circumstances, contributory negligence. *Hawkins v. Johnson*, 3 West. Rep. 288, 105 Ind. 59.

Where a passenger is injured by the negligence of a carrier, an act done by the former in the face of impending danger, for the purpose of avoiding the same, does not constitute "contributory negligence," although it may in fact have helped to produce the injury complained of. *Ladd v. Foster* (Or.) 81 Fed. Rep. 827.

A stage-coach proprietor is liable for an injury to a passenger caused by the negligent overturning of the coach, notwithstanding the passenger contributed to the injury by his own rashness, imprudence or indiscretion at the time of the accident, if he did only what a person of ordinary prudence would probably have done under the same circumstances. *Lawrence v. Green*, 70 Cal. 417.

The driver of a carriage on a dark night, hearing a buggy coming at full speed toward him, is not negligent in taking the side of the road belonging to him, although had he remained where he was the injury would have been avoided. *Flower v. Witkovsky*, 69 Mich. 371, 14 West. Rep. 44.

The rule that a man in a position of danger is not responsible for a mistake of judgment in getting out is subject to the qualification that he must have gotten into the danger without negligence or fault of his own. *Pennsylvania R. Co. v. Aiken* (Pa.) 20 Pittsb. L. J. N. S. 182, 25 W. N. C. 13, post.—

Where two persons approach each other upon a road covered with snow, through which a track has been broken for teams, the one on foot and the other in a sleigh, and they come into collision, and the one on foot is injured, the fact that he did not step out of the beaten track to allow the other to pass is not conclusive evidence of contributory negligence. *Kendall v. Kendall*, 7 New Eng. Rep. 160, 147 Mass. 423.

A verdict will not be annulled merely because artificial expressions and words are used in framing it. *State v. Wilson*, 1 L. R. A. 795, 40 Ia. Ann. 751.

the baggage of passengers from one to the other.

"That the said defendant Louisville, New Albany & Chicago Railway Company to the north of said crossing had a main track and one side track east of and immediately adjoining the same, and about ten feet east of said side track had a building thirty-six feet long, the north half of which was used and occupied by said Company as a passenger waiting-room and ticket and telegraph office, and the south half thereof as a freight-room, and in front of such building, and extending to the said side track, a platform at an elevation of about one foot from the grade of its tracks, which building was forty-seven feet north of said crossing. That said defendant, the Pennsylvania Company, to the east of said crossing had one main track and a side track north of and immediately adjoining the same, and about ten feet north of said side track a freight-house forty-one feet long, and in front of such freight-house, and extending to said side track, a platform at an elevation of about three feet from the grade of its tracks, without any steps leading down therefrom to the ground, which freight-house was forty-one feet east of said crossing.

"That said defendant Pennsylvania Company had a passenger ticket office on the south side of its main track, about 175 feet east of such crossing, with a gravel walk, on the grade of its track, extending from a little east of said ticket office nearly to the crossing, along which walk it received and discharged its passengers. That there was a platform about twenty feet wide extending from said Pennsylvania Company's freight-house, and connected with and joining on to the said platform in front thereof, and so extending thence westward along and abutting on said side track, to a point where it joined and connected with a like platform, about ten feet wide, extending southward from said platform in front of said passenger and freight-house of the defendant Louisville, New Albany & Chicago Railway Company, and so joining and connecting at the angle formed by said crossing. That such platforms, and the respective extensions thereof aforesaid to such junction thereof were under the charge and control of the respective defendants on whose tracks they abutted as aforesaid, and were used by both said defendants, for the entire length thereof, for their joint use and convenience, for the transfer of freight and baggage by one to the other, respectively. That said platforms were so constructed and joined together as aforesaid as to form, and they did form, one continuous passageway, without interruption, or any visible hindrance to the use thereof by passengers, and were so constructed and joined together as to lead one unfamiliar with the locality to suppose that they were intended for the use and convenience of passengers in and from the said station-house of the defendant Louisville, New Albany & Chicago Railway Company to that of the other defendant, and so as naturally to invite such use.

"There was, however, a way of going from said station of the Louisville, New Albany & Chicago Railway Company to the other, consisting of a plank walk about five feet wide,

on a grade with their tracks, and leading from said elevated platform across said side-track, and thence southward between the main and side tracks, to a point about fifteen feet north of the main track of the Pennsylvania Company, and thence southeastwardly diagonally across such last-mentioned track, to the south side thereof, and connecting there with the aforesaid gravel walk, which last-mentioned route and way was the one ordinarily used by passengers. That the foregoing, so far as therein stated, represents the situation, condition, use and control of all the premises in question at the time of the injury hereinafter mentioned, and for five years prior thereto.

"At the time, however, of such injury, the said platform, so extending from said Pennsylvania Company's freight house to such junction and connection, was old, decayed and greatly dilapidated and out of repair; and about fifteen feet east of such junction there was a hole in said last-mentioned platform, caused by the brakage of planks therein, of the size and for the space of three to five feet either way, which hole was then, and had been and remained, open and wholly unguarded for the period of four months prior to such injury, and the existence thereof, as well as such general condition of such platform, was during all said time well known to both the defendants. That there was during all of said time a ditch running under said platform, and immediately under said hole and open space, and the distance from the top of such platform to the bottom of such ditch was seven and one half feet.

"That on the 12th day of November, 1885, the plaintiff in this cause was a passenger for hire on one of the regular passenger trains of the defendant Louisville, New Albany & Chicago Railway Company from the south, destined for Wanatab aforesaid, and intending there to take a train on said Pennsylvania Company's road. That such train on which plaintiff was so traveling arrived at and stopped in front of the said passenger house of said Louisville, New Albany & Chicago Railway Company, at Wanatab aforesaid, at 6.30 P. M. of that day. That it was then after nightfall, dark and raining. That she alighted from said train, and the train immediately moved on and away. That said platform was wholly unlighted, and there was no light visible in or about said passenger house or the platform, or the tracks in front thereof, nor any person in attendance thereon or present thereabouts. That plaintiff was wholly unfamiliar with said premises, only knowing the general direction from one station to the other. That she so alighted between said tracks, and, discerning the outlines of said elevated platform in front of such passenger house, she stepped at once to and upon the same, and from there, looking around, she did not, and by reason of the darkness could not, discover such walk between the tracks, nor any entrance to such station building, but could and did discover the said elevated platform, extending southward in the direction of the other road. That she had no notice or knowledge of the existence of such walk between the tracks of the Louisville, New Albany & Chicago Railway Company. That after look-

ing about she did not nor could she see or hear any person about the premises, and there were no lights visible, except in the distance, and upon or beyond the said Pennsylvania Company's railroad. That there was barely sufficient light to enable a person to see the general outlines of said buildings and platforms. That said plaintiff knew of no other way, and, supposing and believing that the said platform, so extending south, was the way, and the only way, from said station at which she alighted to the other, she carefully walked along the same southwardly to such junction, and turned thence eastward on said Pennsylvania Company's platform, still supposing and believing as aforesaid, and without any notice or knowledge of any defect or imperfection in said platform, and unable, on account of the darkness, to discern any defect or imperfection therein; and, so walking on carefully and at a moderate gait, she suddenly, and without notice or warning, stepped into and fell through the hole aforesaid, to the bottom of said ditch, and by reason of such fall she suffered severe and permanent physical injuries, whereby she was and is damaged in the sum of \$4,500. That during all the time from her alighting from such train to the occurrence of such fall and injury the plaintiff was exercising such care, caution and prudence as persons of ordinary prudence would and do exercise under like circumstances.

"Now if, upon the facts aforesaid, plaintiff is entitled to recover against the defendants or either of them, then we find for the plaintiff, and assess her damages at \$4,500."

The plaintiff, as a passenger of the appellant, was entitled to demand that the stations, approaches and accessories used by it should be kept in a safe condition. A carrier of passengers is under a duty to provide and maintain safe alighting places, and for a breach of this duty must respond in damages to a passenger who, without contributory fault on his part, is injured by a negligent failure to perform this duty. *Terre Haute & I. R. Co. v. Buck*, 96 Ind. 346; *Cincinnati, H. & I. R. Co. v. Carper*, 112 Ind. 26, 11 West. Rep. 221; *Longmore v. Great Western R. Co.* 19 C. B. N. S. 183; *Burgess v. Great Western R. Co.* 6 C. B. N. S. 323; *Gussman v. Long Island R. Co.* 73 N. Y. 606; *McDonald v. Chicago & N. W. R. Co.* 26 Iowa, 124; *McKons v. Michigan Cent. R. Co.* 51 Mich. 601.

Where passengers are discharged after dark, it is the duty of the railroad company to light its stations and platforms. *Moses v. Louisville, N. O. & T. R. Co.* 59 La. Ann. 649; *Stewart v. International & G. N. R. Co.* 58 Tex. 289; *Foreyth v. Boston & A. R. Co.* 103 Mass. 510; *Beard v. Connecticut & P. R. Co.* 48 Vt. 101; *Buenemann v. St. Paul, M. & M. R. Co.* 82 Minn. 390; *Quaife v. Chicago & N. W. R. Co.* 48 Wis. 513; *Gaynor v. Old Colony & N. R. Co.* 100 Mass. 215.

The duty of a railway carrier does not end when it provides safe cars, engines and appliances, for its duty extends so far as to require it to provide means for passengers to safely enter its cars at its stations, and that duty also requires the carrier to make it safe for them to leave its cars and stations. After the passenger has left the cars and stations of a railway car-

rier, its duty as a carrier ceases, but not until then. *Cincinnati, H. & I. R. Co. v. Carper, supra.*

It was the duty of the appellant to keep the platform which is used in conjunction with the Pennsylvania Company in a safe condition. The situation of the platform and the manner of its construction were such as to make it the duty of the appellant to see that it was safe; for it was bound to know that, if it became unsafe, the lives and limbs of its passengers were put in peril. A railroad company may not be bound to foresee and provide against accidents that no one could by the highest degree of practicable care anticipate; but it is bound to use the highest degree of practicable care to provide against accidents to passengers that may be foreseen and prevented. *Louisville, N. A. & O. R. Co. v. Wood*, 113 Ind. 544, 12 West. Rep. 308; *Wabash, St. L. & P. R. Co. v. Locke*, 112 Ind. 404, 11 West. Rep. 877; *Terre Haute & I. R. Co. v. Buck, supra*; *Birford v. Johnston*, 82 Ind. 426; *Louisville & N. R. Co. v. Schmidt*, 81 Ind. 264; *Cranfordville v. Smith*, 79 Ind. 303; *Wagner v. Goldsmith*, 73 Ind. 517; *Billman v. Indianapolis, O. & L. R. Co.* 76 Ind. 166.

The negligence of the appellant in leaving a platform constructed as was the one described in the verdict in a dangerous condition, without lights or guards, might have been expected to bring upon a passenger just such an injury as the plaintiff actually received, and the appellant was in fault for not foreseeing and guarding against what did occur. The consequences which resulted were the natural consequences of the appellant's breach of duty, and it must answer to the injured person. *Blyth v. Birmingham Water Works Co.* 11 Exch. 785; *Hoag v. Lake Shore & M. S. R. Co.* 85 Pa. 293; *Smith v. London & S. W. R. Co.* L. R. 6 C. P. 14; *Indianapolis, P. & O. R. Co. v. Fitzer*, 109 Ind. 179, 4 West. Rep. 250.

It is not necessary that precisely such an accident as actually occurred might be anticipated, for there is liability if it was probable that some injury might result from a negligent breach of duty.

We have disposed of the argument of appellant, which asserts that the negligence attributed to it was not the proximate cause of the appellee's injury in what we have said; for, as the authorities all declare, if the injury resulted from the negligent act of the defendant, that act will be deemed the proximate cause, unless the consequences were so unnatural and unusual that they could not have been foreseen and provided against by the highest practicable care. The authorities we have cited declare the doctrine we have stated, as do those which follow, and many others. Bishop, Non-Contract Law, §§ 456, 457; Wharton, Neg. 2d ed. § 77.

If it were granted that the negligence of the Pennsylvania Company concurred with that of the appellant in causing the appellee's injury, it would not exculpate the latter. It is not legally possible that one negligent person may escape liability because the negligence of another concurred in producing the injury.

Pittsburgh, O. & St. L. R. Co. v. Spencer, 98 Ind. 186; *Suter v. Mercereau*, 64 N. Y. 138; *Barrett v. Third Ave. R. Co.* 45 N. Y. 628;

Thomp. Neg. 1088; Bishop, Non-Contract Law, § 578.

The question here is not as to the rights of the appellant against the Pennsylvania Company, but the question is, What are the rights of a passenger which the appellant had undertaken to carry safely? The duty which rested upon the appellant we have already defined, and it only remains to add that there is a right of action, although the Pennsylvania Company may also have been guilty of culpable negligence.

The special verdict very satisfactorily shows that the appellee was not guilty of contributory negligence. She had a right, within reasonable limits, to rely upon the presumption that the Company had done its duty, and that the platform was safe. *Nave v. Flack*, 90 Ind. 205-206; Bishop, Non-Contract Law, § 582.

She did all that the most prudent person could well have done under the circumstances, and this was all that the law requires. She had a right, in the situation she was placed by the appellant, to proceed, using care and caution as she did, and the injury which she received is attributable solely to the culpable fault of the railroad companies. *Terre Haute & I. R. Co. v. Buck*, *supra*.

In considering whether or not passengers are in fault, it may be taken into account that they are justly entitled to presume that the duty of making stations, approaches and surroundings

safe has been performed. Bishop, Non-Contract Law, § 1086.

On cross-examination, one of the medical witnesses was asked whether the present debilitated condition of the plaintiff might not be produced either directly or indirectly by the fall she received; and another was asked: "What might be the result of a dislocation of the kidney?" And the appellant's counsel asserts that the trial court erred in permitting the questions to be asked. In our judgment, counsel are clearly in error. It is competent to ask a medical witness his opinion as to the probable results of an injury to the person, on direct examination; and it is certainly competent to ask such a question on cross-examination where one of the chief objects is to test the skill and professional knowledge of the witness. *Goodwin v. State*, 96 Ind. 550; *Wabash R. Co. v. Savage*, 110 Ind. 156, 6 West. Rep. 293; *Louisville, N. A. & C. R. Co. v. Falvey*, 104 Ind. 409, 1 West. Rep. 888; *Louisville, N. A. & C. R. Co. v. Wood*, 118 Ind. 544-588, 12 West. Rep. 808.

We cannot hold that the damages assessed are excessive, for there is abundant evidence that the appellee was very severely injured, and that her injuries are of a permanent nature.

Judgment affirmed.

Motion for rehearing overruled September 10, 1889.

MARYLAND COURT OF APPEALS.

James T. PERKINS, Trustee

v.

Lewis C. DYER, *Appl.*

(....Md.....)

A promise to pay taxes, made by a taxpayer after the expiration of the time prescribed for collection by Md. Code, art. 81, § 83, will take them out of the operation of the Statute and make them enforceable.

(December 17, 1889.)

A PPEAL from an order of the Circuit Court, Prince George's County, overruling a motion to dissolve an injunction against collection of taxes. *Reversed.*

The case is stated in the opinion.

Mr. R. B. B. Chew, for appellant:

There is no limit to the duration of the lien except that fixed by the Statute itself, and there is none under this Statute where the parties from whom the taxes may be demanded do not plead the Statute or waive its provisions, or by their conduct are stopped from pleading it. The proceeding is *in rem*.

Eschbach v. Pitts, 6 Md. 77.

It is not a presumption of law that a debtor will plead the Statute of Limitations to every claim to which it may be pleaded; such a presumption cannot receive the sanction of any court of law or equity.

Burtles v. State, 4 Md. 274.

The plea of limitations is not favored in the law; a party is never bound to make it, and may waive it at his option.

Farmers Bank v. Sprigg, 11 Md. 889.

6 L. R. A.

Neither party shall reap any advantage from his own fraud.

Shutte v. Thompson, 82 U. S. 15 Wall. 151 (21 L. ed. 128).

No one can rely upon the Statute against a claim after any act done or sanctioned by him which implies an abandonment of such defense, or that the claim is to be met upon its merit.

Welch v. Stewart, 2 Bland, Ch. 87; *McMeehan v. Chase*, 1 Bland, Ch. 85, *note c*.

Where delay in bringing suit is caused by the request of the defendant, and his promise to pay the debt, and not to avail himself of the plea of the Statute, he will not be allowed to plead the Statute, as it would be against equity and good conscience; but in such case the creditor must bring his action within the statutory length of time after such promise and request for delay.

Joyner v. Massey, 97 N. C. 148, 4 Gen. Dig. (1889) p. 1251, par. 559.

Agreements to waive proceedings to preserve and enforce statutory liens upon real estate taxed have been expressly recognized by the Supreme Court of New Hampshire.

Winnipisseege Lake C. & W. Mfg. Co. v. Gilford, 6 New Eng. Rep. 597, 64 N. H. 514.

A naked promise not to plead the Statute of Limitations to a debt already barred is not sufficient; but a promise to pay will be sustained, as founded on the original claim, and continues it in force.

Stockett v. Sasser, 8 Md. 379.

In this State promises to pay open-account debts, or claims not under seal, have always

been held sufficient to remove the bar of the Statute as to such claims, and to give the right to sue upon the original cause of action and not upon the new promise.

Barney v. Smith, 4 Har. & J. 485; *Oliver v. Gray*, 1 Har. & G. 204; *Knight v. House*, 29 Md. 194.

In *Green v. Seymour*, 5 New Eng. Rep. 367, 59 Vt. 459, the Supreme Court of Vermont held it to be questionable whether any consideration other than the original indebtedness was necessary to support a new promise to pay the debt, and declared a new promise to pay the debt in legal effect to be the same as an agreement to waive the Statute of Limitations.

The case shows a consideration other than the original indebtedness, which was held to be sufficient.

Paddock v. Colby, 18 Vt. 485; *Burton v. Stearns*, 24 Vt. 181; *Stearns v. Stearns*, 32 Vt. 678. The proceeding to enforce the collection of delinquent taxes is *in rem*.

Rev. Code 1878, p. 105; art. 11, §§ 49, 50; *State v. Philadelphia, W. & B. R. Co.* 45 Md. 376.

Taxes are not ordinary debts, but of paramount obligation, and generally not regarded as collected until paid by those on whose property they have been levied.

State v. Brewster, 3 West. Rep. 596, 44 Ohio St. 249; *Jack v. Weinnett*, 2 West. Rep. 86, 115 Ill. 105; *Cooley*, Taxn. 18.

The privilege of pleading the Statute is in the nature of an exemption and should be strictly construed, and not be permitted when clearly waived, or the acts and conduct of the party are such as to constitute an estoppel.

Atlantic & P. R. Co. v. Lesueur (Ariz.) 1 L. R. A. 244, 2 Inters. Com. Rep. 189; *Illinois Mut. F. Ins. Co. v. Archdeacon*, 82 Ill. 236, 25 Am. Rep. 318; *Smith v. Niagara F. Ins. Co.* 1 L. R. A. 216, 60 Vt. 682; *Hutton v. Marx*, 12 Cent. Rep. 899, 69 Md. 256; *Belt v. Blackburn*, 28 Md. 227; *State v. McCarty*, 60 Md. 878; *Stockett v. Basscer*, 8 Md. 874; *Maryland F. Ins. Co. v. Gusdorf*, 43 Md. 514.

A court of equity will not, under such circumstances, lend its aid to the consummation of a fraud or a deceit. "He who hath committed iniquity shall not have equity."

Medford v. Levy, 2 L. R. A. 368, 31 W. Va. 649; *Hershey v. Weiting*, 50 Pa. 244; *Odesa Tramways Co. v. Mendel*, L. R. 8 Ch. Div. 235; 1 Pom. Eq. Jur. 434, 398; *Roman v. Mali*, 42 Md. 513.

Mr. George C. Merrick, for appellee:

A collector has no right or power to sell real estate for county taxes after four years from date of levy, if the person from whom they are demandable pleads the law requiring them to be collected within four years from date of levy in bar of their recovery.

Alexander v. Walter, 8 Gill, 269; Md. Laws 1874, chap. 483, § 82; *Perkins v. Gaither*, 70 Md. 134.

Taxes are not a debt in the sense used by the law when treating of the revival of a debt by new promise.

Cooley, Taxn. 1; *Black*, Tax Titles, § 45; *Eschbach v. Pitts*, 6 Md. 71.

The law empowering the circuit court to extend time of collectors and sheriffs is in subordination to time limited, within which taxes must finally be collected or be barred.

6 L. R. A.

See Code, § 17, art. 67, p. 726; *State v. Dorsey*, 3 Gill & J. 75.

Robinson, J., delivered the opinion of the court:

The main question in this case turns on the construction of section 83 of article 81 of the Code, which provides that all county and city taxes shall be collected within four years after the same shall have been levied, and if not collected within that time the parties from whom such taxes are demanded may plead the section in bar of any recovery of the same.

The taxes in controversy have been levied and uncollected more than four years, and the question is whether a promise to pay them by the party from whom they are demanded takes such taxes out of the operation of the Statute. The object of the Statute, it is said, was to enforce the speedy collection of taxes; and if the collector has neglected to collect them within the time prescribed, it would be against public policy to allow him to enforce their payment, even though the party from whom they are demanded may have admitted them to be due and may have promised to pay the same. We cannot agree to this construction of the Act.

Taxes are levied annually to meet the annual expenses of the county and city government, and if the object was to provide for their speedy collection, we can hardly suppose the Legislature would have extended the time of their collection to so long a period as four years. Nor do we see how the public is to be benefited, or any public policy subserved, by denying the right to collect such taxes after the expiration of the time prescribed by the Act in cases where the taxpayer admits them to be due and has promised to pay them. And besides the Legislature had by other Acts made ample provision for the collection of county and city taxes. It had provided that a copy of the annual assessment of such taxes should be delivered to the county and city collectors within ten days after the assessment; and that such collectors should, within six months after its receipt, collect and pay to the county and city authorities all taxes thus levied; and, upon failure to do so, their bonds were made liable to suit, and the collectors themselves liable to indictment and punishment. By these Acts full provision was made for the speedy collection of such taxes.

Prior to the Act of 1862, chap. 75, and the Act of 1874, chap. 483, there was not, as we all know, any Statute of Limitations applicable to the collection of taxes, and the object of these Acts was to prescribe a time within which county and city taxes should be collected, and unless collected within that time, to allow the party from whom they are demanded the privilege of pleading the provisions of the Act in bar of their recovery. These Acts are nothing more nor less than Statutes of Limitations applicable to the collection of county and city taxes, and founded on the same reasons and policy as all other statutes and limitations are founded, and must be construed in accordance with the settled rules which govern the construction of such statutes. This being so, a promise on the part of the taxpayer to pay such taxes, made after the expiration of the time prescribed, must be held to take them out of the operation of the Statute. And as these

taxes are made statutory liens, the collector has the right in such cases to enforce their payment by execution and sale of the property.

The remaining question, whether there was such a promise on the part of the appellee, is one about which there can be no contention. Not only the appellant himself, but Perkins, his agent and clerk, both of whom are competent witnesses, testify that at different times during the years 1886, 1887 and 1889 the appellant repeatedly promised to pay these taxes, always begging for a little more indulgence, promising

to pay them first out of one tobacco crop and then the crop of another year, and finally out of some insurance money which he expected to get. These promises were made in the most explicit terms, and after he had examined each of the tax bills separately. It is quite unnecessary to consider the exceptions to other proof on the part of the appellant tending to show a promise on the part of the appellee. We rest our conclusion on this point upon the testimony of the appellant, and of Perkins, his clerk.

Order reversed and bill dismissed.

WISCONSIN SUPREME COURT.

Julius MEISWINKEL *et al.*, *Respts.*,
v.

ST. PAUL FIRE & MARINE INSURANCE CO., *Appt.*

(...Wis....)

1. **Testimony must be plain and convincing** beyond reasonable controversy in order to overcome the presumption that a written contract expresses correctly the intention of the parties thereto.
2. **Testimony of mortgagees** who had taken the mortgage for purchase money on a sale of insured property, that upon assigning the policy with the company's assent to the purchaser they requested the agent to put the policy in a shape that would fully protect them, and he agreed to do so, and said, after making an indorsement thereon, making the loss payable to them, that he had insured them, and not the mortgagor, is insufficient, especially when disputed by the agent, to warrant a reformation of the contract of indorsement so as to make a separate independent contract of insurance with

them which would not be affected by the mortgagor's breach of the conditions contained in the policy.

(November 5, 1890.)

APPEAL by defendant from a judgment of the Milwaukee County Circuit Court in favor of plaintiffs in an action for the reformation of a policy of fire insurance, and for a recovery upon the policy as reformed. *Reversed.*

Statement by Lyon, J.:

This is an action to reform a policy of insurance against loss by fire, issued by the defendant company to the plaintiffs on a certain dwelling-house, and to recover on the reformed policy for the loss by fire of such dwelling-house. The insurance is for \$2,000. The term of the policy is five years from January 23, 1886. The policy contains a large number of conditions and requirements, and specifies many causes of forfeiture. Among these are the following: "If the property or any portion

NOTE.—Reformation of insurance contract.

The jurisdiction of equity to reform a written instrument, on the ground of mistake, is exclusive. Story, Eq. 154-157; Follett v. Heath, 15 Wis. 601; Harrison v. Juneau Bank, 17 Wis. 340; Hammel v. Queen Ins. Co. 50 Wis. 243.

The court may correct errors, but cannot make new contracts for parties. Casady v. Woodbury Co. 13 Iowa, 113.

A mistake of law will be relieved against. Broughton v. Hutt, 3 DeG. & J. 501; *Re* Condon, L. R. 9 Ch. 609; Stone v. Godfrey, 5 DeG. M. & G. 90; 1 Story, Eq. Jur. § 138 a, 138 f; Harney v. Charles, 45 Mo. 157; Northrop v. Graves, 19 Conn. 548.

The conveyance cannot be reformed unless there is a valid, written, executory contract to reform by. Glass v. Hulbert, 102 Mass. 24; Elder v. Elder, 10 Me. 80; Osborn v. Phelps, 19 Conn. 63; Best v. Stow, 2 Sandf. Ch. 298.

A contract must be shown to exist which, by a mutual mistake of the parties, has been incorrectly reduced to writing. Lanier v. Wyman, 5 Robt. (N. Y.) 147; Sutherland v. Sutherland, 69 Ill. 481; Evans v. Steger, 5 Or. 147; Wood, Fire Ins. 800.

Not only is the best evidence required, but it must be clear and convincing. Bryan v. Cowart, 21 Ala. 82; Cook v. Gudge, 2 Jones, Eq. 172.

If the proofs are doubtful and unsatisfactory, and the mistake is not made entirely plain, equity will withhold relief, upon the ground that the written paper ought to be treated as a full and correct

expression of the intent, until the contrary is established beyond reasonable controversy. 1 Story, Eq. Jur. § 152.

In order to justify a court in reforming a written instrument on the ground of mistake, it must appear clearly that the writing, as reformed, will express what was understood and agreed to by both parties. Andrews v. Essex F. & M. Ins. Co. 3 Mason, 10; Sawyer v. Hovey, 3 Allen, 331; Nevius v. Dunlap, 33 N. Y. 676.

A mortgagee has an insurable interest in the property covered by the mortgage. Wood, Fire Ins. 529; Holbrook v. American Ins. Co. 1 Curt. C. C. 193; Davis v. Quincy Mut. F. Ins. Co. 10 Allen, 113; Fox v. Phenix F. Ins. Co. 52 Me. 333; Traders Ins. Co. v. Robert, 9 Wend. 404; State Mut. F. Ins. Co. v. Updegraff, 21 Pa. 513; Royal Ins. Co. v. Stinson, 103 U. S. 25 (26 L. ed. 473); King v. State Mut. F. Ins. Co. 7 Cush. 4; Carpenter v. Providence Wash. Ins. Co. 41 U. S. 16 Pet. 495 (10 L. ed. 1044).

Yet the insurance is in no sense an insurance of the debt, but of the mortgagee's interest in the property as security for the debt. Wood, Fire Ins. 863; King v. State Mut. F. Ins. Co. 7 Cush. 4.

Making the loss payable to the mortgagee is nothing more nor less than an appointment of the mortgagee by the mortgagor as his agent to collect the money. The effect is the same as an assignment of the policy after loss. Wood, Fire Ins. 863; Carpenter v. Providence Wash. Ins. Co. 41 U. S. 16 Pet. 495 (10 L. ed. 1044); King v. State Mut. F. Ins. Co. 7 Cush. 4.

v. L. R. A.

thereof, shall be sold, transferred or incumbered . . . or if any change takes place in the title, use, occupation or possession, . . . this policy shall be void."

When the policy was issued, the plaintiffs were the owners of the insured dwelling-house and the farm on which it was situated. On April 27, 1886, they sold and conveyed the farm to one Lindner for \$6,000, and took back a mortgage thereon executed to them by the purchaser, to secure \$5,900 of the price. Afterwards, on the day the conveyance was made, the plaintiffs, Lindner and one Hunkel, the local agent of the defendant Company at Milwaukee, had an interview concerning such insurance, the result of which was that Hunkel gave the assent of the Company to an assignment of the policy to Lindner. The plaintiffs assigned the same to him accordingly, and, with the consent of Lindner, an indorsement was made upon the policy to the effect that any loss under it should be payable to the plaintiffs, mortgagees, as their interest might appear. Lindner thereupon went into possession of the insured property thus purchased by him. Early in December, 1886, the insured dwelling-house was destroyed by fire. Soon thereafter the plaintiffs delivered to the Company proofs of the loss, as required by the policy, stating the assignment of the policy, and other proceedings in respect thereto as above, and stating, further, that they made such proofs, because Lindner had left the State, and the loss was payable to them. The Company refused to pay the loss, giving as reason therefor that Lindner had placed additional insurance on the property without its consent, and that he had set the house on fire. The plaintiffs thereupon brought this action. The relief demanded is that unless the court shall be of the opinion that the policy, with the indorsements thereon as they now are, create a valid, independent insurance of plaintiffs' mortgage interest, the indorsement of April 27, 1886, assigning the policy to Lindner, and making the loss payable to plaintiffs, be stricken out, and there be indorsed thereon instead as follows: "This policy shall be and continue an insurance of the interest of said Meiswinkel, Weisner and Landwehr, as mortgagees of said property, in the same amounts as originally written,"—separate from and independent of the right or interest of Lindner.

The complaint alleges that the contract of April 27, 1886, with Hunkel, defendant's agent, was that the plaintiffs should hold the policy as an independent insurance of their mortgage interest alone; that he assured them the indorsements on the policy effected that object; and that they relied upon his assurances in that behalf, and rested in the belief that they had an insurance which could not be affected by the acts of Lindner or others. The answer of defendant denies liability on the policy as it is written, and puts in issue most of the material allegations in the complaint. The testimony given on the trial is sufficiently stated in the opinion. The court found the facts substantially as stated in the complaint, and gave judgment for the plaintiffs, reforming the indorsements on the policy as prayed, and for the amount of the policy as reformed. The defendant appeals from such judgment.

Messrs. Winkler, Flanders, Smith, Bottum & Vilas and Lusk & Bunn, for appellant:

To justify relief against an alleged mistake in a written instrument, the mistake must appear beyond a reasonable doubt, and be mutual.

Blake Opera House Co. v. Home Ins. Co. 73 Wis. 667; *Newton v. Holley*, 6 Wis. 592; *Lake v. Meacham*, 18 Wis. 855; *Fowler v. Adams*, Id. 458; *Harrison v. Juneau Bank*, 17 Wis. 840; *Kent v. Lasley*, 24 Wis. 654; *McClellan v. Sanford*, 26 Wis. 595; *Ledyard v. Hartford F. Ins. Co.* 24 Wis. 496; *Hartor v. Christoph*, 32 Wis. 245-248; *Jarrell v. Jarrell*, 27 W. Va. 743, 748, 750; *Mead v. Westchester F. Ins. Co.* 64 N. Y. 453; *Ford v. Joyce*, 78 N. Y. 618; *Cox v. Woods*, 67 Cal. 817; *Bartholomew v. Mercantile M. Ins. Co.* 34 Hun, 263; *Sutherland v. Sutherland*, 60 Ill. 481, 488; *Douglas v. Grant*, 12 Ill. App. 273; *Hinton v. Citizens Mut. Ins. Co.* 63 Ala. 488, 498; *Pom. Spec. Perf. § 261, note 1*; *Howland v. Blake*, 97 U. S. 624-626 [24 L. ed. 1027, 1033]; *Guernsey v. American Ins. Co.* 17 Minn. 104 (Gil. 83); *Wachendorf v. Lancaster*, 61 Iowa, 509; *Ramsey v. Smith*, 82 N. J. Eq. 28, 31; *Turner v. Shaw*, 96 Mo. 23, 15 West. Rep. 250; *Edmond's App.* 59 Pa. 220; *Stockbridge Iron Co. v. Hudson Iron Co.* 107 Mass. 290.

There must not only be this convincing evidence as to a mistake, but what the contract agreed on was must be established by the same kind of testimony beyond reasonable doubt.

Tesson v. Atlantic Mut. Ins. Co. 40 Mo. 33; *Petech v. Hambach*, 48 Wis. 446.

Messrs. Stark & Sutherland, for respondents:

Equity will reform a policy of insurance, whenever it appears that the insured intended to secure a protection which he has not obtained, and the insurance company knew that such was his understanding and purpose.

Hearn v. Equitable S. Ins. Co. 4 Cliff. 192; *Oliver v. Mutual Com. Ins. Co.* 2 Curt. 277; *Maher v. Hibernia Ins. Co.* 67 N. Y. 283; *Goldsmith v. Union Mut. L. Ins. Co.* 18 Abb. N. C. 325; *Miller v. Hillsborough Mut. F. Assn.* 12 Cent. Rep. 827, 44 N. J. Eq. 224; *Brugger v. State Invest. Ins. Co.* 5 Sawy. 304; *Huy v. Star F. Ins. Co.* 77 N. Y. 235; *Home Ins. & Bkg. Co. v. Lewis*, 48 Tex. 622; *De Pryster v. Hasbrouck*, 11 N. Y. 582; 2 Pom. Eq. §§ 845, 849; *Hill v. Millville Mut. M. & F. Ins. Co.* 89 N. J. Eq. 66; *Palmer v. Hartford F. Ins. Co.* 4 New Eng. Rep. 470, 54 Conn. 488; *Mercantile Ins. Co. v. Jaynes*, 87 Ill. 199; *Ben. Franklin Ins. Co. v. Gillett*, 54 Md. 212; *Malleable Iron Works v. Phœnix Ins. Co.* 25 Conn. 465; *Bidwell v. Astor Mut. Ins. Co.* 16 N. Y. 263; *Williams v. North German Ins. Co.* (Iowa) 24 Fed. Rep. 625; *Spare v. Home Mut. Ins. Co.* (Or.) 17 Fed. Rep. 568; *Bailey v. American Cent. Ins. Co.* (Iowa) 18 Fed. Rep. 250; *Pink v. Queen Ins. Co.* (La.) 24 Fed. Rep. 818; *Sias v. Roger Williams Ins. Co.* (N. H.) 8 Fed. Rep. 183; *Woodbury Sav. Bank & Bldg. Assn. v. Charter Oak F. & M. Ins. Co.* 81 Conn. 517; *Longhurst v. Star Ins. Co.* 19 Iowa, 365; *Hammel v. Queen Ins. Co.* 50 Wis. 243; *Knox v. Lycoming F. Ins. Co.* 50 Wis. 671; *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 316.

It is doubtful whether the transfer, with

mortgage back, under the circumstances, constituted such an alienation as to affect the insurance.

Hitchcock v. North Western Ins. Co. 26 N. Y. 68; *Sanders v. Hillsborough Ins. Co.* 44 N. H. 288; *Washington Ins. Co. v. Hayes*, 17 Ohio St. 433; *Stetson v. Mass. Mut. F. Ins. Co.* 4 Mass. 338; *Howard F. Ins. Co. v. Bruner*, 23 Pa. 50; *Tittlemore v. Vermont Mut. F. Ins. Co.* 20 Vt. 546; *Ayers v. Hartford F. Ins. Co.* 17 Iowa, 176; *Kyte v. Commercial Union Assur. Co.* 8 New Eng. Rep. 884, 144 Mass. 43.

After the indorsement is made then the doctrine of estoppel applies, and the defendant is precluded from averring want of consideration or insisting upon previous forfeiture.

Pratt v. New York Cent. Ins. Co. 55 N. Y. 505; *Frost v. Saratoga Mut. Ins. Co.* 5 Denio, 154, and cases cited; *Wolfe v. Security F. Ins. Co.* 39 N. Y. 52; *Atlantic Ins. Co. v. Goodall*, 85 N. H. 328; *Green Bay & M. Canal Co. v. Hewitt*, 62 Wis. 334; *Hill v. Millville Mut. M. & F. Ins. Co.* 39 N. J. Eq. 75; *Bailey v. American Cent. Ins. Co.* (Iowa) 18 Fed. Rep. 250.

Lyon, J., delivered the opinion of the court:

The conveyance of the insured property by the plaintiffs to Lindner, without the consent of the defendant Company, would have invalidated the policy had the Company insisted upon a forfeiture. But the assignment thereof to Lindner with the consent of the Company, although after the conveyance was executed, was an effectual waiver of such forfeiture by the Company. The stipulation indorsed upon the policy, making any loss payable to plaintiffs as their interest might appear, constituted them the beneficiaries of the whole amount of insurance, for their interest under their mortgage greatly exceeded the insurance. If the contract expressed in the indorsement on the policy of April 27, 1886, is allowed to stand, the plaintiffs are entitled to all money the Company is liable to pay under the policy, for no part of the mortgage debt has been paid. But in such case all the conditions, stipulations and causes of forfeiture expressed in the policy remain intact. If any act or omission of plaintiffs would have defeated a recovery on the policy, had the same occurred before the conveyance to Lindner, the same act or omission of Lindner since the conveyance will also defeat it. But the contract which the plaintiffs seek to establish by a reformation of the policy, or rather of the indorsements of April 27, is a very different one. Such contract would practically give the plaintiffs absolute indemnity against loss of the insured property by fire. A violation of its terms and conditions by Lindner, without their consent, would not defeat the policy. He might convey the property away, or cover it with mortgages; he might obtain additional insurance upon it; he might use the dwelling-house for prohibited purposes, or fill it with prohibited combustibles; he might, in short, disregard every requirement of the policy inserted for the reasonable protection of the insurer, and still the plaintiffs would recover on the reformed policy.

The question we are to determine is, Which of these two widely different contracts did the parties to this action make on April 27, 1886? The writings which were then executed and

accepted, which are the evidence of the contract until reformed, show the contract to have been that the Company would continue the insurance in favor of Lindner, and that, if the policy should remain valid, the plaintiffs should be entitled to the insurance money in case of loss until their mortgage debt should be paid. The incidents of such a contract have already been stated. In place of the contract thus expressed and accepted by them the plaintiffs seek to substitute another, far more favorable to themselves, by showing that they did not in fact make the contract with the agent expressed in the indorsements of April 27, but that they made the other and more favorable contract above mentioned. They do not deny that they knew the terms and contents of such indorsements, or that they accepted them as written, and acquiesced in them for many months, and until after the insured property was burned. But they claim that the agent of the Company led them to believe that the indorsements operated to give them an insurance of their mortgage interest, entirely independent of Lindner and entirely unaffected by his acts or omissions, and that they confided in his statements, while the agent was himself mistaken as to the legal effect of the indorsements, or fraudulently deceived them as to their effect. The circuit court found from the testimony, substantially, that the contract actually made was as the plaintiffs claim it to have been, and that they were misled by the agent, either innocently or fraudulently, into the belief that the same was expressed in the indorsements. Are these findings supported by the testimony?

The rule of evidence in such cases is stated by the Supreme Court of the United States as follows: "In each case the burden rests upon the moving party of overcoming the strong presumption arising from the terms of a written instrument. If the proofs are doubtful and unsatisfactory, if there is a failure to overcome this presumption by testimony entirely plain and convincing, beyond reasonable controversy, the writing will be held to express correctly the intention of the parties. A judgment of the court, a deliberate deed or writing, are of too much solemnity to be brushed away by loose and inconclusive evidence." *Howland v. Blake*, 97 U. S. 624 [24 L. ed. 1027].

The rule thus laid down has been affirmed and applied several times by this court. *Harter v. Christoph*, 32 Wis. 245, and cases cited. Indeed, the rule seems to prevail in all or most of the courts in this country. See cases cited in brief of appellant.

Some of the courts say the alleged mistake must be proved beyond a reasonable doubt, or no reformation of the deed or writing will be decreed. It was held in *Ledyard v. Hartford F. Ins. Co.* 24 Wis. 496, and reaffirmed in *Harter v. Christoph*, *supra*, that a written instrument will not be reformed unless the correction asked for expresses the understanding of both parties thereto at the time it was executed. Furthermore, in *Ledyard v. Hartford F. Ins. Co.*, and again in *Kent v. Lasley*, 24 Wis. 654, it was queried whether, as a general rule, a writing should be reformed on the unsupported testimony of the party asking its reformation; and in *Harter v. Christoph* it is said: "It would be an extreme case which would

justify the court in reforming or defeating a written instrument, for a mistake therein, upon the uncorroborated testimony of a party to it, although such testimony were uncontradicted."

Having thus ascertained the rules of evidence which must govern the case, brief reference will be made to the testimony. The only witnesses to the transactions of April 27, who testified on the trial, were the three plaintiffs and the agent Hunkel. The plaintiffs severally testified, in a variety of forms, that they requested Hunkel to put the policy in a shape which would fully protect them, and he agreed to do so, and said to them, after the indorsements were made, "I have insured you, and not Mr. Lindner, and all you have to do in case of fire is to come to my office and let me know, and you get your money." This is the strongest testimony we find in the record of anything said by Hunkel which tends to support the plaintiffs' contention. The mortgage debt was to become due in six months, and the plaintiffs expected it would be then paid. They obtained an express promise from Hunkel that, when it was paid, the policy should be canceled, and the unearned premium returned to them. It also appeared that Lindner said he would have nothing to do with the policy; that it belonged to the plaintiffs, and that he intended to obtain other and cheaper insurance. We find no testimony that the plaintiffs expressly told Hunkel they desired an independent contract insuring their mortgage interest alone, which would eliminate from the policy all the numerous conditions and specifications of acts, omissions and causes, which would work a forfeiture of the contract, thus making it a contract for absolute indemnity. Neither do we find any sufficient testimony showing that Hunkel had any idea that they desired to make, or supposed they had made, such a contract. When it is remembered that the policy covered only a little more than one third of the mortgage debt, and hence that the entire legal title thereto was in plaintiffs (*Hammel v. Queen Ins. Co.* 50 Wis. 240), Lindner might well say that it belonged to plaintiffs, and he would have nothing to do with it. Although Hunkel said he had insured the plaintiffs, and not Lindner, it is unreasonable to believe he meant that he made a contract in behalf of his Company so radically different from that expressed in the writings—a contract, too, which it was proved on the trial he had no authority to make. The whole conversation is entirely consistent with the theory that Hunkel only meant that Lindner could not get the insurance in case of loss, but the same would be paid to the plaintiffs. He testified that is what he said. He also denied that he made the contract the plaintiffs claim he did, and testified that nothing was said about issuing a policy direct to the plaintiffs to insure their mortgage interest alone. The agreement for the cancellation of the policy, and the return of the unearned premium when the mortgage should be paid, is against the contention of the plaintiffs. The payment of the mortgage would have canceled the policy if it only covered the mortgage interest, and there was no necessity for any agreement to cancel it. Moreover, Hunkel would hardly

agree to refund the unearned premium after the indemnity had ceased, when the Company would have been under no legal obligation to do so.

It seems very clear to our minds that the judgment of the circuit court, reforming this written contract of insurance, violates every rule of evidence above stated. The proof is not clear and convincing, beyond reasonable controversy, that the plaintiffs asked the agent of the defendant Company to contract with them to insure their mortgage interest alone,—that is, for absolute indemnity against loss by fire,—which would abrogate so many conditions of the policy inserted for the protection of the insurer. Although they may have been seeking to obtain such a contract, they said nothing to the agent which necessarily communicated that desire to him. All they said to him, and all he said in reply, is entirely consistent with the theory that the agent had no thought of so changing the contract as to insure their mortgage interest alone, or that they desired him to do so. Hence it is not sufficiently proved, within the above rule, that the reformed contract expresses the understanding of both parties. Moreover, the same was reformed on the uncorroborated testimony of the parties asking for such reformation, which testimony is disputed in most vital points by that of Hunkel.

In *Gillet v. Liverpool & L. & G. Ins. Co.* 73 Wis. 208, the plaintiff, a mortgagee of the insured property, claimed, as the plaintiffs do here, that he applied for insurance on his mortgage interest alone, but that by mistake the policy was issued to the mortgagor, loss payable to the mortgagee, as his interest might appear. He did not pray a reformation of the policy in terms, but the case is discussed as though he had done so. It appeared that he applied for an insurance on the mortgaged property to secure his mortgage interest therein, without any agreement or reservation as to its forms, or the stipulations it should contain. He accepted the policy as issued, and retained it several months without objection. The proof was held insufficient to authorize a reformation of the policy, and the plaintiff was held estopped by his laches to deny that the writing expressed the true contract. That is fully as strong a case for reformation as the present case. A valuable note to this case, prepared by J. R. Berryman, Esq. (the state librarian), will be found in the American Law Register for April, 1889 (2d Series, vol. 28, No. 4), in which many cases are collected, some of which bear upon the principles and rules above laid down.

For the reasons above stated, we are impelled to the conclusion that the plaintiffs have failed to show themselves entitled to a reformation of the contract of insurance, and that the circuit court erred in granting them such relief. We have considered and determined the case on the hypothesis that the agent Hunkel had authority to bind the defendant Company by the contract which the plaintiffs claim he entered into with them. It should be observed that we do not decide this proposition. There are stipulations in the policy which may bring the case within the rule of *Hankins v. Rockford*

Ins. Co. 70 Wis. 1. But we leave that question open.

Another very valuable note by Mr. Berryman to the case last cited will be found in 27 Am. Law Reg. (N. S.) 194, in which many

cases bearing on the powers of insurance agents, and the limitations thereto, are collated.

The judgment of the Circuit Court must be reversed, and the cause will be remanded for further proceedings according to law.

MICHIGAN SUPREME COURT.

JOHN SPRY LUMBER CO., *Appt.*,

v.

SAULT SAVINGS BANK, LOAN & TRUST CO. *et al.*

(.... Mich.)

A statute which provides that the lien of a laborer or furnisher of materials of a building erected by a contractor shall not be defeated by any agreement between the owner and the contractor or sub-contractor, or by any payment made to either of them, or by failure to perform the contract, in case the laborer or furnisher complies with the provisions of the Act, is an unconstitutional attempt to subject property to sale for obligations to which the owner never became bound, and strikes at the foundation of all property in land.

(October 25, 1889.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Chippewa County, denying the existence of a mechanics' lien which it sought to enforce against the defendant corporation. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Shepard & Lyon*, with *Mr. E. S. B. Sutton*, for plaintiff, appellant:

Statutes giving liens to laborers and mechanics are to be liberally construed.

Flagstaff Silver Min. Co. v. Cullins, 104 U. S. 176 (26 L. ed. 704).

The provision of the Statute that if a husband purports to act for his wife in the erection of a building, or in making improvements upon property in which she has an interest, she shall be considered to have sanctioned the erection of that building by the mere fact that the improvements were done in an open and notorious manner, was a valid and proper one.

Heath v. Solles, 73 Wis. 217; *North v. LaFlesh*, 73 Wis. 520.

The parties must be held to contract with reference to the law as it exists and incorporate it in and as a part of their contract.

Reilly v. Stephenson, 62 Mich. 509.

Messrs. Hayden & Young, with *Mr. H. M. Oren*, for defendant, appellee, the Savings Bank, Loan & Trust Co.:

No alienation can be effected of a homestead—a property right so sacredly regarded as to be the subject of special constitutional provision—without at least a delivery of the instrument for the very purpose of that alienation, such delivery to be intended by the parties as an alienation.

Jeffron v. Flanigan, 87 Mich. 274; *Thatcher v. St. Andrew's Church*, Id. 264; *Eaton v. Troubridge*, 38 Mich. 454.

The memorandum required by this Statute need not contain a single word of devise, mort-
6 L. R. A.

gage or alienation. Without delivery, how can such an instrument, not bearing any seal or any appearances of an intention to authenticate it as an alienation, be held to exempt the transaction from the provisions of the constitutional prohibition upon the sale of homesteads on execution?

See *Meyer v. Berlandi*, 39 Minn. 488.

The Constitution (§ 5, art. 16) prohibits the incumbrance of the wife's property for the husband's debt.

No presumption can arise, that because a wife knows of her husband's act she therefore consents to that act so as to bind herself and her separate estate.

Fecheimer v. Peirce 70 Mich.—14 West. Rep. 648; *Willard v. Magoon*, 30 Mich. 273; *Newcomb v. Andrews*, 41 Mich. 518; *Morrison v. Berry*, 43 Mich. 389.

Any statute or rule which should in any way deliver a sub-contractor or any under workman or materialman from the obligation undertaken by his superior would at once violate the constitutional provisions against laws which impair the obligations of contracts. • A person making a subcontract is presumed to make it knowing the agreement of the principal contractor, and to make it in strict subordination thereto.

Overton, Mechanics' Liens, 578; *Cooley, Const. Lim.* 285; *Meyer v. Berlandi*, 39 Minn. 488; *Shaver v. Murdock*, 36 Cal. 293; *Pike v. Irwin*, 1 Sandf. 14; *Stewart v. Wright*, 52 Iowa, 335; *Phill. Mechanics' Liens*, p. 65; *Donahy v. Clapp*, 12 Cush. 440; *Parker v. Bell*, 7 Gray, 429.

The provision of section 2, which gives the owner the right to pay any lien claimant upon an *ex parte* affidavit all he asks in his itemized bill, without notice thereof to the contractor, and thereby absolutely to discharge himself from his obligation to the contractor, to the amount of such payment, and giving to the contractor, as his only remedy for the fraud or false statement of the person obtaining the money, the barren prospect of a prosecution against an irresponsible person for perjury, is an adjudication of a contract right without giving to the contractor his day in court, is a capricious determination of the legality of a debt, and deprives the contractor of property rights without due process of law. It is clearly within the constitutional inhibition of such legislation.

Parsons v. Russell, 11 Mich. 113; *Bidwell v. Whitaker*, 1 Mich. 469; *Rockwell v. Nearing*, 35 N. Y. 806; *Reese v. Elmendorf*, 38 N. J. L. 125.

The law is a menace to land titles which ought to deprive it of favor.

Willard v. Magoon, 30 Mich. 273; *Clark v. Raymond*, 27 Mich. 456.

The radical provisions of this Statute, but for

which the Act would probably not have been passed, being unconstitutional, the entire Statute should be disregarded.

Cooley, Const. Lim.; *Meyer v. Berlandi*, *supra*; *Western U. Teleg. Co. v. Texas*, 13 Am. & Eng. Corp. Cas. 886; *State v. Pugh*, 1 West. Rep. 86, 48 Ohio St. 98.

Mr. John H. Goff for defendants Myers, appellees.

Campbell, J., delivered the opinion of the court:

Plaintiff sued, counting expressly on the Lien Law (No. 270, Gen. Laws 1887), claiming a lien on the banking house of the principal defendant for lumber furnished the defendants Myers, and used in its construction. The Savings Bank, Loan & Trust Company made a written contract with the defendants Myers, June 27, 1887, to begin by July 1, 1887, and finish by November 1, for \$27,000, the building in question, payable on monthly estimates, with the usual drawback of 20 per cent to be held till completion. The court below held the Lien Law of 1887 to be unconstitutional, and gave judgment on the personal debt against defendants Myers, who do not appeal. Plaintiff appeals on account of the denial of the lien.

The Law of 1887 repeals all previous laws on the subject, and only saves pending proceedings. But it is assumed, and correctly, to apply to all material furnished after the law took effect, whether under old or new contracts. It changes the old law chiefly in regard to the cases under which liens may be created, and does so in such a way that it must stand or fall together. The machinery is merely secondary and incidental. The new law varies from the old law in these important particulars: *First*. It allows a homestead to become bound to the persons claiming a lien, where a building contract is executed with the original contractor, signed by husband and wife. *Second*. It binds a married woman's land, where the articles or labor are furnished to a contractor or sub-contractor of the husband with her knowledge or consent, express or implied, as if by her own express authority; and furnishing labor or materials "in an open and public manner" is made sufficient evidence of knowledge and consent. *Third*. The building contract made with any person, whether man or woman, has no effect on the lien, whether fully performed by the landowner or not; and the laborer or furnisher may enforce his lien for any material or labor furnished under any

contract, express or implied, written or unwritten, whether conforming to the original contract or not. In short, this law makes the mere fact that a building contract exists, or has existed, a sufficient reason for binding the land for any act or omission of the building contractor or his sub-contractor, whether within the range of the contract or not, or whether or not in harmony with its terms.

The law says, in so many words: "Such lien shall not be defeated by any contract, agreement or understanding between the owner, part owner, or lessee of the real estate upon which such improvements are made, or for which such materials are furnished, and the original, or any sub-contractor, by any payment made by such owner, part owner or lessee to such contractor or sub-contractor for the contract price of such labor or material, or any part thereof, in case the person performing such labor or furnishing such material shall comply with the provisions of this Act."

This Statute is made for the express, and, so far as differing from former laws, for the only, purpose of enabling strangers to the title to subject it to sale for obligations to which the owner never became bound, and in which he has no part whatever. It strikes at the foundations of all property in land. There is no constitutional way for divesting a man's title except by his own act or default. Here his own act is not required, and his freedom from default is no defense. He may pay in full, in advance or otherwise, for all he has contracted for. He may contract for a house built in a certain way, and of certain materials, and may have to pay for what he never bargained for, and what his building contractor had no right to put off upon him. The original contract plays no part in the matter, except as a fact which binds no one, and has no significance. Such a gross perversion of all the essential rights of property is so plain that no explanation can make it plainer; and, as this purpose forms the only apparent reason for it, the Statute, and all its parts, must fall together, leaving the law of the State where it was before the Law of 1887 was passed.

In *Hanes v. Wade*, 73 Mich. —, 41 N. W. Rep. 222, the validity of the law was not discussed, as it has not been in any other case hitherto.

The judgment must be affirmed, with costs.

Sherwood, Ch. J., and **Morse and Long, JJ.**, concurred; **Champlin, J.**, did not sit.

PENNSYLVANIA SUPREME COURT.

Jonas BRINSER et al., Plffs. in Err.,

v.

Christina ANDERSON et al.

(....Pa....)

Knowledge of a writing which is in form

NOTE.—Effect of knowledge of possession. See *Thomas v. Burnett*, 4 L. R. A. 222, note, 128 Ill. 37; *Pittsburgh, C. & St. L. R. Co. v. Bosworth*, 2 L. R. A. 200, note, 46 Ohio St. 81; *Constant v. University of Rochester*, 2 L. R. A. 722, note, 111 N. Y. 604. 6 L. R. A.

a lease of real property to a person in possession does not relieve a purchaser from the duty of inquiring as to the possessor's rights.

(October 7, 1880.)

ERROR to the Court of Common Pleas of Dauphin County to review a judgment in favor of plaintiffs in an action of ejectment brought to recover possession of a lot of ground in the Borough of Middlesex. *Affirmed.*

Prior to 1857, one John Snyder died seised of the lot in question. During that year Washington R. Snyder, his son, acting for himself, and, as plaintiff contended, for the remaining heirs of John Snyder, entered into a parol contract with one John Anderson to sell said lot to him. The consideration for this sale was \$300, of which \$150 was paid. Anderson took possession of the lot, erected a dwelling-house thereon, and continued to live therein.

In 1858 the heirs of Snyder conveyed the same lot to J. Hoffman Hershey. Plaintiffs claimed that this conveyance was made to Hershey at the request of Anderson. The consideration of the deed was \$150, being the amount remaining unpaid of the purchase money due by Anderson, and plaintiffs claimed that the transaction was simply an advance by Hershey of the unpaid purchase money, and that the conveyance of the land to him was as security therefor.

In 1875 a lease at will of the lot was executed by Hershey to Anderson at the rent of \$2 per month, after which Anderson remained in possession, occasionally paying rent.

Subsequently Anderson died and his heirs remained in possession of the lot.

In 1884 Hershey executed a deed of the lot to one Brinser and he brought an action of ejectment and recovered possession of the same. Thereafter the heirs of Anderson brought ejectment to recover back the lot.

When the case reached the supreme court it held that the contract had been sufficiently proved and so far performed as to take the case out of the Statute of Frauds, but ruled that the burden of proof was upon the plaintiff to prove the authority of Washington R. Snyder to represent the other heirs, and sent the case back for another trial.

At such trial the authority of said Snyder was shown, and also it was proven that Brinser had knowledge of the lease under which the Anderson heirs held possession.

The further facts appear in the opinion.

Mr. J. C. McAlarney for plaintiffs in error.

Mr. S. J. M. McCarrell for defendants in error.

Clark, J., delivered the opinion of the court:

When this case was here before (10 Cent. Rep. 776) we said there was abundant proof of a contract for the sale of the lot in dispute by Washington R. Snyder to John Anderson in the year 1857. "The receipt, dated October 22, 1857," we then said, "taken with the other evidence in the cause, was full and complete upon this point. The terms of the contract are, we think, sufficiently shown. The lot is described as 'No. 258 in the Borough of Middletown,' which may be regarded, perhaps, as a proper designation of the boundaries. The consideration was \$300, a considerable part, if not all, of which, was shown to have been paid. Possession was taken immediately after and in pursuance of the purchase, and a dwelling-house was erected upon it. The possession was open and notorious, and was continuously maintained for many years, and until legal proceedings were instituted to test the title." The testimony at this trial, on that branch

of the case, is substantially the same as before; and we adhere to the opinion we expressed on that point at the former hearing.

The testimony at the former trial has been supplemented, however, with satisfactory proof that Washington R. Snyder, in this transaction, acted not only for himself, but in the behalf of his sisters, who were the heirs of John Snyder, deceased; and that not only the purchase money paid by Anderson, but the money advanced by Hershey, was divided between the brother and sisters according to their respective interests. There was abundant evidence of the most satisfactory character to this effect, and the fact has been found by the jury. We are of opinion, also, that there was evidence from which the jury might fairly infer that the deed to Hershey was only a security for the money advanced by him to pay out the purchase money; and that the writing, denominated a "lease," which, it is alleged, was subsequently executed between Hershey and Anderson, was a contract on part of the defaulting vendee for the continuance of the possession on terms agreed upon,—the rent, as it was paid, being applicable to the principal and interest of the purchase money. In view of what was said in our former opinion, we think it is not necessary to enter into any further discussion on this branch of the case.

The only remaining question for our consideration is whether or not Jonas Brinser is to be regarded as an innocent purchaser, and entitled to protection as such. Anderson died in 1882, and the conveyance by Hershey to Brinser was in 1884. Anderson's heirs were in the actual possession of the premises in dispute at the time of the conveyance, and it is contended that their possession put Brinser upon inquiry as to the title in virtue of which that possession was maintained, and that, having failed in this respect, he is affected with notice of that which a proper inquiry would have developed.

The rule of law which is thus invoked is settled in a long line of cases, including *Jaques v. Weeks*, 7 Watts, 261; *Maul v. Rider*, 59 Pa. 167; *Hottenstein v. Lerch*, 104 Pa. 454; *Rove v. Ream*, 105 Pa. 543. But it is said that Detwiler, who was the agent of Hershey in the transaction between him and Brinser, exhibited to Brinser the writing in form of a lease by Hershey to Anderson; that the so-called "lease" was in itself explanatory of the possession, and Brinser was thereby relieved from further inquiry. *Leach v. Ansbacher*, 55 Pa. 85, is cited in support of this position.

When this case was here before, we said: "Anderson was at the time in possession, under the terms of the paper which has been denominated a 'lease,' and if Brinser had actual knowledge of the lease, and had no knowledge of the facts relating to its execution, it is probable, under the ruling of this court in *Leach v. Ansbacher*, 55 Pa. 85, he might be regarded as an innocent purchaser." "Nothing in the transaction," says *Mr. Justice Thompson* in the case last cited, "gave the least sign to put the purchaser on inquiry. The possession will, it is admitted. But, when the party is in possession under a lease, the knowledge of the lease dispenses with the inquiry of how the possession is held. That knowledge the agent had, and of the very terms of the lease. That

was enough for him. He was not bound to inquire of the tenant in possession if the lease was fair or fraudulent, or whether there was a trust notwithstanding."

But, as it did not then appear that Brinser had any knowledge whatever of the lease, the rule suggested in *Leach v. Ansbacher*, as above, was not considered applicable to the case. We intimated, however, somewhat cautiously and doubtfully, that, if that fact had been established, it was probable "the ruling laid down in *Leach v. Ansbacher* might apply." Upon a careful examination, however, the doubt which then existed in our mind as to the soundness of this view has grown into a conviction that it cannot be sustained. The case of *Leach v. Ansbacher* was without doubt rightly decided; but the remarks of the learned justice who delivered the opinion quoted above were not necessary to the decision of that case. In *Leach v. Ansbacher* it was found as a fact that Ansbacher was an innocent purchaser without notice; and that Leach himself, who had actual knowledge of the whole transaction, not only gave no notice of his claim of title, but assented to and approved of the sale. The same conclusion was irresistible, therefore, on other ground; and in this sense it may be said that the remarks quoted were not necessary to the decision of the cause. The authorities cited do not declare the principle in support of which they are cited. Neither in Sugden on Vendors, nor in the case of *Hood v. Fahnestock*, 1 Pa. 470, do we find any such doctrine declared. Indeed, upon a somewhat careful examination of all the cases, we conclude that the language quoted from *Leach v. Ansbacher* is sustained neither by reason nor authority.

Knowledge of the existence of a lease will, of course, give constructive notice of all its provisions; but the possession, apart from the lease, we think, should be treated as notice of the possessor's claim of title, whatever that claim may be; for the lease may be but the first of two or more successive rights acquired by the tenant. While in the occupancy under a lease for years, the tenant may have purchased

under articles, and entitled himself to an equity; or, indeed, he may have purchased the legal estate in fee, and failed to record his deed. Would it be supposed that a knowledge of the precedent lease would dispense with the duty of inquiry, and entitle a subsequent grantee to the protection of an innocent purchaser? Or the lease may have been the instrument of a base fraud. It may have been executed under the false and fraudulent pretense, to an illiterate person, that it was in fact a conveyance or a contract of sale. Would possession afford no protection in such a case? We think it would. In such cases the possession is the possessor's only reliance, for he may be powerless to put his claim of title upon the record.

In Sugden on Vendors, vol. 1, 6th Am., from 10th London, ed., p. 265, § 22, it is expressly stated, and numerous authorities are cited in support of the statement, that if a tenant, during his tenancy, changes his character by having agreed to purchase the estate, his possession amounts to notice of his equitable title as purchaser. Among the cases cited we find *Daniels v. Davison*, 16 Ves. Jr. 249, where it is held that the possession of a tenant, who had taken it under a lease for a term of years, and, during the pendency of the lease, made a contract with his lessor for the purchase of the reversion, was notice in itself to a subsequent purchaser (the lease being still unexpired), not only of a tenant's interest under it, but likewise of his equitable title to the estate under his contract for the purchase. To the same effect is *Allen v. Anthony*, 1 Meriv. 282, and our own cases of *Hottenstein v. Lerch* and *Rouse v. Ream*, *supra*.

Moreover, it now appears that Anderson, the lessee, was not himself in the possession. He had died two years or more before the sale to Brinser, and his widow and children were in the possession. The term of the lease had expired; and it would not be, we think, presumed in favor of a purchaser, in the absence of proof, that the heirs were holding over.

We are of opinion that this case was properly tried, and the judgment is affirmed.

TENNESSEE SUPREME COURT.

TOMLINSON, *Appt.*,

v.

BOARD OF EQUALIZATION.

(....Tenn.....)

1. No appeal lies from the action of the Board of Equalization of taxes where it is not provided for by statute.
2. "The right to summon before them witnesses," given to the Board of Equalization by the Assessment Act of March 25, 1897, § 42, does not give to a complaining taxpayer any right to introduce evidence, or make it the duty of the Board to summon witnesses of their own selection, unless it deems that justice demands evidence from witnesses.
3. A writ of certiorari cannot be demanded by a complaining taxpayer to review on the merits the action of a Board of Equalization under the Act of March 25, 1897, § 42, R. A.

which declares that the action of the board shall be final.

4. "Sufficient cause" for a writ of certiorari, as provided by Const., art. 6, § 10, must be defined either by statute or judicial decision, and does not exist for the purpose of reviewing a decision on the merits, except where the writ lies as a substitute for an appeal or writ of error, or possibly instead of *audita querela*.

(Turney, Ch. J., *dissentia*.)

(October 12, 1899.)

APPEAL by petitioner from a judgment of the Circuit Court for Grainger County dismissing a petition for writs of certiorari and supersedeas to review proceedings of the Board of Equalization approving the valuation fixed by the assessor upon his property, and to prevent the return of such excessive assessment. *Affirmed.*

The facts are fully stated in the opinions.
Messrs. Shields & Shields for appellant.
Messrs. Tate & Pickle for appellee.

Lurton, J., delivered the opinion of the court:

The petitioner applied for and obtained writs of certiorari and supersedeas. Upon motion, at the following term of the circuit court, the petition was dismissed. His complaint is that the tax assessor of Grainger County has placed an excessive tax upon three parcels of land owned by him. He alleges that he made complaint before the Board of Equalization that his assessment was excessive, and produced and sought for permission to examine witnesses to support his complaint; that the Board refused to allow him to examine these witnesses, or to grant him a subpoena for others that he proposed to bring before them; and that they adopted and approved the valuation fixed by the assessor. The petition shows the ground upon which the Board refused to hear his witnesses, in that it states that they ruled that "a complaining taxpayer had no right, under the law, in such cases to introduce evidence as to the value of his property claimed to be excessively assessed, or the Board any authority to hear and consider any evidence upon the subject, unless, in the judgment of the Board, justice demands that it should have evidence, and then only such as the Board might see fit to call itself, in its discretion." Petitioner then alleges that he preferred a bill of exceptions, which the Board refused to sign, and prayed an appeal to the circuit court, which was refused.

What relief can petitioner obtain under a writ of certiorari, upon these facts? The duties and powers of the Board of Equalization are defined in section 42 of the Assessment Act, passed March 26, 1887. It is as follows: "That said Board of Equalization shall carefully examine and compare and equalize said assessments, and shall eliminate from the lists thereof all property exempt under this Act, and they are hereby empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive assessments, when, in their judgment, justice demands it, and to correct any and all errors arising from clerical mistakes, or otherwise; and the corrections made, if any, shall be entered upon the assessment book without in any way altering the assessment lists; and the action of this Board as to valuation shall be final; and all complaints in this regard are hereby required to be made and acted upon by this Board, during its session, which shall be from the first Monday to the third Monday in June. If complaint made is based on excessive values, said Board shall have the right to summon before them witnesses, who shall be disinterested freeholders, and the sworn testimony of three such witnesses, concerning same, will be sufficient evidence upon which such Board may act." The italics are ours.

It may be directly seen from the plain words of the Act that the legislative intention was that there should be no appeal or review of the action of this Board upon the subject of valuations, where it has acted upon a complaint. The law-maker has in so many words declared that its action in this regard "shall be final." When no right of appeal is given by the Statute

in express words, or by necessary implication, an appeal will not lie; and it was therefore not error in the board to refuse the appeal prayed for. *Wade v. Murry*, 2 Sneed, 50; *Ex parte Knight*, 8 Lea, 401.

But it is insisted that when no appeal lies the writ of certiorari may be used in lieu of, or as a substitute for, an appeal. Article 6, § 10, of the State Constitution provides that "the judges or justices of inferior courts of law and equity shall have power in civil cases to issue writs of certiorari to remove any cause, or the transcript of the record thereof, from any inferior jurisdiction into such court of law, on sufficient cause, supported by oath or affirmation." What is "sufficient cause" must be defined by either statute or judicial decision. Judicial decision has established that where the law gives an appeal, and the party is deprived of it without any fault or negligence on his part, that is "sufficient cause," if he shows, in addition to it, a meritorious case. History of a Lawsuit, § 655, Old ed.

But in the case before us the law gave no appeal; hence, the writ will not lie in lieu of or as a substitute for an appeal. But will it lie under any of the statutory definitions of "sufficient cause?" Code, § 8123, is as follows: "The writ of certiorari may be granted when ever authorized by law, and also in all cases where an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy or adequate remedy." By the succeeding section it is declared that the writ of certiorari lies in the following cases: "on suggestion of diminution; where no appeal is given; as a substitute for appeal; instead of *audita querela*; instead of writ of error."

This is a case which learned counsel contend comes under the provision for the writ in the section last quoted, "where no appeal is given." It is too plain for argument that if the writ cannot lie under this provision it will not under any of the other cases named in the Statute. These two sections must be construed together. The statutory ground is that the writ of certiorari will lie, upon sufficient cause shown, where no appeal is given; where an inferior tribunal, board or officer exercising judicial functions has exceeded the jurisdiction conferred, or is acting illegally; where, in the judgment of the court, there is no other plain, speedy or adequate remedy. Does petitioner present such a case? Waiving for the present any consideration of the question as to whether a Board of Equalization, under our Act of 1887, is a judicial tribunal, or whether, in regard to its action upon a complaint of an excessive assessment, it is a board "exercising judicial functions," we will first undertake to ascertain whether, if we assume it to have been in the exercise of judicial functions in the matter complained of, it has in any way exceeded its jurisdiction, or, in the language of the Statute, was acting illegally.

The complaint made in the petition is that it refused to hear witnesses offered by complainant in support of his complaint as to an excessive assessment as to valuation. In this did they "exceed their jurisdiction," or "act illegally?" To determine this, we must not only

consider the language of the Act defining their duties, but consider the general nature and scope of the powers conferred upon them. They are styled a "Board of Equalization." They are charged, primarily, with the duty of "examining" and "equalizing" assessments. Thus duty they are expected, most manifestly, to perform, not upon testimony, but upon a "comparing" the assessments in one district or neighborhood with another,—one piece of property with the assessment upon another of equal value. Clearly, this is to be done upon their own knowledge of the comparative valuations, and the end to be reached is an equalization whereby discriminations in favor of one, or against another, are to be corrected. In addition to this, they are to correct mistakes made by the assessor, and eliminate from the list property exempt under the law from assessment. Finally, they are empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive taxation, where in their judgment justice demands it. How are they to "hear and adjust" such complaints? Petitioner's contention is that they must hear witnesses produced by him; that he has a right to examine such witnesses, and cross-examine such as are produced against him. In other words, that the Act contemplates a regular trial, according to the ordinary course of law, and the decision according to the weight of the proof. We have seen that, with reference to the primary duty of the Board,—that of equalizing assessments,—the Act contemplates no issue of fact or hearing of evidence, but that the equalization is to be brought about by a comparison of assessments and the knowledge they have of the relative values of different pieces of property. Can the law contemplate any very different method of correcting an excessive assessment? The knowledge of relative values—of comparative values—which they have as citizens and freeholders, and which they obtain from an examination and comparison of the assessment lists, will, in the vast majority of cases, enable them to act justly upon the complaint. But cases may occur where these means are, in their judgment, unsatisfactory. In such case, the Act declares that the "Board shall have the right to summon before them witnesses, who shall be disinterested freeholders; and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such Board may act." The "Board shall have the right" to summon before them disinterested freeholders, is the language of the Act. Does this power conferred make it their duty to either have witnesses brought by the party making complaint, or require them in all cases to summon witnesses upon such complaint being made; or is the hearing of witnesses a matter wholly in their discretion? We think the Statute means no more than it plainly discloses. To hold that it was the duty to permit the examination of witnesses offered by a complainant would imply a duty to the State and county to hear and examine witnesses to sustain the assessment. All this would imply a trial, and a judgment upon weight of proof. The question of valuation is altogether a matter of opinion. Before questions of opinion the greatest diversity may be expected. The sessions of

this Board terminate in two weeks; and at the end of that time they are required to return the assessment lists, and their corrections, to the clerk of the county court. In populous counties the assessments reach into the thousands. That each taxpayer should have the right to come with his witnesses, and have them heard, and be heard by counsel, would result in such delay and embarrassment as to amount to a great public peril with regard to the assessment of the public revenues. No legislative body could have seriously contemplated such a tribunal to determine a mere question of an excessive valuation for purpose of assessment. Occasional instances of excessive assessments may occur; but they had better be borne than that such a court should be created to settle them. The taxpayer in the first instance may make his representations to the assessor. If he overassess him, he may carry the matter to a board of disinterested freeholders, acting under oath. If they, upon their own knowledge, agree with the assessor, and, upon a "comparison," find no case for a reduction for purpose of equalization, the chances are that the assessment is not far wrong. If he cannot induce the Board to think that it is a case where they ought, for their own enlightenment, to exercise the power they have to summon witnesses of their own selection, he must submit. The Board was not "exceeding its jurisdiction," or "acting illegally," in refusing to have the witnesses offered by petitioner; and it had a right to refuse to summon witnesses of its own selection, if it deemed that justice did not demand evidence from witnesses.

The next contention is that petitioner has the right to have the writ of certiorari to the end that he may have the matter heard or retried upon the merits. This is based upon the proposition that if the Board had heard witnesses, or had decided the matter without witnesses, and upon their own knowledge, or upon a comparison of the assessment complained of with other assessments, in any event their action in adopting and approving the assessment is a judgment which they are entitled to have reviewed upon the merits; and that, inasmuch as it is a case where no appeal lies, for this reason the writ of certiorari lies to review and retry the matter upon its merits. The answer to this is that it is only where the writ of certiorari lies as a substitute for an appeal or a writ of error, or, possibly, instead of *audita querela*, that the writ will operate to give to the petitioner a new trial upon the merits. On the first plan the Act, as we have before seen, expressly declares that the action of the Board shall be final. The law-maker did not intend that its judgment on the merits should be subject to review. In all such cases the writ will not lie to review the matter upon the merits. Such controversies must be finally settled by some means. The judgment of a disinterested board of freeholders upon a mere matter of opinion as to the valuations for taxation is as likely to be right as that of any court. Says Judge Cooley upon this question: "As a general rule, a tax cannot depend for its validity upon the ability to justify it to the satisfaction of a court or jury. Value is matter of opinion; and, when the law has provided officers upon whom the duty is imposed to make it, it is the

opinion of these officers to which the interests of the parties are referred. The court cannot sit in judgment upon their errors, nor substitute their own opinions for the conclusions the officers of the law have reached." Cooley, *Taxn.* 1st ed. 157.

Every interest of the State alike demands that such questions shall be settled cheaply and speedily. Where an Act creating a special tribunal, even exercising judicial functions, gives it power and authority to settle particular grievances, such as this, and either expressly or by plain implication declares that the judgment of such special tribunal shall be final, and it confines itself within its jurisdiction, and does not "act illegally," the writ of certiorari will not lie to review its action upon the merits. This question has been settled in this State since the case of *Wade v. Murry*, 2 Sneed, 50. That case was this: Under Act 1854, chap. 82, contested elections of judges and attorney-generals were to be heard and determined by a special tribunal, consisting of the chancellor of the division within which the contest arose. The jurisdiction was conferred upon the chancellor, and not upon the chancery court. The Act prescribed how, when and where he should hear the contest. No provision was made for an appeal or writ of error. Judge McKinney delivered the opinion of the court, and held: *first*, that no appeal or writ of error would lie from the judgment of the chancellor determining such a contest; *second*, that no writ of certiorari would lie as a substitute for a writ of error, and that when the law intended the decision to be final and conclusive there could be no review of the judgment in any way whatever. The learned judge, however, qualifies his decision—as we think, properly—when he says that "we do not mean to say, however, that the certiorari might not be resorted to for some purposes in a case like the present. We think it might. In a case involving a question as to the legal competency of the judge, or showing such a substantial departure from the course of proceeding prescribed in the Statute as would render the proceedings void, the certiorari would be the proper remedy." *Id.* 57.

The learned author of "A History of a Law-Suit," in commenting on the doctrine now under discussion, says, that "the law as stated in *Wade v. Murry*, precluding all inquiry into the correctness of the judgment upon the merits of the case, may be considered settled." This has been thought by some to operate as an abridgment of the right to a certiorari which is secured by the Constitution. But the language of the Constitution secures the benefit of the writ "on sufficient cause;" and what is sufficient cause is not defined by the Constitution. It must be, therefore, by the Legislature or the courts. When the Legislature has created an inferior jurisdiction, and has given no appeal from its decisions, it must be evident that it did not intend them to be reversed upon the merits of the case. It is equally evident that it intended the jurisdiction to keep itself within the prescribed limits, and to proceed in a legal manner; and it is only when it transgresses in these respects that "sufficient cause" exists for a certiorari. Caruthers, *History of a Law-Suit*, Old ed. §§ 750, 751.

Wade v. Murry has been followed in the 6 L. R. A.

case of *Ex parte Knight*, 8 Lea, 401. Opinion by Judge McFarland, Judges Turney and Freeman dissenting. That this writ will not lie to review the judgment of a board of assessors or a board of equalization upon the merits, where the controversy is as to the valuation, has been repeatedly settled in other States.

Judge Cooley, in his elaborate work on Taxation, in speaking of the office of this writ, says: "It will not lie to review any merely discretionary action of any tribunal, nor is it within the proper scope of the writ to review the decisions of inferior tribunals upon the merits. The court awarding it, therefore, will not look into the evidence on which the inferior tribunal may have acted, except so far as may be necessary to the determination of any jurisdictional question that may depend upon it." Again, he says: "The writ does not lie to the collector of taxes, or any other mere ministerial officer, to review either his action or any of the prior actions on which his own was based," and "that assessments cannot be revised, and set aside on this writ, on the ground, merely, that they are excessive or unequal." Cooley, *Taxn.* 1st ed. 531-533. See also *Shelby Co. v. Mississippi & T. R. Co.* 16 Lea, 412.

We have been referred to Mr. Burroughs on Taxation, who seems to entertain the opinion that a writ of certiorari will lie to correct an excessive assessment, although the assessor or board of equalization have not acted illegally or exceeded their jurisdiction. This is a total misconception of the "sufficient cause" upon which such writ is authorized, either at common law or under our Constitution. It is certainly not in accord with our cases, and is in direct conflict with the views of Judge Cooley, as quoted above.

The judgment of the Circuit Court dismissing the petition is affirmed, with costs.

Turney, Ch. J., dissenting:

By an Act passed the 25th of March, 1887, creating a Board of Equalization in the assessments of taxes, it is provided, in section 43, "that said Board of Equalization shall carefully examine and compare and equalize said assessments, and shall eliminate from the lists thereof all property exempt under this Act; and they are hereby empowered to hear and adjust complaints from any party feeling aggrieved on account of excessive assessments, when, in their judgment, justice demands it, and to correct any and all errors arising from clerical mistakes or otherwise, and the corrections made, if any, shall be entered upon the assessment book, without in any way altering the assessment lists; and the action of this board as to valuation shall be final, and all complaints in this regard are hereby required to be made and acted upon by this board during its session, which shall be from the first Monday to the third Monday in June. If complaint made is based on excessive values, said board shall have the right to summon before them witnesses, who shall be disinterested freeholders; and the sworn testimony of three such witnesses concerning same will be sufficient evidence upon which such board may act."

The tax assessor of Grainger County assessed three separate tracts of land of petitioner at \$70,000. On a day fixed for hearing his com-

plaint petitioner appeared before the Board, and filed a sworn exception to the assessment, alleging that it was \$30,000 in excess of the value of the property. He offered to sustain his complaint by three competent witnesses. The Board refused to hear his proof, holding that petitioner had no right to introduce proof, or be heard upon the subject of his complaint. Petitioner prepared and extended a bill of exceptions, which the Board refused to sign. He then prayed an appeal to the circuit court, which was refused. The prayer of the petitioner is that said Board be restrained from returning said excessive assessment; that the matter be brought into the circuit court; that the property be lawfully and justly assessed; that said erroneous and unjust assessment be reviewed and canceled. The Board moved the court to dismiss the petition, because the Statute provided that the action of the Board should be final, and that petitioner's remedy was to compel the examination of witnesses,—was by mandamus. Upon the final ground, if the Act intended to prohibit and cut off appeal to the courts for relief, it would be void,—a violation of article 1, § 17, of the Constitution, ordaining "that all courts shall be open; and every man, for an injury done him in his lands, goods, person or reputation, shall have remedy by due course of law, and right and justice administered, without sale, denial or delay;" and of section 8, same article, that no man shall be deprived of his property but by the judgment of his peers, or the law of the land.

Every man has a right to be heard before he can be lawfully condemned, in person or property. Is the writ of certiorari a proper remedy under this petition? By section 8838, Code M. & V., it is provided: "The writ of certiorari may be granted whenever authorized by law, and also in all cases where an inferior tribunal, board or officer, exercising judicial functions, has exceeded the jurisdiction conferred, or is acting illegally, when, in the judgment of the court, there is no other plain, speedy or adequate remedy." By section 8839, "certiorari lies . . . where no appeal is given."

For the purposes of the question, we treat the petition as true. We have a board exercising judicial functions, exceeding the jurisdiction conferred, in its refusal to hear proof as directed by the Act, and therefore acting illegally. No appeal is given by the Act, and for that reason an appeal was refused. There is no other plain, speedy or adequate remedy. The action of the Board was on the 11th day of June, and its existence expired, by direction of law, on Saturday before the third Monday in June. It was a tribunal of only two weeks' duration. The first term of court after its action was on the fourth Monday in August, when there would have been no tribunal, board or officer, upon whom a peremptory mandamus could have operated; and the petitioner would have been without remedy, either plain, speedy or adequate.

In *Dodd v. Weaver*, 2 Sneed, 673, it is said: "If there be no appeal, then the certiorari, which is a constitutional writ, is a proper remedy, by which any injurious irregularity in the proceeding may be corrected, or a trial *de novo* had. 'The maxim of the law is that there is no wrong without a remedy, and it is a par-

ticular rule that a certiorari will lie to all inferior jurisdictions, the proceedings of which cannot be corrected by writ of error, to remove their proceedings into the superior court, to be there affirmed or quashed, or otherwise corrected, as law and justice shall require.'"

In *Saunders v. Russell*, 10 Lea, 295, this court holds: "The writ of certiorari is in this State a constitutional writ, and has always had a more extended application than in England, and been used for purposes unknown to the common law. It is the universal method by which the circuit courts exercise control over all inferior jurisdictions, however constituted, and whatever may be their course of proceeding."

In *Burroughs on Taxation*, 242, 243, it is said: "In *Swift v. Poughkeepsie*, 37 N. Y. 511, to determine the validity of a tax on bank shares, where the bank claimed an exemption to the extent of its capital invested in the United States bonds, and finally to examine into the action of assessors, so as to look into the evidence before the assessors, and correct mere questions of valuation, the court says: 'It has been finally settled that a common-law certiorari to review the proceedings of assessors brings up the merits, as well as questions of jurisdiction and regularity; and that, where assessors have neither exceeded their powers nor been irregular in exercising them, the court will still, upon the facts appearing in the return, examine and correct their decisions, if erroneous.' The cases in other States sustain those in New York as to the functions of the certiorari."

To the argument that if this petition be allowed to prevail it will multiply suits, and thereby cripple the State in the collection of taxes, it is sufficient to say that the State is ordinarily as much bound by the Constitution and laws thereunder as the citizens; and it is its duty to protect, and not oppress, the citizens. While every legitimate aid will be given to the State in collecting its revenue, the courts must see that their aid is authorized, remembering that the State is the creature, and not the creator, of the Constitution. This argument of inconvenience to the State is, to my mind, a begging of the question. The State has set in motion machinery shown by the petition in this case to be apprehensive, and requires it to complete its work and cease to exist in the space of two weeks, and now asks to say that "the shortness of the life of an institution of my own creation will, if its acts be allowed to be reviewed, imperil my revenues. I must therefore be permitted to take advantage of my own wrong."

Recurring to the Act, I do not see that it requires such interpretation. It requires the Board to hear and adjust complaints from any party feeling aggrieved. How heard? How adjusted? Why, by summoning "before it witnesses, who shall be disinterested freeholders, and the testimony of three such witnesses will be sufficient evidence upon which said Board may act." The language that "it shall have the right to summon such witnesses means that it shall be its duty to do so on the complaint made. This is the only way in which the complaint could be made and adjusted. The argument that it may exercise the right,—and that it is merely a right, unembarrassed

by a duty,—and determine the question of excessiveness, presumes that the Board is acquainted with all lands in their county,—a presumption that cannot hold good in any one county in the State. The objection that a trial will result if witnesses are introduced is answered by the Statute providing for this introduction and examination: The trial naturally comes of the power conferred and the duty imposed upon the Board by the words of the Act. The petition only seeks to have the duties defined by the Act enforced. It sets out the grounds, and suggests the names of witnesses of the character specified by the law. This was refused. If the action of the Board is to be final, it can only be so after the law has been obeyed, which cannot be done under a rule that the Board may, in its arbitrary discretion, as was done here, reject a main provision. The Board is a judicial tribunal, to try questions of fact and law. In this case it passed alone upon that of law,—the construction of the Statute,—holding that petitioner

had no right to introduce proof, or be heard upon the subject of his complaint. It construed the law for itself, and by itself. It said to petitioner: "The law does not mean what you claim it to mean. We are the sole and exclusive judges of the meaning of the words of the Act, and of the intention of the Legislature in the employment of these words." Now, if the Legislature may confer such judicial functions on this Board, I can see no reason why it may not say that magistrates, county, circuit and chancery, and such other inferior courts as may be established, shall have exclusive jurisdiction in such matters as the Legislature may name, and their respective actions, judgments and decrees "shall be final." The Board of Equalization is a court, and authorized by article 6, § 1, of the Constitution, and upon which the Legislature had no power to confer a jurisdiction to make its action final. Such legislation contravenes the spirit and the glory of a state government.

NEW YORK COURT OF APPEALS.

CITY OF ALBANY, *Resp.*, v.

John W. McNAMARA, *Exr.*, etc., of Mary E. Payne, Deceased, *App.*

(.....N. Y.....)

1. A person receiving aid as a poor sick person from the officers of the poor in a city or county, in the absence of representations as to his responsibility or physical condition, incurs no liability to repay the amount expended on his or her behalf by such city or county; at least in the absence of some application or request by him for aid or assistance more than the usual solicitation for charity which apparently needy persons make to the poor authorities.

2. A presumption that a request for aid was made by one assisted by public officers as a poor person will not be entertained where the making of such request lies at the foundation of an alleged right to recover compensation therefor from her estate: such request must be proved.

(November 26, 1889.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Albany Special Term entered upon the report of a referee disallowing a claim presented against a decedent's estate. *Reversed.*

The case sufficiently appears in the opinion. *Mr. James F. Tracey*, for appellant:

The presumption of the regularity of official acts does not apply to jurisdictional facts in case of officers of special, limited or statutory jurisdiction.

Taylor, *Ev.* § 147; Wharton, *Ev.* § 1318; *Jewell v. Van Steenburgh*, 58 N. Y. 85; *Miller v. Brown*, 56 N. Y. 833; *Sibley v. Waffle*, 16 N. Y. 180; *Wood v. Terry*, 4 Lans. 80.

In order to maintain an action for money paid to the use of the deceased in the absence of an express promise, there must be shown a

request by the person for whom the money was paid, either express or implied.

Taylor v. Baldwin, 10 Barb. 626; *Ingraham v. Gilbert*, 20 Barb. 151.

To imply a request the person to be charged must be shown to have been bound primarily to pay the particular claim, and the person paying to have been under compulsion or liability to make the payment.

Bailey v. Bussing, 28 Conn. 455; *Jones v. Wilson*, 8 Johns. 434; *Moffat v. Henderson*, 18 Jones & S. 211.

The plaintiff has entirely failed to put in evidence any facts tending to show that the deceased ever was a proper or fitting object of poor relief. This was necessary.

New Bedford v. Chase, 5 Gray, 28; *Monson v. Williams*, 6 Gray, 416; *Berkeley v. Taunton*, 19 Pick. 480.

The support of the worthy poor is made by statute a charge on the public (1 Rev. Stat. 614, § 14; 3 Rev. Stat. 8th ed. 2106) and they are by law given a right to their maintenance. Relief to them is nowhere styled a loan, nor has repayment even been contemplated by any law.

See *Goodale v. Lawrence*, 88 N. Y. 513; *Alna v. Plummer*, 4 Me. 258; *Templeton v. Stratton*, 128 Mass. 137; *Alger v. Miller*, 56 Barb. 227; *Puplin v. Hawke*, 8 N. H. 305.

Mr. D. Cady Herrick, with **Mr. John A. Delehanty**, for respondent:

The City, having paid out the money under its primary obligation to support paupers, can recover it from whomsoever was legally liable to support defendant's testatrix.

1 Rev. Stat. 616, § 14; *Charlestown v. Groveland*, 15 Gray, 15; *Monson v. Williams*, 6 Gray, 416; *Goodale v. Lawrence*, 88 N. Y. 518.

Assumpsit will lie by a stranger against a party for necessities furnished to and support provided for one whom such party is under legal obligation to maintain.

Forryth v. Hanson, 5 Wend. 558.

The plaintiff by the issuing of its commit-

ments placed itself in the position of a surety, the testatrix being the principal debtor.

Moffit v. Henderson, 18 Jones & S. 211.

The plaintiff (surety), having been compelled to pay the debt, is entitled to recover from the defendant (principal).

Hunt v. Amidon, 4 Hill, 848.

When one pays money without any legal obligation to do so, under a mistake of fact and without the means of ascertaining the truth, he may recover it back.

Rheel v. Hicks, 25 N. Y. 291.

Plaintiff could not be barred from a recovery of money paid under mistake of fact, even if it disregarded the means to obtain the necessary knowledge.

Lawrence v. American Nat. Bank, 54 N. Y. 432.

A strict rule of construction cannot be applied to moneys even voluntarily paid by a "public officer, who pays out the moneys of the State, county or town, as the power of such officers is generally limited by statute; the payment of money contrary to statute might be a misappropriation by which the recipient would get no right."

Burdum v. Fuller, 81 Hun, 502; *People v. Starkweather*, 10 Jones & S. 325; *Richmond Co. v. Ellis*, 59 N. Y. 620; *People v. Fields*, 53 N. Y. 491.

Ruger, Ch. J., delivered the opinion of the court:

The material question in this case is whether a person receiving aid as a poor sick person from the officers of the poor in a city or county, in the absence of any representations as to his responsibility or physical condition, incurs a liability to repay the amount expended on his or her behalf by such city or county.

The claim was that the plaintiff was entitled to recover of the defendant's testatrix an amount of money paid by it to the Albany Homeopathic Hospital for the care and maintenance of such testatrix as a poor person.

The question arises in proceedings under the statute upon a reference, authorized by the surrogate, to determine claims against the estate of the testatrix. At the close of the plaintiff's evidence the defendant moved for a nonsuit, which was denied by the referee, and the defendant excepted. The motion was based upon the ground that no application or request for aid or assistance on the part of defendant's testatrix to the authorities of Albany had been shown, and that without such proof the action could not be sustained.

This proof was essential upon the theory of the case presented by the plaintiff, and, not having been furnished, the exception to the refusal to dismiss the claim was well taken.

We might properly dismiss the discussion of the case at this point; but as that would not wholly satisfy the object of counsel as exhibited by the argument, we have thought it proper to indicate our views as to the propriety of the action generally. The proof showed that the City of Albany had paid to the Homeopathic Hospital the sum of \$538.28 for care and maintenance furnished to Mary E. Payne under an order made by its overseer of the poor, directing the hospital to extend aid to her.

There was no evidence that this order was

issued upon the application of the testatrix, or of anyone upon her behalf. It was proved that such applications were usually made and also that such orders were sometimes issued without any applications.

It is obvious that this claim, if supportable at all, must be so upon the principles which obtain in actions to recover back moneys paid and expended by one person for another.

It is an elementary principle in such actions that money voluntarily paid out by one for another cannot be recovered back. 1 Parsons, Cont. p. 471 *et seq.*

In order to support such an action it is essential that a request on the part of the person benefited to make such payment, either expressed or fairly to be implied from the circumstances of the case, must be proved. *Addison*, Cont. 1055; *Wright v. Garlinghouse*, 26 N. Y. 589; *Wellington v. Kelly*, 84 N. Y. 546.

To bring itself within these rules, the respondent claims that the testatrix was legally liable to the hospital for the debt incurred for her board and maintenance, and that inasmuch as the City had paid that liability upon the implied request of the testatrix, her estate is liable to the plaintiff for such payment.

We are of the opinion that, under the circumstances of this case, no such liability was incurred by the testatrix to the hospital; neither is there any proof that she directly or indirectly requested the plaintiff to pay such liability or incur such expenses for her benefit. It is claimed that such request may be inferred from a presumption applying to the acts of public officers, that they have performed such legal duties as the law imposes upon them, and that the law makes it their duty to make inquiries and afford aid to the poor sick. No such duty is expressly imposed by the statute, and, if it existed at all, it is itself an application from the nature of the powers conferred upon them. It relates to a course of conduct, and not to any specific act, and is not such a specific duty as authorizes the application of the rule in question. Neither can such a presumption be indulged in as to a vital jurisdictional fact in favor of the officers, or the principal they represent, in an action which is founded solely upon the condition of a performance of duty by them. The claim that they were requested to act lies at the foundation of the alleged right of recovery and is a substantive fact in the controversy, not the subject of a presumption. *Sheldon v. Wright*, 7 Barb. 39; *People v. Brooklyn*, 21 Barb. 484; *U. S. v. Ross*, 92 U. S. 281 [23 L. ed. 707].

There is no claim that the testatrix made any personal application to the poor authorities for relief; but it is sought to raise a presumption that someone, who is not shown, made some sort of application in her behalf, because, as it is argued, such application was usually made. It is not shown that such person, whoever it might be, had any authority from the testatrix to make such application, or any representations in her behalf, or what representations were, in fact, made in regard to her circumstances or condition upon that occasion.

If the court were at liberty to draw inferences from the circumstances shown, they could infer only that before extending aid the city authorities, in the performance of their

duty, had examined into the circumstances of the defendant's testatrix and found she was entitled to such aid. There is no evidence in the case but that she was, in fact, a person entitled to relief under the law; and we cannot see how the alleged presumption, even if it was indulged, could aid the plaintiff's case.

But we do not think that a request for aid can be implied from the circumstances stated, or, if it can, that it was anything more than the usual solicitation for charity which apparently needy persons make to the poor authorities, and for receiving which no implied promise can be raised for reimbursement. The fund from which the moneys were advanced was created for the purpose of affording gratuitous relief to the indigent poor, and if an applicant therefor did not come within the description of persons entitled to such relief the authorities were not authorized to grant it. The law contemplates some examination by the authorities into the circumstances of objects of charity, and if that does not show them to belong to the class entitled, under the statute, to aid, it is their duty to deny relief. The circumstances which control the exercise of the power to grant relief to poor persons are so various in the cases of different persons, and are so incapable of being defined by strict rules, that much must be left to the judgment and discretion of the officers.

The possession of some property by a person does not always and necessarily preclude such person from a just claim for relief. The question of the propriety of relief is confided to the discretion of the poor authorities, and if they grant the relief asked it is to be presumed they have made such investigations as they deemed necessary, and have determined the question as to the right of the party examined to such relief.

There is no provision made in the law for a review of that determination, and such aid once furnished must thereafter be regarded as

a charity extended by the city to the object of their benevolence without expectation of reimbursement. *Deer Isle v. Eaton*, 12 Mass. 328; *Medford v. Learned*, 16 Mass. 215.

The misjudgment of the officers of the poor as to the necessities of the person relieved raises no implied promise, on the part of such person, that he will repay moneys expended in his behalf.

It is urged by the respondent that every person is, in law, primarily liable to support himself. It is quite probable that most persons who do not support themselves are likely to get little or very poor support from anyone; yet it is not true, as a legal proposition, that every person is liable to support himself. Every person has a natural right to choose the mode and manner of his life, and so long as he does not violate any positive provision of law to follow it, and if aid and assistance are voluntarily furnished by the charitable and credulous, without deception, to such person, we know of no rule that enables the persons giving to recover back from the object of their benevolence the moneys so advanced to him. *Deer Isle v. Eaton*, *supra*.

It is also claimed by the respondent that the moneys paid may be recovered back upon the ground that they were paid under a mistake of fact. Even if this were so, it affords no claim against a third person who has made no request for the payment of such moneys; but a more conclusive answer to the contention rests in the fact that there is no evidence that any such mistake occurred.

The case is destitute of any evidence that the defendant's testatrix was not a proper object of bounty at the time the relief was extended to her.

The judgment of the General Term, and that entered upon the report of the referee, should therefore be reversed, and a new trial ordered, with costs to abide the event.

All concur.

GEORGIA SUPREME COURT.

CARROLL, *Pf. in Err.*,

v.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO.

EAST TENNESSEE, VIRGINIA & GEORGIA R. CO., *Pf. in Err.*,

v.

CARROLL.

(....Ga....)

*1. A motion for a new trial, duly continued from a day set for hearing it in vacation to *Head notes by BLECKLEY, Ch. J.

the next term of the court, need not be further continued from one day to another during the term, though successive orders be passed appointing particular days for the hearing. Once in court in term time, the motion remains there in full life until heard or otherwise disposed of.

2. Where the want of care and diligence imputed to the plaintiff, who was a fireman upon a locomotive, relates to his failure to keep the engineer awake, or take other measures for his own safety, and the imputed negligence reaches back some hours, a paragraph of the court's charge to the jury, which might be understood by them as restricting the inquiry to a much shorter period, is erroneous; and for the court, in the same paragraph, to specify certain

NOTE.—Contributory negligence a question of fact for the jury.

Plaintiff cannot recover for an accident if he could have averted it by reasonable care and prudence. *Meredith v. Cranberry Coal & Iron Co.* 99 N. C. 578.

Whether the plaintiff was guilty of negligence 6 L. R. A.

contributing to the accident was a question of fact for the jury. *Shook v. Cohoes*, 11 Cent. Rep. 301, 108 N. Y. 643. See also *Glushing v. Sharp*, 96 N. Y. 677; *Twgood v. New York*, 3 Cent. Rep. 65, 103 N. Y. 216; *Bullock v. New York*, 99 N. Y. 654; *Greany v. Long Island R. Co.* 2 Cent. Rep. 433, 101 N. Y. 419 and cases there cited; *Osgrove v. New York Cent. & H. R. R. Co.* 97 N. Y. 33, 32; *Kellogg v. New York Cent. & H.*

conduct of the fireman, and instruct upon it in a way to imply that the same would not be negligence, is additional error, the question whether such conduct would or would not be negligence being for the jury.

3. The measure of risk which a fireman ought to incur by remaining upon a locomotive, and assisting a sleeping engineer to run the train, is that only which his duty and obligations to the company, under all the circumstances, impose upon him. If he subjects himself to any greater risk, and is thereby injured, he is not without fault, and cannot recover.

4. Reports to the general manager of the company touching the facts, circumstances and results of a railway accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and of several other employes, are not admissible in evidence to affect the company, whether such reports were exacted and made under standing rules requiring the same, or under special orders for the particular occasion, no question of notice to the company being involved in the controversy.

5. It being in question whether a fireman could, by reporting the facts of his situation to an official of the company by telegraph, have obtained relief from his peril, evidence is admissible to show that, under the usage and practice of the company in like or analogous circumstances, relief would probably have followed in a specified way, and by the use of specified means.

6. An employe of a corporation, though obligated in writing, as terms of his employment, to "study the rules governing employes, carefully keep posted and obey orders," is not bound by rules, as such, of which he is ignorant, and which have never been promulgated to him by the company.

(September 25, 1889.)

CROSS writes of error to the Superior Court of Bibb County to review a judgment granting a motion for new trial in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence, in which judgment had been rendered for plaintiff, the plaintiff excepting to so much of the judgment as granted the new trial, and defendant excepting to so much as refused a new trial, upon other and further grounds urged in its motion. *Affirmed on plaintiff's exceptions, and reversed on those of defendant.*

The case sufficiently appears in the opinion. *Messrs. Dossau & Bartell* for Carroll. *Messrs. Bacon & Rutherford* for the Railroad Company.

Blockley, C. J., delivered the opinion of the court:

1. The case was tried at the November Adjourned Term, 1887, and the motion for a new trial was made during the same term; the hearing of the motion being fixed by order for

a day in vacation, and then continued to the following May Term. Other continuances took place during the May Term, each of them being to a particular day. One of these days was June 30, on which no action was taken with reference to the motion. On July 2 the motion was taken up, and continued to a subsequent day in the same month, and on the latter to a still later day, when it came up for a hearing, and the respondent moved to dismiss it because no continuance from the 30th of June to the 2d of July had been granted or entered. The motion to dismiss was properly overruled, because, after the May Term of the court was reached by duly continuing the motion from the November Adjourned Term, no further continuance was requisite in order to keep the matter in court so long as the May Term lasted; and that term, as we understand the record, was still in progress when the motion for a new trial was finally taken up and decided. The rule as to continuance from day to day in vacation has no application to what transpires in term time. Once in court, the motion remains there until heard or otherwise disposed of. Fixing a time for the hearing, or entering continuances from day to day, is no disposition of it.

2. The court committed no error in granting the motion for a new trial on the fourteenth and seventeenth grounds of the amended motion. The most vital question in the case was one of fact, to wit, whether the plaintiff was negligent in remaining upon the engine, and exposing himself to risk, without taking more active and diligent measures to keep the engineer awake, or urging the conductor to do so, or telegraphing to the master of trains or some other officer to interpose. That the engineer was falling asleep at his post was known to the plaintiff, who was his fireman, some time before the collision happened, and consequently the question of his negligence should not have been restricted in point of time to the moment of collision, and some minutes previous thereto. The charge of the court in the fourteenth ground of the motion was as follows: "If the jury should believe, from the evidence in the case, that the train on which the plaintiff was as fireman was approaching another train on the same track; that the engineer of plaintiff's train was at some distance from the latter train, at his post and awake, discharging his duty; that the plaintiff did not know of the approaching train; and that the plaintiff, having finished firing his engine, took his seat on the place assigned to him, and then, discovering a train ahead, and that his engine was not slacking, and that the engineer was asleep, — then I charge you that if the plaintiff was injured by a collision which he could not have avoided by the exercise of all reasonable care and ordinary diligence, in the causing of which no fault was committed by or attributable to him, he may be entitled to recover." This

R. R. Co. 79 N. Y. 72; *Ernst v. Hudson River R. Co.* 35 N. Y. 9; *Salter v. Utica & B. R. Co.* 88 N. Y. 42; *Bernhard v. Benseliser & S. R. Co.* 1 Abb. App. Dec. 131; *Bloux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 637 (21 L. ed. 745); *Hayes v. Mich. Cent. R. Co.* 111 U. S. 228 (28 L. ed. 410), 30 Alb. L. J. 38; *Randall v. Baltimore & O. R. Co.* 109 U. S. 478 (27 L. ed. 1008); *Nash v. New York Cent. & H. R. R. Co.* 14 N. Y. S. R. 531. 6 L. R. A.

For rules as to the duty of ordinary care, see *Ernst v. Hudson River R. Co.* 35 N. Y. 9, 23.

As to submission to the jury, see *Ernst v. Hudson River R. Co.* 35 N. Y. 33; *Weber v. New York Cent. & H. R. R. Co.* 67 N. Y. 587; *Payne v. Troy & B. R. Co.* 33 N. Y. 572; *Byrne v. New York Cent. & H. R. R. Co.* 6 Cent. Rep. 302, 104 N. Y. 362, 367.

might have been understood by the jury as virtually throwing out of the case any and all negligence the plaintiff may have been chargeable with until just before the collision took place, and was, besides, an intimation to the jury that the conduct of the plaintiff, if as described in the charge, would not amount to negligence. But for this instruction, the jury might have thought, in view of what had already transpired within the plaintiff's knowledge showing the tendency of the engineer to go to sleep, that it was not enough for the plaintiff to see that he was awake, and then seat himself at the place assigned to him, but that he ought to have continued to see to it and assure himself that the engineer kept awake. The charge seems obnoxious to both objections which we have indicated, viz., a too narrow restriction in point of time, and a too wide latitude in drawing to the court and taking from the jury a decision of the question of negligence.

3. The request of counsel for the defendant to charge the jury as set out in the seventeenth ground of the motion for a new trial was as follows: "If you find that the said Carroll was an employé of the defendant, and that he subjected himself to any greater danger or risk than his duty and obligations to said Company required, and that by reason of said increased danger or risk he has been injured, then the court charges you that he cannot recover." In view of the testimony in the record, we agree with the court in thinking that this charge should have been given in the terms requested, and without any qualification. If the plaintiff took any improper risk, it was by remaining upon the engine without doing more than he did in seeing that the engineer kept awake, or without appealing to the conductor or reporting by telegraph, as it was contended he should have done. If he was in fault in either of these respects, he was negligent, and, if negligent, he could not recover. The court, in giving the request in charge to the jury, qualified it by adding, after the word "required," the phrase, "by any rules, which rules had been communicated to him." This qualification narrowed the charge to a violation of the rules; whereas the plaintiff's duty to protect himself against his sleepy engineer might be as complete and obligatory without rules on the subject as with them. The jury might have thought that, if he had common sense, he ought not, under the circumstances, to have remained passively upon the engine, with knowledge that the engineer was going to sleep at intervals while in charge of his engine. Due care in keeping the engineer awake, or, if that could not be done, by ceasing to aid in running the train, involved not only the safety of the fireman, but that of others, and also the preservation of the Company's property from wreck and destruction.

4. We turn now to the cross-bill of exceptions, in adjudicating upon which we find that the court should have granted a new trial on two other grounds, to wit, the second and third of the amended motion. By a standing rule of the Company, as may be inferred, reports by its officers and employées were to be made to it of the facts and circumstances attending accidents. This accident occurred on the 8th of

February, and on the 18th of that month the superintendent prepared a report to the general manager on the subject. On the following day, the 19th, a report by the conductor, supported by his affidavit and that of several others, embracing engineer, firemen, flagman, brakeman and another conductor, the plaintiff himself being one of the affiants, was made, and, as we infer, was transmitted through the superintendent, and, along with his report, to the general manager. The report of the conductor cast the whole blame on the engineer, treating all the rest of the crew as faultless. These documents were admitted in evidence on behalf of the plaintiff, over the defendant's objection. Having had their origin many days after the happening of the events to which they related, they were no part of the *res gesta* of the cause of action on trial, but were mere narrative touching past occurrences. Consequently they do not fall within the principle of the case cited from 10 West. Rep. 646 (*Keyser v. Chicago & G. T. R. Co.*, decided by the Supreme Court of Michigan in June, 1887). *Mechem*, Ag. §§ 714, 715; Code, § 2306.

Nor is *Carlton v. Western & A. R. Co.* 81 Ga. 531 (October Term, 1888), a decision upon the question of their admissibility. As far as that case goes is to suggest that they were not confidential communications; but, really, even that question was not involved so as to render a decision of it necessary. Upon principle, we think it clear that these reports were inadmissible; and several authorities which we deem sound are to that effect. In *Langhorn v. Alnutt*, 4 Taunt. 511, it was held that letters of an agent to a principal, in which he is rendering him an account of the transactions he has performed for him, are not admissible in evidence against the principal. A like ruling was made in *Reynier v. Pearson*, Id. 662. See also *Kahl v. Jensen*, Id. 565.

"An official statement or report received by the corporation or board from one acting as officer, and accepted and adopted by them, is competent evidence against the corporation, and those bound by its acts, without further proof of the appointment of the officer; but a report to a corporation or board is not made admissible in evidence against it by the mere fact that it was received and 'accepted' by it, except for the purpose of charging it with notice of the contents." *Abb. Tr. Ev.* p. 51, § 62.

"An admission by a corporation of a fact or liability, duly and properly made, is, of course, evidence against it; but a municipal corporation, by accepting, that is, by receiving, the report of a committee of inquiry, does not admit the truth of the facts stated therein; and such a report, though accepted by the vote of the corporation, is not admissible in evidence against it." 1 Dill. Mun. Corp. 8d ed. § 805 (earlier editions, § 242).

The case of *Vicksburg & M. R. Co. v. Putnam*, 118 U. S. 545 [30 L. ed. 257], was cited and relied on in behalf of the plaintiff. The opinion was delivered by *Mr. Justice Gray*, who devotes but a single sentence to the question, merely saying: "The reports made by the superintendent to the board of directors in the course of his official duty were competent evidence, as against the corporation, of the condition of the road." Looking to the statement of

facts prefixed to that opinion, we find it represented that "the plaintiff offered in evidence two printed reports made by the superintendent of the road to the board of directors,—one in 1877, which stated that, in the portion of the road where the heaviest traffic was done, there were about thirty-five miles of iron that had been run over for more than twenty-five years, and required the closest attention to prevent accidents; and the other, made in 1880, stated that there were twenty-five miles of track made of iron forty-two years in service, and now almost entirely worn out. The defendant objected to the admission of these reports because they were not sworn to under examination in court; because they had no reference to the place of the accident, but only to the general condition of the rails; because they could not bind the defendant as admissions; and because the information of the superintendent as to the condition of the road was derived, in part, from the reports of subordinates. But the court overruled the objections, and admitted the reports in evidence." According to this statement, the reports were printed, and in all probability had been promulgated by the company as official documents adopted by and proceeding from it. If so, this would make them utterances of, and therefore admissions by, the company. Moreover, had they not been printed and promulgated, they would have tended to show that the company had notice of the condition of its road previously to the occurrence of the injury in controversy, and would have been admissible to charge the company with such notice, under the rule as above quoted from Abbott. The reports now in question do not relate to the condition of the road, and have no bearing upon any question of notice to the company of any fact whatsoever prior to the injury,—their contents consisting wholly of historical matter touching past conduct, and its consequences. So far as appears, the truth of the reports was never in any way passed upon, adopted or affirmed by the corporation; nor were the documents printed, issued or circulated by it as true.

It surely cannot be sound law to hold that by collecting information, whether under general rules or special orders, and whether from its own officers, agents and employes, or others, a corporation acquires and takes such information at the peril of having treated as its own admissions, should litigation subsequently arise touching the subject matter. As well might it be considered that any and every suitor who sends out agents to discover witnesses and collect facts touching his rights or duties regarding a pending or prospective lawsuit is to be met at the trial with the communications made by or to such agents as admissions made by himself. Can it be possible that a collector of historical materials is to be held responsible for the truth or accuracy of them, without himself having indorsed or promulgated them as true?

The case of *Kroff v. Atlanta & W. P. R. Co.*, 77 Ga. 202, was also cited and relied upon. The evidence held competent in that case consisted of declarations made by the general manager, some of them relating to the condition of the track, and some to the cause of the accident, which he attributed to too much elevation of the superstructure on one of the curves of

the road. It would seem that the admissibility of this evidence was put by the court partly on the ground that the general manager represented the corporation in making the statements (which, by the way, were not made as reports to the Company, or any superior officer, but as mere oral declarations), partly upon the ground that they were embraced in the *res geste*, and partly upon the ground that they showed his knowledge, and therefore the knowledge of the corporation, as to the improper construction and condition of the road before the accident. We need not comment upon this case further than to observe that its facts are so different from those of the case in hand that the one cannot be a precedent for the other. An officer so high in power and position, and so comprehensive in his duties, as is the general manager of a railroad, might possibly be competent to affect the company by his admissions or declarations when like admissions or declarations proceeding from subordinate officers or agents, or from mere servants and employes, of the company, would be attended with no such admissible quality. Certainly, this distinction could well be drawn where the declarations of subordinates, etc., were made to the company some time after the transaction to which they relate, and were elicited for the sole purpose of its own information, and for use in guiding its own conduct.

5. We see no substantial objection to the question propounded to the witness Gallagher, as set out in the sixth ground of the amended motion, the object being to show what, according to the usage and practice of the Company, would have been the result had the plaintiff reported by telegraph to the train dispatcher that the engineer was falling asleep at intervals while on his engine. In order for the jury to determine whether such a report would have been available to terminate or lessen the plaintiff's danger, it would be necessary for them to know what action would probably have been taken upon such a report. Perhaps the question to the witness could have been better shaped; but, on the whole, we think the court erred in not allowing the witness to answer it.

6. As there has to be another trial, we forbear to express any opinion on the correctness of the verdict; and, as to the grounds of the motion not already discussed, we merely say that we have discovered in most of them no error whatsoever, and in none of them anything sufficiently material to require correction. Several of the grounds involve, directly or indirectly, the question of duty, on the part of the plaintiff, to inform himself of the rules of the Company, and abide by them, whether they had been communicated to him or not. We agree with the trial judge that the undertaking of the plaintiff, in his written application to the Company for employment, to "study the rules governing employes, carefully keep posted and obey them," did not extend to any unknown rules not promulgated to him by the Company. *Brunswick & W. R. Co. v. Clem*, 80 Ga. 540, 541, fifth head of the opinion.

The rules of a railway company stand to its employes as laws for the regulation of their conduct, and all such laws ought to be promulgated in some reasonable, practical way. If

is based on an unlawful consideration, and, if executory, cannot be enforced.

One of the purposes of this clause of the Constitution was to protect the public, as well as stockholders, against spurious and worthless stock by the process of watering,—in other words, from fraudulently issuing and putting on the market fictitious corporate stock, which is based on nothing valuable, as a consideration for its issue. *Fitzpatrick v. Dispatch Publishing Co.* 83 Ala. 604; *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287 [80 L. ed. 595]; *Peoria &*

S. R. Co. v. Thompson, 103 Ill. 187. It is greatly to the interest of the public that the policy of this provision should be enforced. We repeat that the present contract is in violation of this provision of the Constitution, and is void.

The court erred in the charges given.

Other questions need not be considered, as the defendant is entitled to the general affirmative charge in his favor, if requested.

Reversed and remanded.

CALIFORNIA SUPREME COURT.

J. F. NOUNNAN *et al.*, Appts.,

v.

SUTTER COUNTY LAND CO., Resp't.

(81 Cal. 1.)

1. Representations as to the amount of earth necessary for constructing a levee, and its quality or kind, made to induce another to enter into a contract for constructing the levee within a certain time, with a forfeiture for failure to complete it in that time, are mere expressions of opinion equally within the power of both parties to ascertain, and therefore not a sufficient ground for an action for damages, although the contractor was not within 150 miles of the place of the work when he entered into the agreement, and it would have taken many days to have ascertained the truth of the representations.

2. A contract for constructing a levee within a certain time at a certain price per cubic yard, with a forfeiture for delay, describing the kind of earth to be worked and its quantity, which fails to provide for any different rates in case the quantity or kind is not as represented, shows that these representations were not considered material.

3. A contractor continuing work under a contract to construct a levee at a certain price per cubic yard, after discovering that the representations of the other party as to the quantity and kind of earth to be handled were false, waives any claim for damages because of such representations.

(October 1, 1889.)

APPEAL by plaintiffs from a judgment of the Superior Court of the City and County of San Francisco sustaining a demurrer to the complaint in an action to recover damages for alleged fraudulent representations made to in-

duce plaintiffs to enter into a certain contract. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Craig & Meredith for appellants. Mr. W. W. Cope, with Mr. James Wheeler, for respondent:

Estimates of amounts and quantities are matters of opinion.

Morrison v. Koch, 83 Wis. 254; *Stebbins v. Eddy*, 4 Mason, 414; *Jennings v. Broughton*, 17 Beav. 234; *Southern Development Co. v. Silva*, 125 U. S. 247 (81 L. ed. 678); 2 Kent, Com. *484; *Joliffe v. Baker*, L. R. 11 Q. B. Div. 262. Statements of the quality of the soil beneath the surface, are matters of opinion.

Clapham v. Shillito, 7 Beav. 146; *Colby v. Gadsden*, 34 Beav. 416-421; *Clark v. Everhart*, 63 Pa. 347; *Tindall v. Harkinson*, 19 Ga. 448; *Stewart v. Alliston*, 1 Meriv. 26; *Watts v. Cummins*, 59 Pa. 84; *Jennings v. Broughton* and *Southern Development Co. v. Silva*, *supra*; *Scott v. Hanson*, 1 Sim. 18; *Martin v. Jordan*, 60 Me. 581.

When plaintiffs had notice of the circumstance indicative of fraud, they should have stopped. It was notice sufficient to put them to their election, and having taken the risk of going on they must suffer for their own negligence. They could not afterwards recall that election and subsequently make another, thereby nursing their damages.

Selway v. Fogg, 5 Mees. & W. 88; *Collins v. Townsend*, 59 Cal. 614; *Blen v. Bear River & A. W. & Min. Co.* 20 Cal. 602; *Saratoga & S. R. Co. v. Row*, 24 Wend. 74; *Musson v. Bovet*, 1 Denio, 69; *Campbell v. Fleming*, 1 Ad. & El. 40.

Works, J., delivered the opinion of the court:

This is an action for damages for fraudulent

NOTE.—False representations inducing entry into contract.

A statement of opinion amounting to an affirmation inducing a contract is ground for a rescission in equity, where the affirmant has the advantage in means of information not open to the other. *Rorer Iron Co. v. Trout*, 88 Va. 397, 5 Am. St. Rep. 285.

Representations, for the purpose of inducing one to enter into a contract to build a portion of a railroad, that the person making them has bought a quantity of rails at a certain price specified, and will sell them to the other person at the same price, constitute no ground for action of deceit. *Dawe v. Morris*, 4 L. R. A. 158, 149 Mass. 182.

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A representation, to be material, must be in respect to an ascertainable fact, as distinguished from a mere matter of opinion, judgment, probability or expectation. If it is vague and indefinite in its nature and terms, or is merely a loose, conjectural or exaggerated statement, it is not a material representation. *Putnam v. Bromwell* 73 Tex. 465; *Finlayson v. Finlayson*, 8 L. R. A. 801, 17 Or. 347; *Dawe v. Morris*, 4 L. R. A. 158, 149 Mass. 182.

Whether or not an alleged misrepresentation is so material as to form the foundation for an action is, in the absence of dispute as to the facts, a question for the court. *Dawe v. Morris*, 4 L. R. A. 158, note, 149 Mass. 182. See, generally, *Davis v. Nuzum*, 1 L. R. A. 774 note, 72 Wis. 430.

representations alleged to have been made by the respondent to induce the appellants to enter into a contract to construct a levee upon the lands of the former. A demurrer to the complaint was sustained, and, the plaintiffs refusing to amend, judgment was entered in favor of the defendant. From this judgment the plaintiffs have appealed. Several grounds were stated in the demurrer, but the only one discussed here is that the complaint did not state facts sufficient to constitute a cause of action. The representations relied upon as fraudulent are thus stated in the complaint:

"That on the 13th day of August, 1884, at said city and county, the defendant represented to the plaintiffs that the defendant wished the plaintiffs to construct a certain levee upon the lands of the defendant in the County of Sutter. The defendant, in order to induce the plaintiffs to do the said work, represented to them that the amount of earth measured in excavation, necessary to be placed upon said levee in order to construct the same, was 350,000 cubic yards. The defendant further represented to the plaintiffs that the character of the earth along the line of said levee was light, sandy loam, and that it was good scraper material. The plaintiffs then stated to the defendant that if the quantity exceeded 350,000 cubic yards, or, if the adjacent earth varied from that stated, they would not do the said work, and proposed to go upon the ground and examine the same. Thereupon the defendant dissuaded and prevented them from doing so, and said that the plaintiffs could entirely rely on the accuracy of said statements. The defendant stated to the plaintiffs that the defendant had made a careful survey and measurement of said work, and had fully informed itself of the character of the said material. Both and all of said representations were made with the intent to induce the plaintiffs to enter into the contract hereinafter mentioned. The plaintiffs relied upon the said representations, and were induced by them to abstain from examining the premises. The premises are about one hundred and fifty miles from San Francisco, and it would have required many days of examination, surveys and measurements to have ascertained the truth or falsity of said representations."

It is alleged that the plaintiffs relied, and had a right to rely, upon these representations; and that they were thereby induced to enter into the contract without investigating for themselves the matters about which the representations were made. The contract is set out in the complaint, and bound the plaintiffs to construct a certain levee on the lands of the defendant, for which they were to be paid 12 cents per cubic yard of excavation. The contract was executed August 15, 1884. Estimates were to be made at the end of each month, and 75 per cent of the amount of the estimates to be paid on the seventh day of each month, the balance of 25 per cent to be paid ten days after the satisfactory completion of the contract and the engineers' approval of the work, and acceptance by the board of directors of the defendant; but if the work should not be completed by the first of the following December, the 25 per cent was to be forfeited unless the contractors were prevented in the due

prosecution of their work by either providential acts or causes beyond their control, in which case a proportional time was to be allowed for such stoppage.

After setting out the contract the complaint further alleges: "Both of the said representations were material, and neither of them was a matter of opinion merely. The materiality of the first-mentioned representation consisted in this: that the said work could not be prosecuted during the rainy season, and the then approaching rainy season did not afford more, or but very little more, than sufficient time to construct a levee of 350,000 cubic yards. And if the said levee should be in an incomplete condition when the rain should set in, then, by reason of overflow of the land, the partially constructed levee would be destroyed. And, in addition to this, the plaintiffs only had a capital of about \$6,000, and the same would be exhausted in constructing a levee exceeding 350,000 cubic yards. *Second.* That said representations were material in this: that the materials of the character mentioned can be moved with less expense and labor, and with greater rapidity, than any other kind. That both of said representations were untrue.

"The fact was that the cubic contents of the said levee were such that it required 600,000 cubic yards, as aforesaid, to construct it. And the character of said adjacent earth was, except very near the surface, stiff adobe, and to a great extent hard-pan, both of which are more difficult to remove than light, sandy loam. The defendant at said time had reasonable ground to believe, and did believe, that both of said representations were not true, and to believe, and did believe, the facts to be as hereinabove set forth. Thereupon the plaintiffs entered upon the performance of said work, and in so doing they removed 400,000 cubic yards of earth, and placed the same on said levee. But they did not know that they had removed so great a quantity, because they had not measured or surveyed the same, and the surveyor mentioned in said contract had not done so. That as said work proceeded, it was at first of the character represented, but the same became harder as the plaintiffs progressed, but the plaintiffs did not discover the said fact until they had placed about 200,000 cubic yards on said levee. And afterwards, although the material became harder and more of the character of adobe, plaintiffs continued to believe that the quantity of such hard material would be but small, relying upon the statement of the defendant.

"On or about the tenth day of December, 1884, the plaintiffs discovered, and the fact was, that nearly all of the earth still necessary to be removed in order to complete said levee was very stiff adobe and hard-pan. They had already been delayed by the occasional appearance of said material. It became and was impossible thus to complete said levee. There still remain 100,000 cubic yards unfinished, although this latter fact the plaintiffs did not discover until on or about the 16th day of December, 1884. On the said 16th day of December the plaintiffs, by reason of the matters aforesaid, quit work under said contract, abandoned the same, and declared to the defendant that they did abandon and repudiate

the same, and have ever since done so, and they demanded of defendant the reasonable value of the work done. The reasonable value of the said work was \$57,120, and the plaintiffs admit that they received from defendant, in the premises, \$36,350. But the same was paid before the plaintiffs discovered any of the facts regarding quantity and quality. The capital of the plaintiffs was wholly exhausted in the performance of said work. The plaintiffs have been damaged in the premises in the sum of \$20,700. And therefore the plaintiffs pray judgment against the defendant in the sum of \$20,700 and costs."

It will be seen that there are two representations relied upon, viz., that the amount of earth in excavation necessary to construct the levee was 350,000 cubic yards, and that the character of earth along the line of said levee was light, sandy loam and good scraper material.

It is contended by the respondent, in support of the ruling of the court below, that neither of these were representations as to a material fact, but were matters of opinion, and were immaterial. If this be so the complaint was insufficient, unless there are other allegations sufficient to take this case out of the general rule that the statements of mere matters of opinion, although false or erroneous, are not sufficient ground for an action of damages. Civil Code, § 1710; *Rendell v. Scott*, 70 Cal. 514; *Lawrence v. Gayetty*, 78 Cal. 126.

It is quite clear, we think, that both of these statements were mere expressions of opinion with reference to matters equally within the power of both of the parties to the contract to ascertain and determine for themselves. *Clapham v. Shillito*, 7 Beav. 146; *Southern Development Co. v. Siloa*, 125 U. S. 247 [81 L. ed. 678]; *Watts v. Cummins*, 59 Pa. 88.

It is evident from the contract itself that the plaintiffs did not regard either of these representations as material, and that they did not rely upon them. They could have protected themselves against both of the contingencies covered by the representations by their contract. They were by the terms of the agreement to have a fixed sum per cubic yard for the work. Therefore the amount of earth necessary to be moved in order to complete the work was immaterial, except that they were required to have the same completed within a certain time or forfeit a part of their compensation. They could easily have guarded against this by providing that if the work overran the quantity named a longer time should be allowed them. As to the representation that the material was of a kind that would be easily worked, they could have protected themselves by providing that for that class of work they should have 12 cents per cubic yard, and for more difficult or expensive material to handle a greater sum. To have inserted such provisions in the contract would have been but an act of common prudence. If they had regarded these matters as material and contracted with reference to them, they would no doubt have been inserted.

Treating these as a part of the negotiations leading up to and forming the basis of the contract, we must presume that the entire negotiations of the parties were included in the writ-

ten contract as executed, and, so presuming, we must hold that they were bound to move the earth contracted to be handled, and to do it within the time named, without reference to its quantity or quality. Civil Code, § 1625; *Pickering v. Douson*, 4 Taunt. 779.

This was their contract. Treating them as mere representations made to induce the making of the contract, the contract itself furnishes sufficient evidence of the fact that they were not relied upon, and were not regarded by the plaintiffs as material. Besides, so far as both the quantity and quality of the material were concerned, the complaint shows a waiver on the part of the plaintiffs of the right to contest the contract on that ground. They did not stop work when they found the material to have been different from the kind represented, but kept on with the work long after such discovery. Nor did they stop work when they had handled 350,000 cubic yards of earth. This shows that they must have been willing to handle the kind of material they found, and in a greater quantity than the defendant had represented to be necessary, at the price named in their contract. Having continued on after they must have known that the alleged representations were fraudulent, we must presume that they were willing to and did waive the fraud, with the hope, we suppose, of again finding a soft spot of earth. Having taken this risk, and made the defendant liable for the work done, after they discovered the alleged fraud, at the contract price, it was then too late to recover on the ground that such representations had been fraudulently made. *Blen v. Bear River & A. W. & Min. Co.* 20 Cal. 602, 614; *Syratoga & S. R. Co. v. Row*, 24 Wend. 74; *Masson v. Row*, 1 Denio, 69.

For these reasons the complaint was bad, and the demurrer to it was properly sustained.

Judgment affirmed,
I concur. **Fox, J.**

Paterson, J.:

I concur. It is clear that the plaintiffs did not rely upon any statements as to the number of cubic yards which would be required in the construction of the levee. The contract itself shows that the dimensions of the levee were subject to the direction of the engineer. It provides: "The levee will be formed in layers of such uniform depth, and the materials disposed of and distributed in such manner, as the engineer may direct. . . . The levee is to be built six feet wide on top, unless otherwise directed, with slopes of four horizontal to one vertical on the inside." The other subject is well disposed of by *Mr. Justice Works*, in holding that, so far as the quality of the material was concerned, it is clear that the plaintiffs cannot complain. The complaint charges that the defendant represented to plaintiffs that it had made a careful investigation, and fully informed itself of the character of said material; that this representation was made with the intent to induce plaintiffs to enter into the contract, and that they were induced by the representations to abstain from examining the premises. Under these circumstances, I think the plaintiffs would have had a cause of action against the defendant if they had stopped work and rescinded the contract promptly when they

found the material was different in kind from that which was represented. This they did not do, and they must be held to have been willing to excavate the kind of material they found

in a greater quantity than the defendant had represented to be necessary. Having continued on, it must be conclusively presumed that they did so at their own risk.

MISSOURI SUPREME COURT.

STATE OF MISSOURI, *ex rel.* William H. WINE, Collector, etc., *Resp't.*,

v.

KEOKUK & WESTERN R. CO., *App't.*

(....Mo....)

1. The consolidation of the rights, privileges, franchises and properties of two or more railroad companies into one, where there is no provision of the Statute or Constitution to the contrary, leaves the portions of the road thus formed subject to the same rules of taxation that existed before the consolidation.
2. The prohibition of the Constitution against exempting property from taxation applies to a corporation formed by consolidating two or more separate corporations under the Act of March 2, 1889, which provides in such cases for calling in the stock of the former companies and exchanging for it "stock in the new company," and declares that it shall be subject to the same duties and obligations, and entitled to the same franchises and privileges, as if the consolidation had not taken place. Such a corporation is a new one formed under that Act from others which were thereby dissolved, and therefore it is not entitled to a continuance of an exemption from taxation of the property of one of the former companies; and the fact that some of the consolidating companies were domestic and some foreign is immaterial.
3. A suit to enforce payment of taxes levied upon certain property in a particular year is a separate and distinct cause of action from suits relating to the taxes levied upon the same property in previous years; hence judgments in such previous suits determining that the property is exempt from the taxes levied constitute no bar to the later suit.
4. A question of law in regard to which counsel make a concession in an agreed statement of facts submitted to the court for its judgment upon other questions as to which there is a controversy, is not determined by the judgment in the case; especially where the court does

not pass upon that question, but regards it as not controverted.

(November 4, 1889.)

APPEAL by defendant from a judgment of the Scotland County Circuit Court in favor of plaintiff in an action to enforce the payment of certain taxes levied upon defendant's property. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Felix T. Hughes for appellant.

Messrs. John M. Wood, Atty-Gen., and John C. Moore, Pros. Atty., for respondent:

The State of Missouri was not a party to either of the cases of *Scotland Co. v. Missouri, I. & N. R. Co.* 65 Mo. 128, or *Secor v. Singleton*, 9 Fed. Rep. 809; hence there is no former adjudication as to the rights of the State.

By the agreement made May 3, 1870, by and between the Alexandria & Nebraska City, the Iowa Southern, and the Missouri, Iowa & Nebraska Companies, on one part, with the State of Missouri on the other, the right to exemption was surrendered to the State, the charter was annulled and the new company became organized under the general laws of the State and not under a charter.

State v. Garratt, 67 Mo. 445; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665 (23 L. ed. 757); *Mains Cent. R. Co. v. Muine*, 96 U. S. 499 (24 L. ed. 880); *Clearwater v. Meredith*, 68 U. S. 1 Wall. 25 (17 L. ed. 604); *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359 (25 L. ed. 185); *McMahan v. Morrison*, 16 Ind. 173; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42; *Memphis & L. R. Co. v. Railroad Comrs.* 112 U. S. 619, 622, 623 (28 L. ed. 841, 842); 1 Bruner, Collected Cases, 618.

The Missouri, Iowa & Nebraska Railroad Company never had any existence until 1870.

Wagner v. Meely, 69 Mo. 150.

The Constitution of 1865, art. 11, § 16, deprived the General Assembly of all power to hereafter exempt this class of property.

NOTE.—Taxation, consolidated corporation, exemption.

On the consolidation of two corporations, the exemption of one will not extend to the property of the other. *Philadelphia & W. R. Co. v. Maryland*, 51 U. S. 10 How. 376 (13 L. ed. 461); *Tomlinson v. Branch*, 82 U. S. 15 Wall. 490 (21 L. ed. 189); *Delaware R. R. Tax. Case*, 85 U. S. 18 Wall. 206 (21 L. ed. 888); *Evansville, H. & N. R. Co. v. Com.* 9 Bush, 438; 1 Desty, Taxn. 106.

A subsequent legislative Act, taxing the property of a new corporation formed by the consolidation of two old corporations, is not a violation of the Constitution as to impairing the obligation of contracts. *Atlantic & G. R. Co. v. Georgia*, 96 U. S. 359 (25 L. ed. 185). Compare *McMahan v. Morrison*, 16 Ind. 173; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42; *Clearwater v. Meredith*, 68 U. S. 1 Wall. 40 (17 L. ed. 608).

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When the Georgia Air-Line Railroad was consolidated with the South Carolina Air-Line Railroad, and formed the Atlanta & Richmond Air-Line Railroad, the last-named company was a new corporation, at least *de facto*, and its property was subject to taxation as the property of other persons under the Consolidation Act. *Atlanta & R. A. L. R. Co. v. State*, 63 Ga. 488; *Petersburg v. Petersburg R. Co.* 29 Gratt. 778.

Where the State, by its statutory Code, reserves the right to change or modify private charters thereafter granted, the consolidation of two corporations thereafter is in effect the creation of a new corporation, and such new corporation is subject to the provisions of the Code. *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359 (25 L. ed. 185). See *State v. St. Paul, U. D. Co.* post, 234.

State v. Chicago, B. & K. O. R. Co. 4 West. Rep. 635, 89 Mo. 523, 532.

A subsequent legislative Act, taxing the property of a new corporation formed by the consolidation of two old corporations, is not a violation of the Constitution as to impairing the obligation of contracts.

Atlantic & G. R. Co. v. Georgia, 98 U. S. 859 (25 L. ed. 185); *Petersburg v. Petersburg R. Co.* 29 Gratt. 773; *Atlanta & R. A. L. R. Co. v. State*, 63 Ga. 483.

Exemption from taxation is a personal privilege and cannot be assigned nor transferred.

State v. Whitworth, 8 Lea, 594; *East Tenn. V. & G. R. Co. v. Hamblen Co.* 102 U. S. 273 (26 L. ed. 152).

Exemptions will never be presumed.

St. Louis, I. M. & S. R. Co. v. Loftin, 80 Ark. 693; *Weston v. Shawano Co.* 44 Wis. 257; *Jones & N. Mfg. Co. v. Com.* 69 Pa. 137; *Providence Bank v. Billings*, 29 U. S. 4 Pet. 514 (7 L. ed. 939); *Philadelphia & W. R. Co. v. Maryland*, 51 U. S. 10 How. 376 (13 L. ed. 461); *Delaware R. R. Tax Case*, 85 U. S. 18 Wall. 206 (21 L. ed. 868); *State v. Matthews*, 3 Jones, L. 451; *Gordon v. Baltimore*, 5 Gill, 231; *Judson v. State*, Minor (Ala.) 150; *St. Louis v. Boatmen's Ins. & Trust Co.* 47 Mo. 150.

Exemptions are not favored.

Sioux City v. Independent School Dist. 55 Iowa, 152; *Griswold College v. State*, 46 Iowa, 275; *Tucker v. Ferguson*, 89 U. S. 22 Wall. 573 (23 L. ed. 815); *Burlington & M. R. R. Co. v. Hayne*, 19 Iowa, 143.

Exemptions are contrary to public policy, and can only be allowed when granted in clear and unmistakable terms.

Nashville, C. & St. L. R. Co. v. Marion Co. 7 Lea, 665; *Wilson v. Gaines*, 103 U. S. 421 (26 L. ed. 402); *Hoge v. Richmond & D. R. Co.* 99 U. S. 349 (25 L. ed. 303); *Allen v. Morse*, 73 Me. 502; *Erie R. Co. v. Pennsylvania*, 83 U. S. 21 Wall. 492 (23 L. ed. 595); *People v. Long Island City*, 76 N. Y. 20; *People v. New York Tax Comrs.* 76 N. Y. 64.

It is the universal rule that exemptions, being acts of grace, must be strictly construed.

People v. New York Tax Comrs. 76 N. Y. 77; *Railroad Co. v. Berks Co.* 6 Pa. 70; *Wayne Co. v. Delaware & H. Canal Co.* 15 Pa. 851; *Crawford v. Burrell Twp.* 53 Pa. 219; *Com. v. Chesapeake & O. R. Co.* 27 Gratt. 848; *Charles River Bridge v. Warren Bridge*, 36 U. S. 11 Pet. 548 (9 L. ed. 773).

Black, J., delivered the opinion of the court:

This is a suit in the name of the State to the use of Wine, Collector of Scotland County, to enforce the payment of state, county, school and municipal corporation taxes levied on the property of the Missouri, Iowa & Nebraska Railway Company for the tax year ending in August, 1886. The defendant corporation became the purchaser of the railroad property after the taxes were levied, and the defense is that the property was exempt from taxation while owned by the Missouri, Iowa & Nebraska Railway Company. The circuit court ruled against the defendant, and hence this appeal.

The Legislature, by the Act of February 9, 1856 (Acts 1856, p. 94), incorporated the Al-

exandria & Bloomfield Railroad Company, with power to build a railroad from Alexandria, in Clark County, in the direction of Bloomfield, in the State of Iowa, to a point on the line between this and that State. The Act provides that the construction of the road shall be commenced within ten years after its passage, and completed within ten years thereafter, and that "the stock of said company shall be exempt from taxation for a period of twenty years after its completion." It is alleged in the answer, and not denied, that the company was duly organized in 1864, and then commenced and proceeded to carry out its proper business and railroad operations under the Act. The name of the company was changed to that of the Alexandria & Nebraska City Railroad by authority of the Act of February 19, 1866 (Acts 1865-66, p. 223). There are several sections in this Act, and the fourth section provides that the whole or any section thereof shall be adopted by the board of directors, and shall be in full force from and after the adoption. It is alleged, and not denied, that the company adopted the first section, which authorized the change of name; but it does not appear that any of the other sections were adopted.

The Alexandria & Nebraska City Railroad Company and the Iowa Southern Railway Company, a corporation organized under the laws of the State of Iowa, were consolidated on the 8d of May, 1870, under the name of the Missouri, Iowa & Nebraska Railroad Company, thus forming one continuous line from Alexandria, on the Mississippi, in this State, to a point in the State of Iowa near Nebraska City, on the Missouri River. It was admitted upon the trial that the railroad was constructed and put in operation through Scotland County in 1871, and completed to the state line in December, 1872. It does not appear how much work had been done in this State before the consolidation. In 1886, and after the taxes in question had been levied, the entire consolidated road was sold, under a decree of foreclosure entered in the Circuit Court of the United States for the Southern District of Iowa, to certain individuals, who conveyed it to the defendant corporation, the Keokuk & Western Railroad Company. The period of twenty years' exemption had not expired when the taxes in question were levied by the County Court of Scotland County. The general question, therefore, is whether the property was exempt from taxation while owned by the consolidated company.

It was held in the case of *Scotland Co. v. Missouri, I. & N. R. Co.* 65 Mo. 123, brought to recover taxes for the year 1872, that the exemption of the stock of a corporation is an exemption of the property represented by the stock. The court then proceeds to say: "That the present defendant succeeded to all the privileges and liabilities of the Alexandria & Bloomfield Company is conceded. It is insisted, however, that section 16, art. 11, of the Constitution of 1865, operated to repeal the exemption contained in the defendant's charter."

It was then held that the designated section of the Constitution did not, and could not, destroy the rights existing when it was adopted.

and that the Legislature did not repeal the exemption by the Tax Law of March, 1871. As to the question actually considered in that case, it is sufficient to say we are satisfied with what was then said and ruled. The question whether the consolidated company succeeded to the right of immunity from taxation contained in the charter of the Alexandria & Bloomfield Company was then taken for granted, on what appears to have been a concession of counsel in this court; and that question we will now consider.

The consolidation of the rights, privileges, franchises and properties of two or more railroad companies into one, where there is no provision of the Statute or Constitution to the contrary, leaves the portions of the road thus formed subject to the same rules of taxation that existed before the consolidation. That portion of new line which was exempt will continue to be exempt, and that portion which was subject to taxation will continue subject to taxation. Thus, we think, is the result of the following cases: *Philadelphia & W. R. Co. v. Maryland*, 51 U. S. 10 How. 376 [13 L. ed. 461]; *Tomlinson v. Branch*, 82 U. S. 15 Wall. 460 [21 L. ed. 189]; *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665 [23 L. ed. 757]; *Chesapeake & O. R. Co. v. Virginia*, 94 U. S. 718 [24 L. ed. 810].

The Alexandria & Nebraska City Railroad Company was unquestionably exempt from taxation down to the time of the consolidation, namely the 8d of May, 1870; and, under the rule of the cases just cited, the new company acquired that immunity, so far as concerns the Missouri property, unless the law under which the consolidation was effected by the voluntary act of the two corporations produces a different result.

The sixteenth section of article 11 of the Constitution of 1865, which went into operation before the date of the Act under which the consolidation took place, provides: "No property, real or personal, shall be exempt from taxation, except such as may be used exclusively for public schools, and such as may belong to the United States, to this State, to counties, or to municipal corporations within this State."

The plaintiff takes the ground that, when two railroad companies are consolidated, they thereby surrender their charters, and the resultant company takes its powers and rights from the law which authorized the consolidation; in other words, that the old companies are dissolved, and that a new one springs into existence. If it be true that the Alexandria & Nebraska City Company was dissolved by the act of consolidation, and the new Company took its powers from the Act authorizing the consolidation, then it must follow that the new company is not exempt from taxation; for the Legislature had been deprived of the power to grant such immunity. Whether the old companies were dissolved must depend upon the terms and provisions of the Act of March 2, 1869 (Acts 1869, p. 75), under which the consolidation took place; and we therefore set out the important portions of it.

Section 1 provides, "that any railroad company, organized under the general or special laws of this State, whose track shall, at the

line of the State, connect with the track of the railroad of any company organized under the general or special laws of any adjoining State, is hereby authorized to make and enter into any agreement with such connecting company for the consolidation of the stock of the respective companies whose tracks shall be so connected, making one company of the two, whose stock shall be so consolidated, upon such terms and conditions and stipulations as may be mutually agreed between them, in accordance with the laws of the adjoining States in which the road is located, with which connection is thus formed."

By section 2, the terms and provisions of the agreement must be approved by the holders of a majority of the stock in each of the companies at a meeting called for that purpose, or by writing signed by them.

Section 3 provides: "After the terms of the consolidation have been agreed to in one or the other of the modes above set forth, 'it shall be competent for the boards of directors in each of said connecting companies to carry the same into effect, and adopt by a resolution a new corporate name for the company which shall be formed by the consolidation, and to call in the certificates of stock then outstanding in each company, and exchange them for stock in the new company, as may have been agreed by the terms of consolidation; and a copy of said consolidation agreement and the resolutions of consolidation, and the name adopted for the new company, shall be filed with the Secretary of State, and shall be conclusive evidence,' etc.

The fourth section is in these words: "Any such consolidated company shall be subject to all the liabilities, and bound by all the obligations, of the company within this State which may be thus consolidated with one in the adjoining State, as fully as if such consolidation had not taken place, and shall be subject to the same duties and obligations to the State, and be entitled to the same franchises and privileges under the laws of this State, as if the consolidation had not taken place."

In *Central R. & Bkg. Co. v. Georgia*, *supra*, the Legislature of Georgia had created two corporations—the Central Company and the Macon & Western Company. Their charters limited the right of taxation to one half of 1 per cent upon their net income. The companies were consolidated under an Act passed in 1872; and the question was whether there was a surrender of the charter of the Central Company. The court said: "It may be that the consolidation of two corporations, or amalgamation, as it is called in England, if full and complete, may work a dissolution of them both, and its effect may be the creation of a new corporation. Whether such be the effect or not must depend upon the statute under which the consolidation takes place, and on the intention therein manifested."

It is further held that there was no surrender of the charter of the Central Company, but the ruling goes upon the ground that the Act only contemplated a merger of the property and franchise of the Macon & Western Company into the Central Company, the latter retaining its name and charter.

In *Atlantic & G. R. Co. v. Georgia*, 98 U. S.

359 [25 L. ed. 185], two railroad companies had been incorporated under the Laws of Georgia, —one in 1847, and the other in 1856. By their charters they were exempt from taxation beyond a specific amount on their net income. They were consolidated under an Act of that State passed in 1863, which gave them power to consolidate their stocks, and, when consolidated, to be known as "The Atlantic & Gulf Railroad Company." By that name the stockholders of the companies were empowered to sue and be sued, to purchase and enjoy real and personal property, and to exercise corporate powers. The Act also declared that the immunities, franchises and privileges granted by the charters of the two companies should continue in force, except so far as they might be inconsistent with the Act of Consolidation. Under an Act passed in 1874, the property of the new company was taxed as other property. This Act of 1874, it was held, would be void, as impairing contracts, but for the Act of 1863; and the court, in considering the effect of the consolidation, said: "Did the consolidated companies become a new corporation, holding its powers and privileges as such, under the Act of 1863; or was the consolidation a mere alliance between two pre-existing corporations, in which each preserved its identity and distinctive existence? Or, still further, was it an absorption of one by another, whereby the former was dissolved, while the latter continued to exist? The answer to these inquiries must be found in the intention of the Legislature, as expressed in the Consolidating Act. We think that intention was the creation of a new corporation out of the stockholders of the two previously existing companies. The consolidation provided for was clearly not a merger of one into the other, as was the case of *Central R. & Bkg. Co. v. Georgia*, 92 U. S. 665 [23 L. ed. 737]; nor was it a mere alliance or confederation of the two. If it had been, each would have preserved its separate existence, as well as its corporate name. But the Act authorized the consolidation of the stocks of the two companies, thus making one capital in place of two. It contemplated, therefore, that the separate capital of each company should go out of existence as the capital of that company; and, if so, how could either have a continued separate being?"

The court then goes on to say, in substance, that, as this new corporation took its powers and privileges from the Act of 1863, it took them subject to the laws then in force, and as a result the Tax Act of 1874 was held to be valid and binding on the new company. The same line of reasoning is pursued in the tax cases of *Maine Cent. R. Co. v. Maine*, 96 U. S. 499 [24 L. ed. 836], and in *Atlanta & R. A. L. R. Co. v. State*, 63 Ga. 483.

The effect of consolidating three railroad companies into one, says the court in *McMahan v. Morrison*, 16 Ind. 172, "was a dissolution of the three companies named, and at the same instant the creation of a new corporation."

A recent text-book says: "The franchises of a corporation formed by the consolidation of several companies are derived wholly from the Act of the Legislature authorizing the consolidation." 2 Morawetz, Priv. Corp. 2d ed. § 944.

The same doctrine is asserted in terms more or less positive in the following cases: *Chorwater v. Meredith*, 68 U. S. 1 Wall. 38 [17 L. ed. 608]; *Shields v. Ohio*, 95 U. S. 323 [24 L. ed. 358]; *Lawman v. Lebanon Valley R. Co.* 30 Pa. 42.

Now, the Alexandria & Bloomfield Company had, by its charter, a capital stock of \$2,000,000, divided into shares of \$100 each. The Act of 1869 contemplates and provides for the surrender of the stock in both of the uniting companies; and accordingly we find it provided in the articles of consolidation that the stock issued by each of the companies, and outstanding, shall be surrendered, and shares of stock of the consolidated company issued therefor. The Act speaks of the consolidated company as "the new company;" and the very process by which it is brought into being makes it a new company, and the effect of the consolidation was to dissolve both of the old companies. It is true, the Act of 1869 does not specifically enumerate the corporate powers and privileges conferred upon the new company, but the corporate powers and privileges are granted by reference to the powers of the company in this State which unites with the one of another State. There is in this respect some difference between this case and that of *Atlantic & G. R. Co. v. Georgia*, 98 U. S. 359 [23 L. ed. 185]. But as said in *Maine Cent. R. Co. v. Maine*, 96 U. S. 499 [24 L. ed. 836], a new corporation may be as readily created by the union of two or more companies as by the union of individuals; and its powers and privileges may as well be designated by reference to the charters of other companies as by special enumeration.

The conclusion is irresistible that the Missouri, Iowa & Nebraska Railroad Company is a new corporation, created under and by force of the Act of 1869. Being thus created after the adoption of the Constitution of 1865, the Legislature had no power to grant to it exemption from taxation. The exemption, therefore, did not, and could not, pass to the new company. We cannot see that the fact that one of the consolidating companies was a Missouri, and the other an Iowa, corporation, affects the conclusion just stated. The new company, in this State, is entitled to the privileges and subject to the obligations imposed upon it by the laws of this State; and in Iowa it is a corporation of that State, and subject to the laws thereof. By the legislation of both States, however, it is but one company.

We are cited to a number of cases which were suits on bonds, and involved the legality of subscriptions made by counties to railroad corporations. In some of the cases the subscriptions were made to this consolidated company, but we do not see that any of them are decisive of the question in hand. It must be kept in mind that exemption from taxation will not be recognized, unless granted in terms too plain to be mistaken. *Chicago, B. & K. C. R. Co. v. Guffey*, 120 U. S. 569 (30 L. ed. 732); *St. Louis v. Boatman's Ins. & Trust Co.* 47 Mo. 150, 155.

Such an exemption is a personal privilege, and cannot be assigned except by legislative authority. *State v. Chicago, B. & K. C. R. Co.* 89 Mo. 536, 4 West. Rep. 665.

If the consolidated company is in any sense a new corporation taking its powers to be a corporation and its privileges from the Act of 1869, then it cannot in justice claim the exemption; for the Legislature was powerless to make new grants of that character. It seems to us the tax cases before cited are quite conclusive.

The answer sets up the proceedings in the suit of *Scotland County v. Missouri, I. & N. R. Co.* before mentioned, and reported in 65 Mo. 123. That suit was commenced in 1873 to recover county and school taxes levied for the year 1872. The judgment, which was for defendant, was affirmed in 1877.

It is also alleged in the answer, and not denied, that James Secor and others, stockholders in the consolidated company, filed their bill in the Circuit Court of the United States for the Eastern District of Missouri to enjoin the company from paying taxes levied by Scotland, Clark and Schuyler Counties, and to enjoin the county courts, judges thereof, and collectors of said counties from collecting any taxes levied upon the property of the company for the year 1881 or previous years; and that the temporary injunction was made perpetual on the ground that the property of the company was exempt from taxation. According to the answer, the bill was filed in 1881. The case seems to have been determined in 1881. *Secor v. Singleton*, 9 Fed. Rep. 809.

The taxes sued for here are for the year 1886, and they accrued long after those suits were commenced and determined. This suit is for a separate and distinct cause of action, and for this reason we do not see how the former judgments can be a bar to the prosecuting of this suit. *Davenport v. Chicago, R. I. & P. R. Co.* 83 Iowa, 635.

But we do not understand it to be claimed by the defendant, in this court, that those former judgments operate as a technical bar. The claim is that rights have been acquired on the faith of the ruling in the *Scotland County Case*, followed in the injunction case; and to make a different ruling at this time would be to impair the obligation of contracts, and therefore violative of the Constitution of the United States. The answer to this is that this court did not then pass upon the question whether the exemption from taxation passed to the consolidated company. The question of law was doubtless involved in the agreed facts in that case, but there were many other questions then controverted, and they were decided, and we adhere to what was then said in respect of the propositions of law which were actually considered. It seems to have been asserted on one side, and conceded on the other, in this court at least, that the exemption did pass to the consolidated company, if the exemption clause in the Alexandria & Bloomfield Company had not been repealed; and the court simply stated the question as not a controverted one in that case. All this appears from the decision itself, and we do not see how it can be said the question which we have been considering was decided in that case.

The proposition that the Legislature can, in the face of the Constitution of 1865, exempt property from taxation, is not to be regarded as established because of a concession made by counsel in some former case. It cannot be fairly said that there was a solemn adjudication upon the point we have been considering.

The judgment is affirmed.

Ray, Ch. J., absent. The other Judges concur.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

David ARMSTRONG, Receiver,
v.
CHEMICAL NATIONAL BANK.

(....Fed. Rep.....)

1. The prohibition, under U. S. Rev. Stat. § 5242, against transfers by a national banking association after commission of an act of insolvency, or in contempla-

tion thereof, with a view to the preference of one creditor, does not include a pledge of its securities to a reasonable amount to raise money to meet an unexpected run, although the bank is then in fact insolvent, if it has not become reasonably apparent to its officers that it will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations.

2. Where securities are delivered to a bank specifically to protect the bank-

NOTE.—National banks; not subject to attachment by creditors; paramount lien on assets.

An attachment cannot issue against a national bank before judgment in a suit begun in the circuit court of the United States. *Pacific Nat. Bank v. Mixer*, 124 U. S. 721 (31 L. ed. 567).

Where the attachment is prohibited by law, a bond given to dissolve it has no validity. *Ibid.*

The receiver may proceed in equity against attaching creditors and sureties on such a bond to restrain their enforcing the same; and a decree in such suit will preclude them from all further proceedings on the bonds. *Ibid.*

Section 52 of the original National Bank Act (18 Stat. at L. 115) was intended to preserve to the United States a paramount lien on all the assets of such association, which was given by section 47 as security for repayment of the amount expended in redemption of notes over and above the bonds pledged for that purpose, and to place all other

creditors on equality in distribution of assets provided for in section 50, "on all such claims as may have been proved to the satisfaction of the comptroller, or adjudicated in a court of competent jurisdiction." *First Nat. Bank v. Colby*, 88 U. S. 21 Wall. 609 (22 L. ed. 687); *Pacific Nat. Bank v. Mixer*, *supra*.

The Amendment of 1873, in relation to attachments and injunctions, operates as a prohibition upon all attachments against national banks under the authority of state courts. The prohibition does not in express terms refer to attachments in suits begun in the circuit courts of the United States, but as these courts are not authorized under § 915 of the Revised Statutes to issue attachments in common-law cases except as provided by state laws, it follows that the effect of the amendatory Act of 1873, now a part of section 5242, is to deprive these courts, as well as state courts, of the power to issue such attachments so far as suits against national banks

er in a particular transaction, or series of transactions, the bank has no lien upon them for any other purpose, and cannot assert one for any other indebtedness whether arising upon general account or otherwise.

3. The amount of an overdraft upon a bank account is not necessarily the sum drawn, but it is the amount drawn less the amount to which the drawer, at the time, is entitled to a credit balance upon his account.

(January 2, 1890.)

ACTION to compel the return of certain securities deposited with defendant. *Judgment for complainant.*

The facts are fully stated in the opinion.

Mr. Stephen A. Walker, for complainant:

The transfer of securities was void under National Banking Acts.

National Security Bank v. Butler, 129 U. S. 223 (33 L. ed. 682); *Roberts v. Hill*, 24 Fed. Rep. 574; *Casey v. La Societe de Credit Mobilier*, 2 Woods, 77.

The defendant has no lien for a general balance of account on securities specially deposited to secure a specific loan.

2 Kent, Com. pp. 634, 636; *Grant v. Taylor*, 8 Jones & S. 851; *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 71 (26 L. ed. 698, 700); *Wyckoff v. Anthony*, 90 N. Y. 448; *Duncan v. Brennan*, 88 N. Y. 491; *Vanderzee v. Willis*, 8 Bro. Ch. 21; *Re Mednos's Trust*, 26 Beav. 588; *Jarvis v. Rogers*, 15 Mass. 389; *Neponset Bank v. Leland*, 5 Met. 259; *Story*, Ag. § 881; *Reynes v. Dumont*, 180 U. S. 890 (32 L. ed. 944); *Brown v. New Bedford Sav. Inst.* 137 Mass. 262.

If there had been an actual agreement that enough of this \$300,000 should have been discounted to pay the old debt of March, \$300,000, there can be no doubt but that this agreement would have been contrary to section 5242 and void, and the Chemical would have had to repay to the receiver the amount so held by it.

National Security Bank v. Price, 22 Fed. Rep. 697.

Messrs. Stephen P. Nash and I. Jones for defendant.

Wallace, J., delivered the following opinion:

June 14, 1887, the Fidelity National Bank of Cincinnati transmitted to the defendant, a

bank doing business in the City of New York, securities consisting of notes, drafts and bills of exchange of the aggregate face value of over \$1,000,000. The Fidelity National Bank failed shortly thereafter, and the complainant was appointed its receiver. In the following November the defendant returned some of the securities to the receiver. The receiver now sues to recover the balance. The defendant asserts that it is entitled to retain \$618,587 which it collected from the securities, and apply the same to discharge that amount of indebtedness owing to it by the Fidelity National Bank at the time of the failure of the latter, and that it has returned or accounted for the balance of the securities to the plaintiff.

The following facts appear in the record: The two banking institutions had for a considerable period of time anterior to the transactions in controversy acted as correspondent banks for one another at their respective places of business, during which time the Fidelity Bank also kept with the defendant an ordinary deposit account which was a large and active one. The accounts between the two banks, arising from collections, deposits and payments, were adjusted periodically, and any balance existing at such times was credited or debited, and carried forward in the accounts. In March, 1887, the Fidelity Bank sent to the defendant \$326,695, face value of notes and bills as collateral to a temporary loan which it then asked for of \$300,000, and the defendant consented to make the loan and credited the account of the Fidelity Bank with the amount. The transaction out of which this suit arises, and which originated June 14, appears by correspondence by telegraph and mail between the two banks. June 14 the Fidelity Bank telegraphed the defendant: "Parties have been sending false, anonymous circulars, and have reported a run on us, also false. We forward to you about one million choice bills to hold against any overdraft which will not be to exceed thirty days. Will you protect us?" On the same day it wrote to the defendant: "We enclose herewith about \$1,000,000 of our choice bills to hold against any overdraft we may make until the false rumors subside. We trust you will not fail to stand by us, as everything is all right and we will appreciate the favor in time of necessity."

June 15 the defendant telegraphed the Fidelity Bank: "On satisfactory bills, when re-

are concerned. *Pacific Nat. Bank v. Mixer*, *supra*.

If there was no authority of law for taking the attachment, it follows there can be none for taking the bond given for its dissolution. See *Carpenter v. Turrell*, 100 Mass. 450; *Tapley v. Goodsell*, 122 Mass. 176.

Banker's lien on deposits.

A banker's lien ordinarily attaches in favor of the bank upon the securities and moneys of the customer deposited in the usual course of business, for advances which are supposed to be made upon their credit, not only against the depositor, but against the unknown equities of all others in interest, unless modified or waived by some agreement, express or implied, or by conduct inconsistent with its assertion. *Central Nat. Bank v. Connecticut Mut. L. Ins. Co.* 104 U. S. 54, 71 (26 L. ed. 698, 700).

The general lien which bankers hold upon bills, 6 L. R. A.

notes and other securities deposited with them for a balance due on general account cannot exist where the pledge of property is for a specific sum and not a general pledge. *Neponset Bank v. Leland*, 5 Met. 259; *Duncan v. Brennan*, 88 N. Y. 487, 491.

Where securities are pledged to a banker or broker for the payment of a particular loan or debt, he has no lien on the securities for a general balance or for the payment of other claims. *Wyckoff v. Anthony*, 90 N. Y. 442; *Masonic Sav. Bank v. Bangs*, 84 Ky. 135; *Bank of U. S. v. Macalester*, 9 Pa. 475; *Hathaway v. Fall River Nat. Bank*, 121 Mass. 14.

The true principle upon which bankers' liens must be sustained, if at all, is that there must be a credit given upon the credit of the securities, either in possession or in expectancy. *Fourth Nat. Bank v. City Nat. Bank*, 68 Ill. 393; *Russell v. Haddock*, 8 Ill. 233.

ceived, might advance \$200,000. Amount you name much too large." The same day the Fidelity Bank wrote to defendant: "We have your telegram that you will advance \$200,000 on satisfactory bills. The demand on us to-day is fearful, but we can recover by your help during the week. The \$1,000,000 of bills are choice, and beg of you to stand by us to a larger amount, if we require it, which we will for a few days. We have been keeping an active account with you, and have no other bank to ask favors of. If you will do as we request it will be one of the best acts of your history, and be appreciated more than words can express. There is no bank that we know of that can pay all at one time, without help, and we beg of you to see us through, especially as you run no risk, as these bills receivable are all good beyond question. The panic is subsiding, and we think in one week will be a thing of the past." The same day the Fidelity Bank telegraphed the defendant: "Charge us and deposit with assistant treasurer, New York, \$100,000. Have him wire at once assistant treasurer here to pay us \$100,000 currency." June 17 defendant telegraphed to Fidelity Bank: "We wrote you yesterday that we expected to be liberal, and may increase the amount somewhat. Telegraph us authorizing us to discount any of the notes, and pledging all notes and security in our hands for any indebtedness to us, and confirm by letter." The same day the Fidelity Bank telegraphed to defendant: "If you will discount \$500,000 of the bills and return balance, it will be sufficient. Wire at once." The same day the defendant telegraphed to the Fidelity Bank: "We think it would be enough if we discount \$650,000 of the bills, and then charge up the certificate of deposit for \$300,000, retaining a margin of collaterals, and returning the rest." The same day the Fidelity Bank telegraphed defendant: "Please refuse payment on our four drafts, Nos. 16,411 to 16,414 inclusive, for \$100,000 each." June 18 the Fidelity Bank telegraphed to defendant: "Please discount \$300,000 of the bills, and then charge up certificate of deposit for \$300,000; retain a margin of collaterals and return us balance. If this is done we pledge all notes and securities in your hands for any indebtedness to you." The same day the defendant telegraphed Fidelity Bank: "Attachments just served, suit Bank of Montreal on your account and all your property here; \$200,000 amount of suit." The same day the defendant telegraphed to the Fidelity Bank: "Make no remittances to Chemical, and do not draw on it." The same day the defendant wrote to the Fidelity Bank: "Your telegram of this date has been received. Please discount \$300,000," etc., "and while framing a reply in which we intended to say that we would make it \$700,000 total indebtedness, not \$800,000—which we considered too large—at 11.45 A. M., the warrant of attachment which is enclosed herewith for your perusal, and return by return mail, was served on us, thus putting a check upon any further loans to you or essential change in the account. We then telegraphed you of this attachment and shortly thereafter wired you by Western Union, and then by Baltimore & Ohio, not to send any remittances and not to draw on us."

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You will, of course, see the wisdom of this request, for whatever you sent us would be subject to this attachment if we accept such remittances. Would it not be well also to have any orders which you may have given to your correspondents to remit to us for your account canceled? We send you statement of account, showing you overdrawn \$113,049.99. Our collections account appears about \$34,000 in your hands in addition thereto."

June 18 the Fidelity Bank wrote to defendant: "We to-day drew small checks amounting to about \$5,800 before we received your message. We trust you have sufficient security to protect the \$200,000 attachments and pay the checks of to-day, and leave a small surplus addition which you can no doubt help us on. We think we are over the worst, and if our friends stand by us everything will work in good shape soon. We thank you for your favors, which are greatly appreciated."

June 19 Fidelity Bank telegraphed defendant: "Will you protect our outstanding drafts on you with proceeds in our letter of the 7th (remittances for collection and credit) which will more than cover. If not, deliver to First National Bank and we will instruct them to protect. Wire at once."

June 20 defendant wrote to Fidelity Bank: "Your telegram of the 19th inst. has been received, asking if we would protect your outstanding drafts against yours of 17th. We wired back that we have paid your drafts. We have not refused payment of any of your drafts excepting the four of \$100,000, stopped by you. Herewith statement of your account, showing you overdrawn \$89,020 at close of business to-day. Also you owe us for collections \$34,840.29."

By a stipulation between the parties it appears that the Fidelity Bank "was insolvent on the 14th day of June, 1887, but that the defendant had no knowledge or reasonable ground of apprehension that such was the fact." The Fidelity Bank closed its doors June 21, 1887, and the complainant was appointed its receiver June 27, 1887.

Upon these facts the complainant insists that the defendant did not acquire any title to the securities sent to it June 14, because the transfer was void by §5242, U. S. Rev. Stat., which prohibits all transfers by any national banking association made after the commission of an act of insolvency, or in contemplation thereof, with a view to the preference of one creditor to another. On the other hand the defendant insists that it acquired a banker's lien upon the securities for the amount of any balance upon its general account with the Fidelity Bank which remains unpaid.

The naked fact that the Fidelity Bank was insolvent at the time it sent the securities to the defendant does not imply that the transfer of the securities was made in contemplation of insolvency, or with a view of a preference to the defendant over its other creditors. Although in the light of subsequent events the Fidelity Bank was then insolvent, it may be that its insolvency was not suspected by its officers. So far as appears no act of insolvency had been committed.

A bank is not in contemplation of insolvency until the fact becomes reasonably apparent to

its officers that it will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations. *Roberts v. Hill*, 24 Fed. Rep. 571.

Until this condition of affairs exists, certainly a national banking association does not violate the Statute by pledging its securities to a reasonable amount to raise money needed to meet an unexpected run. The best managed institutions are liable to such contingencies, and the right to use their assets in an honest attempt to bridge over such a crisis is indispensable to their safety. Obviously the exercise of this right would be impracticable if the pledge becomes void whenever the attempt of the bank to rescue itself from failure proves unsuccessful.

It is apparent that the Fidelity Bank did not intend to pledge the securities as collateral to its antecedent indebtedness when it sent them in June to the defendant, or for any purpose other than to the advances which it then desired. They were sent to protect the defendant against a temporary loan, not of any specific sum, but of such sums as the Fidelity Bank might need to meet the exigencies of the situation against overdrafts not warranted by the state of its account with the defendant, and which it expected to be compelled to make immediately. The defendant understood this, but was unwilling to accede to a loan of an indefinite amount, and offered at first to advance \$200,000. The Fidelity Bank was not satisfied with this proposition, and begged the defendant to "stand by" to a larger amount if its necessities so required. The letter of the defendant of June 17 does not imply any understanding on its part that it was to hold the securities to protect the former loan, much less the general account of the Fidelity Bank. That letter mentions the fact of the previous loan of \$300,000 apparently as a suggestion of the extent of the assistance already rendered and its disposition to treat the Fidelity Bank with liberality. That the defendant did not suppose the securities were in its hands as collateral for anything except the sums needed by the Fidelity Bank for the emergency is apparent from its letter of June 17 asking the Fidelity Bank to pledge them for all indebtedness. To this the counter proposition of the Fidelity Bank was that it would accede if the defendant would discount \$500,000 of the securities and return the rest. Up to this time there had been no thought on the part of either bank that the securities were to be a collateral for the general indebtedness of the Fidelity Bank. In the mean time the defendant had advanced \$200,000 by depositing it for the Fidelity Bank with the assistant treasurer at New York City, and the Fidelity Bank had telegraphed for \$100,000 more; and thereupon, answering the last proposition of the Fidelity Bank, the defendant proposed to discount \$650,000 of the securities and return the rest, doubtless meaning to apply the proceeds to its \$300,000 loan of March, and to its advances made after June 14, retaining the excess as a margin to make good these amounts in case any of the discounted paper should not be paid. To this proposition the Fidelity Bank replied that if the defendant would discount \$800,000 of its securities it might charge up the \$300,000, return the balance and retain a margin of collateral,—that is the proceeds of the \$800,000

discounted paper; and in that event all retained in its hands should stand as collateral for its whole indebtedness. At that time its whole indebtedness, as appears from the defendant's letter of June 18, was \$300,000, \$200,000, \$113,000 and \$34,000,—in all \$647,000; and the Fidelity Bank doubtless supposed that the discount of \$800,000 of securities would cover its whole indebtedness and enable it to draw from them until there should be left only a sufficient margin to provide for the nonpayment of any of the discounted paper. Before this proposition on the part of the Fidelity Bank was assented to by the defendant the attachment was served at the suit of the Bank of Montreal, and the negotiations were closed. When the negotiations were thus terminated the Fidelity Bank had not consented that the securities should stand as collateral for the March loan of \$300,000, or for its general indebtedness to the defendant. At this time the defendant had advanced the Fidelity Bank \$200,000 on the faith of the securities, and had written that it expected to be liberal and might increase the amount. It is not quite clear whether the defendant had not also permitted the Fidelity Bank to overdraw its account in the further sum of \$113,000 (subsequently reduced to \$89,000). Under the circumstances any overdraft made after the securities were sent to the defendant, and after it had advanced the \$200,000, should be regarded as one allowed on the faith of the securities, in the absence of distinct evidence to the contrary. If any part of the \$89,000 was a previous overdraft to that extent it is not to be included. In this connection it is proper to say that the amount of an overdraft is not necessarily the sum drawn, but is the amount drawn less the amount to which the drawer, at the time, is entitled to a credit balance upon his account.

If there was no transfer of the securities to protect the antecedent indebtedness of the Fidelity Bank, there was not a preference of the defendant over its other creditors, and consequently there is nothing in the transaction which contravenes the provisions of the Statute. Although the securities sent were of a value vastly in excess of the sum advanced upon them, they were sent upon the expectation by the Fidelity Bank of obtaining advances to the limit for which they would be acceptable collaterals; and before there was any suggestion of pledging them for pre-existing indebtedness the defendant had acquired a valid lien upon them by the advances already made, and the Fidelity Bank was unable to recall them if it had desired to do so. The Statute is directed to a preference, not to the giving of security when a debt is created; and if the transaction be free from fraud in fact, and is intended merely to adequately protect a loan made at the time, the creditor can retain property transferred to secure such a loan until the debt is paid, even though the debtor is insolvent, and the creditor has reason at the time to believe that to be the fact. This has often been decided in the analogous cases arising under the Bankrupt Act (*Tiffany v. Lucas*, 82 U. S. 13 Wall. 410 [21 L. ed. 198]; *Cook v. Tullis*, 85 U. S. 13 Wall. 332 [21 L. ed. 933]; *Clark v. Iselin*, 83 U. S. 21 Wall. 360 [22 L. ed. 568]), and has been expressly held in a cause arising under the

present statute, — *Casey v. La Société de Crédit Mobilier*, 2 Woods, 77.

The view thus reached is necessarily fatal to the contention of the defendant that it acquired a lien securing it for the \$300,000 loan or for the payment of the balance arising upon the general account of the Fidelity Bank. It is familiar law that a banker has a lien upon all funds and securities in his possession deposited with him in the usual course of business by a customer to facilitate the financial transactions contemplated between them, which extends to the payment of any balance on general account. The lien arises from the implied understanding of the parties that credit is to be given in the course of dealings between them by the banker to the customer upon the faith of the securities. It is equally familiar law that the lien does not exist when the securities have been deposited for a special purpose, or for the payment of a particular loan; and where they are delivered specifically to protect the banker in a particular transaction or series of transactions, he has no lien upon them for any other purpose, and cannot assert one for any other indebtedness whether arising upon general account or otherwise.

This doctrine has very recently been declared and applied by the Supreme Court of the United States in *Raynes v. Dumont*, 180 U. S. 854 [82 L. ed. 984]. That was a case in which securities, consisting of \$275,000 of municipal bonds, had been left by one banking firm with another for a period of two years and a half, during which large transactions on general account took place between them, various loans were made to the former by the latter upon an express pledge of the bonds, and the former, at the request of the latter, had also obtained various loans of other bankers by pledging so many of the bonds as was necessary in the particular transaction. The court found as a fact that the bonds were left with the banking firm originally as collateral for a

particular loan, that there was no express understanding between the two banking firms that they were to stand as a security for general transactions, and that the loans subsequently made upon them were specific loans accompanied by an express pledge; and held that these circumstances were inconsistent with the existence of a general lien. The opinion cites various adjudications which hold that where securities are pledged to a banker for the payment of a particular loan or debt he has no lien upon them for a general balance, or for the payment of other claims. As that decision is controlling upon this court it is unnecessary to refer to any other authorities.

It follows that the defendant did not acquire a lien upon the securities except for the advances made and overdrafts permitted on the faith of the securities. If the sending of the securities had resulted either in consequence of a subsequent express contract, or in consequence of any implication from the nature of the transaction in giving the defendant a lien for the antecedent indebtedness of the Fidelity Bank, it is extremely doubtful whether the transaction could be upheld.

The cases of *First Nat. Bank v. Colby*, 88 U. S. 21 Wall. 609 [23 L. ed. 687], and *National Security Bank v. Butler*, 129 U. S. 223 [83 L. ed. 682], take a view of the Statute which suggests that no preference can be obtained by one creditor of a national bank over another, after the bank has become insolvent, whether obtained with the consent of or by adversary proceedings against the bank, and whether the creditor has, or has not, any reason to suppose the bank to be insolvent at the time.

The complainant is therefore entitled to a decree, and the defendant must account for all the securities which it has not returned to the complainant, their value or proceeds, less the amount of advances and overdrafts made after it received them.

DAKOTA SUPREME COURT.

NELSON COUNTY, *Respt.*,

v.

Mowbray S. NORTHCOTE *et al.*, *Appts.*

(....Dak.....)

1. **Loaning cash and securities to a county treasurer**, knowing him to be an embezzler, for the purpose of enabling him to conceal his embezzlement by showing the money and securities as the property of the county, and

thus to have his accounts audited and allowed by the county commissioners, does not render the lender liable to an action in favor of the county, to recover money subsequently embezzled by such treasurer, on the ground that such loan enabled the treasurer to retain his office and thus gave him the opportunity to embezzle the further sum. Any damage which may have resulted from the fraud or wrong of the lender is too contingent, remote and indefinite to constitute a cause of action.

2. **The insertion of an allegation of con-**

NOTE.—*Damages not recoverable for results too remote from alleged cause.*

Where the damage resulting from the act of another is too remote, or flows not naturally, legally and directly from the alleged injury, the plaintiff will not be entitled to recover. *Butler v. Kent*, 19 Johns. 223; *Kelly v. Partington*, 5 Barn. & Ad. 651; *Boyle v. Brandon*, 18 Mees. & W. 738; 8 Steph. Com. 435; Bacon, *Abbr. Actions in General* (B).

The general rule is that a defendant is not answerable for anything beyond the natural, ordinary

and reasonable consequences of his own conduct. *Crain v. Petrie*, 6 Hill, 623; *Bennett v. Lockwood*, 20 Wend. 223; *McGrew v. Stone*, 58 Pa. 436.

If one's fault happens to concur with some extraordinary event, and not likely to be foreseen, he will not be answerable for the unexpected result. *People v. Albany*, 5 Lans. 224; *Fairbanks v. Kerr*, 70 Pa. 86; *Morrison v. Davis*, 20 Pa. 171.

When the injury suffered is not the legal and natural consequence of the wrongful act of the party sought to be made liable, but results from the wrongful act of a third party, only remotely

spiracy in the complaint will not change the nature of an action, the ground of which is a fraud committed and the wrong and damage occasioned thereby.

(October 10, 1889.)

APPEAL by defendants from a judgment of the District Court for Nelson County in favor of plaintiff in an action to recover damages alleged to have been sustained by plaintiff by reason of defendants' collusion with plaintiff's treasurer in concealing his embezzlement. *Reversed.*

Statement by **Spencer, J.:**

Action by the County of Nelson against M. S. Northcote, George Martin and Francis I. Kane, for damages alleged to have been sustained by the plaintiff by reason of fraud and collusion on the part of the defendants and one Andrew Holman, county treasurer of said plaintiff, by which it is alleged the plaintiff was defrauded and sustained damage. Demurrer was first interposed to the complaint on the ground that it did not state facts sufficient to constitute a cause of action, which was overruled. The defendants answered. Upon the trial before the court with a jury, the plaintiff had judgment, and the defendants appealed.

Messrs. Ball, Wallin & Smith for appellants.

Messrs. Bosard & Corliss, for respondent:

Under an allegation of conspiracy judgment may be properly entered against one of the alleged conspirators, on evidence showing him to have been guilty of the wrong, with conspiring to do which all the defendants are charged.

Huiscamp v. Moline Wagon Co. 121 U. S. 810 (30 L. ed. 971); *Dudley v. Danforth*, 61 N. Y. 626; *Smith v. Whitfield*, 87 Tex. 124; *Eureka Iron & Steel Works v. Breanahan* (Mich.) 10 West. Rep. 194; *Kohn v. Clement*, 58 Iowa, 589.

A false affirmation made by the defendant with intent to defraud the plaintiff, whereby plaintiff is damaged, is actionable in an action for deceit, and in such an action it is not necessary that the plaintiff be benefited by the deceit, or that he should collude with the party who is.

Pasley v. Freeman, 8 T. R. 51. See also 2 Kent, Com. pp. 488-490; *Allen v. Addington*, 7 Wend. 18.

Although conspiracy is alleged, proof of it is not essential to the maintenance of the action, where, from the nature of the wrong, it can exist independently of any conspiracy. The tort, and not the combination to commit it, is the basis of the action.

Induced by defendant's conduct, he is not liable. *Ward v. Weeks*, 7 Bing. 211.

There must be, not only a legal connection between the injury and the act complained of, but such nearness in the order of events, and closeness in the relation of cause and effect, that the influence of such act may predominate over other causes, and concur to produce the consequences or be traced to those causes. 18uth. Dam. 66.

Where the wrongful conduct of one person affords the opportunity or occasion for the illegal acts of another, or for an injury from other causes, the injury is too remote. *Cuff v. Newark & N. Y. R.* 6 L. R. A.

Verplanck v. Van Buren, 76 N. Y. 247, 259; *Stevens v. Rowe*, 59 N. H. 578, 47 Am. Rep. 232; *Lavery v. Vanarsdale*, 65 Pa. 507; *Wellington v. Small*, 8 Cush. 145, 50 Am. Dec. 719; *Parker v. Huntington*, 2 Gray, 124; *Bowen v. Matheson*, 14 Allen, 499-502; *Kimball v. Harman*, 84 Md. 407, 6 Am. Rep. 840; *Hutchins v. Hutchins*, 7 Hill, 104-107.

Defendants intended to deceive the commissioners. As they knew Holman to be an embezzler, and aided him with their money to cover up his defalcation, the inference of fraud follows almost as a proposition of law.

Hubbard v. Briggs, 31 N. Y. 518-530; *Williams v. Wood*, 14 Wend. 126; *Russell v. Olark*, 11 U. S. 7 Cranch, 69 (3 L. ed. 271).

The defendants had a motive to deceive the County. Holman was overdrawn in his individual account \$954. Discovery of his dishonesty at that time meant the loss of their claims. Concealment for a time would enable them to save themselves. But the defendants are liable, although they receive no benefit from the fraud.

Allen v. Addington, 7 Wend. 9, 22; *Williams v. Wood and Hubbard v. Briggs*, *supra*; *Lord v. Cooley*, 6 N. H. 99, 25 Am. Dec. 448, note and cases cited; *Busterud v. Farrington*, 86 Minn. 820; *Endsley v. Johns*, 9 West. Rep. 747, 120 Ill. 469, 60 Am. Rep. 572.

That the carelessness of the commissioners on the settlement contributed to the damage is no defense in a case of this kind, because it is well settled that the public cannot be made to suffer for any laches of a public officer however gross.

Monroe County v. Otis, 62 N. Y. 88; *Jones v. U. S.* 85 U. S. 18 Wall. 662 (21 L. ed. 867); *Hart v. U. S.* 95 U. S. 316 (24 L. ed. 479); *Minturn v. U. S.* 106 U. S. 437 (27 L. ed. 209).

Fraud need not be proved by direct and positive evidence; circumstantial evidence is not only sufficient, but in most cases the only proof that can be adduced; it is sufficient to prove such facts and circumstances tending to the conclusion of fraud as may reasonably induce the jury to believe the charge true although there may remain some doubt in their minds.

Rea v. Missouri, 84 U. S. 17 Wall. 532 (21 L. ed. 707); *Burch v. Smith*, 15 Tex. 219, 65 Am. Dec. 157, note and cases cited; *Kempner v. Churchill*, 75 U. S. 8 Wall. 862 (19 L. ed. 461); *Castle v. Bullard*, 64 U. S. 23 How. 172 (16 L. ed. 424); *Marsh v. Falker*, 40 N. Y. 562-566.

The fact that Holman's conduct aided defendants in perpetrating a fraud was no defense. It was not necessary that the fraud of the defendants was the sole inducement influencing the commissioners in retaining Holman in office.

Co. 35 N. J. L. 80; *Scholes v. North London R. Co.* 21 L. T. N. S. 585.

Where the fact that plaintiff suffered damage from the acts of defendant is not capable of legal proof because not within the compass of human knowledge, and depends on numberless unknown contingencies, it can be nothing more than a matter of conjecture. *Wellington v. Small*, 3 Cush. 145.

So a stockholder in a bank cannot maintain an action against the directors for malfeasance in delegating the whole control of the affairs of the bank to the president and cashier, who waste and lose the whole capital. *Smith v. Hurd*, 12 Met. 371.

Lobby v. Ahrens, 26 S. C. 275; *Allen v. Addington*, 7 Wend. 9; *Addington v. Allen*, 11 Wend. 374-381; *Safford v. Grout*, 120 Mass. 20.

As between the sureties on the official bond and the defendants, whose fraud, at least to the extent of the amount recovered in this action, made it necessary for the sureties to pay on their bond, the defendants are ultimately responsible. Upon payment they might have maintained this action by virtue of subrogation, either in the name of the plaintiff or possibly in their own name, under our Code, because of their being the real parties in interest; and any payment made by the defendants to the plaintiff in this case in satisfaction of this wrong after notice of payment by the sureties would be a fraud upon the sureties, and the defendants would be still responsible despite such settlement.

Connecticut F. Ins. Co. v. Erie R. Co. 78 N. Y. 399; *Hart v. Western R. Corp.* 13 Met. 99; *Clark v. Wilson*, 108 Mass. 223; *Monmouth County Mut. F. Ins. Co. v. Hutchinson*, 21 N. J. Eq. 107; *The Monticello v. Molison*, 58 U. S. 17 How. 153 (15 L. ed. 68); *Hall v. Nashville & C. R. Co.* 80 U. S. 13 Wall. 367 (20 L. ed. 594); May, Ins. §§ 454, 455; *Rockingham Mut. F. Ins. Co. v. Boshier*, 39 Me. 253, 63 Am. Dec. 618; *Connecticut Mut. L. Ins. Co. v. New York & N. H. R. Co.* 25 Conn. 265, 65 Am. Dec. 571; *Peoria M. & F. Ins. Co. v. Frost*, 37 Ill. 333; *Mobile & M. R. Co. v. Jurey*, 111 U. S. 584 (28 L. ed. 527); *The Potomac v. Cannon*, 105 U. S. 630 (26 L. ed. 1194); *Harding v. Townsend*, 43 Vt. 536.

Spencer, J., delivered the opinion of the court:

By the complaint in this action it is alleged that the plaintiff is a municipal corporation, one of the counties of this Territory; that defendants were bankers, carrying on business at Lokota, Nelson County; that one Andrew Holman was county treasurer of said county, duly elected and acting as such, and that, as such treasurer, he deposited the funds of said county received by him in defendants' bank, and kept his account therein; that on the 5th day of January, 1886, said Holman was an embezzler in the sum of \$9,300 of said county's funds, which had come into his hands as such treasurer; that the defendants knew at that time that said Holman had been using said funds of said county so deposited with them for the purpose of paying his personal debts, and that he had paid his private debts from the funds of said county so deposited; that, under the Statute of this Territory, it was the duty of said Holman, as such treasurer, on the 5th day of January, 1886, to attend before the board of county commissioners of said county and exhibit his accounts, and vouchers as such treasurer, and the moneys in his hands belonging to such county; that on said day, as such treasurer, he should have had in his hands of the moneys of said county, which he had received, and for which he was chargeable, the sum of \$15,221.78; that he did not have such sum of said funds of said county in his possession, or under his control, but that he had at such time embezzled the sum of \$9,300 thereof; that upon such accounting by said Holman, as such treasurer, he exhibited to the county commis-

sioners, among the moneys of said county, the sum of \$4,200, in cash, and a certain certificate of deposit issued by said defendants to him for the sum of \$2,600, and a bank draft for the sum of \$2,500, issued by the defendants to him; that said \$4,200 cash, and certificate of deposit, and draft were not the property of said Holman, either individually or as such treasurer, or the property of said county, but were temporarily loaned by said defendants to said Holman for the sole purpose of enabling him to conceal, by means thereof, his said embezzlement of said county's funds in his hands as such treasurer, and with the intent on the part of said defendants to deceive and defraud said county thereof; that said defendants knew that said Holman had misappropriated said county's funds, and that he received said cash, certificate and draft for the sole purpose of exhibiting them to said board of county commissioners as money in his hands as such treasurer, for the purpose and with the intent of concealing his embezzlement, and that the defendants, knowing said intent on the part of said Holman to deceive said board of county commissioners and conceal his embezzlement and defraud said county, conspired and colluded with said Holman to conceal such embezzlement and deceive such board of county commissioners, and for that purpose, and with such intent, loaned said Holman said \$4,200 cash and said certificate and draft; that said Holman did exhibit to said board of county commissioners such money, certificate and draft with the money remaining in his hands as such county treasurer, and that they, believing the same to be county funds of said county, in the hands of said Holman as treasurer, did audit and allow his accounts as such treasurer as correct, and, relying thereon, did refrain from taking any steps to have said Holman arrested and prosecuted for embezzlement, and from having sued him while he was in this Territory, and suffered him to remain in office as such treasurer; and that thereupon, and subsequently to said 5th day of January, 1886, and while still acting as such treasurer, he embezzled of the funds of said county, which came into his hands as such treasurer, the further sum of \$6,726.26, and that before such embezzlement was discovered he fled from said Territory, and has not since returned or been discovered, or been arrested for such embezzlement; that by reason of such fraud and collusion said board of county commissioners were deceived, and, believing such money, draft and certificate, so temporarily loaned by said defendants to said Holman, were the property and funds of said county, and relying thereon, refrained from having said Holman arrested and prosecuted until he had fled from the Territory, and refrained from suing said Holman to recover said sum so embezzled as aforesaid until he became hopelessly insolvent. To this complaint the defendants demurred. The demurrer was overruled, and the defendants answered.

Upon the trial of the action the plaintiff had judgment; the court, however, limiting the amount of the recovery to the sum which was embezzled by Holman subsequently to the accounting of January 5, 1886.

The only fraud alleged in the complaint, and proved upon the trial of the action, is that the

defendants, knowing, or having knowledge of the circumstances sufficient to charge them with knowledge that Holman was an embezzler of the county's funds on the 5th day of January, 1886, loaned him a sum of money and some cash certificates for the purpose of enabling him thereby to cause the county commissioners to believe that the money and funds thus exhibited belonged to the county, and thus secure his accounts to be audited and his embezzlement to be concealed; that the county commissioners were deceived thereby, and refrained from bringing action against said Holman to recover such funds, or to prosecute him, until he had escaped from the Territory. The verdict of the jury being against the defendants, the truth of all the material allegations of the complaint is established. The question, therefore, for our determination is whether these facts are sufficient, in law, to entitle the plaintiff to judgment.

The gist of the injury complained of is the fraudulent act of the defendants in loaning Holman the money and certificates to enable him to have his accounts as county treasurer audited, and conceal from the board of county commissioners the fact of his embezzlement of the funds of the county, knowing that he was an embezzler. In order to maintain an action for the fraudulent acts of another, it is absolutely necessary for the plaintiff to prove, not only that damage has been sustained by him, and that the defendant has committed a wrong, but also that the damage is the necessary result of the wrongful act; and such damage must be susceptible of proof, and capable of being clearly ascertained. *Lamb v. Stone*, 11 Pick. 527.

What damage has the plaintiff sustained by reason of the fraudulent acts alleged and found against the defendants? It lost no claim or lien against the property of Holman, for it had no lien thereon. Nor is it even alleged that he at any time had any property from which the deficit could have been made. It did not lose custody of his body, for he had not been arrested, nor, so far as the record indicates, had any steps whatever been taken to that end. There is nothing to show that any such proceeding was contemplated. All that can be said is that if the defendants had not, by their fraudulent act in loaning Holman the money and certificates, thus enabling him to deceive the board of county commissioners, he could not have concealed the first of his embezzlement; that they would have discovered it, and having discovered it, would have prosecuted him criminally and brought actions against him to recover the amount. Upon what theory can an action for such an injury be maintained? How is the fact that the plaintiff refrained from procuring the arrest of the defaulter because of this act of the defendants to be established? By what process are we to determine what designs the county commissioners would have formed in their minds had they known facts of which they were ignorant, or, having ascertained them, what action they would have taken? We may speculate on what men would ordinarily do under such circumstances, but to prove precisely what they would do, so as to know it as an established fact, is an absolute impossibility. But if we assume that the coun-

ty commissioners, had it not been for the fraudulent act of the defendants, would have discovered the embezzlement by Holman, and removed him from office, could we then say that the plaintiff had shown itself entitled to recover against the defendants for the amount stolen subsequent to January 5, 1886, the day the fraud was committed which enabled Holman to conceal his crime? To do this we should be obliged to determine that the county treasurer who would have been appointed to succeed him would have been more honest, and not have embezzled the funds. How is this to be proved? How is it to be determined whom they would have appointed, or that such appointee would not have embezzled the county's funds, or that they might not have been stolen by someone else? Such facts are not susceptible of legal proof. They are wholly conjectural, and beyond the limits of the knowledge of mankind. And though it is not alleged that Holman at any time had any property, yet, if we assume that he had, we cannot undertake to say that he might not have sold it to a bona fide purchaser, or that some other creditor would not have attached it. It is therefore impossible to determine whether the plaintiff would have discovered the embezzlement, and had Holman arrested, or have recovered the amount embezzled, had the defendants not loaned him the money or certificates; and it is equally impossible to ascertain whether he would have been suspended from his office, or his successor therein would not have embezzled a like sum. It is not apparent wherein the plaintiff has sustained any damage by the fraud or wrong of the defendants; but, if it has, it is impossible of ascertainment, and is too contingent, remote and indefinite to constitute a cause of action. The act of the defendants in loaning him the money and certificates was not illegal. It was lawful in itself, and cannot be made the ground of a recovery against them.

This case is analogous to that of *Bradley v. Fuller*, 118 Mass. 239. In that case the allegations of the complaint were that the defendant represented to the plaintiff that a corporation, of which he was treasurer, and against which the plaintiff then held an overdue note, owed no other debts, and that there were no attachments upon its property; that such representations were made falsely and fraudulently, and for the purpose of inducing the plaintiff not to commence an action against said company until after the property thereof should be placed out of reach of process by plaintiff; that all of the property of the company was subsequently attached and sold upon other debts; and that the plaintiff, relying on such representations, lost his debt. It was alleged, also, that the plaintiff was induced, by the representations made by said defendant, to forbear securing payment of his note by attachment of said company's property, as he might and would have done but for such representations. In passing upon the question of the sufficiency of this declaration the court said: "The facts stated in these counts do not show a legal cause of action. . . . There is no attachment, or attempt to attach, on the part of the plaintiff, alleged. It does not appear that by reason of the alleged representations he lost anything

which he ever had. Taking these counts in the most favorable sense for the plaintiff, they simply charge that the plaintiff, induced by the falsehood alleged, refrained from carrying into effect an intention to attach, and that another creditor did attach and apply the company's property in payment of his debt." And the complaint was dismissed because it did not state a cause of action.

This is a much stronger case for the plaintiff than the one at bar, for in this complaint it is not even stated that there was any intention to institute proceedings for the recovery of money. There could not have been, for the plaintiff did not know of the embezzlement; but there is no allegation that Holman owned any property at any time, and, indeed, there is no allegation that he has not now property within the Territory.

So in *Lamb v. Stone*, 11 Pick. 527, which was an action to recover damages from the defendant because of a fraud perpetrated by him upon the plaintiff in purchasing the property of a person who was indebted to the plaintiff, and assisting him to abscond in order to prevent the plaintiff from collecting his debt, the court held that these facts did not constitute a cause of action.

In *Wellington v. Small*, 8 Cush. 145, it was alleged that the defendants and Dexter Small were merchants, and that the latter purchased goods of sundry persons on credit to a large amount; that he gave notes therefor, which were indorsed to plaintiff; that he had not paid the same, and was insolvent, and had no property; that before the notes matured the defendants combined to defraud the plaintiff, and, to enable Dexter Small to take the poor-debtor's oath, and to hinder and delay the plaintiff from securing and recovering payment of his debt, and fraudulently and without consideration, removed from the State a large portion of said Dexter Small's goods; that the defendant George Small fraudulently received and concealed the same from plaintiff, and prevented the levying of an attachment upon them, both parties knowing that the goods, or the notes given therefor, had not been paid; that the defendants afterwards, in pursuance of their fraudulent and unlawful intent and conspiracy, canceled and discharged a valid debt due from one George Small to Dexter Small, and removed other goods of said debtor out of the State fraudulently and with such intent; that plaintiff had recovered judgment against said debtor, but by reason of the fraudulent acts of said debtor he was unable to collect his judg-

ment; and that said debtor had been enabled to take the poor-debtor's oath by the alleged fraudulent action of said defendant, and had taken the same and been discharged. The court, in giving its opinion, said: "The uncertainty of the plaintiff's damage seems, of itself alone, to be a sufficient reason for his not recovering. In an action on the case *ex delicto* the plaintiff must show injury and damage; and these must be shown as facts, by legal proofs, except in a few cases, where, by the rule of law, damage is presumed from the act complained of. This case does not fall within that exception. How could this plaintiff prove that he suffered any damage from the acts of the defendant which are averred in the declaration? How could he prove that he would have secured his debt by attaching the property of his debtor, if the defendant had not intermeddled with it? Other creditors might have attached it before him, or it might have been stolen or destroyed while in the debtor's possession. The fact that the plaintiff has suffered actual damage from the defendant's conduct is not capable of legal proof, because it is not within the compass of human knowledge, and therefore cannot be shown by human testimony. It depends on numberless unknown contingencies, and can be nothing more than a matter of conjecture."

To the same effect are *Morgan v. Bliss*, 2 Mass. 111, and *Randall v. Haselton*, 12 Allen, 412.

The allegation of conspiracy in the complaint does not change the nature of the action. The ground of the action is the fraud committed, the wrong done, and the damage occasioned thereby. An allegation of conspiracy is doubtless proper when it is sought to charge two or more defendants with combining or acting jointly to accomplish the wrong complained of, but it is not essential for any other purpose. *Verplanck v. Van Buren*, 76 N. Y. 247; *Parker v. Huntington*, 2 Gray, 124; *Laverty v. Vanarsdale*, 65 Pa. 507.

The cases relied upon by the plaintiff (*Zabritie v. Smith*, 13 N. Y. 328; *Pasley v. Freeman*, 2 Smith, Lead. Cas. *157; *Endsley v. Johns*, 120 Ill. 469, 9 West. Rep. 747, 60 Am. Rep. 572), are not analogous to the case at bar, and do not sustain the plaintiff's contention.

We are unable to discover any legal hypothesis upon which this action can be sustained, and the judgment appealed from must therefore be reversed and the action dismissed.

Judgment reversed and action dismissed, with costs; all the Justices concurring, excepting McConnell and Templeton, JJ., not sitting.

MINNESOTA SUPREME COURT.

STATE OF MINNESOTA, *Rept.*,
v.
ST. PAUL UNION DEPOT CO., *Appt.*

(... Minn....)

*1. The St. Paul Union Depot Company is not liable to pay, as taxes, a percentage on its receipts or gross earnings.

*Head notes by MITCHELL, J.

6 L. R. A.

2. Payment of a percentage on their gross earnings by the railway companies, which own all the stock and use the terminal facilities of the Depot Company, constitutes payment of taxes on all the property of the latter.

(December 6, 1890.)

APPEAL by defendant from an order of the District Court for Ramsey County in favor

of plaintiff in a proceeding to enforce payment of certain taxes. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. Gordon E. Cole for appellant.

Mr. M. R. Tyler, for respondent:

Defendant filed with the Secretary of State its acceptance of the provisions of the Act of March 10, 1878, relating to railroad taxation. Its board of directors therefore agreed to return its gross earnings and pay the specified per centum on the same in lieu of all other taxation, and it is liable therefor in this proceeding.

No doubt double taxation, within the clear meaning of the term, and the undoubted construction of the law, is repugnant to the general idea of strict justice; but there are vast numbers of cases where questions entirely analogous to that claimed by defendant to exist in this case have been exhaustively discussed by the courts, and held not to be double taxation.

See *Yuba County v. Adams*, 7 Cal. 85; *Knos v. Shawnee County*, 20 Kan. 596; *Dyer v. Osborne* 11 R. I. 331; *Great Barrington v. Berkshire County*, 16 Pick. 572.

It is not possible to avoid what, in its final outcome, is duplicate taxation; and therefore a tax cannot be avoided by a showing that such is the result.

St. Louis Mut. L. Ins. Co. v. St. Louis County Assessors, 56 Mo. 508.

Mitchell, J., delivered the opinion of the court:

The sole question presented by this appeal is the liability of the defendant under the Act of March 10, 1878 (Gen. Stat. 1878, chap. 11, §§ 128, 129), to pay, as taxes, a percentage on its receipts or gross earnings. It was organized under title 1, chap. 84, Gen. Stat., and the general nature of its business, as stated in its articles of incorporation, is, "to build, purchase or lease and operate transfer tracks or railways in the City of St. Paul, open alike to the use of all railroads now constructed, or which may hereafter be constructed, to or into St. Paul, to and between each of said roads, and each and all important industries in said city whose business requires special railroad accommodations by means of transfer tracks, etc., and in connection therewith to build, lease or otherwise provide and maintain in said city a union passenger depot, and proper tracks for access thereto; and to that end to construct, purchase, lease or otherwise secure, maintain and operate lines of railway in said city."

In connection with these articles, and as in fact a part of them, must be considered the Act of March 5, 1879, "Relating to the St. Paul Union Depot Company," the provisions of which were accepted by it, and under and in accordance with which its business has been managed. This Act provided that any railroad then or thereafter constructed and running to or into St. Paul might subscribe to the capital stock of defendant, or become a stockholder therein. It also provided that the board of directors of the defendant should be elected annually by seven several railroad companies interested therein, each railway company electing one director. Also, that any other railroad company then or thereafter organized, whose road should run into St. Paul,

might, upon becoming the owner of such shares of the capital stock as defendant's board of directors should deem equitable, elect, in like manner, an additional director. The Act also prohibited any unjust discrimination against or in favor of any particular railroad company using, or desiring to use, defendant's terminal facilities, and provided that, as far as practicable, all railroads should have the right to use them upon the same terms.

It is evident that this Act contemplated that the entire stock of defendant should be owned by and equitably apportioned among the various roads desiring to use its terminal facilities, for it is not to be supposed that the Legislature intended that such railway companies should have the exclusive management of the corporate property and business while the stock should be owned by someone else. It is also apparent that it was never intended or contemplated that defendant should do what may be termed a "separate and independent railroad business of its own," but that it was merely designed as an agency through which there might be furnished, for the common benefit and use of all railroads coming into the city, a union depot and terminal facilities, to better enable them to perform their duties as common carriers in receiving, delivering and transferring passengers and freight in this city. In accordance with this Act, all of the stock of defendant which has ever been issued was apportioned among and issued to, and has always been and still is owned and held by, the seven (since reduced, by consolidation, to five), railroad companies whose roads then ran into St. Paul, and who then used, and still use, the depot and terminal facilities furnished by defendant, its entire board of directors being elected by the same companies. Two other companies (Minnesota & Northwestern and Chicago, Burlington & Northern), whose roads have subsequently been built into St. Paul, not yet having agreed with defendant's board of directors as to the terms upon which they should be admitted as stockholders, have been using the depot under an agreement by which they pay therefor a stipulated monthly rent (apparently and presumably as the equivalent of interest on their equitable share of the cost or value of the plant), and in addition thereto their proportion of the expenses (not including interest on bonds or dividends on stock) of maintaining and operating the depot and appurtenances. This plant was provided and constructed with the proceeds of stock issued to and paid for by these several companies, and with the proceeds of mortgage bonds issued and sold by the defendant. The greater part of the expense was, however, defrayed out of the proceeds of the mortgage bonds, only a comparatively small amount of stock having been issued.

The rentals or tolls for the use of the depot are apportioned among and paid by the different companies in proportion to the amount of such use by each company, and the aggregate annual amount of all rentals and tolls is the actual cost of furnishing and maintaining the plant, estimated on the following basis: *First*. The current expenses of keeping up and maintaining the terminal facilities, and of managing the property and business, and 6 per

cent interest on the mortgage bonds, and an annual 6 per cent dividend on the amount of paid-up stock outstanding; from which is to be deducted, however, all rents or income received by the Depot Company from other sources, such as rent of dining rooms, express rooms, news-stands, and the like. The fares or tolls which the different railroad companies charge their passengers or other patrons include the use of these terminal facilities furnished by the Depot Company, as no distinction is or can practicably be made in that matter between their own roads and the depot of the defendant. For illustration, if a passenger on one of these roads pays his fare from Chicago to St. Paul, this covers the entire transit between the two cities, including the accommodations of the union depot. Hence, for all the facilities furnished by the defendant to the railroad companies, and for which it charges them their respective shares of the cost, the railway companies charge their patrons as part of their service, and the whole goes into and forms a part of their gross earnings, upon which they pay to the State as taxes a certain percentage. All of the railway companies who use this union depot pay to the State, either under the provisions of their special charters, or under the Act of March 10, 1873, a percentage on their gross earnings in lieu of taxes on all property held and used by them for railway purposes.

It is evident from this statement of facts that the sole and only function performed by the defendant corporation is to furnish, at cost, a union depot and terminal facilities for the common use of these different railway companies, and that the scheme of forming a corporation for that purpose, and issuing stock, is but a more convenient and economical method of holding the property and managing the business than it would be to hold and manage it as tenants in common. It is also apparent that what is charged the railway companies and received by the Depot Company for these terminal facilities is nothing more nor less than a part of the expenses of the former in transacting their railway business, and that what are called the "earnings" of the Depot Company are for services for which the railway companies charge their patrons, and are all included in the gross earnings of the companies, on which they pay a percentage to the State. To collect a percentage on these gross earnings, and also a percentage on the gross earnings of the Depot Company, would be, *pro tanto*, double taxation of the same thing. Or, take another view of the case. The stock of the Union Depot Company represents and fits the exact equivalent of all the property of that corporation. It is held by the railway companies, under legislative authority, for railroad uses, as fully as would be the depot itself if held by them as tenants in common. Hence payment of the required percentage on the gross earnings of the companies constitutes payment of taxes on this stock, and consequently on the property which it represents, and to tax the stock in the hands of the stockholders, and then tax the property which it represents against the corporation, would clearly be illegal or double taxation. The identity of the property taxed is not affected by the fact that in the one case the tax is

paid by the stockholder and in the other by the corporation. The thing taxed is still the same. *Rice County v. Citizens Nat. Bank*, 23 Minn. 280; *Farrington v. Tennessee*, 95 U. S. 679 [24 L. ed. 558].

If, in the present case, the taxes already collected from the railway companies, and those now sought to be collected from the depot company, were both the ordinary form of taxation, the fact of double taxation would be very apparent; but it is none the less double because in both cases the taxes are in the commuted form. Neither has the claim of the State in this case any equities. If the railway companies had owned and used this depot as tenants in common the percentage on their gross earnings payable to the State would have been the same as now, and yet that percentage would have paid the taxes on the depot the same as on any other property held and used by them for railway purposes. We cannot see what difference it can make whether they hold the depot property as tenants in common, or put it in the name of a trustee to hold and manage for their common use, or, as in this case, organize a corporation for the same purpose, as a more economical and convenient method of holding the property, managing the business and apportioning the expenses among themselves. The State plants itself on the technical ground that defendant is a separate and independent legal entity, and that we have no right to consider the functions which it performs, or the relations which it bears to the railway companies who own its stock and use its depot. We think this is too narrow and technical a view of the case. When evasions have been resorted to by railway companies or others to escape taxation, we have unhesitatingly looked through the external form or dress to the substance of the transaction, and the same rule should be applied against the State.

By receipt of the percentage on the gross earnings of all the railway companies who use the property of the Depot Company, and who own all its stock, the State has received its tax once upon all the corporate property of the defendant, and to tax it again by a tax against the Depot Company would be illegal double taxation. We attach no importance to the fact that after its organization defendant's board of directors notified the State of its election to accept the provisions of the Act of March 10, 1873. If it was liable to taxation, this notice might be conclusive on the company as to the mode or form of taxation; but there is nothing in it which would operate either by way of contract or estoppel to obligate it to pay taxes for which it would not be otherwise liable.

Order reversed.

J. R. THOMPSON, *Appt.*,

v.

H. T. WINTER, *Resp't.*

(.... Minn.)

*1. The equitable considerations which will justify a court in refusing to compel specific performance of a valid con-

*Head notes by GILFILLAN, Ch. J.

tract to convey real estate must have some reference to or some connection with the contract itself, or the duties of the parties in relation to it.

2. That the vendor has an independent claim against the vendee, which by reason of the latter's insolvency he may be unable to enforce, is no reason for refusing specific performance on the application of the vendee.

(November 30, 1888.)

APPPEAL by plaintiff from an order of the District Court for Redwood County denying his motion for a new trial in an action to compel specific performance of a contract in the nature of one to convey real estate, in which judgment had been entered for defendant. *Reversed.*

The case sufficiently appears in the opinion. *Mr. John H. Bowers*, for appellant:

The court erred in admitting any of the evidence relating to the oral contract for improvements.

A contract required by the Statute of Frauds to be in writing cannot be modified by parol.

Bishop, Cont. p. 301; *Greenl. Ev.* § 802; *St. Paul Division No. 1, Sons of Temperance v. Brown*, 9 Minn. 157.

In equity, "articles" for the purchase of land are looked on as equal to a conveyance, and after the contract the vendor becomes in equity the trustee of the vendee.

St. Paul Division No. 1, Sons of Temperance v. Brown, 9 Minn. 163.

A compensation in damages for the breach of such contract is not regarded as adequate relief.

Ibid., and *Olason v. Bailey*, 14 Johns. 484.

Mr. J. M. Thompson, for respondent:

When there is any well-founded objection why this extraordinary assistance of the court should not be granted, the party will be left to his remedy at law for a compensation in damages.

Northrup v. Trask, 39 Wis. 515.

Whether a contract shall be enforced specifically must rest in the reasonable discretion of the court.

Garriss v. Garriss, 16 N. J. Eq. 79. See also *Williams v. Williams*, 50 Wis. 311; 5 Wait, Act. and Def. 765; *Rogers v. Saunders*, 16 Me. 92; *Snell v. Mitchell*, 65 Me. 48; 8 Wait, Act. and Def. 471; *Columbia College v. Thatcher*, 87 N. Y. 811.

The mere proof of a valid legal contract will not give a right to the decree.

8 Wait, Act. and Def. 471; *Chicago, B. & Q. R. Co. v. Reno*, 118 Ill. 39; *Menasha v. Wisconsin Cent. R. Co.* 65 Wis. 502.

The decree may be refused upon considerations purely equitable, as where there has been a change in the surroundings.

8 Wait, Act. and Def. 471, 472; *Bird v. Logan*, 35 Kan. 228, 234. See also *Ramsey v. Gheen*, 99 N. C. 215; *Fitzpatrick v. Dorland*, 27 Hun, 291; *Vincent v. Larson*, 1 Idaho, N. S. 241; *Margraf v. Muir*, 57 N. Y. 155.

Gillilan, Ch. J., delivered the opinion of the court:

This is an action to compel specific performance of a contract in the nature of one to convey real estate. The defendant had purchased

the land from the State, paying 15 per cent of the purchase price, and receiving certificates of purchase. February 1, 1886, these parties entered into a contract in writing, whereby the defendant agreed that, upon full performance on the part of the plaintiff, he would transfer by deed of assignment the said land certificate. Plaintiff was to pay therefor \$590, according to two promissory notes—one for \$190 due October 1, 1886, with interest at 10 per cent, and one for \$400, due two years from February 1, 1886, with interest at 8 per cent—and pay all taxes and assessments, and the unpaid purchase money to the State. The plaintiff fully performed this contract on his part.

In March, 1886, the parties made an oral agreement, by which defendant agreed to make certain improvements for the plaintiff on the land, by breaking, erecting buildings and digging a well, for which plaintiff agreed to pay him the cost thereof, with interest; such payment not to be made before the expiration of five years from the time of making the improvements. Afterwards, pursuant to such agreement, defendant made such improvements to the amount of \$500, no part of which has been paid. The plaintiff was insolvent. On these facts the court below denied specific performance. From the memorandum filed by the court below it appears that the specific performance was refused in the exercise of what the court deemed its discretionary power, the reasons for so exercising that power being stated: the plaintiff has become insolvent; that the value of the improvements is equal to the purchase price; and that the plaintiff can be compensated in damages.

The mere fact that a person has a contract for the conveyance to him of real estate does not entitle him, as of right, to the interposition of a court of equity to enforce it. The matter of compelling specific performance is one of sound and reasonable discretion,—of judicial, not arbitrary and capricious, discretion. There must be some reason founded in equity and good conscience for refusing the relief. Such reason has been generally found, by the court refusing it, in some mistake or fraud, or unconscionableness in the contract, or in some laches on the part of the plaintiff changing the circumstances so as to make it inequitable to compel a conveyance, or where the claim is stale, or there is reason to believe it was abandoned. But, whatever the reason may be, it must have some reference to, some connection with, the contract itself, or the duties of the parties in relation to it. We have never found a case where the court refused the relief as a means of enforcing some independent claim of the defendant against the plaintiff, nor because the defendant had some independent claim which he might not be able to enforce against the plaintiff. If such could be regarded as an equitable reason for denying relief, every action of the kind might involve the investigation of all unclosed transactions between the parties, whether relating to the contract or subject matter of the action, or entirely distinct from it. In this case there is no reason to suppose the contract other than a fair one. The plaintiff has been prompt in performing on his part, and in seeking his remedy. The defendant has a claim against plaintiff, entirely independent of

the contract to convey, which claim, by the terms of the agreement under which it arose, was not to become due for more than three years after the time when he was to convey. The possibility that when it becomes due he may not be able to enforce it, by reason that plaintiff's insolvency may continue, does not make it inequitable to enforce this contract already matured. That a purchaser may have an adequate remedy by action for damages,

although a reason for not holding what he has done to be part performance to take the case out of the operation of the Statute of Frauds, is of itself no reason for withholding the proper remedy where the contract is valid under the Statute.

The order is reversed, and the court below will enter judgment on the findings of fact in favor of plaintiff for the relief demanded in the complaint.

MICHIGAN SUPREME COURT.

William L. R. A. ANDRES, *Relator*,
v.
JUDGE OF THE CIRCUIT COURT for
Ottawa County, *Resp't*.

(....Mich.....)

A declaration of intention to become a citizen of the United States, made before a clerk of a court, need not be made in his office, or in open court.

(*Morse, J., dissents.*)

(October 28, 1890.)

PETITION for a writ of mandamus to compel respondent to permit relator to file an information in the nature of a *quo warranto* to try the title of one Edward Vaupell to the office of sheriff of Ottawa County. On hearing of rule to show cause why said writ should not issue. *Denied*.

The relator admitted that Vaupell had a majority of votes cast and was duly elected upon the face of the returns, but alleged that many of the votes, enough to change the result of the election, cast for Vaupell, were cast by persons not citizens of the United States nor lawful voters.

The further facts appear in the opinions.

Messrs. Godwin, Adsit & Dunham, for relator:

Votes cast by the persons who relied on their declarations sworn to before a person who was the clerk of the circuit court, or a "deputy clerk" at a place other than in open court or the office of such clerk, were not legal but were absolutely void.

The naturalization of an alien as a citizen of the United States is strictly a judicial act.

Charles Green's Son v. Salas, 81 Fed. Rep. 106.

The court in which the aliens in question were authorized to commence their proceedings for naturalization was the Circuit Court for the County of Ottawa. This court could only be held at Grand Haven, the county seat of said county.

How. Stat. § 6464; *Atty-Gen. v. Lake Co.* 88 Mich. 294.

The office of the clerk of said court was at the same place, and could not be elsewhere.

How. Stat. § 577; State Const. art. 10, § 4; *Re Langtry*, 81 Fed. Rep. 879.

The law only authorizes aliens to declare their intentions to become citizens of the United States, in open court or before the clerk.

6 L. R. A.

19 U. S. Stat. at L. 2; *State v. Stumpff*, 28 Wis. 630; *State v. Olin*, 28 Wis. 817; 1 Greenl. Ev. §§ 504, 506; *Stephenson v. Bannister*, 3 Bibb, 869; *Lothrop v. Blake*, 3 Pa. 483-495; *Morris v. Patchin*, 24 N. Y. 394-396; *Kansas Pac. R. Co. v. Cutler*, 19 Kan. 88; *McCrary, Elections*, §§ 21, 446; *People v. Sweetman*, 3 Park. Cr. Rep. 358.

Mr. George A. Farr, for respondent:

In this State, deputy clerks may perform all the duties of the clerk.

How. Stat. § 578; *Dorr v. Clark*, 7 Mich. 313; *Calender v. Olcott*, 1 Mich. 344; *Jacobs v. Measures*, 13 Gray, 74; *Goodwyn v. Goodwyn*, 11 Ga. 178; *Touchard v. Crow*, 20 Cal. 150; *Cook v. Knott*, 28 Tex. 85; *State v. Barrett*, 40 Minn. 65.

Declarations of intention to become citizens of the United States may be taken outside the clerk's office.

State v. Olin, 28 Wis. 809.

Campbell, J., delivered the opinion of the court:

The only serious question involved in the inquiry which the relator seeks to make concerning the validity of the declared result of the election in this case is whether declarations of intention can be made before a clerk of a court anywhere but in his office, or in open court. If those declarations were valid, the other questions need not be considered, whether relating to the remedy or otherwise. The statutes of the United States are all that we can be governed by, inasmuch as Congress has exclusive power over naturalization. The fact that this or any other State may extend privileges to aliens, who have merely declared their intention to become citizens, can have no weight in determining how such declarations are to be made. The amendment of 1876 to the Revised Statutes of the United States (§ 2165) is made to qualify a section that had required such declarations to be made before a court of record. It declares that not only for the future, but also for the past, such declarations "before the clerk" of any of such courts shall be as legal and valid as if made before the court. This language, in its natural sense, makes the person before whom the declaration is made, and only the person, material. A declaration on oath for this purpose in no way differs in its nature from any other oath or affidavit, and in the very many cases of such oaths, whether before judges, justices, notaries, commissioners or clerks, the only inquiry recognized is whether the oath is administered within the officer's ju-

isdiction, and not in what particular building or place it may be administered; and, unless there is some statutory intimation to the contrary, there is no reason why this case should form an exception. On the contrary, the history and construction of the Naturalization Laws show that this declaration confers no privileges, and fixes no rights, and is not jurisdictional, but is in several cases dispensed with. The United States Supreme Court has repeatedly held that no inquiry can be made in any controversy to attack the sufficiency of the final admission to citizenship by showing a want of conformity to the previous requirements of the statutes. *Campbell v. Gordon*, 10 U. S. 6 Cranch, 176 [8 L. ed. 180]; *Stark v. Chesapeake Ins. Co.* 11 U. S. 7 Cranch, 420 [8 L. ed. 891]; *Spratt v. Spratt*, 29 U. S. 4 Pet. 898 [7 L. ed. 897].

The Naturalization Laws originally required no preliminary declaration, but allowed citizenship on two years' residence. 1 U. S. Stat. 108.

In 1795 the rule now generally in force was established, requiring a declaration in advance three years (and not two, as now required), but fixing five years' residence as necessary for admission. *Id.* 414.

By that law, as by all subsequent ones, the declaration of intention was merely on the *ex parte* oath of the applicant, and no inquiry was made in any formal way until he applied for his last papers, when evidence was taken, and the facts looked into. The Alien Law of 1798, which covers other matters than naturalization, contained some stringent provisions, and required a declaration of five years before admission and fourteen years' residence, saving, however, cases of aliens residing here before the law was passed. In 1802 the old rule was restored. 2 U. S. Stat. 153. In 1804 declarations of intention were dispensed with in all cases where residence dated back of the Law of 1802, and only final papers required in such cases. *Id.* 292. In 1824, it having been found that the law had been carelessly administered, instead of adopting more stringent rules, the door was opened still wider. It was provided that declarations of intention might be made two years, instead of three, before admission. It was also provided that minors residing three years during minority need not make any declaration; that declarations theretofore as well as thereafter made before clerks, instead of courts, should be valid; and that final admission, made without any declaration at all, should not be invalid. 4 U. S. Stat. 69. On page 310 of the same volume is a law exempting persons coming into the country between 1803 and 1812 from making such declarations. In 1848 the old law requiring, not only residence, but unbroken continuance, in the country, was repealed. 9 U. S. Stat. 240.

This was the state of the law, subject to some further dispensation concerning declarations of intention, and some shortening of residence in particular cases, when the Revised Statutes of 1872 were adopted. It is well known that the compilers of that revision, which was not meant to change the laws, were no more exempt from mistakes than others, and numerous amendments have been required to place the law where they should have found it. That revision 6 L. R. A.

ion, while it retained the several exemptions from declaration of intention which had been brought in from time to time, did not embody the change of 1824, which validated and authorized clerks to take the first declaration. In 1876 this portion was restored and is now in force.

If the declaration of intention was a proceeding on which witnesses were sworn or inquiries made, there would be, perhaps, some reason for formality. But it is a purely *ex parte* oath, which in no way dispenses with the inquiry made on final admission, and which Congress has not made of any particular value. It is difficult to see for what purpose it was devised, unless possibly as a reminder that a man should not become a citizen without two years' deliberation. Even this is dispensed with in quite a number of instances; and when Congress, by the Act of 1824, adopted its present policy, it was evidently for the reason that the declaration was not deemed of any special importance. The final application is not required to be made to the same court, or within the same jurisdiction, where the original declaration is made; and the inquiries made at the time of his admission need not, and generally cannot, go into the *minutia* or circumstances of his declaration of intention, and are complete in themselves.

There is no substantial reason why a clerk must be in his office or in court for this purpose, any more than for any other ministerial act not pertaining to court business. There is no law requiring him to be in any particular place to administer affidavits. As shown in *Whallon v. Ingham Co. Circuit Judge*, 51 Mich. 508, the clerk's movements are not fixed within any one room or set of rooms, or any one place. By our Constitution, until amended, the county clerk was clerk of both circuit and supreme courts held in his county, though not held in the same building, or in the same town. He is clerk *ex officio* of more or less other bodies, and may or must have different places of action, either of which is his official place. There is no reason why an oath may not be taken before him at any place where he happens to be, as well as before a judge, or justice, or notary, or commissioner. He is the person indicated by the law. When it dispenses with his action in open court, it dispenses with the only locality which is universally known for clerical action; and we cannot require his action under the Naturalization Laws to be held in any particular spot or room or building without adding to the law a qualification of our own not indicated by its language, and not required by any of its purposes. The fact that our laws give more force to these declarations than Congress has done cannot have any weight in construing congressional actions. That must speak for itself, and lay down its own conditions. *The writ should be denied.*

Sherwood, M. J., and Long and Champlin, JJ., concurred.

Morse, J., dissenting:

I cannot agree with the conclusion reached by my brethren in this case. The Naturalization Laws which govern the method of procedure in transforming an alien into a citizen of the United States are the Acts of the Congress of the United States, which is given exclusive

jurisdiction over the subject of naturalization. By the Act of Congress of May 26, 1824, aliens were permitted to declare their intentions to become citizens of the United States before "the clerk" of any court of record, and such clerks were authorized to take such declarations. 4 U. S. Stat. at L. 69. This provision was changed by the revision of the laws by Congress of 1873-74, which required the declaration to be made in open court. U. S. Rev. Stat. 1873-74, § 2165.

By an Act of Congress approved February 1, 1876, it was again enacted that "the declaration of intention to become a citizen of the United States . . . may be made by an alien before the clerk of any of the courts named," etc. It was further enacted that "all such declarations heretofore made before any such clerk are hereby declared as legal and valid as if made before one of the courts named in said section." 19 U. S. Stat. at L. 2.

The proceeding is necessarily one of record, as no officer but the clerk of a court of record is authorized to take the declarations. The making of this declaration of intention is the first step in the proceeding to become a citizen. And he cannot be clothed with full citizenship, except by the action of a court of record in open court.

The court wherein the proceedings were commenced, in the case of the persons voting in Ottawa County last fall, and claimed by the relator not to be voters, was the Circuit Court for the County of Ottawa, which court must be holden at the county seat, Grand Haven, and there and nowhere else must be the office of the clerk of said court. There is kept the seal of the court. It is claimed by the counsel for the relator that the county clerk of Ottawa County, who, by virtue of such office, is clerk of said circuit court, cannot act as clerk of the Circuit Court for the County of Ottawa except in his office at Grand Haven, or in open court. That outside of his office, "of the place where his official duties are authorized to be performed, he is simply a citizen, and no more; simply the person who is designated by law to perform the duties of clerk of the court at the proper time and place." It is also urged that when an alien declares his intention to become a citizen he is entitled to a certificate, a certified copy of such declaration, duly attested by the clerk and the seal of the court; that this could not be done at places away from the office and the City of Grand Haven, as the clerk has no authority to go about the county carrying the seal of the court with him. It is therefore contended that proceedings to become a citizen could not be commenced by a declaration of intention made, for instance, at Jamestown, twenty or thirty miles from the county seat, or at any other place than the office of the clerk of the circuit court.

There seems to be no limit to the number of deputies the clerk may appoint, and there might be, if this method is lawful, a deputy in each township in the county on the same day taking these declarations. In such case the opportunities for fraud would also seem to be limitless. The declarations in these cases—eighty-one of them—were commenced, as shown by the records, "in the Circuit Court for the County of Ottawa, at Holland, on the

30th day of April, 1888," before one "Chas. T. Pagelson, Deputy Clerk." On the 27th of April, 1888, seventy-three were made before said Pagelson, at Zeeland; and on the 8d day of May, 1888, thirty were made before "Chas. E. Soule, Deputy Clerk," at Polkton and Tallmadge. It is shown that each of these persons, except those who made their declarations before Soule, signed his declaration on the record book of the court. The record book was taken from the clerk's office, and carried around the county for that purpose. Soule took the declarations before him on blanks, which declarations were afterwards copied upon the record book. While this book was out of the clerk's office it is claimed that declarations were taken on blanks in the clerk's office. This is certainly a loose way of doing business. The question arises, Is it a legal method?

I think the objection made to the taking of these declarations by a deputy clerk is not well founded. In this State deputy clerks may perform the duties of the clerk. How. Stat. § 573; *Calender v. Olcott*, 1 Mich. 844; *Dorr v. Clark*, 7 Mich. 310.

But I think no man can legally declare his intention to become a citizen of the United States outside of the clerk's office, unless it is in open court.

We have on record what the views of one justice of the Supreme Court of the United States are as to the practice prevailing in Ottawa County. On the 28th of June, 1887, Emeline Charlotte Langtry, a subject of the Queen of Great Britain, made application to become a citizen of the United States, and a bound volume of declarations by aliens, in which some of the blanks had not been used, was taken from the clerk's office of the United States Circuit Court for the District of California, at San Francisco, by a deputy clerk, and carried to the private residence of Mrs. Langtry, and there her declaration was made and oath taken by the deputy clerk. This fact coming to the knowledge of Mr. Justice Field of the Supreme Court of the United States, then holding with Circuit Judge Sawyer the Circuit Court at San Francisco, the attention of Mr. Barne, the counsel for Mrs. Langtry, was called by Mr. Justice Field to the manner of taking of her declaration, and he was advised that the court had doubts of the legality of her declaration. Mr. Justice Field said he did not think that the statutes furnished any authority for the clerk of the court to take a declaration of one to become a citizen out of his (the clerk's) office, except in open court, and for that purpose to carry the records of the court to the private residence of the party. To permit the proceeding to pass without comment would be to establish a dangerous precedent, and one calculated to give rise to gross abuses. The justice observed that to be an American citizen was a great privilege; that citizenship should be regarded as a sacred trust; and that persons seeking to take upon themselves its responsibilities ought to consider it of sufficient value to attend where the records of the court are held in proper legal custody. In some States a man is allowed to vote as soon as he makes his declaration of intention to become a citizen; and if the clerk of the court, or his depu-

ty, can go around the country taking declarations of intention and administering oaths, it is evident that dangerous consequences might follow, especially as there is no limit to the number of deputies which a clerk may appoint." See *Re Langtry*, 81 Fed. Rep. 879, 880.

The record in this case shows that it has been the custom for some years in Ottawa County to naturalize people in this way, and it is contended that such custom has almost, if not quite, ripened into law. But the fact that an unlawful custom has prevailed for even thirty years cannot change the Naturalization Laws of the United States, nor is it a good reason for continuing a bad practice. The record in this case also shows on the part of the relator, and it is substantially admitted in the affidavits attached to the showing of the respondent, that about seven months before the general election a number of deputies were appointed by the county clerk of Ottawa County for the sole purpose of going about the county, with the necessary blanks or court records, to hunt up persons who were aliens, and to take their declarations of intention to become citizens. This was also manifestly, if the relator's showing be true, to make voters who otherwise would not have become so, men who, if left to their own motion, would never take any steps to become citizens. It is a matter of common notoriety that all over the land these men, aliens, are waited upon by partisan committees, and their naturalization fees paid out of party funds in order to make them voters. And some of these persons have so little desire of their own to become citizens that they never go any further than the declaration of their intention. The man who is worthy to become a citizen of the United States,

and to share in the privileges of the government, to take part in the making of its laws, and who in good faith desires to do so, will find ways and means of his own to declare his intention, and to take all necessary steps to be clothed in time with full citizenship. It is not necessary, nor is it desirable, that about six months before election the political partisans should be scouring the county, going into every highway and alley, for aliens, who, if the expense is paid, will become voters and recruits in their party. Here lies the great incentive to fraud, and the easy opportunity for it. If the alien must himself go to the office of the clerk of the court, and pay the expenses of his own advancement to citizenship, fraud in declarations of intention to become a citizen will seldom occur; and the citizen, thus acquired, will be in the future, as in the past, a welcome and desirable addition to our voting population. If our Naturalization Laws had been rigidly enforced in the past, our large cities would not have been cursed, as some of them now are, with a large number of voters who openly avow that the only object they have in casting the ballot is to destroy not only our government, but all government and all law, that anarchy may reign in its stead. I do not believe in this kind of business of carrying the records and books of the courts from town to town, and from place to place, to manufacture voters, or even to accommodate an alien who considers the privilege of American citizenship of too little value to seek it at the county seat or at the court-room. And, in my opinion, it is neither required by good policy, nor sanctioned by the law. On the contrary, as I have shown, we have the highest judicial condemnation of it. I think the writ should issue.

INDIANA SUPREME COURT.

CINCINNATI, INDIANAPOLIS, ST. LOUIS & CHICAGO R. CO., *Appt.*,

Cassius B. COOPER, Admr., etc.

(....Ind....)

1. A railroad company is under a duty to a passenger who is thrown on its tracks

by the fault of its servant, producing mental incapacity, to take steps to prevent injury to him from the danger it knows he is likely to incur from its trains.

2. The wrong of a carrier in leaving an injured passenger on its track exposed to great and known peril without mind enough to care for himself is the proximate cause of his death resulting from his being struck by a train.

NOTE—Care and diligence required of carriers of passengers.

The words "utmost care and diligence," which carriers of passengers must exercise, do not mean the utmost care and diligence which men are capable of exercising; but they mean the utmost care consistent with the carrier's undertaking and with a due regard for all the other matters which ought to be considered in conducting the business. *Dodge v. Boston & B. Steamship Co.* 2 L. R. A. 83, 148 Mass. 207.

The greater the danger, the greater the care required by law. *Shumacher v. St. Louis & S. F. R. Co.* 30 Fed. Rep. 174.

The utmost care and diligence, "and the highest degree of care and diligence," are expressions to measure the care and diligence which a prudent man would exert under like circumstances. *Heucke v. Milwaukee City R. Co.* 30 Wis. 401.

What facts will constitute that diligence which 4 L. R. A.

the law requires must depend upon the circumstances of each particular case considered in relation to the business in which the person whose duty it is to exercise care is engaged; the greater the hazard the more complete must be the exercise of care. *Galveston City R. Co. v. Hewitt*, 37 Tex. 473.

The duty of the carrier to exercise the highest degree of care for the safety of his passenger is founded on contract; and where the contract is broken and the passenger suffers consequential injury, the carrier cannot escape liability because the proximate cause of the injury was the negligent act of another. *Kellow v. Central Iowa R. Co.* 38 Iowa, 470.

Where death results from concurrent acts of negligence of defendant in failing to ring its bell, and of deceased in being on its track, paying no heed to his situation and the approach of trains, the verdict must be for defendant, unless the train could have been stopped by its employees after they be-

3. **The drunken condition of a passenger will not excuse a carrier** from liability for negligently leaving him exposed on a railroad track, where he had fallen from a train through the fault of the carrier, and was in consequence dazed and his mental faculties impaired.
4. **Recklessness reaching in degree to an utter disregard of consequences** may supply the place of a specific intent, and be sufficient to establish willfulness.
5. **In an action to recover damages for a death** inflicted by defendant's train upon a person wandering in a dazed condition along its railroad track, it is not error to refuse to exclude from the jury evidence of negligence on the part of defendant's servants, which may have caused decedent to be upon the track in such condition.
6. **Refusal to repeat an instruction** is not error.

(October 30, 1898.)

APPEAL by defendant from a judgment of the Circuit Court for Bartholomew County in favor of plaintiff in an action to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

Mr. S. Stansifer, for appellant:

The alleged conduct of the crew of the mixed train at Lambert's Station has no place in the case; for, even if misconduct, it was not the proximate cause of Holland's death.

Whart. Neg. § 97; 2 Thomp. Neg. 1088 *et seq.*

The call of "Hope" at Lambert's Station, not pretended to be by an employé of the Company, did not impose any duty on the Company to Holland.

Columbus & I. C. R. Co. v. Farrell, 31 Ind. 408.

came aware, or might have become so by exercise of ordinary care, of deceased's imminent peril. *Guenther v. St. Louis, I. M. & S. R. Co.* 14 West. Rep. 735, 95 Mo. 238.

Where a passenger is injured by a collision with another train, the fact is *prima facie* evidence of negligence on the part of the carrier. *Yorktown Turnp. Co. v. Leonhardt*, 8 Cent. Rep. 715, 66 Md. 70; *Albert v. New York, L. E. & W. R. Co.* 43 Hun, 421.

When the plaintiff proves he was a passenger upon defendant's train, and that the car in which he was seated left the track, and he suffered injuries thereby, a presumption of negligence arises against the company, only to be overcome by evidence that the casualty resulted from inevitable or unavoidable accident. *Louisville, N. A. & C. R. Co. v. Jones*, 7 West. Rep. 33, 108 Ind. 551.

Where a passenger shows the failure of the carrier to convey him safely he has made a *prima facie* case, and the carrier is bound to show that it exercised care. *Yorktown Turnp. Co. v. Leonhardt*, 8 Cent. Rep. 715, 66 Md. 70.

Ordinary care required of passenger.

In an action for negligence the "ordinary" care rightly demanded of the person injured is that care which a reasonably prudent and cautious man would take to avoid injury under like circumstances. *Chicago & A. R. Co. v. Adler* (Ill.) 21 N. E. Rep. 846.

In an action for negligence the proper definition of the care required is "such care and caution as an ordinarily prudent person would exercise under similar circumstances," and a definition, as that exercised by an "ordinary" man, is incorrect. *Austin* 6 L. R. A.

Where a passenger has bought a ticket he is bound to remain on the train, and the Company will not be liable to him for injuries incurred while getting on or off at an intermediate station.

State v. Grand Trunk R. Co. 58 Me. 176; *Frost v. Grand Trunk R. Co.* 10 Allen, 887; *Keller v. Sioux City & St. P. R. Co.* 27 Minn. 178.

If the negligence of Holland exposed him to the risk of injury or death, then there can be no recovery for negligence, even if the crew of the passenger train, after becoming aware of the danger, could, by the exercise of ordinary care, have avoided the injury.

Terre Haute & I. R. Co. v. Graham, 95 Ind. 286.

A drunkard may be guilty of contributory negligence by getting drunk before putting himself in a position of danger in which he receives injuries from which, had he been sober, he would have escaped.

Whart. Neg. § 306; 2 Thomp. Neg. 1175; 1 Thomp. Neg. 430; *Wetty v. Indianapolis & V. R. Co.* 2 West. Rep. 651, 105 Ind. 55.

In an action for neglect of duty, it is not enough for plaintiff to show that defendant neglected a duty, and that he would not have been injured if the duty had been performed, but he must also show that the duty was imposed for his benefit, or was one which defendant owed him for his security from injury.

Smith v. Tripp, 13 R. I. 152; *O'Donnell v. Providence & W. R. Co.* 6 R. I. 211; *Morrissey v. Providence & W. R. Co.* 1 New Eng. Rep. 806, 15 R. I. 271. See also Whart. Neg. §§ 3, 24.

If the facts and circumstances point just as much to the negligence of Holland as to its absence, or point in neither direction, then there can be no recovery.

& N. W. R. Co. v. Beatty (Tex.) 11 S. W. Rep. 858; *Needham v. Louisville & N. R. Co.* 85 Ky. 423; *Louisville & N. R. Co. v. Gower*, 85 Tenn. 455; *Parvis v. Philadelphia, W. & B. R. Co.* (Del.) 17 Atl. Rep. 702.

Ordinary care is that degree which a man of ordinary prudence would exercise, not that which any particular man or class of men would exercise. *Louisville & N. R. Co. v. Gower*, *supra*; *Richmond & D. R. Co. v. Howard*, 79 Ga. 44.

Unless the injured party has used ordinary care, gross negligence of defendant will not authorize a recovery where the injured party is guilty of negligence, although slight in comparison. *Willard v. Swansen*, 126 Ill. 381.

An instruction defining "ordinary care" as such care as persons of average prudence and caution would use for like purposes and under like circumstances should have omitted the word "average." *Marsh v. Benton Co.* 75 Iowa, 469.

The degree of care is dependent in some measure upon the capacity of the party injured. *Duffey v. Mo. Pac. R. Co.* 3 West. Rep. 201, 19 Mo. App. 860.

Liability of railroad company for acts of its agents and servants.

Railroad companies are responsible for any conduct of their agents and officials in the natural and necessary discharge of duties incident to the service in which they are employed. *Georgia Pac. R. Co. v. Propst*, 33 Ala. 518.

A master is chargeable with the conduct of his servant only when he acts in the execution of the authority given him. *Morris v. Brown*, 111 N. Y. 327; *North Chicago City R. Co. v. Gastka*, 128 Ill. 713; 4 L. R. A. 481; *Mott v. Consumers Ice Co.* 73 N. Y. 543.

Toledo, W. & W. R. Co. v. Brannagan, 75 Ind. 490; *Indiana, B. & W. R. Co. v. Greene*, 3 West. Rep. 883, 106 Ind. 279.

Whatever may have been the knowledge or information of the crew of the first train, was not the knowledge of the Company or of the crew of the second train.

McClelland v. Louisville, N. A. & C. R. Co. 94 Ind. 276.

If deceased was a trespasser, there could be no recovery.

Belt R. & Stock-Yard Co. v. Mann, 5 West. Rep. 314, 107 Ind. 98; *Cincinnati, H. & I. R. Co. v. Butler*, 1 West. Rep. 110, 103 Ind. 31.

Messrs. G. W. Cooper and C. S. Baker, for appellee:

It is the duty of the carrier to observe the same care toward a drunken as a sober passenger.

Milliman v. New York Cent. & H. R. R. Co. 66 N. Y. 643.

Proof of the happening of an accident to a passenger is prima facie evidence of negligence on the part of the carrier.

Terre Haute & I. R. Co. v. Buck, 96 Ind. 364, 18 Am. & Eng. R. R. Cas. 234; Black, Proof and Plead. in Accident Cas. 15, note 1.

When passengers have alighted at a way station it is the duty of the officers of the train to notify them by signals when the train is about to start.

Doss v. Missouri, K. & T. R. Co. 59 Mo. 29. Of any violent expected jars the carrier must give notice.

Indianapolis & St. L. R. Co. v. Horst, 93 U. S. 291 (23 L. ed. 898); Whart. Neg. § 649.

If Holland had fallen off the train through his own fault, and was there on the track in a dazed, unconscious and intoxicated condition, and the Company was aware of the facts, as al-

leged, what humanity required would certainly overcome the mere duty to the traveling public to make schedule time.

Sweeney v. Minneapolis & St. L. R. Co. 33 Minn. 153, 23 Am. & Eng. R. R. Cas. 304; *Whitson v. Franklin*, 34 Ind. 392.

The alleged conduct of the crew of the mixed train together with the fact that injury came to Holland shortly after, while on the track in the condition alleged, shows a complete cause of action against appellant, regardless of the alleged negligence of the crew of the passenger train.

Indianapolis, P. & C. R. Co. v. Pitzer, 4 West. Rep. 250, 103 Ind. 179, 25 Am. & Eng. R. R. Cas. 319, and authorities; *Central R. Co. v. Glass*, 60 Ga. 441; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624, 16 Am. & Eng. R. R. Cas. 390; *Weymire v. Wolfe*, 52 Iowa, 533; *McClelland v. Louisville, N. A. & C. R. Co.* 94 Ind. 276, 18 Am. & Eng. R. R. Cas. 260; *Kean v. Baltimore & O. R. Co.* 61 Md. 154, 19 Am. & Eng. R. R. Cas. 321; *Werner v. Citizens R. Co.* 81 Mo. 368. See 25 Am. & Eng. R. R. Cas. note, 356, 363; *Morris v. Chicago, B. & Q. R. Co.* 45 Iowa, 29; 2 Thomp. Neg. 1175, 1156; Whart. Neg. 389 a; 2 Wood, Railway Law, 1268.

It will not do to say that Holland was negligent because he may have been intoxicated at the time of the injury. Intoxication is not *per se* contributory negligence.

Thorp v. Brookfield, 36 Conn. 320; *Alger v. Lowell*, 3 Allen, 402; *Maguire v. Middlesex R. Co.* 115 Mass. 239; *Kean v. Baltimore & O. R. Co.* 61 Md. 154, 19 Am. & Eng. R. R. Cas. 325, note; *Mau v. King and Albion Trcps.* 3 Ont. App. 248, 2 Am. & Eng. Corp. Cas. 676; 4 Wait, Act. and Def. 638.

To defeat a recovery on the ground of the

Chicago, M. & St. P. R. Co. v. West, 15 West. Rep. 170, 125 Ill. 320; *Reilly v. Hannibal & St. J. R. Co.* 13 West. Rep. 663, 94 Mo. 600; *Clark v. Koehler*, 46 Hun, 536, 12 N. Y. S. R. 573.

A railway company is liable for the acts of those in charge of its train, in expelling a passenger, from it. *Cain v. Minneapolis & St. L. R. Co.* 30 Minn. 297.

"Negligence" is such an omission, by a reasonable person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury as, in a natural and continuous sequence, causes unintended injury to the latter. *Bucki v. Cone* (Fla.) 6 So. Rep. 160.

Even a trespasser on a train cannot be treated in a willful, wanton or malicious manner. *Atchison, T. & S. F. R. Co. v. Ganta*, 38 Kan. 603.

Duty as to persons exposed to danger on its tracks.

The basis of liability in negligence cases is the violation of some legal duty to exercise care. *Cusick v. Adams*, 115 N. Y. 55, 40 Alb. L. J. 43, 23 N. Y. S. R. 543.

A railroad company is not liable for damage that accrues to others in the exercise of its legal rights by running its engines, etc., unless the damage is caused by its negligence. *Bernard v. Richmond, F. & P. R. Co.* 13 Va. L. J. 184, 8 S. E. Rep. 786; *Alabama G. S. R. Co. v. Arnold*, 34 Ala. 159, 5 Am. St. Rep. 364.

Negligence is failure to exercise the care required by law, which is such care as is necessary, under the circumstances, to secure the protection of the lives, persons and property of others. *Shumacher* 6 L. R. A.

v. St. Louis & S. F. R. Co. 39 Fed. Rep. 174; *Nolan v. New York & N. H. R. Co.* 1 New Eng. Rep. 823, 53 Conn. 461.

It is the duty of one in charge of an engine, on discovering a person on the track, to use all reasonable efforts to prevent an accident. *State v. Baltimore & O. R. Co.* 12 Cent. Rep. 890, 69 Md. 339.

The terms "ordinary care" and "diligence" which railroad companies are bound to exercise, when applied to the management of railroad engines and cars in motion, must be understood to impart all the care and circumspection, prudence and discretion, which the peculiar circumstances of the place or caution reasonably require of such company or their servants; and this will be increased or diminished in the movement or operation of them. *Parvis v. Philadelphia, W. & B. R. Co.* (Del.) 17 Atl. Rep. 702.

The burden of proof is on the defendant to demonstrate the care in operation of its trains, and maintenance of safe appliances. *Cleveland, C. C. & I. R. Co. v. Newell*, 1 West. Rep. 895, 104 Ind. 234.

It is the duty of an engineer, under Mill. & V. (Tenn.) Code, § 1298, subsec. 4, on discovering any person, animal or other obstruction upon the track, not only to use every possible means to stop the train, but also every means to prevent the accident, by sounding the alarm whistle and otherwise. *Memphis & C. R. Co. v. Scott*, 37 Tenn. 494.

When servants of a railroad company, in charge of a train, discover that a trespasser on the track has placed himself in peril, it is their duty to use all reasonable means at their command to save his life, and the company is liable for their failure to do so. *Louisville & N. R. Co. v. Coleman*. 36 Ky.

intoxication of the deceased his intoxication must not only have contributed to his injury, but must also have been the immediate and proximate cause of his injury.

Nave v. Flack, 90 Ind. 205; *Krach v. Heilman*, 53 Ind. 518; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190, 10 Am. & Eng. R. R. Cas. 754; *Kean v. Baltimore & O. R. Co.* 61 Md. 154.

There was no requirement that Holland should keep his seat during the whole trip.

Gee v. Metropolitan R. Co. L. R. 8 Q. B. 161; *Western Maryland R. Co. v. Stanley*, 61 Md. 266, 18 Am. & Eng. R. R. Cas. 206; *Whart. Neg.* 863; 2 Wood, *Railway Law*, 1162.

If the facts alleged show affirmatively that Holland was on the track as a result of the wrongful act of appellant, it cannot be said that he was a trespasser.

Indianapolis, P. & C. R. Co. v. Pitzer, 4 West. Rep. 250, 109 Ind. 179.

The engineer had been informed that Holland had fallen off intoxicated, was walking towards his train and might be found sitting down upon the track. Under such circumstances the engineer was bound to make a reasonable effort to become acquainted with Holland's situation—to keep a reasonable lookout.

Welsh v. Jackson County Horse R. Co. 81 Mo. 466. See 25 Am. & Eng. R. R. Cas. 321, *note*.

Elliott, Ch. J., delivered the opinion of the court:

The material facts stated in the second paragraph of the appellee's complaint are these: On the 18th day of April, 1885, Uriah Holland, the appellee's intestate, entered a train of the appellant, which carried both passengers and freight, at the City of Columbus, and paid his passage to the Town of Hope, a regular station

on the line of the appellant's road. When the train on which the intestate was a passenger reached the station of Lambert, a point between the City of Columbus and the Town of Hope, the appellants employes failed and neglected to announce the name of the station, but someone in the car called out, "Hope," as if naming the station. After the train had stopped at Lambert, the intestate, believing it to be the station for which he had taken passage, endeavored to alight from the train in the usual manner; and the employes of the appellant, without giving any warning or notice, carelessly and negligently caused the train to be suddenly started, and the intestate, without any fault on his part, was thrown violently from the platform of the car on which he was standing onto the track. The fall rendered him unconscious, and of this the appellant had knowledge, as well as of its cause. Soon after the occurrence, and while the intestate was upon the appellant's track in a dazed and partially unconscious condition, at a point seventy rods distant from Lambert, the appellant's employes in charge of a passenger train, and having knowledge of the fact of his fall from the train and his condition in time to have avoided injury to him by the exercise of ordinary care, negligently, and without giving any signal or warning of the approach of the train, or taking any precaution to avoid injuring him, caused the passenger train to run upon him, thus causing his death, without any fault or negligence on his part.

It the intestate had been on the track through no fault of the appellant, and without knowledge on its part of his condition, no action could be maintained; but he was on the track through the fault of the appellant, and it did know of his condition.

556; *Troy v. Cape Fear & Y. V. R. Co.* 99 N. C. 238, 6 Am. St. Rep. 521.

A railroad company owes no duty to a trespasser on its track until his presence there is discovered; and even then, those in charge of a train have a right to presume that he will act so as to avoid injury unless it is obvious, either from his condition or from extraneous circumstances, that he cannot do so. *St. Louis, I. M. & S. R. Co. v. Monday*, 49 Ark. 257; *Williams v. Kansas City, S. & M. R. Co.* 96 Mo. 275; *State v. Baltimore & O. R. Co.* 69 Md. 494; *Baltimore & O. R. Co. v. State*, 69 Md. 551; *International & G. N. R. Co. v. Kuehn*, 70 Tex. 582; *Norfolk & W. R. Co. v. Harman*, 83 Va. 553.

A railroad company is under no obligation to keep a special lookout for intruders or trespassers on its track, except at public crossings and within the limits of towns or cities, and is only bound to reasonable diligence after they are or ought to be discovered. *Columbus & W. R. Co. v. Wood*, 86 Ala. 164.

Duty of care as to one in helpless condition.

The duty of care and of abstaining from unlawfully injuring another applies to the sick, weak and infirm, as fully as to the strong and healthy. *Lapleigne v. Morgan's L. & T.R. & S. S. Co.* 1 L. R. A. 373, 40 La. Ann. 661.

Recklessness may supply want of specific intent.

The fact that one has carelessly put himself in a place of danger is no excuse for another's purposeful or recklessly injuring him. *Shumacher v. St. Louis & S. F. R. Co.* 39 Fed. Rep. 174, 6 L. R. A.

Entire absence of proper care necessary to render safe life, person and property shows a conscious indifference to consequences, making a case of constructive or illegal willfulness. *Ibid.*

Willful neglect is an intentional failure to perform a manifest duty in which the public has an interest, or which is important to the person injured, in either preventing or avoiding the injury. *Kentucky Cent. R. Co. v. Gastineau*, 83 Ky. 119.

Gross neglect is defined to be the want of that care which an ordinary man of common sense, under the circumstances, takes of his own property. *Mark v. Hudson River Bridge Co.* 4 Cent. Rep. 207, 103 N. Y. 23.

That gross negligence is such negligence as evidences a disposition to inflict injury or see it inflicted, is not a correct definition of it. *Pittsburgh, C. & St. L. R. Co. v. McGrath*, 1 West. Rep. 643, 115 Ill. 172.

Gross negligence, to be the ground for exemplary damages, should be that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person to be affected by it. *Missouri Pac. R. Co. v. Shuford*, 72 Tex. 165.

Contributory negligence is no defense where defendant's negligence was reckless or wanton. *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531; *Louisville & N. R. Co. v. Brice*, 84 Ky. 236.

Contributory negligence has no relevancy to an action for ejecting a passenger from a railroad train with excessive force and violence, because such an act is essentially unlawful. *Chicago, St. L. & P. R. Co. v. Bills*, 118 Ind. 221.

The rule applicable to cases where persons trespass on the company's track cannot govern in such a case as this. Even if it should be conceded that there was no breach of duty on the part of the appellant in failing to announce the station, still there was negligence in starting the train with a sudden jerk. *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291 [23 L. ed. 896]; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 29; *Andrist v. Union Pac. R. Co.* 80 Fed. Rep. 345.

But we might go further, and concede that there was no negligence in starting the train, and still we should be required to hold that a cause of action is stated, inasmuch as the fact that the intestate was known to have been thrown to the track in an effort to alight from the train, and rendered unconscious, made it the duty of the appellant to use care to prevent injury to him from its own trains. A railway carrier of passengers has no right, where care and diligence can prevent it, to leave a helpless passenger who has fallen from one of its trains in a situation of known danger. If a passenger, without fault on his part or that of the carrier, but as the result of a pure accident, should be thrown from the train upon the track, and rendered helpless, it would be the duty of the railway carrier, if the facts were known to it, to use proper care and diligence to prevent injury from passing trains.

The appellant was bound to know that trains were running upon its own road, and it was under a duty to the passenger who was thrown upon its track to take steps to prevent injury to him from the danger which it knew he was likely to incur from its trains. It does not matter that the injury which actually occurred was not foreseen; it is enough that it was such as might naturally result. *Billman v. Indianapolis, C. & L. R. Co.* 76 Ind. 166; *Dunlap v. Wagner*, 85 Ind. 529; *Louisville, N. A. & O. R. Co. v. Wood*, 113 Ind. 544-566, 12 West. Rep. 303 and cases cited; *Hill v. Windsor*, 118 Mass. 251; *Lane v. Atlantic Works*, 111 Mass. 136.

"It is not necessary," said the court in the case last named, "that injury in the precise form in which it in fact resulted should have been foreseen." It needs no argument to demonstrate the truth of the proposition that danger must be presumed from passing trains, if one in a state of bewilderment is left upon the track. A long line of cases affirms that one who goes upon a track, even with mental and physical faculties undiminished, is in fault because he enters a place of danger; and the one who unlawfully puts another in such a place does a wrong, and is precluded from averring that the injured person was where he had no right to be. Here, the carrier knowingly left its passenger upon the track, knowing, also, that injury from a fall from its train had impaired his mental faculties; and it cannot be held blameless, and its passenger declared a trespasser. The wrong of the carrier in leaving its injured passenger on the track, exposed to great and known peril, without mind enough to care for himself, was the proximate cause of his death. The case is stronger, not weaker, in the fact that those in charge of the train which ran upon him were informed as to his misfortune and his injury, and the two acts of negligence combined in one efficient cause; and 6 L. R. A.

the effect which might naturally have been expected did, in fact, result. The concurring wrongs blended in one strong unity, producing a legal tort for which the wrong-doer must make compensation. *Evansville & T. H. R. Co. v. Crist*, 116 Ind. 458, 2 L. R. A. 450; *Indianapolis, P. & C. R. Co. v. Pitzer*, 109 Ind. 179, 4 West. Rep. 250.

If, as counsel tacitly assume, it were true that Holland's misfortune was due solely to his own wrong in voluntarily becoming intoxicated, we should have a very different case. We should, if such were the case, hold the paragraph of complaint in which appears the statement that he was intoxicated to be insufficient. This we should do, for the reason that we are satisfied that a carrier is not bound to protect a drunken man from the consequences which result from his own folly or wrong. *Welty v. Indianapolis & V. R. Co.* 105 Ind. 55, 2 West. Rep. 651; *McClelland v. Louisville, N. A. & C. R. Co.* 94 Ind. 276; *Louisville, C. & L. R. Co. v. Sullivan*, 81 Ky. 624.

But a drunken man is not an outcast, and the railway carrier cannot negligently suffer harm to come to him while he is a passenger. It owes him some duty, which, at its peril, it must not omit. It is not to answer for his folly, but for its own breach of duty. *Atchison, T. & S. F. R. Co. v. Weber*, 33 Kan. 543; *Railway Co. v. Valleley*, 32 Ohio St. 845.

Here, the drunken condition of the deceased was not the cause of his injury; for, as the complaint avers, and the demurrer admits, the cause of his injury was the carrier's breach of duty; and for that breach of duty the carrier is answerable. It is a just and beneficent principle, running through all the cases, that a railway company must do what humanity requires, where it acts with knowledge of another's helpless condition. *Atchison, T. & S. F. R. Co. v. Weber and Railway Co. v. Valleley*, *supra*; *Weymire v. Wolfe*, 52 Iowa, 558; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Walker v. Great Western R. Co. L. R. 2 Exch. 228*; *Suarez v. Union Mfg. Co.* 42 Conn. 556; *Atlantic & P. R. Co. v. Reisner*, 18 Kan. 458; *Marquette & O. R. Co. v. Taft*, 28 Mich. 289 (opinion of Cooley, J.); *Terre Haute & I. R. Co. v. McMurray*, 98 Ind. 558; *Louisville, N. A. & C. R. Co. v. Phillips*, 112 Ind. 59, 11 West. Rep. 119.

If, let it be supposed for illustration, a man should be seen bound to the track in time to avoid running upon him, it would certainly be an actionable wrong to run a train upon him. And the case made by the complaint differs from the supposed one only in degree; for, if the man on the track is so helpless from mental incapacity as not to be conscious of his acts, and this is known to the railway company, it is its duty to use reasonable care to prevent injury to him. In such a case the presumption that the man will leave the track cannot apply, although it would apply if his condition were unknown to the employees of the company, or had not been caused by them. In this instance the man was a passenger; and his presence on the track, as well as his incapacity to avoid danger, was the result of the carrier's negligence. In no sense was he a mere trespasser; for by the wrong of the Railroad Company he was thrown upon the track, and there left in no condition to care for himself.

Among the instructions given by the court is this: "To establish the charge of willfulness as set out in the fourth paragraph of the complaint, I instruct you that an actual intent to do the particular injury alleged need not be shown; but if you find, from all the evidence, that the misconduct of the defendant's servants was such as to evince an utter disregard of consequences, so as to inflict the injury complained of, this may of itself tend to establish willfulness." In our judgment, this instruction expresses correctly an abstract rule of law. Recklessness reaching in degree to an utter disregard of consequences may supply the place of a specific intent. *Palmer v. Chicago, St. L. & P. R. Co.* 112 Ind. 250, 11 West. Rep. 676; *Brannen v. Kokomo, G. & J. Gravel Road Co.* 115 Ind. 115, 14 West. Rep. 887; *Indiana, B. & W. R. Co. v. Wheeler*, 115 Ind. 253, 15 West. Rep. 183.

The appellant's theory that the occurrence at Lambert's Station must be excluded from consideration is embodied in several instructions asked, but refused. In refusing these instructions there was no error. The occurrence at that place, as is evident from what has been said, exerted an important influence upon the case, even if appellant's general theory were correct; for from it there was reason for inferring that the wrong which brought the intestate upon the track, and into danger, was that of the appellant, and it also supplies ground for the inference that the appellant's employes in charge of the passenger train which killed Holland knew his condition, knew what caused it, and knew that he was exposed to danger. It warranted, at least, the inference that he was not a mere trespasser. But, more than this, that occurrence may well be regarded as the cause of the unfortunate consequences which culminated in Holland's death. It is not, of course, proper to affirm, in the instructions, as matter of law, that it should be so regarded, but it was proper that, as matter of fact, it should receive consideration by the jury. On the other hand, it would have been error to assert, as matter of law, that what occurred at Lambert was not the proximate cause of the injury. If, as the jury might well have in-

ferred, the negligent conduct at Lambert was the cause of Holland's death, then the conduct of those in charge of the train which killed him cannot be assigned controlling force. If the intestate's death was the probable result of the wrong at Lambert, the right of action was complete, and the defendant liable for the legal consequences of that wrong. If death was the result, then for causing death the appellant is responsible. As strongly as it could well be done, the court directed the jury that if Holland's presence on the track, and his injury, were owing to his drunken condition, there could be no recovery; and the fact that this direction was not repeated does not give appellant just reason to complain. It is a general rule that instructions need not be repeated; and this rule disposes of many of the questions argued by counsel. *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 68.

We do not hold, or mean to hold, that if the appellant had been free from fault at Lambert, the notice of Holland's condition would have required it to run its trains so slowly as to avoid the possibility of injuring him. On the contrary, we hold that the wrong which produced his mental incapacity, and caused him to wander along the track in a dazed condition, is the one which constitutes the chief element of the right of recovery. The instructions of the trial court do not place the right of recovery upon the acts of those in charge of the train which ran over Holland, but they do clearly assert that if his condition was caused by the negligence of the defendant at Lambert, and that his presence at the place of danger was the result of that condition, the appellee is entitled to recover. If there is any criticism at all to be made upon the instructions, it is that they are too favorable to the appellant, or they place too much stress upon the conduct of the persons in charge of the train which killed Holland. We have considered all the questions argued by counsel, but we do not deem it necessary to discuss them in detail, for the questions we have discussed are those which arise in the case, and control its decision.

Judgment affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

Charles H. HUNTER, *Respt.*,

v.

NEW YORK, ONTARIO & WESTERN
R. CO., *Appt.*

(...N. Y....)

1. A brakeman, seeing that the entrance to a tunnel is high enough to

permit safe passage while standing on top of a train, has a right to assume, in the absence of notice to the contrary, that the tunnel is of such height throughout.

2. Judicial notice may be taken of the height of the human body and the measurement of its several parts for the purpose of reversing a judgment on a verdict which necessarily involves a finding, without any evidence as

NOTE—Servant does not assume risks of master's negligence.

A servant assumes all risks save those which flow from the master's negligence in his duty in furnishing safe machinery and keeping the same in repair, and need not keep the implement he uses in repair or search for or report defects, unless bound to do so by his contract. *Missouri Pac. R. Co. v. Crenshaw*, 71 Tex. 340.

A servant has the right to assume, unless the danger is patent, that the proper officer in charge of machinery understands the nature of the business and approves of the methods of operating it, and may rely upon such officer's judgment. *McDonald v. Chicago, St. P. M. & O. R. Co. (Minn.)* 43 N. W. Rep. 380.

A brakeman has a right to assume that cars which it is his duty to couple are in good order for coup-

to plaintiff's height, that while sitting on a car he was struck on the head by an arch four feet seven inches above the top of the car.

(Bradley and Vann, JJ., dissent.)

(December 3, 1899.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Orange Circuit in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Plaintiff, a brakeman employed by defendant, was in the discharge of his duty upon the top of a car in a train while it was passing through a tunnel. There was midway through the tunnel an arch constructed of mason work, the height of which from the track was considerably less than the main height of the tunnel. Of the existence of this arch plaintiff had no knowledge. He claimed to have been struck by it and knocked from the car, receiving severe injuries, to recover damages for which he brought this suit.

The other material facts fully appear in the opinion.

Mr. William Vanamee, with Mr. John B. Kerr, for appellant.

Mr. T. A. Read for respondent.

Brown, J., delivered the opinion of the court:

Assuming that the plaintiff was struck upon the head by the brick arch within the tunnel, and that he was, as a result of that blow, thrown from the cars, and injured, I think there was ample evidence for the jury to determine that the defendant was guilty of neglect producing the accident, and that the plaintiff was free from carelessness contributing to it. The jury were warranted in finding that the only notice that the plaintiff had of the existence of the arch was that received from the tell-tale. This was located about 200 feet west of the west entrance of the tunnel. It served as a warning of the approach to the tunnel, but it gave no notice of the obstruction within the tunnel. A person receiving its warning, and noticing the height of the tunnel, might naturally suppose that the height at the entrance would be maintained throughout its length; and, if the height was at any point reduced, that notice of that fact would be given. Relying, therefore, upon what would be apparent to his observation, he was exposed to a danger of which he had no notice or information. The defendant evidently perceived the weakness of this part of its case, and gave evidence of actual notice of the existence of the arch to plaintiff, but upon that question the verdict of the jury is in accord with the plaintiff's testimony. The plaintiff also testified that he was instructed to

ride upon the top of the cars at places where it might be necessary to apply the brakes. He was approaching such a point on the road when the accident happened; and it was a fact for the jury to determine whether, in going upon the top of the car at the time he did, he was guilty of any negligence. Certainly, if he had a right to assume, as we think he had, in the absence of notice as to the existence of the arch, that there was room in the tunnel to maintain a standing position, he would not necessarily be careless in occupying such a position on the car near his post of duty. The difficult question in the case is to reconcile the plaintiff's theory of the accident with the evidence.

It appears that the tunnel at the west entrance was twenty feet high. Two hundred feet from the entrance the brick arch began, and continued for a distance of eighty-five feet. It reduced the height of the tunnel to fifteen feet nine inches, measured from the rail. The plaintiff testified that he left the engine and went on the top of a box-car, and sat down. His exact words are: "I was sitting down on the box-car,—on the head box-car,—where the brake was. I went out on the box-car and sat down and that is the last I remember." This car was identified and proven by a witness called by plaintiff to have been eleven feet two inches high from the rail to the foot-board that the men walk on, in the center of the roof. There was therefore a space of four feet and seven inches between the top of the car, where plaintiff was sitting, and the bottom of the arch. There was a cut or gash on plaintiff's forehead which, it is claimed, he received by coming in contact with the arch, so that his head, to have received a blow at that point, must have been at least four feet eight inches above the foot board on the top of the car. The plaintiff's counsel in his brief has endeavored to show the space between the car and the arch to have been much less; but the measurements appear, without contradiction, to be those I have stated. The theory of the plaintiff's case was that he was rendered unconscious by a blow received on his head from coming in contact with the arch, and that he was carried by the train to a point about 800 feet east of the east end of the arch, where he fell from the car, and was run over, and his foot crushed. That he might have been carried to the point where he was found is not improbable; but that he could have received a blow on the head from the arch while sitting upon the top of the car would appear to be physically impossible.

There was no evidence given on the trial as to the plaintiff's size or height, and the argument is now made that, as the jury saw him, and could therefore judge of his size, it must be assumed that it was not impossible for his head to have reached as high as the arch; and the learned judge who presided at the trial appears to have submitted this question to the

Ing. Goodrich v. New York Cent. & H. R. R. Co. 26 N. Y. S. R. 787.

The law does not require a brakeman to know absolutely all the defects of construction, and all obstructions along the line of the railroad, and he is not obliged to be on a constant lookout for defects and obstructions. *Chicago & A. R. Co. v. Johnson*, 2 West. Rep. 383, 116 Ill. 203.

6 L. R. A.

A railroad company is liable to a brakeman of another road, injured by the defective construction of its station-house, which the latter road uses. *Nugent v. Boston, C. & M. R. Co.* 5 New Eng. Rep. 865, 80 Me. 62. See *Myhan v. Louisiana Elect. L. & P. Co.* post, —; *Taylor v. Evansville & T. H. R. Co.* post.

jury, saying: "If the plaintiff was sitting down, it is for you to say whether his head would reach to that height." The verdict of the jury rests upon an affirmative answer to this question; and we are now called upon to say whether we will accept that finding and sustain the judgment, or whether we will take judicial notice of the height of the human body, and the measurements of its separate parts, and, so taking notice of those facts, reverse a judgment that is based upon a finding clearly contrary to the laws of nature. No exception was taken to the charge; but by an exception to the denial of the motion to dismiss the complaint, made at the close of the plaintiff's case, and renewed at the close of the testimony, on the ground that the facts proven were insufficient to constitute a cause of action, the question is properly before this court. Courts are not bound to take judicial notice of matters of fact. Whether they will do so or not depends on the nature of the subject, the issue involved, and the apparent justice of the case. The rule that permits a court to do so is of practical value in the law of appeal, where the evidence is clearly insufficient to support the judgment. In such case judicial notice may be taken of facts which are a part of the general knowledge of the country, and which are generally known, and have been duly authenticated in repositories of facts open to all, and especially so of facts of official, scientific or historical character. Thus it has been held that courts will take judicial notice of matters of public history, such as the existence of the late civil war, and the particular acts which led to it (*Swinerton v. Columbian Ins. Co.* 37 N. Y. 174; *Woods v. Wilder*, 43 N. Y. 164); of the general course of business in a community, including the universal practice of the banks (*Merchants Nat. Bank v. Hall*, 33 N. Y. 338; *Yerkes v. Port Jervis Nat. Bank*, 69 N. Y. 382-387); that books of general record, giving descriptions and standing of all ships, known as "American Lloyds," "The Green Book" and "The Record Book," are referred to by business men for the purpose of ascertaining the condition, capacity and value of ships (*Slocovich v. Orient Mut. Ins. Co.* 103 N. Y. 56, 63, 10 Cent. Rep. 456); of the value of "pounds" in our money, and, in rendering judgment, convert them into dollars (*Johnston v. Hedden*, 2 Johns. Cas. 274); of the expectation of human life (*Johnson v. Hudson River R. Co.* 6 Duer, 634); of the course of seasons and husbandry, and the general course of agriculture, and that a crop, at a certain date, would not have matured (*Ross v. Boswell*, 60 Ind. 285; *Floyd v. Ricks*, 14 Ark. 236); of the time of the rising and setting of the sun and moon (*Case v. Pereto*, 46 Hun, 57); and, generally, of those things which happen according to the ordinary course of nature,—the course of time and the movements of the heavenly bodies, the coincidence of the days of the week with the days of the month, ordinary public fasts and festivals, and legal weights and measures (1 Greenl. Ev. pt. 1 chap. 2, § 5). And, to ascertain such well-known facts, recourse is had to such documents and references as are worthy of confidence.

Within this rule the court may take notice of the size and height of the human frame; and, doing so, we know that the plaintiff's head

could not have reached to a height sufficient to come in contact with the arch. We know that the average height of man is less than 6 feet; that the average length of the body from the lower end of the spine to the top of the head is less than thirty-six inches; that this measurement varies but little in adults; and that the chief difference in the height of men is in the length of their lower limbs. To assume, therefore, as we must, in order to sustain the judgment, that the top of the plaintiff's head, when in a sitting position, was four feet seven inches above the board on which he was sitting, is to assume him to have been not only far above the average height of man, but of a height beyond that of which we have any authentic record. It has not been claimed by the respondent that the plaintiff was a man of extraordinary height, and, if he was, I think a fact so rare in the course of nature should be made apparent, in some way, on the record. It can be asserted, I think, without contradiction, that a man whose forehead would be four feet seven inches above a seat upon which he was sitting would have a frame at least nine feet high. History affords no authenticated instance of men attaining such height. Buffon, in his *Natural History*, records instances of men attaining extraordinary heights, but modern writers do not accept his statements. Pliny tells of an Arabian nine feet high, but the story is not authenticated. In the article upon "Giants," in the *Encyclopedia Britannica*, it is stated that the tallest man whose stature has been authentically recorded was Frederick the Great's Scottish giant, who was eight feet three inches tall. In the *College of Surgeons*, in London, there is a skeleton of an Irishman, who was named "Charles Bieme," which measures eight feet. Such heights are of rare occurrence, and the height of nine feet has probably never been attained by man.

Suppose the proof had shown that upon approaching the entrance to the tunnel the plaintiff was standing up, and his body had been found between the entrance and the west end of the arch. Would it be assumed that his head had struck the roof of the tunnel, which would have been eight feet ten inches above the top of the car? In other words, would the court, to sustain the judgment, assume him to have been over eight feet and ten inches in height? Yet that assumption would call for no greater exercise of the imagination than to suppose his head to have reached the bottom of the arch when he was in a sitting posture. To assume either fact requires us to believe the plaintiff was nearly, if not fully, nine feet in height.

I think, therefore, the court may take judicial notice of the fact that a man could not strike his head against an obstruction four feet and seven inches above the place on which he was sitting; and, that being so, the negligence of the defendant was not established. In no other way or manner is it suggested that the defendant was negligent, except in the maintenance of the arch, and the failure to warn the plaintiff of its existence. Unless the plaintiff's injuries can, by a preponderance of evidence, be attributed to those causes, his case must fail. Unless the proof shows that he struck his head against the arch, the judgment can only be sus-

tained on pure speculation. There are numerous ways in which the accident might have happened, but none other have any support in the testimony; and if the case is left in such a condition that it is just as possible the injury came from one cause as another the judgment must be reversed. *Taylor v. Yonkers*, 105 N. Y. 202, 7 Cent. Rep. 230.

It has been said that an appellate court will not take judicial notice of facts not proven on the trial, for the purpose of reversing a judgment. While all reasonable intendments should be indulged in to support a judgment, the court is not called upon to assume the existence of a fact which is contrary to the ordinary course of nature, solely because the party raising the question did not give oral testimony upon it at the trial. In a case like this, in which it is well known that it can be submitted to a jury with generally but one result, the judgment should not be upheld when it is apparent that the verdict is not supported by the evidence. Here the finding which must exist to support the judgment is so contrary to our general

knowledge, and so far outside of common occurrence, that it may, in the absence of further proof, be regarded as contrary to nature, and hence untrue; and substantial justice will be done by reversing the judgment, and granting a new trial. Upon such trial, if the plaintiff was a giant in stature, or if, as claimed by the learned counsel for respondent, the space above the car was less than I have stated, such facts may be made clear.

The judgment should be reversed, and a new trial granted, costs to abide event.

Follett, Ch. J., and Potter and Parker, JJ., concur; Haight, J., not sitting.

Bradley and Vann, JJ., dissent, 'for the reason that the ground upon which Judge Brown founds his conclusion was not specifically raised at the trial, and it does not necessarily appear that it might not have been obviated if it had been so raised there; and that, in such case, judicial notice of a fact upon which no evidence was given or point made on the trial should not be taken for the purpose of reversing a judgment.

MASSACHUSETTS SUPREME JUDICIAL COURT.

HOPEWELL MILLS

v.

TAUNTON SAVINGS BANK *et al.*

(....Mass....)

1. In determining whether an article is a fixture, its nature and the object, effect and mode of its annexation are all usually to be considered.

2. Articles placed in a building subject to a mortgage, by the mortgagor or those claiming under him, to carry out the obvious purpose for which it was erected or permanently to increase its value for occupation or

use, become a part of the realty although removable without injury either to themselves or the building.

3. Machinery in a cotton mill, procured for use in manufacturing cotton cloth, most of it being heavy and not intended to be moved from place to place, but when put in position to be used with the building until worn out or for some unforeseen cause the real estate is put to a different use, constitutes part of the realty.

4. Loom beams, although not fastened to the looms or to the buildings, constitute part of the realty when the looms to which they belong are permanently fixed in a cotton mill.

(January 8, 1890.)

NOTE.—*Fixtures, what constitute.*

Whether a structure is a fixture or not depends on the nature and character of the act by which it is put in its place, and the purpose for which it is intended to be used. *Atchison, T. & S. F. R. Co. v. Morgan* (Kan.) 4 L. R. A. 284.

Ice in an ice-house on premises sold for hotel purposes will pass as a fixture. *Hill v. Munday* (Ky.) 4 L. R. A. 674, *note*.

A baker's oven inseparable from the building is a fixed structure not removable by the tenant. *Colamore v. Gillis* (Mass.) 5 L. R. A. 150.

A scale which would be a real-estate fixture, would be covered by the mortgage. *McGorrick v. Dwyer* (Iowa) 5 L. R. A. 504.

Machinery which constitutes the motive power of the factory is a fixture, and, as between mortgagor and mortgagee, passes to the latter. *Dudley v. Creighton*, 8 Cent. Rep. 284, 67 Md. 44; *McKim v. Mason*, 3 Md. Ch. 186.

Steam engines and boilers with their appliances, that supply the motive power of machinery, and, for the purpose of use, are usually stably attached to the realty, pass by a conveyance or mortgage of the land. 1 *Schouler*, Pers. Prop. 165; *Ewell*, *Fixt.* 290; 1 *Washb. Real Prop.* 8; *Case Mfg. Co. v. Garven*, 11 West. Rep. 288, 45 Ohio St. 289.

The motive power of a cotton mill, consisting of a boiler, engine, etc., passed to the mortgagee, even when they were placed upon the land after

the mortgage was executed. *Dudley v. Creighton*, 8 Cent. Rep. 284, 67 Md. 44; *Winslow v. Merchants Ins. Co.* 4 Met. 306; *Powell v. Monson & B. Mfg. Co.* 3 *Mason*, 459; *Farrar v. Stackpole*, 6 Me. 154; *Voorhis v. Freeman*, 2 *Watts & S.* 116; *Kirwan v. Latour*, 1 *Har. & J.* 289.

The criterion of an immovable fixture is stated in *Binkley v. Forkner*, 3 L. R. A. 33, *note*, 117 *Ind.* 176.

Where in the case of machinery the principal part becomes a fixture by actual annexation to the soil, such parts of it as may be not so physically annexed, but which if moved would leave the principal thing unfit for use, are considered constructively annexed. *Dudley v. Creighton*, *supra*.

Thus the key of a lock, the sail of a windmill, the leather belting of a saw-mill, although actually severed from the principal thing, and stored elsewhere, pass by constructive annexation. They must be such as to go to complete the machinery, which is affixed to the land, and which if removed would leave the principal thing incomplete and unfit for use. *Ibid.*; *Beardsley v. Ontario Bank*, 31 *Barb.* 619; *Burnside v. Twitohell*, 43 *N. H.* 390.

For fixtures as between mortgagor and mortgagee, see *Southbridge Sav. Bank v. Mason*, 1 L. R. A. 350, *note*, 147 *Mass.* 500.

The surrender of leased premises by operation of law vests the landlord with the title of any structures remaining thereon. *Bedlow v. New York Floating Dry Dock Co.* 2 L. R. A. 629, 112 *N. Y.* 233.

A PPEAL from a judgment of the Superior Court, Suffolk County, in favor of defendants in an action for conversion of machinery in a cotton mill. *Judgment for defendants.*

The machinery in question had been placed by the owners of the mill, which was subject to mortgage, and the action was brought by the owners of the mill at the time of foreclosure to recover from purchasers claiming title under the foreclosure sale for the alleged conversion of the machinery.

Messrs. Thos. L. Livermore, Frederick P. Fish and Wm. K. Richardson, for plaintiff:

The loom beams were laid upon the looms and steadied by a rope with a weight attached, but were in no way fastened to the looms or to the mill. They were not peculiarly adapted for use in this mill alone. Such articles are not a part of the realty.

Pierce v. George, 108 Mass. 78-83; *Holbrook v. Chamberlin*, 116 Mass. 155-162; *Walker v. Sherman*, 20 Wend. 686-685; *Hutchinson v. Kay*, 28 Beav. 413; *Ex parte Astbury*, L. R. 4 Ch. 680-688; *Longbottom v. Berry*, L. R. 5 Q. B. 128-129.

The machines were not part of the realty because, although in some sense attached to the freehold, yet they could be easily disconnected, and were capable of being used in any other building erected for similar purposes.

Gale v. Ward, 14 Mass. 352; *McConnell v. Blood*, 123 Mass. 47; *Hubbell v. East Cambridge F. C. Sav. Bank*, 132 Mass. 447; *Maguire v. Park*, 140 Mass. 21-27; *Cooper v. Johnson*, 3 New Eng. Rep. 188, 148 Mass. 108.

In the following cases looms and other machines similar to those now in question, which were screwed to the floor and which were placed in factories to carry out the obvious purpose for which the factories were built, were held to be personal property:

Blanche v. Rogers, 26 N. J. Eq. 563, 565-568; *Voorhees v. McGinnis*, 48 N. Y. 278-286; *Hill v. Wentworth*, 28 Vt. 428-437; *Fullam v. Stearns*, 30 Vt. 443-452; *Cass Mfg. Co. v. Garven*, 11 West. Rep. 283, 45 Ohio St. 289, 800; *Capen v. Peckham*, 85 Conn. 88; *McKim v. Mason*, 3 Md. Ch. 186, 189, 191, 201.

Similar machines used in the manufacture of woolen and linen in buildings which did not appear to have been expressly erected for factories, were held to be chattels in the following cases:

Murdock v. Gifford, 18 N. Y. 28; *Oresson v. Stoultz*, 17 Johns. 117; *Teaff v. Hewitt*, 1 Ohio St. 511, 535-539; *Keeler v. Keeler*, 31 N. J. Eq. 181, 191; *Swift v. Thompson*, 9 Conn. 68; *Wheeler v. Bedell*, 40 Mich. 693.

The principle of law applicable to this case is well stated in *Rogers v. Brokaw*, 25 N. J. Eq. 496, as follows: "Movable machines like these whose number and permanency are contingent on the varying circumstances of the business, and liable to be taken in or out as exigencies may require, are different in nature and legal character from the steam engine, boilers and other articles secured by masonry or other substantial annexation, designed to be permanent and indispensable to the enjoyment of the freehold." This case was approved in *Pope v. Jackson*, 65 Me. 162-166.

6 L. R. A.

Messrs. W. H. Fox and A. M. Alger, for defendants:

Whatever is placed in a building subject to a mortgage, by a mortgagor, or those claiming under him, to carry out the obvious purpose for which it was erected, or permanently to increase its value for occupation or use, becomes a part of the realty, although it may be removed without injury to itself or the building.

Pierce v. George, 108 Mass. 78; *McConnell v. Blood*, 123 Mass. 47; *Southbridge Sav. Bank v. Elzeter Mach. Works*, 127 Mass. 545; *Smith Paper Co. v. Servin*, 130 Mass. 518; *Maguire v. Park*, 140 Mass. 21; *Southbridge Sav. Bank v. Mason*, 1 L. R. A. 850, 7 New Eng. Rep. 165, 147 Mass. 500.

In conformity to this rule, machinery has been held to be realty as follows:

Machines for working iron, placed in a building erected and used for a machine shop.

Winslow v. Merchants Ins. Co. 4 Met. 314.

Polishing frames, fan blowers, punches, etc., in a machine shop built and occupied for the purpose of making heel and toe plates and shoe nails.

Pierce v. George, 108 Mass. 82.

An iron table placed in a factory for the manufacture of plate glass, and used for rolling molten glass.

Smith Paper Co. v. Servin, 130 Mass. 518.

A drill placed in a building adapted and designed for a machine shop, or other manufacturing purposes.

Southbridge Sav. Bank v. Stevens Tool Co. 130 Mass. 547.

Looms, dressers, carding machines, pickers, spoolers, etc., put into a building erected and used for a woolen mill.

Parsons v. Copeland, 88 Me. 537.

In England looms in a woolen mill (*Holland v. Hodgson*, L. R. 7 C. P. 828), spinning mules, sizing, drying and warping machines, a brushing machine, and other machines placed in a building erected as a woolen mill, and applicable to the purpose of manufacturing woolen goods.

Longbottom v. Berry, L. R. 5 Q. B. 123.

In *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57, the machinery of a woolen mill consisting of looms, carders, breakers, etc., was held to be a part of the realty. A like decision was made in *McRea v. Central Nat. Bank*, 68 N. Y. 490, as to machinery for manufacturing twine placed in a building erected as a twine factory; in *Murdock v. Harris*, 20 Barb. 407, as to looms in a woolen mill; in *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 86 N. J. Eq. 452, as to machinery for making nails in a nail mill; in *Voorhis v. Freeman*, 2 Watts & S. 116, as to rolls which were part of the machinery of an iron rolling mill; in *Harlan v. Harlan*, 15 Pa. 507, as to a picker and speeder in a woolen mill; in *Lyle v. Palmer*, 42 Mich. 814, as to looms, spinning jacks, carding machines, etc., constituting the ordinary machinery of a woolen factory, propelled by a water wheel with shaft and belting.

The rule is recognized also in *Roddy v. Brick*, 4 Cent. Rep. 850, 42 N. J. Eq. 225; *Hill v. Farmers & M. Nat. Bank*, 97 U. S. 450 (24 L. ed. 1051); *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 86 N. J. Eq. 452, 455, and cases there cited; *Lathrop v. Blake*, 23 N. H. 46.

The distinction between affixing machines to carry out the obvious purpose for which a building was erected, and affixing them merely to steady them for use, is well shown by *Parsons v. Copeland*, 88 Me. 537, and *Pope v. Jackson*, 65 Me. 165.

Knowlton, J., delivered the opinion of the court:

This case is submitted on an agreed statement of facts; and since the burden of proof is on the plaintiff, there must be judgment for the defendants unless the facts stated establish the plaintiff's title.

There is some conflict of authority in different jurisdictions in regard to the question when machines placed in a building become fixtures which pass with a conveyance of the real estate. In this Commonwealth the general principles applicable to such cases have often been considered and are well established; but there is frequently difficulty in the application of them to particular cases.

The character of the property as real or personal may be fixed by contract with the owner of the real estate when the article is put in position; but such a contract cannot affect the rights of a mortgagee, or of an innocent purchaser without notice of it. *Hunt v. Bay State Iron Co.* 97 Mass. 279; *Thompson v. Vinton*, 121 Mass. 189; *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 545; *Oase Mfg. Co. v. Garcon*, 45 Ohio St. 289, 11 West. Rep. 283.

Except in cases where a contract determines the question, a machine placed in a building is found to be real estate or personal property from the external indications which show whether or not it belongs to the building as an article designed to become a part of it, and to be used with it to promote the object for which it was erected, or to which it has been adapted and devoted,—an article intended not to be taken out or used elsewhere unless by reason of some unexpected change in the use of the building itself. The tendency of the modern cases is to make this a question of what was the intention with which the machine was put in place. *Southbridge Sav. Bank v. Exeter Mach. Works*, 127 Mass. 545; *Turner v. Wentworth*, 119 Mass. 459; *Allen v. Mooney*, 180 Mass. 155; *Smith Paper Co. v. Servin*, 180 Mass. 513; *Hubbell v. East Cambridge F. C. Sav. Bank*, 132 Mass. 447; *Maguire v. Park*, 140 Mass. 21; *McRea v. Central Nat. Bank*, 66 N. Y. 490; *Hill v. Farmers & M. Nat. Bank*, 97 U. S. 450 [24 L. ed. 1051]; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57.

These cases seem to recognize the true principle on which the decisions should rest. Only it should be noted that the intention to be sought is not the undisclosed purpose of the actor, but the intention implied and manifested by his act. It is an intention which settles, not merely his own rights, but the rights of others who have or who may acquire interests in the property. They cannot know his secret purpose, and their rights depend, not upon that, but upon the inferences to be drawn from what is external and visible. In cases of this kind every fact and circumstance should be considered which tends to show what intention

in reference to the relation of the machine to the real estate is properly imputable to him who put it in position.

Whether such an article belongs to the real estate is primarily and usually a question of mixed law and fact. *Allen v. Mooney*, 180 Mass. 155; *Turner v. Wentworth*, 119 Mass. 459; *Maguire v. Park*, 140 Mass. 21; *Carpenter v. Walker*, 140 Mass. 416, 1 New Eng. Rep. 586; *Southbridge Sav. Bank v. Mason*, 147 Mass. 500, 1 L. R. A. 350, 7 New Eng. Rep. 165.

But the principal facts when stated are often such as will permit no other presumption than one of law. It is obvious that in most cases there is no single criterion by which we can decide the question. The nature of the article, and the object, the effect and the mode of its annexation are all to be considered. In this Commonwealth it has been said that "whatever is placed in a building subject to a mortgage, by a mortgagor or those claiming under him, to carry out the obvious purpose for which it was erected, or permanently to increase its value for occupation or use, becomes a part of the realty, although it may be removed without injury to itself or the building." *Pierce v. George*, 108 Mass. 78; *Southbridge Sav. Bank v. Mason*, *supra*.

This rule generally prevails in other jurisdictions. *Parsons v. Copeland*, 88 Me. 537; *Holland v. Hodgson*, L. R. 7 C. P. 828; *Longbottom v. Berry*, L. R. 5 Q. B. 128; *McRea v. Central Nat. Bank*, 66 N. Y. 490; *Hill v. Farmers & M. Nat. Bank*, 97 U. S. 450 [24 L. ed. 1051]; *Harlan v. Harlan*, 15 Pa. 507; *Delaware, L. & W. R. Co. v. Oxford Iron Co.* 36 N. J. Eq. 452; *Roddy v. Brick*, 43 N. J. Eq. 225, 4 Cent. Rep. 850; *Ottumwa Woolen Mill Co. v. Hawley*, 44 Iowa, 57.

We are of opinion that it is applicable to the case at bar. The building mortgaged was a cotton mill, and the machinery in controversy was all procured for use in manufacturing cotton cloth. Most of it was heavy, and there is much to indicate that, while there were changes in the kinds of goods manufactured, the machines were not of a kind intended to be moved from place to place, but to be put in position and there used with the building until they should be worn out, or until, for some unforeseen cause, the real estate should be changed and put to a different use. Of most of them it is said in the agreed statement that they were fastened to the floor for the purpose of steadying them when in use; but it is also said that this is not a statement of the only purpose for which they were fastened. They seem to have been attached to the building and connected with the motive power with a view to permanence. The loom beams are essential parts of the looms, and although they are not fastened to the looms, but are laid upon them when in use, they are no less real estate than those parts of the looms which are annexed to the realty. No suggestion is made in regard to any other part of the property, which calls for a distinction between different articles.

We are of opinion that the agreed facts do not show that the machinery was personal property, for which trover can be maintained, and the entry must be—

Judgment for the defendants.

UNITED STATES CIRCUIT COURT, DISTRICT OF CONNECTICUT.

HARLAND, *Plff.*,

v.

UNITED LINES TELEGRAPH CO.

(40 Fed. Rep. 306.)

A federal court cannot by attachment of property within the district where suit is brought acquire jurisdiction to render judgment against such property, where the owner is not a resident of the district and is not legally found and served therein so as to authorize a personal judgment. This rule is not changed by the Act of Congress of March 3, 1887.

(November 14, 1889.)

ACTION at law against defendant's property by attachment. On demurrer to defendant's plea to the jurisdiction. *Overruled.*

The facts are fully stated in the opinion.

Messrs. Morris W. Seymour and William G. Wilson for plaintiff, in support of the demurrer.

Messrs. W. W. Hyde and Robert G. Ingersoll for defendant, *contra*.

Shipman, J., delivered the following opinion:

The question at issue in this action at law arises upon the plaintiff's demurrer to the defendant's plea to the jurisdiction of the court. The complaint alleges that the plaintiff is a citizen of the State of Connecticut, and that the defendant is a corporation existing under the laws of the State of New York, and a citizen of said State, and carrying on business in the State of Connecticut, and having an office in Hartford, in said State.

Section 910 of the General Statutes of Connecticut provides as follows: "When the defendant is not a resident or inhabitant of this State, and has estate within the same which is attached, a copy of the process and declaration

or complaint, with a return describing the estate attached, shall be left by the officer with the agent or attorney of the defendant in this State; and when land is attached a like copy shall be left in the office of the town clerk of the town where the land lies, as in cases where the defendant belongs to this State; and, if the defendant has no agent or attorney within this State, a like copy shall be left with him who has charge or possession of the estate attached."

Section 908 of the same Statutes provides that "in actions against towns, societies, communities or corporations, the service of the process by the officer by leaving a true and attested copy of it, and of the accompanying declaration or complaint, with or at the usual place of abode of their clerk, or either of the selectmen or committee, or the secretary or cashier, or, in case of a private corporation having no secretary or cashier, at the principal place in this State where such corporation transacts its business, or exercises its corporate powers, shall be sufficient. When a corporation doing business in this State has no secretary or cashier resident in this State, service of process upon a resident director shall be good and effectual service."

The return of the marshal declares that he attached, as the property of the defendant, divers articles of personal property situated in the offices of the defendant in five towns of the State, viz.: New Haven, Hartford, Meriden, Bridgeport, and the Borough of Willimantic, in the Town of Windham, and left true and attested copies of the writ, and of his indorsement thereon, with five named persons, who have "the charge and possession of said estate of the defendant so attached" at the several places before named; "the defendant not being a resident or inhabitant of this State, and not having any known agents or attorney in the same, and being absent therefrom." By chapter 9 of the Public Acts of Connecticut, which

NOTE.—*Jurisdiction, United States circuit court; not conferred by attachment process.*

A court created within and for a particular territory is bounded in the exercise of its power by the limits of such territory. *Picquet v. Swan*, 5 Mason, 35; *Ex parte Graham*, 3 Wash. C. C. 456; *Desty*, Fed. Proc. 147.

Whatever may be the extent of the jurisdiction over the subject matter in a suit, in respect to jurisdiction over persons and property, it can only be exercised within the limits of the judicial district. *Toland v. Sprague*, 37 U. S. 12 Pet. 300 (9 L. ed. 1068); *Picquet v. Swan*, *supra*.

The circuit court has jurisdiction only over the inhabitants of the district, or persons found therein and served with process. *Pollard v. Dwight*, 8 U. S. 4 Cranch, 424 (2 L. ed. 666); *Anderson v. Shaffer*, 10 Fed. Rep. 236.

Where a citizen of the United States is a resident in a foreign country the circuit court has no jurisdiction over a suit brought by an alien although he has property within the district which may be attached. *Picquet v. Swan*, *supra*.

The circuit court has no jurisdiction in attachment suits against a nonresident without the district. *Hollingsworth v. Adams*, 2 U. S. 2 Dall. 393 (1 L. ed. 431); *Toland v. Sprague*, *supra*; *Chaffee v. 6 L. R. A.*

Hayward, 61 U. S. 20 How. 208 (15 L. ed. 804); *Day v. Newark India Rubber Mfg. Co.* 1 Blatchf. 623; *Sadler v. Hudson*, 2 Curt. 6; *Mauldin v. Carll*, 3 Hughes, 249; *Picquet v. Swan*, *supra*; *Richmond v. Dreyfous*, 1 Sumn. 131; *Desty*, Rem. Caus. 80.

Section 915, giving to district and circuit courts similar remedies by attachment or other process, which are provided by the laws of the State in which such courts sit, applies only when process *in personam* has been served on the defendant (*Chittenden v. Darden*, 2 Woods, 437; and, although a resident of the district, defendant cannot be proceeded against by attachment unless served with process in the district. *Sadler v. Fallon*, 2 Curt. 579.

Process of foreign attachment cannot be properly issued by the circuit court in cases where defendant is domiciled abroad, or not found within the district, so that it can be served upon him, and this applies to corporations. *Myers v. Dorr*, 13 Blatchf. 22; *Pollard v. Dwight*, 8 U. S. 4 Cranch, 424 (2 L. ed. 666).

But if served not only on the property but on the defendant, jurisdiction attaches. *North v. McDonald*, 1 Biss. 57; *Anderson v. Shaffer*, 10 Fed. Rep. 236.

An assignee appointed by a bankrupt court of another district is within the rule, although there is property within the district. *Shainwald v. Lewis*, 5 Fed. Rep. 510.

were passed in 1889, the fixtures of a telegraph company in this State can be attached in the same manner as real estate is attached in civil actions, by the officer's lodging in the office of the secretary of state a certificate that he has made such attachment. Under an order which was made after the foregoing service, and which permitted an additional attachment, the marshal attached the wires, posts, etc., of the defendants in this State, in the manner provided in said Statute, and also left a copy of the writ, application and order, and of his indorsement, "at the principal office of the defendant in this State, and also with its attorneys," who had entered a limited appearance in the case. The defendant pleaded to the jurisdiction, because, after alleging that it was and is a foreign corporation, "said writ was not otherwise served upon the defendant than by the officer's making a pretended attachment of certain personal property which the plaintiff claimed to be the property of the defendant, and leaving a copy of said writ and complaint with the agents in charge of certain offices of the Postal Telegraph Cable Company in the State of Connecticut, and with the secretary of the State of Connecticut, as will appear from the officer's return on said writ indorsed. No service of said writ and complaint was made, or attempted to be made, on any officer of said defendant Company." The plaintiff demurred to the plea.

Under the admissions of the able counsel for the respective parties, but a single question arises upon the demurrer. The defendant admits that by the proper construction of the Act of March 8, 1887, a foreign corporation defendant may be found within the district which is the residence of the plaintiff; and if so found, and duly served with process, it can, when the jurisdiction is based upon the fact of diverse citizenship, properly be sued in the district of the residence of the plaintiff. Assuming that this construction, which has been sanctioned by a number of decisions of the circuit courts, is correct, the next question which would naturally be considered is whether any personal service was made upon the defendant. The plaintiff, in the last brief of his counsel, properly admits that up to the present time no such service has been made, and no such appearance has been entered by it, as would entitle the plaintiff to a judgment *in personam*, but contends that under the Act of March 8, 1887, a judgment can properly be rendered against the defendant's property which is situated in this State, and was attached in this suit. His argument, briefly stated, is that, whereas, the Statute of Connecticut permits the attachment of the property, located in this State, of a non-resident defendant, without personal service upon him, and, in the absence of his voluntary appearance, the subjection of such property to a judgment *in rem*; and whereas, sections 914 and 915 of the Revised Statutes authorize the practice and modes of proceeding in the United States courts to be conformed to the modes of procedure in the respective States wherein such courts are held, and authorize the same remedies by attachment as are permitted by the statutes of said respective States; and whereas, by the Act of March 8, 1887, when an original suit is brought in the circuit court, and jurisdiction is founded only on the fact of diverse

citizenship, such suit can be brought either in the district of the residence of the plaintiff or the defendant,—the circuit court can obtain jurisdiction *in rem* by attachment of the property of a nonresident defendant, which is situated within the district of the plaintiff, without personal service.

It will be readily admitted that the United States courts, which are created by statute, "can have no jurisdiction but such as the statute confers" (*Sheldon v. Sill*, 49 U. S. 8 How. 441, 12 L. ed. 1147), and that this doctrine has been asserted with great earnestness by the supreme court. It is furthermore evident that a State may subject property situated within its limits, which is owned by nonresidents, to the payment of the demands of its own citizens, and that, when the nonresident cannot be personally served with process, the statutes of the State may authorize a constructive service, which shall be sufficient to subject the property to a proceeding *in rem*; but such proceedings must be authorized and derive their validity from the local statutes. *Pennoyer v. Neff*, 95 U. S. 714 [24 L. ed. 585].

Neither can it be denied that prior to the enactment of sections 914 and 915 there was no statute of the United States which gave authority to a circuit court, by original process, in an action at law, to seize the property of a non-resident defendant, and subject it to the demands of a resident plaintiff, without personal service upon the defendant, and, in the case of a corporation, upon such agents as may properly be deemed its representatives, or the voluntary appearance of the defendant in the suit.

In the well-known case of *Toland v. Sprague*, 87 U. S. 12 Pet. 300 [9 L. ed. 1093], the following proposition was announced, which has ever since been adhered to (Curt. Jur. of U. S. Courts, 105); and in *Ex parte Des Moines & M. R. Co.* 108 U. S. 794 [26 L. ed. 461], was evidently regarded as axiomatic: "(4) That the right to attach property, to compel the appearance of persons, can properly be used only in cases in which such persons are amenable to the process of the court *in personam*; that is, where they are inhabitants, or found within the United States, and not where they are aliens, or citizens resident abroad, at the commencement of the suit, and have no inhabitancy here; and we add that, even in case of a person being amenable to process *in personam*, an attachment against his property cannot be issued against him, except as part of, or together with, process to be served upon his person."

In *Ex parte Des Moines & M. R. Co.* decided in 1880, Chief Justice Waite said: "It is conceded that the person against whom this suit was brought in the circuit court was an inhabitant of the State of Massachusetts, and was not found in, or served with process in, Iowa. Clearly, then, he was not suable in the Circuit Court of the District of Iowa, and, unless he could be sued, no attachment could issue from that court against his property. An attachment is but an incident to a suit, and, unless the suit can be maintained, the attachment must fall."

The attachment in that case was made in accordance with the Statute of the State of Iowa

in regard to attachments of the property of nonresidents. But it is said, notwithstanding this decision was made after sections 914 and 915 were passed, that those sections confer upon the circuit courts jurisdiction *in rem* over attached property of nonresidents which is situated within the limits of the State wherein the suit is brought, if the attachment is made in conformity with state laws. Section 914 assimilates the practice, forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the courts of the United States, to the practice, forms and proceedings in the courts of record of the State within which such circuit or district courts are held. The Statute is an Act in regard to practice and procedure, and not in regard to jurisdiction. The question at issue in this case relates to the power of the court. Section 914 confers no new power or authority upon the circuit court.

In *Butler v. Young*, 1 Flip. 276, the distinction which is to be observed, in the construction of this section, between power which is conferred and practice which is to be observed, is clearly pointed out. The court says: "Care and caution will be used that substantive rights given by the state laws shall not be confounded with what is mere practice in the state courts. In this connection, I may mention, among other matters, the right to bring an absent or nonresident defendant into court by publication, or the right to a second trial, which are not matters of mere practice, but are substantial rights conferred by the statute of the State, and, in my opinion, were not contemplated by Congress, by the law in question, to be given to parties in this court." *Wear v. Mayer*, 6 Fed. Rep. 660; *Lyons v. Lyons Nat. Bank*, 19 Blatchf. 279, 8 Fed. Rep. 369; *New York L. Ins. Co. v. Bangs*, 108 U. S. 435 [26 L. ed. 580].

Section 915 entitles plaintiff, in common-law causes in the courts of the United States, to similar remedies by attachment against the property of the defendant which are provided by the law of the State in which such court is held for its courts. It empowers the United States court to adopt the remedies by attachment or other process, and relates to methods and forms. It does not create jurisdiction over property without personal service upon the defendant.

As succinctly stated by Mr. Justice Miller in *Nasro v. Cragin*, 8 Dill. 474: "The effect of

this section in the Act of 1873 is simply this: If the court has or can acquire jurisdiction over the defendant personally, this section gives to the plaintiff the right to the auxiliary remedy by attachment, but it does not afford a means of acquiring jurisdiction." *Chittenden v. Darden*, 2 Woods, 437.

Stress is laid by the plaintiff upon the general doctrines which are announced in *Cooper v. Reynolds*, 77 U. S. 10 Wall. 808 [19 L. ed. 931]; *Pennoyer v. Neff*, 95 U. S. 714 [24 L. ed. 565], and in *Freeman v. Alderson*, 119 U. S. 185 [30 L. ed. 373], in regard to the power of the State over the property of nonresidents within its limits, and the jurisdiction which a court acquires over such property by seizure. In these cases, the supreme court was considering the power which the State has over the property, within its limits, of nonresidents, and which state courts obtained by state statutes over attached property; and the opinions are very far from intimating either that the courts of the United States, in common-law causes, have an authority over the property of a defendant which is not conferred by statute, or that the existing statutes confer a right to seize property, in an action at common law, and subject it to execution, unless in a suit where personal service has been made upon the defendant. The Statute of March 3, 1887, introduced no new principle which obviated the necessity of personal service. It provided that suit, when jurisdiction is founded upon diverse citizenship, must be brought in the district either of the residence of the plaintiff or of the defendant; and it omitted the provision that the defendant could be sued in any district in which he should be found at the time of serving the writ; but it by no means intended to discard the long-established doctrine that the defendant must be legally found and served in the district in which he is sued. The conclusions in *Toland v. Sprague*, *supra*, in regard to the scope of the federal statutes which existed at the time of that decision, are still applicable.

It is not necessary, at the present time, to discuss whether there was service upon agents who properly represent the defendant. The demurrer admits, for the purposes of pleading, how the writ was served, and the plaintiff does not now ask that it may be considered as anything else than a service by attachment.

The demurrer is overruled.

COLORADO SUPREME COURT.

Henry KIEL

v.

William S. JACKSON, Receiver of the Denver & Rio Grande R. Co., *Appt.*,

(....Colo....)

1. A lot-owner whose only means of ingress and egress to and from his lot by ve-

nues is through a street intersecting the one on which his premises front, and which terminates just beyond them, may maintain an action for the special and peculiar injury resulting to him from a blockade of the entrance to the latter street by railroad cars standing on the former.

2. The difference between the rental value of premises free from the effect of a nul-

NOTE.—*Improper use of street by railroad company.*

Appropriating a public street to use for an ordinary commercial railroad is not a proper street use. *Adams v. Chicago, B. & N. R. Co.* 1 L. R. A. 493, 39 6 L. R. A.

Minn. 236, 38 Alb. L. J. 333; *Ruttles v. Covington*, 10 Ky. L. Rep. 706, 10 S. W. Rep. 644.

The measure of damages in favor of an abutting lot-owner against a railway company for using the street in the operation of its road beyond what is

sance, and subject to it, is the measure of damages for the nuisance.

(November 1, 1889.)

A PPEALS by defendant from judgments of the Denver Superior Court in favor of plaintiff, one overruling a demurrer to the complaint and the other entered upon the verdict of a jury, in an action to recover damages for obstructing the means of access to and from plaintiff's property. *Affirmed.*

Statement by Helm, Ch. J.:

Kiel, plaintiff below, is the owner in fee of lot 3, block 86, West Denver. This lot, upon which are erected four dwelling-houses, with fences, out-buildings, etc., fronts a distance of sixty-six feet on Tenth Street. Wyncoop Street, which intersects Tenth Street 183 feet southeasterly of plaintiff's lot, furnishes the only approach thereto, Tenth Street terminating a few feet beyond, and there being no connecting street or alley in the opposite direction. The Denver & Rio Grande Railway Company erected its railroad tracks along Wyncoop Street, through the space of intersection with Tenth Street, and on the premises intervening between plaintiff's lot and said Wyncoop Street. At the commencement of the action it had seventeen such lines of track, the nearest being within twenty feet of plaintiff's premises. During the time mentioned in the complaint, defendant, receiver of the road, kept continually standing upon these tracks a large number of freight-cars, completely obstructing and cutting off plaintiff's ingress and egress with vehicles to and from his property. Touching this subject, the complaint contains the following averment: That defendant has "continuously obstructed said Tenth Street by standing cars thereon, to the exclusion therefrom of all travel thereon, and has cut off all access to and from plaintiff's said lot and premises by vehicles of every kind, so that his said dwellings have remained vacant; whereby," etc. Defendant demurred to the complaint upon the ground that

it did not state a cause of action. The demurrer was overruled; and from the order thus entered defendant appealed to the supreme court, under the Practice Act of 1885. Thereafter the cause duly proceeded to trial; defendant's counsel appearing, cross-examining witnesses, offering evidence, and interposing objections from time to time. The trial resulted in a verdict and judgment for plaintiff, from which judgment another appeal was duly taken. By stipulation of counsel, the two cases were consolidated, and the two appeals were to be heard and decided together.

Mr. Edward O. Wolcott, for appellant:

A common-law action for nuisance cannot be sustained by an abutting lot-owner against a railroad company which has constructed railroad tracks through, over or across the streets of a city by authority of the common council.

Colorado Cent. R. Co. v. Mollandin, 4 Colo. 154; *Denver v. Bayer*, 7 Colo. 118.

When the obstruction to a street is at a distance from the premises, an action can only be maintained when the obstruction is unlawful, and no obstruction can be said to be unlawful when created pursuant to the authority conferred by the persons or corporation having exclusive supervision and control over the streets.

Fritz v. Hobson, 19 Am. L. Reg. N. S. 615.

It is evident from the complaint that every property holder upon the same side of the railroad tracks as the plaintiff is obstructed in the use of his property, and cut off from the city in the same manner that he is. For such injuries the law affords no relief at the suit of a private party.

Hogan v. Central Pac. R. Co. 71 Cal. 483; *Shaubert v. St. Paul & S. O. R. Co.* 21 Minn. 502; *Morgan v. Des Moines & St. L. R. Co.* 64 Iowa, 589; *Harvard College v. Stearns*, 15 Gray, 1; *Blackwell v. Old Colony R. Co.* 123 Mass. 1; *Proprietors of Locks & Canals v. Nashua & L. R. Corp.* 10 Cush. 885; *Boston & W. R. Corp. v. Old Colony R. Corp.* 13 Cush. 605; *Presbrey*

necessary for the proper running of its trains is the impairment of the value of the use of such property by such nuisance during its continuance, and not the market value of the property. *Harmon v. Louisville, N. O. & T. R. Co.* 87 Tenn. 614; *Nelson v. Minneapolis & St. L. R. Co.* (Minn.) 42 N. W. Rep. 788.

If one does or authorizes the doing of an act creating a public nuisance, by obstructing a highway, he is answerable in damages to those suffering injuries thereby. *Carlin v. Driscoll*, 10 Cent. Rep. 178, 50 N. J. L. 28.

One who, in violation of an express statutory duty, obstructs a public highway, cannot be heard to say that he did not anticipate an injury which was the direct result of his unlawful act, where the person injured was without fault. *Evansville & T. H. R. Co. v. Carver*, 12 West. Rep. 204, 113 Ind. 51.

A private individual may maintain an action to abate a public nuisance which occasioned some special damage to himself in addition to that occasioned to the public. *San José Ranch Co. v. Brooks*, 74 Cal. 463; *Ison v. Manley*, 76 Ga. 804; *Mehrhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.* 51 N. J. L. 56; *Platt v. Chicago, B. & Q. R. Co.* 74 Iowa, 127; *Wheeler v. Bedford*, 2 New Eng. Rep. 831, 54 Conn. 244.

One injured by a highway obstruction when he 6 L. R. A.

could easily go around it cannot recover. *Joehem v. Robinson*, 1 L. R. A. 178, 73 Wis. 199.

If the only injury occasioned to a private individual by obstruction to a public road is an inconvenience in using it, which is the same in kind, although to a greater degree, as that occasioned to any other person who might be obliged to use the road, he cannot maintain an action to abate it. *San José Ranch Co. v. Brooks*, 74 Cal. 463; *Talbot v. King*, 38 W. Va. 6.

The use by a railroad company of a part of its right of way, over which it has only a right of passage, for keeping cars laden with live stock standing there, so that the stenches, smoke, etc., impair the legitimate use of private property, is a nuisance, and the person injured is entitled to redress. *Thompson v. Pennsylvania R. Co.* (N. J.) 13 Cent. Rep. 299.

A provision of Iowa Code, 8831, giving the right to "any person injured thereby" to maintain an action to abate a nuisance, does not change the ordinary rule that a private person will not be allowed to maintain an action to restrain or abate a public nuisance unless he can show some peculiar or special damage or injury to himself. *Innis v. Cedar Rapids, L. F. & N. W. R. Co.* 2 L. R. A. 282, 78 Iowa, 165.

v. *Old Colony & N. R. Co.* 108 Mass. 1; *Grand Rapids & I. R. Co. v. Heisel*, 88 Mich. 62.

The measure of compensation is the actual diminution in the market value of the premises for any use to which they may reasonably be put, occasioned by the construction and operation of the railroad through the adjacent street.

Denver v. Bayer, 7 Colo. 118; *Wilmington & R. R. Co. v. Stauffer*, 60 Pa. 374; *Western Pa. R. Co. v. Hill*, 56 Pa. 460; *East Pa. R. Co. v. Heister*, 40 Pa. 68; *Pa. R. Co. v. Heister*, 8 Pa. 445; *Watson v. Pittsburgh & O. R. Co.* 37 Pa. 469; *Harvey v. Lackawanna & B. R. Co.* 47 Pa. 428; *Hornstein v. Atlantic & G. W. R. Co.* 61 Pa. 87.

The measure of damage recognized in the following cases was how much less the property was worth after the erection of the structure than before, but not the loss of rent.

Jeffersonville, M. & I. R. Co. v. Esterle, 18 Bush, 669; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 393; *Chicago & I. R. Co. v. Baker*, 73 Ill. 516; *Chicago & P. R. Co. v. Stein*, 75 Ill. 41; *Powers v. Council Bluffs*, 45 Iowa, 652.

Messrs. Brown & Putnam, for appellee:

When the property abuts on the street, the right of the abutting owner to recover has been practically settled in —

Mollandin v. Union Pac. R. Co. 4 McCrary, 290; *Denver v. Bayer*, 7 Colo. 118.

Several States have settled the meaning of the phrase "or damaged" found in the constitutional provisions in harmony with the above decisions.

Rigney v. Chicago, 102 Ill. 64; *East St. Louis v. Lockhead*, 7 Ill. App. 83; *Johnson v. Parkersburg*, 16 W. Va. 402; *Brakken v. Minneapolis & St. L. R. Co.* 29 Minn. 41; *Atlanta v. Green*, 67 Ga. 386; *Gottschalk v. Chicago, B. & Q. R. Co.* 14 Neb. 550; *Elgin v. Eaton*, 88 Ill. 535; *Burlington & M. R. Co. v. Reinhackle*, 15 Neb. 279; *Hastings & G. I. R. Co. v. Ingalls*, Id. 123; *Omaha & R. V. R. Co. v. Brown*, 16 Neb. 161; *Republican Valley R. Co. v. Fellers*, Id. 169.

Helm, Ch. J., delivered the opinion of the court:

We shall decline to follow counsel into a discussion of the question whether plaintiff has, and has sufficiently pleaded, a right to recover for injuries to his property occasioned by the construction and operation of the railway mentioned through the intersection of Tenth and Wyncoop Streets. The complaint is not artificially worded, but it appears to have been framed upon the theory of an unlawful obstruction or abatable public nuisance, whereby plaintiff suffered a special and peculiar private injury; and we think enough facts are averred in support of this cause of action to justify the court in overruling the general demurrer interposed by defendant. Both the pleadings and evidence show clearly that the ingress and egress to and from plaintiff's property by vehicles was had solely by means of the intersection of Wyncoop Street with Tenth,—the street upon which his lot fronts. In no differ-

ent way, circuitous or otherwise, could his premises be thus reached. The right to a free use of this space of street intersection for purposes of ingress and egress was therefore as closely identified with his lot, and interference therewith was as peculiar and personal an injury, as if the obstruction had prevented access from his lot to the street immediately adjacent thereto. A complete blockade of Tenth Street at this point would produce damage to his property hardly less direct and serious than would the vacation and closing up of this street in front of his lot. It appears beyond question that defendant kept a large number of railway cars on Wyncoop Street, across the space of its intersection with Tenth; that during the entire period covered by the complaint the obstruction thus created rendered it absolutely impossible for vehicles of any kind to reach plaintiff's premises. The completeness of the obstruction is clearly shown by the testimony of defendant's own witness, the general yard-master of the Railway Company, who says, among other things: "We have never kept Tenth open, or recognized it as a street."

It also, in like manner, appears that, in consequence of this obstruction, plaintiff was seriously damaged by the depreciation of the rents received for his premises. Tenth Street was a public highway; and an unauthorized obstruction thereof, especially if long continued, would constitute a public nuisance. If we assume that the right of way along Wyncoop Street at this point was lawfully obtained, in the first instance, for the purpose of constructing and operating the railway, such right did not authorize the complete blockade of the crossing. Defendant could not absolutely destroy, for a considerable period, the usefulness of this part of Tenth Street for the usual street purposes under any license or authority appearing in the record before us. He was bound to so use the right of way obtained as not to permanently prevent the passage of vehicles, and the employment of the street in other ordinary uses. Plaintiff, of course, could not recover for any general inconvenience thus occasioned which he may have suffered in common with the general public; but for the special and peculiar injury shown in this case he was doubtless entitled to compensation. Appellants have no cause to complain of the measure of damages recognized in the charge to the jury. The difference in rental value occasioned by the nuisance or obstruction is the rule usually adopted in such cases; though, under proper circumstances, the recovery may take a wider scope. The right to recover, if established, includes "the depreciation of rental value, by the difference, in other words, between the rental value free from the effects of the nuisance and subject to it." 3 Sutherland, Dam. 414, and cases.

The ruling of the court below, from which the first appeal was prosecuted, and its final judgment, from which the second appeal was taken, are both affirmed.

OREGON SUPREME COURT.

Gus ROSENBLATT, Exr. of Sigmund
Rosenblatt, Deceased, *Appt.*,
v.

R. S. PERKINS, *Resp't.*

(....Or.....)

1. While a verbal lease of real property for a longer term than one year is void by the Statute of Frauds, so that neither party thereto can enforce its terms as against the other, yet if the lessee enter into possession of the property under the lease, and pay his rent to the lessor, who accepts the same, obligations may thereby be created in reference to the occupation of the property that will be legally binding upon the parties.
2. The acts of the parties under such a lease may create in the lessee an estate from year to year.
3. To terminate an estate from year to year by notice requires the giving of such a notice as is prescribed in section 2987, Code Gen. Laws Or.
4. The provisions of the Forcible Entry and Detainer Act applicable to the removal of a tenant (§ 3519, Code Gen. Laws Or.) can only be enforced as against a tenant who is wrongfully in possession of the demised premises, or who is doing or neglecting something in violation of his duty to his landlord, in view of the relations existing between him and the latter; and a remedy under said Act cannot be taken against a tenant from year to year, until the tenancy is determined by notice as provided in said section 2987, or by an agreement between the parties.
5. A tenant in possession of demised premises, without any written lease or agreement therefor, cannot be dispossessed under the said Act, unless he is in by wrong.

(November 4, 1889.)

APPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County reversing a judgment of a justice of the peace in his favor in an action of forcible entry and detainer *Affirmed.*

Statement by **Thayer, Ch. J.:**

Appeal from a judgment of the Circuit Court for the County of Multnomah, rendered upon an appeal to that court from a judgment of a justice of the peace, in proceedings of forcible entry and detainer. The appellant instituted the proceeding in the justice's court to remove the respondent from certain premises, consisting of real property situated in the City of Portland, County of Multnomah, claiming that the latter unlawfully withheld the same from him. The justice of the peace gave the appellant judgment for the restitution of the premises; from which the respondent appealed to the said circuit court, where the case was tried without a jury. Upon said trial the circuit court found the following facts and conclusions of law:

"FINDINGS OF FACT.

"*First.* That the respondent and one Holton, under the name of Holton & Perkins, oc-

cupied the premises in controversy under a written lease made by S. Rosenblatt, the appellant's testator, from November 1, 1885, till October 31, 1887; at which date said written lease, by its terms, expired. *Second.* That the respondent alone, said Holton having ceased his connection with the respondent, remained in possession of said premises, as tenant from month to month, at a rent reduced from \$45 a month to \$37.50 a month, till about or on the 9th day of March, 1888. *Third.* That on or before said 9th day of March, 1888, the said S. Rosenblatt, who was the owner of said premises, entered into a verbal agreement with respondent, whereby the said S. Rosenblatt orally leased to the respondent, and the respondent orally agreed to take and use, said premises for a term to commence March 10, 1888, and to terminate on the 28th day of October, 1890, at the monthly rental of \$37.50 a month, with a proviso that if the said S. Rosenblatt, or his heirs, should proceed to erect on said premises a brick building, or if said S. Rosenblatt should sell said premises,—neither of which said events had occurred when this action was begun,—then respondent should quit and surrender up to said Rosenblatt, or his heirs and assigns, said premises. That respondent remained in possession of said premises, pursuant to said oral agreement with appellant's testator, paying the stipulated rent of \$37.50 per month, which was accepted by appellant; and that he is still in possession, claiming under said agreement and oral lease. *Fourth.* That on the 9th day of March, 1889, the appellant caused to be served on the respondent, at Portland, Or., a written notice to quit and surrender up said premises to appellant on the 31st day of March, 1889; and on the 1st day of April, 1889, appellant demanded possession from the respondent, which the latter refused to deliver, and declared to appellant's agents, who served said notice to quit, that he would not quit nor surrender up said premises without litigation.

"CONCLUSIONS OF LAW.

"*First.* That the respondent, by virtue of and under the above oral agreement or lease, took and had in said premises an estate as tenant from year to year. *Second.* That no sufficient notice to quit was served on respondent. *Third.* That respondent was not guilty, and appellant was not entitled to the possession of the premises in controversy. *Fourth.* That respondent was entitled to judgment for costs and disbursements."

Upon which findings the judgment appealed from was entered.

Mr. T. A. Stephens, for appellant:

Leases come within the purview of subdivisions 1 and 6 of § 785 of the Code.

Pulsee v. Hamer, 8 Or. 251.

When they are discovered to be incapable of being performed within a year from the date of the making thereof they are void; that is, of no legal force, null, and incapable of confirmation or ratification,—some thing which the law forbids to be enforced.

Code, subd. 1, 6, § 785.

A party would not be permitted to prove a

*Head notes by THAYER, Ch. J.

parol agreement for the leasing of premises for two years, for the purpose of establishing a lease for one year.

Chenoweth v. Lewis, 9 Or. 150; *Noyes v. Stauff*, 5 Or. 455.

The policy of the law is not to abridge, nor expand, nor yet to make new exceptions to statutes such as these, but rather, having regard for the general policy of the Act as well as the language thereof, to construe the same strictly, giving no interpretation thereto beyond its obvious meaning.

Connecticut Mut. L. Ins. Co. v. Talbot, 12 West. Rep. 289, 118 Ind. 878, 8 Am. St. Rep. 655; *Ex parte Sweeney*, 18 Nev. 74.

Mr. H. T. Bingham for respondent.

Thayer, Ch. J., delivered the opinion of the court:

The appellant's counsel has presented on the appeal two questions for the consideration of this court: *First*. Did the respondent lease said property from the appellant's testator under a verbal lease from month to month, at a monthly rental of \$37.50, as alleged in appellant's complaint? *Second*. Was there sufficient evidence to prove the making of the lease set out in respondent's amended answer? If there was, is not said alleged lease or agreement within the Statute of Frauds and therefore void?

This court has nothing to do with the questions of fact involved in the counsel's inquiry. The circuit court found what the fact was in relation to that matter, and we have no right to review its findings, if supported by any evidence tending to prove it. Under the circumstances, we must regard the fact as having been proven, and consider its effect as a matter of law. The question for us to determine is, What are the legal relations of the parties under the facts as found by the circuit court? The main point in the case is as to the effect of the verbal agreement made between S. Rosenblatt, appellant's testator, and the respondent, entered into on or about the 9th day of March, 1888, for the leasing of the premises, as stated in the third finding of facts, as above set out. The only right, as I understand, which the respondent had to the occupancy of the premises when the forcible entry and detainer proceeding was begun against him arose out of said agreement, and the conduct of the parties which took place under it. Said counsel contends that the said verbal agreement was void by the Statute of Frauds, and that the respondent cannot claim any right to the possession of the premises under it. That such an agreement is void under subdivisions 1 and 6 of section 785 of the Civil Code, there can be no question; that is, the terms of the agreement could not be enforced. If either of the parties to it had gone into a court of justice, and undertaken to compel the other to comply therewith or to pay damages for a non-compliance with its terms, the court would unhesitatingly have said that it was void. So long as the parties to such an agreement remain inactive in regard to its execution it is inoperative. But, on the other hand, where the parties acquiesce in the agreement, and proceed to carry out its terms, binding obligations may thereby be created. Thus, a verbal agreement to lease land for a

longer term than one year is invalid in the outset; but if the tenant enter under it, pay rent, and remain longer than one year, with the assent of the landlord, a tenancy from year to year is thereby created, with all the rights and incidents which attach to that kind of tenancy. It would be unjust and fraudulent to permit the landlord, after agreeing that the tenant might enter and occupy his premises on condition of paying him rent, and the latter enters and complies therewith, to then treat the tenant as a trespasser.

The Statute which the appellant's counsel relies upon was not passed to enable land owners to perpetrate frauds, or exercise bad faith. The agreement in such a case is void, at the option of the parties, or either of them; but if they both see fit to engage in the execution of its terms, and do acts under it, they may thereby establish such a relation between themselves as the law will recognize and enforce. Under the facts as found by the learned circuit court, the respondent clearly became a tenant of the premises in controversy from year to year. This view is in harmony with the decisions of this court in *Garrett v. Clark*, 5 Or. 484, and *Williams v. Ackerman*, 8 Or. 405, which I think laid down the true rule upon the subject. Under this view, the position of the appellant's counsel is untenable.

But how such a tenancy is terminated under our Statute is a somewhat perplexing question. We have a General Statute which provides as follows: "All estates at will or by sufferance may be determined by either party, by three months' notice in writing given to the other party, and when the rent reserved in a lease at will is payable at periods of less than three months the time of such notice shall be sufficient if it be equal to the interval between the times of payment; and, in all cases of neglect or refusal to pay the rent due on a lease at will, fourteen days' notice to quit, given in writing by the landlord to the tenant, shall be sufficient to determine the lease." Code Gen. Laws Or. § 2987.

This provision was adopted in 1854 by the Territorial Legislature, and was continued in force by the terms of the Constitution of the State. Then we have the Forcible Entry and Detainer Act, adopted in 1866, which seems to have been thrust into the Statute without regard to its harmony or fitness with the other provisions thereof. Section 11 of that Act, which is section 3519 of the Code of General Laws of Oregon, provides as follows: "The following shall be deemed cases of unlawful holding by force within the meaning of this chapter [Act]: (1) when the tenant or person in possession of any premises shall fail or refuse to pay any rent due on the lease or agreement under which he holds, or deliver up the possession of said premises for ten days after demand made in writing for such possession; (2) when, after a notice to quit as provided in this chapter [Act], any person shall continue in the possession of any premises at the expiration of the time limited in the lease or agreement under which such person holds, or contrary to any condition or covenant thereof, or without any written lease or agreement therefor."

The notice to quit, as provided in the Act is

required to be in writing, and to be served upon the tenant for the period of ten days before the commencement of the proceedings to dispossess him, unless the leasing or occupation is for the purpose of farming or agriculture; in which case it must be served for the period of ninety days before the commencement thereof. Whether it was intended by this Act to change the words of terminating estates by will or by sufferance, as provided in the former Statute, does not appear. It would seem, however, that an occupant might, in accordance with its provisions, be dispossessed by the owner of the premises while the relation of landlord and tenant still existed between them. The remedy given by the Act in such a case is eminently proper, where the tenant has failed to pay the rent due upon the lease, or continues in possession contrary to a condition or covenant contained therein, or continues in possession at the expiration of the time limited in the lease. But to summarily remove him because he is holding without any written lease or agreement therefor, where his holding is lawful (as it might be, and have no written lease or agreement), would be an outrage upon justice. I think the Act only has in view the removal of a tenant who is in by wrong, or who is doing or neglecting something in violation of his duty to his landlord, in view of the relation existing between him and the latter. The Legislature certainly did not intend by it that a tenant rightfully in possession of the premises, and who had complied with the condition of the lease or agreement under which he held, although such lease or agreement was by parol, could be so dispossessed.

The question as to the effect of the Act upon the rights of the respondent herein was not discussed by counsel at the hearing, and I should not have noticed it had not its provisions, taken literally, had so important a bearing upon the case. Estates from year to year continue for an uncertain number of fixed periods of time. Originally the fixed period of time was one year; but the term "year," as now used, is merely descriptive, and the estate includes tenancies from month to month, etc. If the rent reserved is annual, the fixed period of time is a year, though the rent be payable at stated intervals during the year. In case of yearly tenancies the English rule requires six months' notice to determine the tenancy. In America, the length of time for the notice has been variously fixed by statute. Where the letting is for a less time than one year, the period for notice is fixed by the manner of paying rent. If the rent is paid monthly, a month's notice is required, etc. If no notice is given, the tenancy continues for another term, and so on. The tendency of the court is to construe all general or doubtful tenancies into estates from year to year; and parol leases which, under the Statute of Frauds, constitute estates at will, are turned into estates from year to year by the payment and acceptance of rent, or other circumstances indicating that that is the intention of the parties. So, where the tenant holds over after the expiration of a lease for years, he will be considered as a tenant from year to year. 6 Am. & Eng. Cyclop. Law, 888, 889.

The definition here given of estates from year to year, and the description of their inci-

dents, are sanctioned by the courts and writers of text books. In order to terminate such an estate, notice must be given by one of the parties of an intention to determine it; and it follows that until such notice is given the tenant cannot be regarded as a wrong-doer. Such estates partake of the nature of an estate at will; and under the old rule, as said by this court in *Garrett v. Clark, supra*, "the tenancy would probably be deemed one merely at will." I think that it would require such a notice as specified in said § 2987, Code Gen. Laws Or., to determine them; and that, until such notice was given, no proceedings under the said Forcible Entry and Detainer Act could properly be taken. This seems to have been the view entertained by the learned circuit court, and which, in my opinion, is correct.

The judgment appealed from will be affirmed.

William CHURCH, Jr., *Appt.*,
v.
CITY OF PORTLAND, *Respnt.*

(....Or.....)

*1. In dedicating lands to the public, the dedicatory may attach such reasonable restrictions to its use by the public as he may see fit; but he

*Head notes by THAYER, Ch. J.

NOTE.—Dedication of land to public use.

A dedication to public use must be with intent to dedicate. There must be *animus dedicandi*, and when that is ascertained, whether by the express declarations and the acts of a party, or by user, it is sufficient. *Wiggins v. Tallmadge*, 11 Barb. 463; *Lade v. Shepherd*, 2 Strange, 1004; *Jarvis v. Dean*, 8 Bing. 447; *Grand Surrey Canal Co. v. Hall*, 1 Man. & Gr. 822; *Parker v. Van Houten*, 7 Wend. 145; *Galatian v. Gardner*, 7 Johns. 103; *State v. Wilkinson*, 2 Vt. 480.

Even the existence of a grantee is not essential to the validity of a dedication, nor is any particular form of words necessary to give it effect; and this principle is applicable to the dedication or appropriation of ground to be used as a square, or a public walk, landing or common. *Rutherford v. Taylor*, 38 Mo. 319; *Hannibal v. Draper*, 15 Mo. 664; *Brown v. Manning*, 6 Ohio, 286.

Where the owner of land has laid out village lots intersected with roads and public squares, such roads and public squares are dedicated to public use. *Post v. Pearsall*, 22 Wend. 435; *Pearsall v. Post*, 20 Wend. 118; *Woodyer v. Hadden*, 5 Taunt. 125; *Wyman v. New York*, 11 Wend. 486.

The same rules of law are applicable to the dedication of public squares as to the dedication of highways. *New Orleans v. U. S.* 85 U. S. 10 Pet. 714 (9 L. ed. 673); *Mankato v. Willard*, 13 Minn. 23; *Price v. Thompson*, 48 Mo. 363; *Hunter v. Sandy Hill*, 6 Hill, 407; *Mowry v. Providence*, 10 R. I. 52; *San Leandro v. Le Breton*, 72 Cal. 175; *Huber v. Gazley*, 18 Ohio, 18; *Carter v. Portland*, 4 Or. 339; *Ruch v. Rock Island*, 5 Blas. 96; *Grogan v. Hayward*, 6 Sawy. 498.

Open squares in towns are as much within the principle referred to as highways, and it has been held in numerous decisions that such squares may be dedicated to public uses. *Abbott v. Cottage City*, 8 New Eng. Rep. 775, 143 Mass. 524; *Com. v. Fisk*, 8 Met. 233, 243; *New Orleans v. United States*, 35 U. S. 10 Pet. 682, 718 (9 L. ed. 573); *Cady v. Conger*, 19 N. Y. 256, 261; *Abbott v. Mills*, 3 Vt. 521, 522; *Com.*

cannot dedicate to the public the lands of another person, for public use, without the latter's consent.

2. Proof of dedication. Where L. S. C. and W. W. C. were joint occupants of a tract of public land which had been settled upon under the regulations of the provisional government, and upon which they had laid off a town, which became the City of Portland, made a plat thereof, sold lots to each other, and to third persons, with covenants for further assurance, and had referred to such plats for a description of the lots sold, but which plat was unrecorded at the time; and subsequently, ascertaining that they could not enter the land under the provisions of the Donation Act of September 27, 1850, said parties made an agreement, under their hands and seals, in which they designated a part of the tract which should belong to each, and covenanted therein that each should fulfill and perform all contracts and agreements he had theretofore entered into with others or with either of them, or of other persons, respecting the said tract of land, or any part thereof; and subsequently, and on the 18th day of December, 1852, the said L. caused the said plat to be recorded, with a dedicatory writing, under his hand and seal attached, which was to the effect that any public square on the plat should be subject to the by-laws of a city corporation for ornamental purposes, and not otherwise; and one half of the public square shown upon said plat was upon the part of the tract agreed to be set apart to the said W. W. C.—*Held*, in view of the said agreement, and of the facts that the parties were jointly engaged in the enterprise of laying out the town, and had a common interest in its growth and development, and the recording of the plat and dedicatory writing being in furtherance of their common design, and the plat and

writing having stood upon the record for more than thirty-six years, and no dissent thereto on the part of the other parties, or of the City, appearing to have been made, that the act of L. should be considered as the act of all, and that the writing should be regarded as cogent proof of the conditions upon which the public squares were dedicated.

3. Held, further, that the building of a city hall upon such public squares, to be used for the transaction of city business, with a jail in the basement thereof, would be a use of them foreign to the purpose for which they were dedicated; and that the owners of a lot which had been purchased from the town proprietors, or either of them, and which would be affected by such appropriation, had a remedy in equity to inhibit such use.

4. Held, also, that a general dedication of the land for public squares implied that they were to be enjoyed by the public at large, and could not rightfully be appropriated by the city authorities for the use of the City in the management and conduct of its economic affairs.

(October 21, 1889.)

A PPEAL by plaintiff from a decree of the Circuit Court for Multnomah County in favor of defendant in a suit to enjoin it from erecting a building upon a public square alleged to have been dedicated for use as an open plaza. *Reversed.*

The facts are fully stated in the opinion.

Mr. William T. Muir, for appellant:

The power of the Legislature over property dedicated to a public use is not absolute. It

v. Rush, 14 Pa. 186; *Rowan v. Portland*, 8 B. Mon. 232, 248; *Bayonne v. Ford*, 43 N. J. L. 292; *Princeton v. Auten*, 77 Ill. 325; *Grogan v. Hayward*, 4 Fed. Rep. 161.

Commons are dedicated to public uses, and the original proprietors can never appropriate them exclusively to any private use. *Perkins v. Perkins*, 44 Barb. 126.

The word "park," written upon a block on a map of city property, indicates a public use, and conveyances made by the owners of the plotted land, by reference to such map, operate conclusively as a dedication of the block. *Price v. Plainfield*, 40 N. J. L. 606.

Restriction to a particular use.

Property dedicated to public use may be restricted to a particular use or such uses as are consistent with or necessary to the use as designated by the party who dedicates it. *Bayard v. Hargrove*, 45 Ga. 342; *Morrison v. Hinkson*, 87 Ill. 587; *Warren v. Lyons*, 22 Iowa, 351; *Warren v. Grand Haven*, 30 Mich. 24; *Rutherford v. Taylor*, 38 Mo. 315.

If the dedicated property be put to a use foreign to that contemplated by the dedication, any property owner may inhibit such use. *Harris v. Elliott*, 35 U. S. 10 Pet. 25 (9 L. ed. 383); *Barclay v. Howell*, 31 U. S. 6 Pet. 498 (8 L. ed. 477); *Campbell County Court v. Newport*, 12 B. Mon. (Ky.) 538; *Carter v. Portland*, 4 Or. 339; *Price v. Methodist Episc. Church*, 4 Ohio, 515; *Le Clercq v. Gallipolis*, 7 Ohio (pt. 1) 217; *Board of Education v. Edson*, 18 Ohio St. 221; *Hardy v. Memphis*, 10 Heisk. (Tenn.) 127; *Guelph v. Canada Co.* 4 Grant, Ch. 654; *Atty-Gen. v. Goodrich*, 5 Grant, Ch. 402.

A street cannot be enclosed so as to bar the rights of the public represented by a city. *Jersey City v. Morris Canal & Bkg. Co.* 12 N. J. Eq. 547, 561.

The grounds of the doctrine were discussed at

6 L. R. A.

length, and reasserted in *Cross v. Morristown*, 18 N. J. Eq. 805, 811; and it has since been considered the settled doctrine in this State. *State v. Morristown*, 33 N. J. L. 57; *Tainter v. Morristown*, 19 N. J. Eq. 46; *State v. Trenton*, 36 N. J. L. 198, 201; *Price v. Plainfield*, 40 N. J. L. 614.

Estate created by dedication.

Cases of dedication rest upon the principle of estoppel *in pais*, it being considered fraudulent on the part of one dedicating his land to public uses to retract, to the prejudice of parties who have purchased on the faith of such dedication. *Wood v. Seely*, 32 N. Y. 116.

It is not competent for the party making a dedication to reassert any right over the land, at all events, so long as it remains in public use. *Adams v. Saratoga & W. R. Co.* 11 Barb. 450; *Re Lewis Street*, 2 Wend. 472.

Where the owner of a tract of land lays it out into lots, and intersects it with a street or alley, obviously for the convenience of the lots, and purchases are made in reference to such convenience, there is created in the owners an easement in the street or way which cannot be recalled. *Wiggins v. McCleary*, 49 N. Y. 848; *Adams v. Saratoga & W. R. Co.* 11 Barb. 450; *Bissell v. New York Cent. R. Co.* 23 N. Y. 61.

If the premises to which the right of way attached are divided, the right of way passes to each portion into whosever hands it may come, but only so far as applicable to such portion. *Dawson v. St. Paul F. & M. Ins. Co.* 15 Minn. 136, 2 Am. Rep. 118; *Watson v. Bioren*, 1 Serg. & R. 227; *Underwood v. Carney*, 1 Cush. 235.

A charge upon the estate or property of the servient tenement follows it into the hands of any person to whom such tenement, or any part thereof,

may regulate the use of such property or promote its improvement, but cannot divert or subject it to any use clearly inconsistent with the contract of dedication. And upon such diversion any person interested would be authorized to institute proper proceedings to enjoin it.

Portland & W. V. R. Co. v. Portland, 14 Or. 189, 196, 197; *Carter v. Portland*, 4 Or. 339; *Price v. Thompson*, 48 Mo. 361; *Pensacola & G. R. Co. v. Spratt*, 12 Fla. 26, 91 Am. Dec. 747; *Robeson v. Pittenger*, 2 N. J. Eq. 57, 32 Am. Dec. 412; *Whitfield v. Rogers*, 26 Miss. 84, 59 Am. Dec. 244; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540; *Alves v. Henderson*, 16 B. Mon. 168; *Hemphill v. Boston*, 8 Cush. 197; *Com. v. Rush*, 14 Pa. 186.

Equity may prevent a threatened injury.

Coalter v. Hunter, 4 Rand. 58, 15 Am. Dec. 726; 8 Pom. Eq. Jur. § 1851; *Corning v. Lowerre*, 6 Johns. Ch. 439; *Watertown v. Cowen*, 4 Paige, 510.

The word "square," as a term of dedication, imports complete and unrestricted abandonment to public use, either for purposes of a free passage or to be ornamented and improved for grounds of pleasure, amusement, recreation or health.

Hoboken M. E. Church v. Hoboken, 38 N. J. L. 13, 97 Am. Dec. 696; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540.

The word public "square," without more, means place to be kept open.

Com. v. Rush, 14 Pa. 189; *Barclay v. Howell*, 31 U. S. 6 Pet. 498 (3 L. ed. 477); *Ellicott v. Pearl*, 85 U. S. 10 Pet. 412 (9 L. ed. 475); *Watertown v. Cowen*, 4 Paige, 510-515; *Warren*

v. Lyons, 22 Iowa, 351-353; *Princeville v. Auten*, 77 Ill. 325-329; *Macon v. Franklin*, 12 Ga. 239; *Com. v. Bowman*, 3 Pa. 206.

The intention of the dedicatory must control. *Portland & W. V. R. Co. v. Portland*, 14 Or. 189, 197; *Price v. Thompson*, 48 Mo. 365; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540; *Hoboken M. E. Church v. Hoboken*, 38 N. J. L. 13, 97 Am. Dec. 696; *Hemphill v. Boston*, 8 Cush. 195, 54 Am. Dec. 749; *Godfrey v. Alton*, 12 Ill. 29, 52 Am. Dec. 476; *Elizabethtown, L. & B. S. R. Co. v. Combs*, 10 Bush, 387; *Warren v. Lyons*, 22 Iowa, 351; *Baker v. Johnston*, 21 Mich. 344, 347; *Com. v. Rush*, 14 Pa. 186, 188, 189, 190.

When the object of the dedication is specifically stated, it must be so construed as to carry into effect the purpose intended.

Com. v. Rush, 14 Pa. 189, 190.

The Legislature cannot extinguish public use in property dedicated.

Hoboken M. E. Church v. Hoboken, 38 N. J. L. 13, 97 Am. Dec. 696; *Alton v. Illinois Transp. Co.* 12 Ill. 60; *Jacksonville v. Jacksonville R. Co.* 67 Ill. 540; *Portland & W. V. R. Co. v. Portland*, 14 Or. 189.

Nor can it divert a square for uses foreign to dedication.

Warren v. Lyons, 22 Iowa, 351.

Great weight has always been attached, and very rightly attached, to contemporaneous exposition.

Cohens v. Virginia, 19 U. S. 6 Wheat. 264, 418 (5 L. ed. 257). See also *Cooley*, Const. Lim. 5th ed. pp. 81, 82.

Admitting a necessity for the purchase in or

is subsequently conveyed. *Weyman v. Ringold*, 1 Bradf. 55.

And the lots, being bounded by public streets, extend to the center of the street as a legal presumption. *Adams v. Rivers*, 11 Barb. 363.

The right secured by dedication is an incorporeal hereditament; it becomes at once appurtenant to the lot, and forms "an integral part of the estate" in it. It follows the estate and constitutes a perpetual incumbrance upon the land burdened with it. From the moment it attaches, the lot becomes the dominant, and the open way or street the servient, tenement. *Story v. New York Elevated R. Co.* 90 N. Y. 145; *Child v. Chappell*, 9 N. Y. 246; *Watertown v. Cowen*, 4 Paige, 514; *Hills v. Miller*, 3 Paige, 256; *Brewer v. Marshall*, 18 N. J. Eq. 345. See generally *Atty-Gen. v. Tarr*, 2 L. R. A. 87, note, 148 Mass. 309; *Harrison County v. Seal* (Miss.) 3 L. R. A. 650, note; *Clarke v. Providence (R. I.)* 1 L. R. A. 725; *Meier v. Portland Cable R. Co.* 1 L. R. A. 856, 18 Or. 500.

Presumption of dedication from user.

The length of time necessary to raise a presumption of dedication from user must depend upon the circumstances of each particular case; no absolute rule can be laid down to govern it; but where the only evidence of dedication is user by the public, unaccompanied by any circumstance or act indicating an intention to dedicate, or where the public or individuals have not acted upon the acquiescence in such a way that its retraction would materially affect the public accommodation and private rights, and thus evince bad faith in the owner, such user, from analogy to the Statute of Limitations, must be for twenty years to establish the public right. *Wood v. Hurd*, 34 N. J. L. 91; *Smith v. State*, 23 N. J. L. 130; *Holmes v. Jersey City*, 12 N. J. Eq. 209; *Central R. Co. v. State*, 32 N. J. L. R. A.

J. L. 220; *Hoole v. Atty-Gen.* 23 Ala. 190; *State v. Snedeker*, 30 N. J. L. 80; *Jersey City v. Morris Canal & Bkg. Co.* 12 N. J. Eq. 547; *Irwin v. Dixon*, 50 U. S. 9 How. 10 (13 L. ed. 25).

A plea of a public prescriptive right has been extended to a public square and to a burying-ground. *Gardiner v. Tisdale*, 2 Wis. 153, 60 Am. Dec. 417.

Effect of dedication to public use.

The principal effects of a dedication of squares to the use of the public are plain and obvious. The naked fee of the land remains in the original proprietors, and the public acquire an easement merely, coextensive with the purposes to which such open squares in populous towns are usually appropriated; and where there is a corporation to represent the public, and take charge of its interests, the easement vests in such corporation, which thus becomes the trustee of a use. *Anderson v. Rochester, L. & N. F. R. Co.* 9 How. Pr. 558.

By the dedication, the city acquired the right to open the square and, having performed the condition on which it was limited, became seised of the entire legal estate subject to the trust. *New York v. Stuyvesant*, 17 N. Y. 43.

All the united and consolidated power became vested in the corporation. *Cammeyer v. United Lutheran Churches*, 2 Sandf. Ch. 221.

It would seem that if the corporation were to recognize and regulate the space as and for a public street, it would be bound thereafter to let it remain so. *Schermerhorn v. New York*, 3 Edw. Ch. 180.

Common right of residents.

Residents of the village have a common interest with each other and with the village itself, in preventing any obstruction to the use of the public square dedicated for the purposes of a park. *May-*

der to cut off a claim of title which might be advanced by Chapman, still the City thereby acquired no right to alienate or use the property for purposes other than those designated in the dedication.

Coffin v. Portland, 16 Or. 77, 82.

Mr. W. H. Adams for respondent.

Thayer, Ch. J., delivered the opinion of the court:

In this case the appellant filed his complaint to enjoin the respondent, a municipal corporation, from entering upon and building a city hall, with a city jail in the basement thereof, upon block 54, in the City of Portland, claiming that said block, and also block 53, adjacent thereto, were both dedicated to, and accepted by, the City as a "public square," for the use of the inhabitants thereof, and the public generally, as an open plaza, and it was to be kept and maintained as open ground, to be planted with trees and otherwise ornamented, as a place for public gatherings and outdoor recrea-

tion. It is alleged in the complaint that said blocks are a part of a certain tract of land which was formerly in the joint occupation of Daniel H. Lowndsale, Stephen Coffin and W. W. Chapman, who claimed to be the owners thereof, and who subsequently obtained a patent to it in severalty from the United States under the Act of Congress of September 27, 1850, known as the "Donation Law." That said Lowndsale, Coffin and Chapman, while in possession of said tract of land as aforesaid, caused a survey thereof to be made into blocks, lots, streets, parks and other public grounds, and caused a map or plat thereof to be made, commonly known as the "Brady Map," and sold lots and blocks by reference to that map. That the appellant is a resident of said City, and is now the owner of lot 4, in block 59, which is a part of said tract of land. That said lot is upon the opposite side of the street from said block 53, and was for a valuable consideration sold and conveyed by said Lowndsale and others to Charles Hubbard on

wood Co. v. Maywood, 5 West. Rep. 534, 118 Ill. 73; Green v. Oakes, 17 Ill. 251; Gage v. Chapman, 56 Ill. 811; 2 Story, Eq. Jur. § 924.

Owners of separate dwellings, which are all injured by a single nuisance, of which the defendant was the author, could all unite and obtain full relief of injunction and removal by one decree. *Kensington v. White*, 3 Price, 164; *Mills v. Campbell*, 2 Younge & C. (Exch.) 389; *Reid v. Gifford*, Hopk. 416; 1 Pom. Eq. 273; *Bushnell v. Robeson*, 62 Iowa, 540; *Robinson v. Baugh*, 81 Mich. 290; *Brandriff v. Harrison County*, 50 Iowa, 164; *Robbins v. Sand Creek Turp. Co.* 34 Ind. 461.

Each of the complainants would have had the right to file a bill to restrain the nuisance, which was a special injury to his individual property. But as the relief sought was the same as to all the complainants, there certainly was no good reason for compelling them to file several bills to protect their common right against acts of the defendant, which were injurious to all of them. *Murray v. Hay*, 1 Barb. Ch. 64, 43 Am. Dec. 776.

Rights of purchaser of lot designated on plat.

The purchaser of a lot upon a street so dedicated acquires a perpetual and indefeasible right of access to his lot over the same, or at least over so much as leads from his lot to the next adjoining public street on each side, whether the same be accepted and adopted by the public as a highway or not, and retains it, if, after acceptance, the same be abandoned by the public as a public highway. *Atty-Gen. v. Morris & R. R. Co.* 19 N. J. Eq. 394.

Enjoyment of easement protected by injunction.

Equity has jurisdiction to restrain by injunction erections on servient lands, in violation of an easement or right of enjoyment in respect of such lands, attached or belonging to adjoining premises. *Seymour v. McDonald*, 4 Sandf. Ch. 508; *Ravenswood v. Fleming*, 22 W. Va. 52, 46 Am. Rep. 501; *St. Paul & P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 277 (19 L. ed. 74); *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 (19 L. ed. 984).

Where an easement or servitude is annexed to a private estate, the due enjoyment of it will be protected by injunction against encroachment or invasion. *Wheeler v. Gilsey*, 35 How. Pr. 148; *Cornif v. Lowerre*, 6 Johns. Ch. 439; *Tallmadge v. East River Bank*, 26 N. Y. 105; *Lawrence v. New York*, 2 Barb. 560; *Oakley v. Williamsburgh*, 6 Paige, 263.

Upon application of the government, courts of 6 L. R. A.

chancery will exercise their authority to restrain the placing of obstructions in or upon public highways, streets, bridges, grounds or navigable waters. *Metropolitan City R. Co. v. Chicago*, 96 Ill. 627; *Atty-Gen. v. London*, 8 Beav. 270; *Atty-Gen. v. Richards*, 2 Anstr. 603; *Atty-Gen. v. Forbes*, 2 Myl. & C. 123; *Atty-Gen. v. Galway*, 1 Molloy, 107; *Georgetown v. Alexandria Canal Co.* 37 U. S. 12 Pet. 93 (9 L. ed. 1013); *United States v. Duluth*, 1 Dill. 469; *People v. St. Louis*, 10 Ill. 351.

So equity may enforce the execution of the plainly declared trust either upon the application of the owners of lots abutting upon the square, or upon application of the city, the trustee. *Jacksonville v. Jacksonville R. Co.* 67 Ill. 544.

A city never loses its right to protect the right of the public in property in which there is a public easement, by reason of an adverse possession. Unauthorized acts of exclusive possession by any party upon a street or public square is a nuisance which no time will legalize without statutory aid. *Price v. Plainfield*, 40 N. J. L. 614.

Action for interference with easement.

Unless a private person has acquired in some legal way an interest in such easement, from the person dedicating the land, he cannot maintain an action against a person or corporation, interfering with or disturbing such easement, unless he sustains thereby some special and peculiar damage, which is not sustained by the great mass of the inhabitants. *Burnet v. Bagg*, 67 Barb. 164.

Where it sufficiently appears that the plaintiff is one of the inhabitants of the town, living and holding property contiguous to the square, the value of which is affected by the dedication, he is entitled to a remedy for the protection both of his individual and of his common interests. *Brown v. Manning*, 6 Ohio, 305, 27 Am. Dec. 257, citing *Brown v. Ricketts*, 4 Johns. Ch. 303; and see *Beatty v. Kurtz*, 27 U. S. 2 Pet. 585 (7 L. ed. 523); *Brown v. Vermuden*, 1 Ch. Cas. 272; *York v. Pilkington*, 1 Atk. 234; *Leigh v. Thomas*, 2 Ves. Sr. 312; *Hendricks v. Robinson*, 2 Johns. Ch. 226; *Grosvenor v. Austin*, 6 Ohio, 112; *Thompson v. Brown*, 4 Johns. Ch. 619; *Brown v. Ricketts*, 4 Johns. Ch. 553; *Sherritt v. Birch*, 3 Bro. Ch. 229; *Lloyd v. Loaring*, 6 Ves. Jr. 779; *Adair v. New River Co.* 11 Ves. Jr. 429; *Palk v. Clinton*, 13 Ves. Jr. 48.

That is so, notwithstanding the grantors with whom the agreement or covenant was made had released it to the purchasers. *Brouwer v. Jones*, 23 Barb. 161.

or about the 12th day of February, 1850, under and through whom, by regular and mesne conveyances, the appellant has become, and now is, the owner thereof. That said City of Portland is situated, in large part, on said tract of land. That at a meeting of the common council of said City, held on the 29th day of April, 1852, among other business transacted, the following resolution was passed: "Resolved, That the city council of Portland adopt the plat of said City drawn by John Brady as the city plat; and that the mayor appoint a select committee, with instructions to call upon the proprietors of the City of Portland, and obtain from them a bond or deed of all the public streets in said City, and a deed of trust for all the land donated to benevolent societies, public schools, public squares," etc. And by an ordinance approved February 27, 1869, entitled "An ordinance adopting a map showing the plan of the streets, blocks and public property in the City of Portland," it was recited and ordained as follows:

"Whereas, the common council of the City of Portland, at its regular meeting held April 29, 1852, adopted the map commonly known as the 'Brady Map' as the plan of streets, blocks and public property; and whereas, since that date, several additions have been made to the City; and whereas, a complete plan of all the streets, blocks and public property has been made by order of the common council by C. W. Burrage, and submitted at a meeting of the common council held July 18, 1866: Now, therefore, the City of Portland does ordain as follows: Section 1. That the map of the City of Portland surveyed and drawn by order of the common council by C. W. Burrage, city surveyor, 1866, be, and is hereby, adopted as the official map of this City, showing the plan of the streets, blocks and public property within the city limits. Sec. 2. That the auditor and clerk be, and is hereby, directed to attach to said map a certified copy of this ordinance, and cause said map and ordinance to be recorded in the records of deeds in the office of the county clerk of Multnomah County, Oregon."

That upon said Burrage map said blocks 53 and 54 were each marked and designated by the words "Public Square," and recognized by said City as having been set apart and dedicated by said Lownsdale and Chapman to the use of the public, as aforesaid, and that said City had planted trees therein, and otherwise improved the same, as and for public parks and open plazas. That all of the said improvements were made by the said City in pursuance of ordinances duly passed by its common council, and approved by its mayor, in which ordinances the said blocks 53 and 54 were referred to and designated as the "Public Square," and as the "Plaza."

That neither of said blocks has ever been built upon, or made use of, otherwise than as a public park or open plaza, having said shade trees growing thereon, and as ground devoted to public use and adornment, and as a place for public meetings and for outdoor recreation on the part of such of the inhabitants of said City, and of the public generally, as might choose to resort thereto for such purposes; and that appellant, and each of his predecessors in title

to said lot 4, in block 59, bought said lot, and took a conveyance thereto upon the faith, and in the expectation and belief, that said blocks 53 and 54 were each so dedicated to, and accepted by, said City. But that, notwithstanding, the common council of the City, on the 19th day of April, 1889, resolved to build and erect a city hall on the west half of said block 54, and authorized and empowered the committee on ways and means to act in breaking ground thereon for the foundation of said building, and that said committee were threatening and intending so to do, and had caused the city surveyor to make a survey thereof, and set stakes preparatory to digging up and excavating the ground for the construction and erection of such city hall; and, unless enjoined from so doing, the City will cut down the shade trees on said west half of said block 54, and will proceed immediately to erect thereon a building for a city hall. That the plans and specifications for said building, adopted by said City, provide that the basement story thereof shall be finished and completed as and for a city jail; and, if the said city hall be erected, said basement story thereof will be so finished and completed, and will be used as a public jail, wherein will be confined prisoners awaiting trial for crimes against the laws of the State, as well as persons convicted of violating city ordinances.

The complaint also contains the usual allegations of damage and irreparable injury which will result in case the respondent is not restrained from doing the acts referred to. It also appears therefrom that the west half of each of said blocks 53 and 54 is situated upon that part of said tract of land patented to said W. W. Chapman, and the east half thereof upon the part patented to the said David H. Lownsdale. It further appears from the complaint that on or about the 21st day of September, 1870, the common council of the City passed the following ordinance, to wit:

"Ordinance No. 861. An ordinance to provide for quieting the title to certain portions of public property. Whereas, it is deemed expedient to quiet and perfect the titles to certain pieces of land heretofore dedicated to the use of the City of Portland as public parks and squares; and whereas, W. W. and M. F. Chapman have proposed to convey to the City any interest they may have, whether of dower or otherwise, in property so dedicated, especially the west half of blocks No. 53 and 54, and the blocks known on the map as 'Park Blocks,' lying between Salmon and Mill Streets: Now, therefore, the City of Portland does ordain as follows: Section 1. That the standing committee of the common council on streets and public property be, and are hereby, authorized and empowered to negotiate with W. W. and M. F. Chapman for a deed conveying all their interest, whether of dower or otherwise, in the west one half of blocks number 53 and 54, and the seven blocks known as 'Park Blocks,' lying between East and West Park Streets and Salmon and Mill Streets, provided that the consideration therefor, including expense connected therewith, shall not exceed \$6,400."

That, pursuant to said ordinance above recited, the said purchase was made, and a deed of conveyance from the said W. W. and M.

F. Chapman was executed to the City of Portland. A copy of the "Brady Map," together with an abstract of all the deeds and conveyances affecting said blocks 53 and 54, was filed with said complaint as an exhibit. The demurrer to the complaint was upon the general ground that it did not state facts sufficient to constitute a cause of suit.

No argument was, as we are informed, had upon the merits of the case before the circuit court, and its decision in sustaining the demurrer was only formal. Counsel for the respective parties have attempted to make an agreed case herein, by stipulating that the demurrer admits all the matters and things alleged in the complaint, and that the complaint is an agreed statement of undisputed facts in the case. I do not think, therefore, that the stipulation changes the status of the case, as an agreed case must be made up in the manner prescribed by the Code.

The question before us is as to the sufficiency of the complaint to constitute a cause of suit. Said blocks 53 and 54 are indicated upon the Brady map as "public squares;" but the complaint is very ambiguous as to the time when said map was made, and the circumstances attending the affair. It appears that on the 9th day of December, 1852, a plat of D. H. Lownsdale's claim was delivered to the clerk and recorder of Washington County for record; that it included a map or plat of the original Town of Portland, which map or plat is conceded to have been the "Brady Map;" that said plat of D. W. Lownsdale's claim was on the 16th day of December, 1852, recorded in the office of said clerk and recorder; that a writing was attached to said plat, bearing date December 8, 1852, purporting to be under the hand and seal of the said Lownsdale; that by the terms of said writing the use and control of said blocks were expressly restricted. It is evident, however, that said map was in existence prior to that time, as the common council of the City adopted it as the city plat on the 29th day of April, 1852.

The contention between the counsel is not, however, as to the fact that the blocks were dedicated as a "public square," but it is as to the restriction of their use and control by the city authorities. If the owners of the land set the blocks apart to remain open grounds, subject to the control of the city authorities only for the purpose of being ornamented, as would appear from the dedicatory writing attached to the said plat, then the City has no ground whatever to claim the right to erect the proposed city hall thereon. The owners of the land had a right to restrict the use of it by the public to any reasonable extent which they saw fit. But the respondent's counsel insists that, as Lownsdale alone signed said dedicatory writing, the restriction contained therein, of the use and control of any public square, did not affect the west half of said blocks, that portion thereof being upon Chapman's donation land claim. Lownsdale, of course, had no authority to limit the public use of any land belonging to Chapman; but the latter could hardly pretend that he owned, at the time, a distinct interest in the tract of land, consisting, in the main, of the town-site of the City of Portland.

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The complaint and exhibits filed herein show that the claim which was known as the "Portland Claim" was settled upon and occupied under the laws of the provisional government. That Lownsdale purchased the possessory right to it from Pettygrove in 1848, and in September of that year had it recorded in his own name in the territorial record books. That Coffin and Chapman subsequently became interested with Lownsdale in the claim; but that the record title thereto still remained in the latter. That the parties afterwards ascertained that they could not jointly enter the claim under the provisions of the Donation Act, and therefore made the agreement of March 10, 1852, known as the "Escrow," by the terms of which the said parties each severally covenanted, among other things, that he would fulfill and perform all contracts and agreements which he had theretofore entered into with the others, or either of them, or with other persons, respecting the said tract of land, or any part thereof. They had laid out the town and had a common interest in its growth and development. It was an enterprise which they had jointly undertaken, and in which they had a community of interest. Each of them may be presumed to have incurred obligations in the sale of lots, in the transaction of business relative to the laying out of the town, which, according to the terms of the escrow, he was required to fulfill and perform. Under such circumstances, said parties should not be regarded as strangers to each other; but the act of one, in carrying out the common object, should be considered as the act of all, especially where there is nothing showing any dissent from it upon the part of the others. Said dedicatory writing has stood recorded in the records of the county for more than thirty-six years; it is signed by one of the town proprietors; and neither of the other two, nor the City of Portland, is shown to have ever made any objection to it. It seems to me, therefore, that the writing should be regarded as cogent proof that the parties, in making the map, intended that blocks 53 and 54 should remain open plazas, and that the city authorities should have no control over them, further than to ornament and protect them.

But counsel for the respondent contend that if said blocks were dedicated to the City "for ornamental purposes, and not otherwise," as provided in said dedicatory writing, it does not mean that they were to be kept and preserved as open plazas forever, and in no other way; that the language is too vague and uncertain to have such effect; that the ground may as well be ornamented with public buildings as with public seats, shade trees and walks; that the fact that, by the same writing, lots and blocks of ground were dedicated for churches and school-houses, as well as for "parks" or "plazas," but none for public buildings, unless it was intended that these "public squares" might be so appropriated and used, is strongly indicative of the intention of the dedicators that they might be "ornamented" with public buildings if the city authorities should so determine; that a grant is construed most strongly against the grantor where the intention is doubtful, and that, in reason, the same rule must apply in case of a dedication to public use; that the

intent to restrict the use to a particular purpose must be plainly expressed, to deprive the proper municipal authority of the right to devote the property to such use as may appear to be most beneficial to the public.

I do not think that the language, in said dedicatory writing, that the blocks were dedicated to the City for ornamental purposes, and not otherwise, is vague or uncertain. It restricts their use to the one purpose, and provides, in effect, that they shall not be used for any other. The city authorities do not propose to use the blocks for ornamental purposes, but for the direct private benefit of the City. Using land to erect a public building thereon is not using it for ornamental purposes, however grand or magnificent the structure erected may be. It devotes the land to a useful purpose; but it certainly is not using it for an ornamental one. Building a private dwelling upon a spot of ground may have the effect to ornament it very much; but nevertheless the dwelling is not erected for ornamental purposes. It is built to afford shelter, protection and convenience to the owner or occupant. The argument which would admit of the city authorities building a city hall upon said blocks would also admit of their building thereon engine-houses, pauper-houses, pest-houses and every kind of structure which the city authorities might determine to be ornamental. Nor do I see any force in the argument that the fact that lots and blocks of ground were dedicated in the same writing for churches and school-houses, as well as for "parks" and "plazas," but none for public buildings, is indicative of the intention of the dedicators that the blocks dedicated for "public squares" might be ornamented with public buildings, if the city authorities should so determine. The dedication for churches and school-houses, as shown by the writing, is full and explicit. It is as follows: "C Church appropriated to the Congregational Church; No. 28, N. † B. Church appropriated to the Baptist Church; No. 62, N. † district school block 211." There is no vagueness or uncertainty about these dedications; and, if the town proprietors had intended to dedicate said blocks 58 and 54 as a site for public buildings, they would doubtless have been equally explicit. I cannot understand how the city authorities are able to suppose that any such use of the blocks in question was intended.

The City of Portland was no mendicant, nor was it expected to be. It has always been able to buy necessary and suitable grounds upon which to erect its public buildings; and it should do so, and not attempt to encroach upon its public squares, which were clearly intended to be left open and unoccupied for the health, comfort and recreation of its inhabitants. The argument of the respondent's counsel, that the dedicators intended that the blocks might be ornamented with public buildings, if the city authorities should so determine, if maintained, would be liable to lead to absurd consequences. One set of city officials might hold to one policy, and another set to a contrary one, and each act lawfully. The city authorities of to-day might determine that the blocks should be ornamented with public buildings, and proceed to erect them at a great expense;

which would be entirely consistent with the intention of the dedicators. The city authorities of next year may conclude that the blocks should be ornamented only with walks, rustic seats, trees, grass, flowers, fountains, statues and mementoes of heroic deeds, and, in order to carry out the latter mode of ornamentation, proceed to tear down the edifices erected by their predecessors; which would be equally consistent with the intention of the dedicators. I do not think that the court would be justified in adopting any such view.

The rule in regard to property dedicated for public use, as laid down in 5 Am. & Eng. Cyclop. Law, 417, 418, is as follows: "Property dedicated to the public use may be said to be restricted to the use for which it was fairly intended to be dedicated; although this rule is construed to include such uses as are consistent with, or necessary to, the principal use. If dedicated property be put to a use foreign to that contemplated by the intention and purpose of the dedication, then not only the dedicator, but any property owner, will have his remedy in equity to enforce the proper use, and inhibit an improper one."

The questions to be determined herein are: For what use were the blocks intended to be dedicated? and, Will the construction of the building which the common council of the City propose to erect thereon be consistent with the purpose of the dedication? That the blocks were intended to remain open plazas, and be beautified and adorned by the hand of art, I do not think there can be any doubt. Spots of that character, especially in large cities, are highly important. They afford healthful and pleasant resorts in the heated season, and are in fact the only places where a large class of the community are able to go and enjoy the blessings and comfort of shade and pure air; and any attempt on the part of public officials to appropriate them as a site for public buildings, in which to conduct the economic affairs of a city, under any pretext whatever, would, as I view it, be a cruel effort to subvert a humane scheme. The building of a city hall, with a jail in the basement thereof, upon the said block, as the common council propose to do in this case, would, in my judgment, be a use of it foreign to the purpose for which it was dedicated, and should not be permitted.

Said counsel also claims that the City accepted the Brady map before said dedicatory writing was attached to it, and that the town proprietors had no right, after the acceptance, to attempt to restrict the use of the blocks as therein provided. The City did not accept the map in terms. The common council, by the resolution of April 29, 1852, adopted the plat drawn by John Brady as the city plat; and the resolution provided that the mayor appoint a select committee, with instructions to call upon the proprietors of the City, and obtain from them a bond or deed of all the public streets in the City, and a deed of trust for all the land donated to benevolent societies, public schools, and for public squares, etc. Whether the mayor ever appointed any such committee, or whether any such committee ever conferred with the town proprietors upon the subject, does not appear. The probabilities, however, are that the committee was appointed, and that

the subsequent recording of the Brady map, with the dedicatory writing attached, was the result of such conference. But, if said writing had never been executed, I do not see that it would have made any difference. The blocks were indicated on the map as public squares; which implied, of course, that they were to be enjoyed as such by the public at large, and not be appropriated and used by the City in the management and conduct of its affairs. The use of them in the way proposed would necessarily exclude the public from the use of them, except for the transaction of city business; but that privilege can be enjoyed wherever the buildings may be located. The act of building the city hall in question would virtually be a

purpresture. The City would be making that several to itself which ought to be common to many.

The complaint is very loosely drawn in many particulars, and should have been made more definite and certain, but I do not think a demurrer to it upon the ground that it did not state facts sufficient to constitute a cause of suit should have been sustained.

The decree appealed from will therefore be reversed, and the case remanded to the circuit court, with directions to overrule the demurrer, and to enter a decree in accordance with the prayer of the complaint, unless good cause is then shown for allowing the respondent to answer in the suit.

ILLINOIS SUPREME COURT.

John R. TRUE, Treasurer, etc., *Appt.*,
v.

George R. DAVIS, Treasurer, etc.

(.....ILL.....)

The annexation of two or more cities, incorporated towns or villages to each other, all of which are indebted, the indebtedness of some being in excess of the limit allowed by Const., art. 9, § 12, is not prohibited by the provisions of that section that no municipal corporation shall become indebted to an amount "in the aggregate exceeding 5 per cent on the value of the taxable property therein;" and that any such corporation incurring indebtedness "shall provide for the collection of a direct annual tax" for the payment of the same.

(October 23, 1889.)

A PPEAL by petitioner from a judgment of the Circuit Court for Cook County in favor of defendant in a proceeding to compel defendant, as treasurer of Cook County, by mandamus to pay over to petitioner, as treasurer of Lake View City, all taxes collected for the account of said city. *Affirmed.*

The defendant demurred to the petition and

it was dismissed by the court on the ground that the City of Lake View had been annexed to the City of Chicago and hence had no legal existence, and that the City of Chicago was entitled to receive the taxes. Petitioner contended that the annexation was unconstitutional.

The case further appears in the opinion.

Mr. Edward Maher, with *Messrs. John S. Cook* and *John N. Jewett*, for appellant.

Mr. Francis Adams for appellee.

Per Curiam:

The public welfare, within the territory over which the City of Chicago is now exercising municipal authority, so manifestly demands an early and final decision of the question discussed upon this record that we forbear all inquiry as to the appropriateness of the proceeding to present that question, and assume that it is properly before us for decision, and proceed to give our conclusion thereon, and enter judgment in the case, without that delay that might, but for this urgency, be desirable for a careful presentation of the reasons which have led to our conclusion.

The question may be stated thus: Does the

NOTE.—Municipal corporation, annexation of territory.

With the exception of certain constitutional limitations the power of the Legislature over the public corporations is supreme and transcendent; it may erect, change, divide, and even abolish, them, at pleasure, as it deems the public good to require. *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518 (4 L. ed. 629); *Allen v. McKean*, 1 Sumn. 276; *People v. Morris*, 13 Wend. 325; *Penobscot Boom Corp. v. Lamson*, 16 Me. 224; *Yarmouth v. North Yarmouth*, 84 Me. 411; *Story*, Const. §§ 1385, 1388; *North Yarmouth v. Skillings*, 45 Me. 133; *Girard v. Philadelphia*, 74 U. S. 7 Wall. 1 (19 L. ed. 53); *Jersey City v. Jersey City & B. R. Co.* 20 N. J. Eq. 360; 1 Dillon, Mun. Corp. 139.

A municipal corporation, in which is vested some portion of the administration of the government, may be changed at the will of the Legislature. *Piqua Branch Bank v. Knoop*, 57 U. S. 16, How. 369, 380 (14 L. ed. 977).

The special powers conferred upon them may at any time be repealed or abrogated by the Legislature, either by a general law operating upon the

whole State, or by a special Act altering the powers of the corporation. *Sloan v. State*, 8 Blackf. (Ind.) 361, approving *People v. Morris*, 13 Wend. 325; *Armstrong v. Dearborn Co.* 4 Blackf. (Ind.) 208.

It is no constitutional objection to the exercise of the power of compulsory annexation, that the property thus brought within the corporate limits will be subject to taxation to discharge a pre-existing municipal indebtedness, since this is a matter which, in the absence of special constitutional restriction, belongs wholly to the Legislature to determine. *Girard v. Philadelphia*, *supra*; *Elston v. Crawfordsville*, 20 Ind. 272; *Edmunds v. Gookins*, Id. 477; *Morford v. Unger*, 8 Iowa. 82; *Burlington & M. R. Co. v. Spearman*, 12 Iowa, 112; *Cheaney v. Hooser*, 9 B. Mon. 380; *Layton v. New Orleans*, 13 La. Ann. 515; *Arnoult v. New Orleans*, 11 La. Ann. 54; *Gorham v. Springfield*, 21 Me. 59; *Opinion of Justices*, 6 Cush. 590; *Warren v. Charlestown*, 2 Gray, 104; *Chandler v. Boston*, 112 Mass. 200; *St. Louis v. Russell*, 9 Mo. 503; *St. Louis v. Allen*, 13 Mo. 480; *Smith v. McCarthy*, 55 Pa. 350; *Norris v. Smithville*, 1 Swan (Tenn.) 164; *Wade v. Richmond*, 18 Gratt. (Va.) 583; 1 Dillon, Mun. Corp. 248.

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prohibition of section 12, article 9, of the Constitution prevent the annexation of two or more cities, incorporated towns or villages to each other, in the manner provided by the provisions of the Act entitled "An Act to Provide for the Annexation of Cities, Incorporated Towns or Villages, or parts of the Same, to Cities, Incorporated Towns and Villages," approved and in force April 25, 1889 (Laws 1889, p. 66; Ill. Rev. Stat. ed. 1889, chap. 24, § 211), when such cities, incorporated towns or villages are each indebted, and the indebtedness of one or more of them exceeds the limit named in that section? We answer, in our opinion it does not.

The language of the section, so far as material to be now stated, is: "No . . . city . . . or other municipal corporation shall be allowed to become indebted in any manner, or for any purpose, to an amount . . . in the aggregate exceeding five per centum on the value of the taxable property therein; . . . and any . . . city . . . or other municipal corporation incurring any indebtedness as aforesaid shall, before or at the time of doing so, provide for the collection of a direct annual tax," etc.

It thus appears that the duty to levy the tax is inseparable from the power to incur the debt; and so, in every case contemplated by the section, that duty must be performed by the same agency that incurs the debt; and this can only be the corporate authorities of the municipality who are empowered by its charter to create debts for and on its behalf, and levy taxes for their payment. But where two or more municipalities are annexed to each other, pursuant to the Statute, and thus form one municipality in the place and stead of the several that are thus united, it is manifest the resulting municipality does not become the owner of all the property of the several united municipalities, and bound to pay all of their debts, by virtue of any act of its municipal agencies, or of those of either of the united municipalities, but by virtue alone of the Statute, and a majority vote of the electors of each of the united municipalities, at an election held pursuant thereto.

A municipal corporation is purely of legislative creation, for local government in places where it is presumed the public welfare will be subserved thereby. Our Constitution contains no restriction as to the organization of cities, towns and villages, or the changing and amending or repeal of their charters, and consequently no restriction in respect to uniting or dividing or annulling them, save only that it cannot be by local or special law, but must be by a general law; and it is familiar law that, in the absence of constitutional restriction, the Legislature may provide for the organizing, uniting, dividing or annulling such corporations, in such manner as it shall deem best to promote the public welfare. *Morgan v. Beloit*, 74 U. S. 7 Wall. 618 [19 L. ed. 203]; *Thompson v. Abbott*, 61 Mo. 176; *Colchester v. Seaber*, 3 Burr. 1866; *Mount Pleasant v. Beckwith*, 100 U. S. 514 [25 L. ed. 699].

"Persons residing in or inhabiting a place to be incorporated, as well as the place itself, are,"—says Dillon,—“both the persons and the place,—indispensable to the constitution of a
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municipal corporation." 1, Dillon, *Mun. Corp.* 2d ed. § 96.

And the debt created by a municipal corporation can, in the nature of things, be nothing more than a charge collectible by taxation upon the persons and property within the place included by the corporation. When, therefore, two or more municipalities are united, the resulting municipality includes the persons and the places of the several municipalities; and it has the same property, and owes the same debts, which they all had and owed. Not a dollar of debt is thereby added to the aggregate indebtedness chargeable against the persons and property within the boundary of the resulting municipality, and nothing is thereby withdrawn from its resources. Obviously, this may result in requiring some persons and property within the parts of the municipality embraced by the former municipalities to pay more taxes than they would have had to pay had the corporations not been annexed to each other; but this would be so in all cases where one of the uniting municipalities is indebted more than one or more of the others; and in the cases before cited this objection was not taken into consideration as an element preventing the annexation of different municipalities. See also *Id.* §§ 36, 37, and cases cited in *note*, and *Cooley*, *Const. Lim.* 4th ed. 232, and cases cited in *note*, where the omnipotence of the Legislature, in the absence of express constitutional restriction, to reorganize municipalities, and redistribute their property and burdens so as to affect different persons and property, is asserted.

There is no provision in our Constitution which makes a municipal debt a specific charge or lien upon the persons or property within the municipality; nor is there any provision in that instrument which guarantees the resident within the municipality that his property shall bear the burden of taxation only for the purpose of paying debts incurred by the municipality while that property had an existence there. It is within common observation that large amounts of property, and, it may be, all the persons, within a municipality when a debt is contracted, cease to be there when the debt is payable. The property within a municipality when a tax is levied for its payment can alone be made to pay it.

If, then, there is no constitutional restriction upon annexation of municipalities, and no constitutional right to exempt the property of taxpayers from burdens other than debts contracted by the municipality while the property or person was within its jurisdiction, it would seem inevitably to follow that there is no constitutional ground to object that the burden of some taxpayers will be larger in consequence of annexation than it would otherwise have been.

It may be observed, in conclusion, that perfect equality between burdens and benefits in matters of general taxation is matter of theory only, and never has been, and doubtless never will be, carried out in practice. Each individual within a municipality may be presumed to be benefited by every municipal expenditure equally to the amount that he is taxed therefor; but, in fact, all know that this cannot be

where a high rate of speed would be extremely dangerous to persons and property, while the other may run through a portion of the same municipality where there are but few inhabitants, and where it is extremely improbable that injury will happen to any person who is in the exercise of ordinary care. In such case a discrimination could hardly be said to be unreasonable. In the case before us no such disparity of circumstances seems to be shown. Part of the line of both railways is through thickly settled portions of the City, and part through sections where there are but few inhabitants. It may be fairly inferred from the evidence that the number of persons and vehicles ordinarily crossing the track of the Chicago & Evanston Railway at the street crossings of the City within a given time is somewhat greater than the number of those crossing the track of the Chicago & Northwestern Railway during the same time; but it appears that the number crossing the track of both railways is very large, and that the disparity is not so great as to necessitate, or even justify, different regulations as to the speed of trains. We are of the opinion, then, that no justification for the discrimination is shown, and that the ordinance, therefore, must be held to be invalid.

Thus far we have discussed the question of the validity of the ordinance as though it were open to this court to consider and weigh the evidence bearing upon that question; but if the matters thus presented are to be regarded as mere questions of fact, upon which the judgment of the appellate court is final, the same result necessarily follows. The case was tried in the criminal court before the court without a jury, and was submitted to the court upon the evidence, no propositions being presented to be held as the law in the decision of the case. If, then, the determination of the validity of the ordinance involved the decision of a question of fact, or even of a mixed question of law and fact, such questions are conclusively settled by the judgment of the criminal court, affirmed, as said judgment has been, by the appellate court.

In either view of the case, *the judgment of the Appellate Court must be affirmed.*

Carrie CULVER, *Plff. in Err.*,

v.

CITY OF STREATOR.

(...ILL...)

A municipal corporation is not liable for injuries resulting from negligent acts of

NOTE.—A municipal corporation is not liable for injuries received by a person who falls into a sewer, in process of construction and left unguarded, in the absence of any statutory provision making it liable for the neglect of its officers. *Chope v. Eureka*, 4 L. R. A. 325 and *note*, 78 Cal. 588.

It is liable only for its own negligence, and not for the negligence of its agents or of its licensees. *Lincoln v. Boston*, 3 L. R. A. 257 and *note*, 148 Mass. 578.

It is not liable for injury to a traveler caused by a rope stretched across a street by order of a judge of a court in session at the time, where the city 6 L. R. A.

one employed by it to enforce an ordinance forbidding the running at large of unmuzzled dogs, committed while in the discharge of the duties of his employment.

(November 26, 1889.)

ERROR to the Appellate Court, First District, to review a judgment affirming a judgment of the La Salle Circuit sustaining a demurrer to the complaint in an action to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servant. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Joel T. Buckley and McDougall & Chapman* for plaintiff in error. *Messrs. Walter Reeves and William H. Boys* for defendant in error.

Bailey, J., delivered the opinion of the court:

We are of the opinion that the several counts of the amended declaration, though differing somewhat in the character of their averments, all call for the application of the same principles. The fourth count, which is fullest in its allegations, shows that the injury complained of was caused by the negligent act of a party employed by the City of Streator to enforce a municipal ordinance forbidding the running at large of dogs in said City without being muzzled, and providing that all dogs running at large contrary to said ordinance should be destroyed. This was clearly an ordinance passed by the City in the exercise of its police powers, and the injury was caused by the party employed to enforce such police regulations. The third count alleges that the injury was caused by the negligent and careless acts of the servants of the City while destroying dogs running at large contrary to a city ordinance; and the first and second counts allege, in substance, that the injury was caused by the negligent and careless acts of servants hired and employed by the City to shoot and kill dogs at large in the City, and which had not been by it duly licensed.

The matter of regulating and restraining the running at large of dogs by a municipal corporation manifestly pertains to the police power. That power may be defined, in general terms, as comprehending the making and enforcement of all such laws, ordinances and regulations as pertain to the comfort, safety, health, convenience, good order and welfare of the public, and all persons officially charged with the execution and enforcement of such police ordinances and regulations are, *quoad hoc*, police officers. The pleader, in drafting the declaration, seems to have endeavored to obviate the

had no agency in the matter. *Belvin v. Richmond* (Va.) 1 L. R. A. 807.

It is not liable for the malfeasance or negligence of its officers or employés acting under ordinances, and within its powers given by charter. *Hines v. Charlotte* (Mich.) 1 L. R. A. 844 and *note*; *Robinson v. Rohr*, 2 L. R. A. 366, *note*, 78 Wis. 436.

A municipal corporation is, however, liable for injuries caused by negligence in the care of its property. *Neff v. Wellesley*, 2 L. R. A. 500, 148 Mass. 487.

Its liability as governed by statute. *Anderson City v. East*, 2 L. R. A. 712, 117 Ind. 126.

conclusions to be drawn from the character of the duties which the officer in question was performing at the time the plaintiff was injured, by designating and describing him as a "servant" or "employé" of the City, and alleging that he was hired and employed by the City to perform said duties. Merely denominating him a "servant" or "employé" does not make him such in a sense calling for an application of the maxim *respondet superior*. Whether he was a servant or employé in that sense depends mainly upon whether he was employed to perform acts which the corporation could do in its private or corporate character, or acts which the corporation was empowered to do in its public capacity as a governing agency, and in discharge of duties imposed for the public or general welfare.

Acts performed in the exercise of the police power plainly belong to the latter class. Police officers appointed by the city are not its agents or servants so as to render it responsible for their unlawful or negligent acts in the discharge of their duties. Accordingly it has been held that a city is not liable for an assault and battery committed by its police officers, though done in an attempt to enforce an ordinance of the city (*Buttrick v. Lowell*, 1 Allen, 172); nor for illegal and oppressive acts of officers committed in the administration of an ordinance (*Board of Trustees v. Schroeder*, 58 Ill. 353); nor for an arrest made by them which is illegal for want of a warrant (*Pollock v. Louisville*, 18 Bush, 221; *Cook v. Macon*, 54 Ga. 468; *Harris v. Atlanta*, 62 Ga. 290); nor for their unlawful acts of violence, whereby in the exercise of their duty in suppressing an unlawful assemblage, an injury is done to the property of an individual. *Stewart v. New Orleans*, 9 La. Ann. 461; *Dargan v. Mobile*, 81 Ala. 469.

Upon the same principle, it has been held that a city having power to establish a fire department, to appoint and remove its officers, and to make regulations in respect to their government and the management of fires, is not liable for the negligence of the firemen appointed and paid by it, who, when engaged in the line of their duty, upon an alarm of fire,

run over the plaintiff on their way to the fire, (*Hafford v. New Bedford*, 16 Gray, 297; *Wilcox v. Chicago*, 107 Ill. 384); nor for injury to the plaintiff caused by the bursting of a hose of one of the engines of the city, through the negligence of a member of the fire department (*Fisher v. Boston*, 104 Mass. 87); nor for negligence whereby sparks from the fire-engine of the city caused the plaintiff's property to be burned. *Hayes v. Oshkosh*, 33 Wis. 814.

In like manner it is held that where a city, under authority of law, establishes a hospital, it is not liable to persons injured by the misconduct of its agents and employes therein. *Richmond v. Long*, 17 Gratt. 375. See also 2 Dill. Mun. Corp. §§ 973-975, and authorities cited in notes.

The ground upon which the foregoing cases, and many others of like nature, are admitted as exceptions to the general rule of corporate liability, is that in those matters the city acts only as the agent of the State, in the discharge of duties imposed by law for the promotion and preservation of the public and general welfare, as contradistinguished from mere corporate acts, having relation to the management of its corporate or private concerns, and from which it derives some special or immediate advantage or emolument in its corporate or private character. The police regulations of a city are not made or enforced in the interest of a city in its corporate capacity, but in the interest of the public. A city, therefore, is not liable for the acts of its officers in attempting to enforce such regulations. *Calhoun v. Boone*, 51 Iowa, 687; *Prather v. Lexington*, 13 B. Mon. 559; *Elliott v. Philadelphia*, 75 Pa. 347; *Board of Trustees v. Schroeder*, supra.

The injuries complained of in the declaration having been caused by the negligence of an officer or employé of the City while attempting to enforce a police regulation, the maxim *respondet superior* does not apply, and the demurrer to the declaration, therefore, was properly sustained.

The judgment of the Appellate Court will be affirmed.

NORTH CAROLINA SUPREME COURT.

Samuel S. ALSOP, *App't*,
v.
SOUTHERN EXPRESS CO.
(.....N. C.)

It is the duty of an express company, under Code, § 1964, which requires that agents shall receive articles for transportation "when-ever tendered at a regular depot, . . . and shall forward the same by the route selected by the person tendering the freight under existing laws," to receive a package of money "when-ever tendered" except at times for repose, or for taking meals according to the usages of the place; the words "under existing laws" qualify only the word "forward." Therefore a rule of the company prohibiting the receipt of money packages except on the same day of, and prior to, the arrival and departure of trains going towards the

destination of the package, is unreasonable and void.

(*Merrimon*, Ch. J., *dissents*.)

(November 26, 1889.)

APPEAL by plaintiff from a judgment of the Halifax Superior Court in favor of defendant upon appeal from the judgment of a justice of the peace in an action to recover a penalty under § 1964 of the Code because of defendant's refusal to receive certain money for transportation when tendered by plaintiff. *Reversed*

Statement by *Avery, J.*:

Civil action, brought in the court of a justice of the peace, to recover a penalty of \$50, under the provision of section 1964 of the Code, and heard on appeal to the Superior Court of Hal-

fax, before MacRae, J., on the following case agreed: "(1) The defendant is a common carrier and transportation company, duly chartered, and doing business in the State of North Carolina. (2) That on the 9th day of January, 1889, the plaintiff tendered to the defendant's agent, at Halifax (a regular station on the Wilmington & Weldon Railroad Company line, from which the defendant Company shipped freight by express), whose duty it was to receive freight and money at said station for shipment, the sum of \$70 in money, for shipment by said Company to Battleboro, a station at which there was an express office and agent; and the agent declined to receive the same on said day. (3) The defendant Company, by virtue of its charter, was a regular carrier engaged in the transportation of money and other articles by express. (4) That, when said money was tendered for shipment to the defendant's agent, he informed the plaintiff that he could not receive it for shipment on that day; that an order had been issued a few days previous, from the superintendent of the Company, directing the agents not to receive money for shipment by express, unless the same was tendered prior to the arrival and departure of the train going in the direction of the point of destination on which the Company shipped such articles. (5) That the said money was tendered to the agent for shipment after the departure of the train for Battleboro; and that the agent informed the plaintiff that he would receive said money on the following morning, and transport it to its destination. (6) That there was only one train passing Halifax, going towards Battleboro, during the day of tender, on and by which the defendant transported express. (7) That said money was received for shipment two days thereafter, and shipped by defendant to its destination. (8) That the notice to the agents of the Company not to receive shipments of money, unless tendered prior to the departure of the train, was sent out in the form of a circular letter to the agents; and that the public had not been notified of such notice, nor did the plaintiff know of such regulation until so informed by the agent. (9) That the train for Battleboro left Halifax at 12.55 P. M., and said money was tendered at 2 P. M., on said 9th day of January."

On the foregoing facts agreed, it was considered by the court that the defendant is a transportation Company within the meaning of section 1964 of the Code, and that money was an article of the nature and kind received by such Company for transportation. It was further considered that said Company might receive money for transportation, under reasonable regulations as to the time during the day when it would receive the same; and that it was reasonable to require that money tendered for transportation to said Company should be tendered before the arrival and departure of the train on which the same was to be transported. Judgment against the plaintiff for costs, and that the defendant go without day. Plaintiff appeals.

Mr. R. O. Burton, Jr., for appellant.

Messrs. Day, Zollicoffer & Ransom, for appellee:

The rule was reasonable.

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Story, Bailm. § 508, and cited cases; Ang. Carriers, p. 118, § 125; Schouler, Bailm. § 379.

Avery, J., delivered the opinion of the court:

This controversy depends upon the construction given to section 1964 of the Code, which is as follows: "Agents or other officers of railroads and other transportation companies, whose duties it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation, whenever tendered at a regular depot, station, wharf or boat-landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall be liable to a penalty of \$50; and each article refused shall constitute a separate offense."

The plaintiff tendered to the defendant's agent at Halifax (a regular station on the Wilmington & Weldon Railroad line, from which the defendant Company shipped freight and money), \$70 in money, for shipment to Battleboro, another station on said line of railroad, at which the defendant Company had an office and an agent; and the agent refused to receive it, because the Company had ordered its agents not to receive money, except on the same day of and prior to the arrival and departure of trains going in the direction of the point to which the shipment was destined. The tender was made at 2 o'clock P. M., and a train carrying express freight had passed at 12.55 o'clock P. M., on the same day. According to the schedule, the next train by which the defendant shipped money and freight would pass on the next day, at 12.55 o'clock P. M. If the parties had not so agreed, the law would have determined that money was an article of the nature and kind usually received by express companies for transportation, and, moreover, that it was the peculiar business of corporations of this character to carry money, and small but valuable packages. *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.* 5 Myer, Fed. Dec. 670, 3 McCrary, 147.

While express companies, as declared by Justice Miller (*Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.*), do not carry bulky freight, it is not the business of railway companies to carry money; and the latter cannot be held liable for its loss, while being transported in the trunk of a passenger, beyond what a prudent man would deem proper and necessary for traveling expenses. *Jordan v. Fall River R. Co.* 5 Cush. 69.

So that it is peculiarly the business of express companies to carry and collect money along the lines of our railways. The meaning of that portion of section 1964 of the Code that is material to the settlement of this controversy would not be plainer, if, by dispensing with verbiage that is unnecessary, because applicable to other corporations, it should be summarized thus: "Agents or officers of express companies shall receive money, whenever tendered for shipment at a regular station, where such companies have agents, and are accustomed to receive goods for transportation." If we adopt this fair and reasonable interpretation of the language of the law, it would only remain for

the court to decide whether the regulation with regard to hours of business is reasonable, and one that would be sustained, as within the purview of the powers of the Company.

When we had banks issuing bills under charters granted by the State, they were required to redeem their bills, when tendered, with gold or silver coin; but the courts construed the requirement to mean when offered for redemption within such business hours as the banks had a right to prescribe. But it has been held that these hours must be reasonable, and adapted to the peculiar nature of the business that the corporation is transacting with the public in general.

In *Marshall v. Am. Exp. Co.*, 7 Wis. 1, the court held that, though a bank might prescribe hours of business from 9 A. M. to 4 P. M., yet they could not compel an express company to conform strictly to such hours in the delivery of money; and that a tender to the bank of money packages at 5 P. M. would be good, if the jury found that a reasonable hour for making it.

In *Marshall v. Am. Exp. Co.*, *supra*, the court says: "It was therefore very proper for the parties to prove, and the jury to consider, the usual mode of doing the particular business in question [that of receiving and forwarding packages by express], in reference to the time of the arrival and departure of trains with which the parties (consignor, consignees and carriers) in this case are shown to be familiar. Because notes due the bank on a particular day must be paid before the usual hour of closing the bank on that day, it by no means follows that a mechanic making repairs on its building must quit work at that hour, or that he must present his bill within the prescribed period."

While granting the power of the bank to make reasonable regulations generally, the court says, further: "The rules prescribed, and the hours of business designated, must be reasonable, and adapted to the exigencies of the particular kind of business in reference to which they are established."

Such was the view of the common law, presented with irresistible force and great clearness by the learned judge who delivered this opinion, now cited as the leading case, upon the right to establish hours of business, and upon the question whether, when prescribed, the law will enforce conformity to them, as reasonable, on the part of other persons and corporations dealing with the framers of such regulations. It will be noted that the court there held that a tender at a reasonable hour, and a refusal to receive by the bank, relieved an express company of the responsibility of insurers, and changed their relation to the bank to that of a mere mandatary, liable for gross negligence only, though the teller of the bank to whom the money was offered declared that his bank had a regulation as to hours, and refused to receive it because of such rule, and because the cashier was absent, and had the key to the safe. But, in the face of a statute requiring them to receive money "whenever tendered," the defendant Company's agent should not be allowed to meet the plaintiff, who comes to deal with him by invitation, and decline to receive his money

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for shipment because of a regulation of his Company declared reasonable, "under existing laws." Such a rule would enable the defendant Company, by late receipts and speedy delivery, to rid itself of responsibility and reap the rewards of its work with the minimum of risk at both ends of the line. It is clearly a question for the jury, under the instructions of the court, in cases like this at bar, as it was in that, to determine whether, looking to the custom of business men generally at the particular place (here, Halifax) as to hours of repose and times of taking meals, the tender at 2 o'clock P. M. was made at a reasonable hour. The most liberal construction would not allow the courts to limit the operations of the words "whenever tendered" by supplying any other ellipsis after them than "within the usual hours adopted by the public for the transaction of such business at the place where the tender is made." This rule avoids the inconvenience of offers of goods at midnight, or at meal-time, while it steers clear of the other extreme of neutralizing the force of the whole enactment by holding that the words "under existing laws," in the next clause of the section, limit the time of tender as well as of forwarding, and that the old common law governing the receipt of goods by boats and wagons still exists, and is applicable to-day to these gigantic corporations.

The study of the several statutes relating to the receipt and shipment of goods by corporations will shed further light upon the legislative intent in enacting section 1964 of the Code. By the Act of 1871-72, chap. 138, § 85 (Code, § 1963), it was prescribed that railroad companies should furnish sufficient accommodation for such freight and passengers as should, "within a reasonable time previous thereto, be offered for transportation," and should be liable in damages to the party aggrieved for neglect or refusal to provide such means of transportation. Subsequently the Legislature seems to have realized that the requirement to furnish accommodation within a reasonable time was but a reaffirmance of the common law (leaving the courts to say what time was reasonable), and passed the Act of 1874-75 (Code, § 1967), fixing the limit of delay in shipment at five days after delivery by the consignor. This law was pronounced constitutional in *Branch v. Wilmington & W. R. Co.* 77 N. C. 847, and railroad companies were held liable for the penalty for delay in shipping freight as prescribed in that section. Then it was (when the opinion was rendered in *Branch v. Wilmington & W. R. Co.* in the year 1877) that the discussion arose as to the right of a consignor to compel a railroad corporation to receive freight when offered for shipment, and store it in its warehouse till cars could be procured to transport it.

The Act of 1879 (Code, § 1964) was passed to meet the suggestion that the ancient principle laid down as applicable to the cumbrous old conveyances used by common carriers 200 years ago still survived, and conferred on railroad companies the power to compel the shipper to camp with his wagon at the station, and guard his goods till the last hour of time fixed by law, and receive them only when the train was on the eve of departure. But the Statute

was so drawn as to include not only railroad companies and steamboat lines under the general description, but also "other transportation companies whose duty it is to receive freight," and to require them to receive "all articles of the nature and kind received by such company for transportation, whenever tendered;" thus plainly indicating a purpose to include express companies, because they claimed the peculiar or exclusive right to transport money and goods of certain kinds. The manifest intent of the Legislature was to force all corporations coming under the description in the Statute to take goods when offered for shipment at a regular station, with the full measure of liability growing out of its custody, even if they should not be shipped till near the expiration of the five days, and then forward them under existing laws, fixing the legal relations of consignor and consignee, and the duties and liabilities of the carrier company and its connecting lines.

Evidently the evil intended to be remedied was the refusal to take goods or money immediately when offered for shipment to an agent of one of these companies; and the history of the legislation in aid of shippers but adds emphasis to the unmistakable expression of this purpose. But the construction contended for, that the words "under existing laws" should be construed as qualifying the words "whenever tendered," instead of the word "forward" only, would lead, if the common law is correctly interpreted by defendant's counsel in connection with the Statute, to the strange conclusion that the obligation of an express company to receive money tendered for shipment remains now just what it was before the Act of 1879 was passed; and the company can, under regulations declared reasonable by the courts, still fix the hour of receipt just as it was before, and thus render nugatory by their rules the provision of the law imposing a penalty. Railway companies are inseparably connected with other transportation companies in the Act; and therefore it is just as competent for the courts to declare a regulation that compels a consignor to hold his cotton in his wagon for five days, awaiting the arrival of freight cars, to be reasonable and lawful, as one that forces a person to retain and guard his money till before the departure of a train on the next day. If it is unlawful to force one of these corporations to place in its office or warehouse goods of the nature that it is accustomed to carry, in violation of its regulations, because of the liability incident to its receipt, the rule must apply equally to all others comprehended under the description contained in the section, and clothe all with the power to repeal or modify the law by such reasonable rules as would prove sufficient to obviate the penalty.

But it is further contended that if the companies comprehended under the section in question do not formulate any rules to govern their agents in the receipt of freight, the principles of the common law would apply to them; and thus, under this view, the same satisfactory result would be reached by the defendant by holding that the law of to-day, applicable to this new species of transportation agency, which permeates the world with

its officers and agents, everywhere delivering money and jewels, and other valuable goods, is the same that governed the receipt of packages by a carrying cart in the time of Bracton, or the tender of goods to a vessel sailing from Liverpool 200 years ago.

If, for the sake of argument, it be admitted that the General Assembly meant to inaugurate no change, but simply to publish the vain and empty declaration that transportation companies would hereafter, just as heretofore, receive freight under "existing laws," and consequently under any regulation made by the companies and adjudged reasonable by the court, would it follow that the courts would declare the rule under which a wagoner, engaged in carrying goods, could compel his customers to wait till the horses should be hitched, applicable to express companies? The result of giving the sanction of the court to such a rule would be that these companies could induce an individual, by inviting his patronage, to come to one of their regular stations to intrust his money to their care, and then compel him to stand guard over his treasure a whole night, in order to protect the company from a risk that it can better afford to incur than the customer. But, in order to a proper discussion of this view of the subject, it is necessary to understand that the nature, powers and liabilities of express companies have been defined by the courts. An express company is a species of common carrier, to which have been accorded important privileges, and which, from the nature of its business, incurs great responsibility. These companies originated out of the necessity, in conducting the growing commerce of the world through the agency of railroads and steamboats, for securing the safe carriage and speedy delivery of small but valuable packages of goods and money. *Witbeck v. Holland*, 45 N. Y. 18; 2 Am. & Eng. Cyclop. Law, 781-784; 5 Myer, Fed. Dec. § 1511. They are essentially different from railway companies, not only in the fact that the latter carry more bulky freight, but they collect money, and do other things that would be held *ultra vires*, if attempted by a railroad company. Id. § 1509.

It has been held that a railroad company could not refuse to carry for an express company according to the peculiar methods of their business, and would be compelled by the courts to admit the messengers of all of these companies to its cars with their safes on equal terms, and without inspection [of their safes. Id. §§ 1508, 1519.

If a railroad company engage in those branches of the express business authorized by their charter, they must not deny to express companies equal privileges with themselves as to that business. Id. §§ 1508, 1515-1521; *Camblos v. Philadelphia & R. R. Co.* 9 Phila. 411; *Texas Exp. Co. v. Texas & P. R. Co.* 6 Fed. Rep. 426; *Messenger v. Pennsylvania R. Co.* 87 N. J. L. 581, 18 Am. Rep. 754; *Southern Exp. Co. v. St. Louis, I. M. & S. R. Co.* 10 Fed. Rep. 869.

Apart from the construction of our Statute, it is the duty of express companies to receive all goods offered for transportation upon the payment or tender of their charges; but prepayment will be considered waived if not de-

manded. *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344 [12 L. ed. 465].

They are required, too, to have adequate facilities within a reasonable time, and cannot be exonerated for delay on account of increased expense, though not foreseen and not entirely unreasonable. *Condict v. Grand Trunk R. Co.* 54 N. Y. 500.

An express company could, in the absence of any statutory requirement, refuse goods on account of an unusual rush of business, especially where the goods offered for transportation are of a perishable nature. *Hare*, Cont. 155.

But these are the rules without reference to any such enactment as that before us for construction. When goods are received by an express company without any special and valid contract limiting its liability, it insures the safe and speedy personal delivery of the articles received, at the place of destination if on its route, or, if not, then at the end of its route. *Witbeck v. Holland*, *supra*; *Bishop*, Cont. §§ 432, 591, 596.

Even if the goods are placed in a warehouse, and not shipped immediately, the liability as insurers begins on the execution of a receipt for them. 7 Am. & Eng. Cyclop. Law, 548, 558.

A high degree of care is required of an express company in the delivery of goods. It must deliver them as soon as practicable after they reach their destination, within business hours, to the consignee, at his residence or place of business, unless he authorizes or directs delivery to be made at some other place. *Marshall v. Am. Exp. Co.* and *Witbeck v. Holland*, *supra*.

After the consignee receives notice from the company of the arrival of his goods, he is not bound to call at the office for them, but need only notify the company of his residence, place of business, or where he may be found; and the liability of the company as insurers remains till delivery or tender of the goods at the place designated, within business hours, and failure to receive or pay charges. *Witbeck v. Holland*, *supra*; 7 Am. & Eng. Cyclop. Law, 567-570.

If, in the interim between the arrival at its destination and the delivery, as the law requires, a package of money should be stolen from the agent, the company would be liable to the consignee. Supposing that a friend had sent by express \$1,000 from Battleboro to the plaintiff, Alsop, at Halifax, and the latter lived several miles out of the town, we can readily see that it might require more than twenty-four hours for the Company to rid itself of liability as a common carrier; and meanwhile it would be strangely negligent to fail to provide a safe for the security of valuable property and money received for its customer, and held as an insurer.

With this review of the relation that the defendant sustains to the public under other circumstances, necessitating the provision at all offices where money is received of the means to make it safe and secure from thieves till delivery, it is submitted that, if this court is to determine, leaving the Statute out of view, whether a citizen who comes from the country,

unprepared to protect his property from thieves and burglars, shall be required, rather than a company, provided with safes, servants and secure rooms, to incur the risk of the custody of a sum of money, it should be guided by reason, and look to the situation of the parties, and the preparation that the law intends shall have been made by each or either for assuming the responsibility. Experience has shown that the principles of the common law are pliable; and a few fundamental rules have been expanded so as to furnish the basis of important branches of the law governing us at this day. This is notably true as to corporations. But, while the ancient land-marks of the law are worthy of veneration, and should be examined with conservative care, in determining how they meet the exigencies of a progressive age, we should not be so subservient to precedent as to blindly follow them when no longer sustained by reason. It strains the faith of the young student when he attempts to follow *Lord Coke* in his discoveries of all the hidden diversities in the text of *Lord Lyttleton*; and when we profess to find in the mouldy black-letter volumes of past centuries a principle that with prophetic ken was formulated to meet and solve a problem arising out of the adjustment of the relations between the people and one of the greatest and most useful corporations in the world, we must, if we would avoid shocking the common sense of mankind, find a rule founded on reason. The fact that a captain and crew of a vessel, according to the English authorities, had the right, in the thirteenth year of William III., to refuse to accept freight offered for shipment till the vessel was ready to sail, furnishes no analogy that can be safely applied to govern the relations of the plaintiff and defendant.

The case of *Lane v. Cotton*, 1 Ld. Raym. 648, heard at Easter Term, 18 Wm. III., decided this principle, and is the only authority cited in *Story*, Bailm., § 508, to sustain the rule announced by the author. It may have been just, at that remote period, to require the shipper, who had protected his goods on the way to the point of delivery, to continue his oversight over them, rather than force a driver, whose attention was required to be devoted to the preparation for his journey, or the master of a vessel, who, with his crew, was engaged in repairing and inspecting it, and laying in supplies for a voyage, to take them prematurely; for that would have made it requisite for them to prepare a place for storage, which they need not otherwise provide. But an express company, as we have seen, incurs from its nature such liabilities as to require a place of storage at every depot, so guarded as to insure the safety of property consigned to its care; and it is not unreasonable to require the same care of money tendered for shipment during business hours. *Cessante ratione, cessat ipsa lex*. If, therefore, the Statute were not written in plain terms, and if the history of legislation on this and kindred subjects did not indicate that the manifest meaning of the language was what the Legislature intended to express, still, we ought to bring this question to the touchstone of reason, based upon a broad view of the condition of the parties interested, and decide it as an original one, of first impression, between a new and impor-

was so drawn as to include not only railroad companies and steamboat lines under the general description, but also "other transportation companies whose duty it is to receive freight," and to require them to receive "all articles of the nature and kind received by such company for transportation, whenever tendered;" thus plainly indicating a purpose to include express companies, because they claimed the peculiar or exclusive right to transport money and goods of certain kinds. The manifest intent of the Legislature was to force all corporations coming under the description in the Statute to take goods when offered for shipment at a regular station, with the full measure of liability growing out of its custody, even if they should not be shipped till near the expiration of the five days, and then forward them under existing laws, fixing the legal relations of consignor and consignee, and the duties and liabilities of the carrier company and its connecting lines.

Evidently the evil intended to be remedied was the refusal to take goods or money immediately when offered for shipment to an agent of one of these companies; and the history of the legislation in aid of shippers but adds emphasis to the unmistakable expression of this purpose. But the construction contended for, that the words "under existing laws" should be construed as qualifying the words "whenever tendered," instead of the word "forward" only, would lead, if the common law is correctly interpreted by defendant's counsel in connection with the Statute, to the strange conclusion that the obligation of an express company to receive money tendered for shipment remains now just what it was before the Act of 1879 was passed; and the company can, under regulations declared reasonable by the courts, still fix the hour of receipt just as it was before, and thus render nugatory by their rules the provision of the law imposing a penalty. Railway companies are inseparably connected with other transportation companies in the Act; and therefore it is just as competent for the courts to declare a regulation that compels a consignor to hold his cotton in his wagon for five days, awaiting the arrival of freight cars, to be reasonable and lawful, as one that forces a person to retain and guard his money till before the departure of a train on the next day. If it is unlawful to force one of these corporations to place in its office or warehouse goods of the nature that it is accustomed to carry, in violation of its regulations, because of the liability incident to its receipt, the rule must apply equally to all others comprehended under the description contained in the section, and clothe all with the power to repeal or modify the law by such reasonable rules as would prove sufficient to obviate the penalty.

But it is further contended that if the companies comprehended under the section in question do not formulate any rules to govern their agents in the receipt of freight, the principles of the common law would apply to them; and thus, under this view, the same satisfactory result would be reached by the defendant by holding that the law of to-day, applicable to this new species of transportation agency, which permeates the world with

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With this review of the relation that the defendant sustains to the public under other circumstances, necessitating the provision at all offices where money is received of the means to make it safe and secure from thieves till delivery, it is submitted that, if this court is to determine, leaving the Statute out of view, whether a citizen who comes from the country,

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The case of *Lane v. Cotton*, 1 Ld. Raym. 646, heard at Easter Term, 18 Wm. III., decided this principle, and is the only authority cited in Story, Bailm., § 508, to sustain the rule announced by the author. It may have been just, at that remote period, to require the shipper, who had protected his goods on the way to the point of delivery, to continue his oversight over them, rather than force a driver, whose attention was required to be devoted to the preparation for his journey, or the master of a vessel, who, with his crew, was engaged in repairing and inspecting it, and laying in supplies for a voyage, to take them prematurely; for that would have made it requisite for them to prepare a place for storage, which they need not otherwise provide. But an express company, as we have seen, incurs from its nature such liabilities as to require a place of storage at every depot, so guarded as to insure the safety of property consigned to its care; and it is not unreasonable to require the same care of money tendered for shipment during business hours. *Cessante ratione, cessat ipsa lex*. If, therefore, the Statute were not written in plain terms, and if the history of legislation on this and kindred subjects did not indicate that the manifest meaning of the language was what the Legislature intended to express, still, we ought to bring this question to the touchstone of reason, based upon a broad view of the condition of the parties interested, and decide it as an original one, of first impression, between a new and impor-

tant public agency and a citizen, just as the English judges considered the question involved in *Morse v. Blue* [1 Vent. 190, 238] (cited in *Lane v. Cotton*, *supra*), and bearing in mind that it is more just to impose a risk upon a body politic, abundantly prepared to incur it, than upon an individual who has placed his goods in peril on the invitation of the corporation.

It is admitted that railroad companies have the power to provide different cars for excursionists, who purchase tickets at reduced rates, from those occupied by passengers paying more per mile, and also that they have the right to assign a separate car for colored people, as decided by this court; but, should our Legislature pass a law prohibiting in plain terms such discrimination, the courts would be compelled to enforce the law, if not pronounced unconstitutional. Such a law could not be ignored utterly in a discussion of these subjects after its passage. It seems, therefore, safe to conclude that:

1. The first clause of section 1964 is in itself a full and complete expression of the legislative intent that goods shall be received whenever tendered; and that the language cannot, by any accepted rule of interpretation, be limited further than to require that the tender shall not be made during hours that can reasonably be claimed, according to usages of business men at the place of tender, for repose, or for taking meals.

2. The words "under existing laws" can be construed to qualify the word "forward," and to mean that, at least when the law is applied to railroad companies, the goods shall be shipped within five running days from delivery, as required by the Code, § 1967, and subject to the law fixing the relations of consignor, consignee, the carrier and its connecting lines, while the construction contended for would give to the Statute no effect, but leave the law as it was before its passage.

If no statute had been passed, the courts could not, when the conditions and the relation of plaintiff and defendant are so widely different from those existing between the carrier of the last century and his customer, declare that an express company could not be compelled to receive goods till the hour of shipment, in conformity to the ancient rule, or that the transportation company could arbitrarily determine, by regulations prescribed for the government of its agents, exactly how it would, *ex gratia*, or with a view entirely to its own convenience, allow a departure from the old rule by giving further time. There is error. As the defendant did not rely affirmatively on the defense, or insist on a finding that the tender was at a time other than in business hours, the judgment on the facts found must be for the plaintiff.

Clark, J., concurring:

At common law, common carriers were under no compulsion to receive goods or freight till ready to ship the same. *Lane v. Cotton*, 1 Ld. Raym. 652. Nor, after acceptance of the goods for shipment, were they liable for delays, if the goods were shipped within a reasonable time; and what was "a reasonable time" depended upon the facts and circumstances surrounding each particular case. These regula-

tions sprang out of the former condition of things, when the modes of transportation were of a more primitive order. The law-making power in this State has modified the common-law rule in both particulars. In 1874-75, the Legislature enacted a Statute, which is now section 1967 of the Code, making a delay of more than five days in shipping the goods after accepting them *per se* unreasonable delay, and affixing a penalty of \$25 for each day's delay beyond that limit. This Act has been held constitutional, and found judicial construction, in several cases with which the profession is familiar. *Branch v. Wilmington & W. R. Co.* 77 N. C. 347; *Keeler v. Wilmington & W. R. Co.* 86 N. C. 346; *Branch v. Wilmington & W. R. Co.* 88 N. C. 570.

It still remained in the power of common carriers to nullify the Act of 1874-75 by exercising their common-law right of not receiving goods till their own convenience should be suited, or they were in readiness to ship. For this reason, doubtless, the Legislature passed the Act of 1879 (now § 1964 of the Code), which provides: "Railroad and other transportation companies, whose duties it is to receive freights, shall receive all articles of the nature and kind received by such company for transportation, whenever tendered at a regular station," etc. The words "whenever tendered," upon a reasonable construction, signify "whenever tendered" in the ordinary business hours of such companies at the place of tender. If the object had been to prescribe merely the place where the tender should be made, there was no mischief or complaint to be remedied; and, besides, in that case the Statute would have naturally read, "if tendered at a regular station," etc. "Whenever tendered" has, clearly, reference to the time of tender, and to the common-law rule which gave the carrier the right to defer accepting the goods until ready to ship.

The regulation adopted by the defendant Company, that it will only receive packages each day just before the departure of the train going in the direction of the desired shipment, is in direct conflict with the Statute. To give it validity would enable transportation companies, by regulations adopted in their own interest and for their own convenience, to repeal an Act of the Legislature passed in the interest of and for the convenience of the public. A very analogous case is the decision in *Branch v. Wilmington & W. R. Co.*, 88 N. C. 573, which held to be invalid an agreement or regulation, "goods to be shipped at the convenience of the company," which had been inserted by the defendant in its bills of lading, in hope of avoiding the penalties of section 1967. The words "whenever tendered" were evidently intended for the benefit of shippers, and in derogation of the common-law rule. It is our duty to give the Statute such construction as will effectuate the legislative will. Should the execution of the Statute, according to a fair and legitimate construction of it, impose any hardship upon transportation companies, the remedy is to be sought in a modification of the Act by the Legislature, and not in the virtual repeal of it by judicial construction. In the increasing competition for shipments, few cases of failure to accept goods "whenever tendered" will arise, unless at points where a company has

a monopoly; and it is for those very points that the protection of the law is most needed to secure such conveniences as the public demand. At competing points, where no monopoly of business exists, the law of competition will usually furnish the public all needed facilities.

Merrimon, Ch. J., dissenting:

I do not concur in the opinion of the court, and will state some of the grounds of my dissent. The defendant is a common carrier of numerous kinds and classes of freight; including gold and silver, coined and uncoined, treasury notes, bank notes, public and private securities, gems, jewelry and the like. It is not, however, such carrier of all kinds and classes of freight. It carries mainly such as require to be transported quickly, and generally such as are not very ponderous. A leading and distinctive feature of its purpose is to transport and deliver such freight as it carries certainly, promptly and expeditiously. It is not a warehouseman, or depository of freights of any kind. It simply and only receives the same for such transportation, and it holds, or should hold, them for that purpose as short a time as practicable, in the orderly course of business. In the nature of its business, it is to be charged with freights for the purpose, and only for the purpose, of transportation, and liabilities properly incident thereto. It has the right to prescribe reasonable and appropriate rules and regulations, not in contravention of law, for the conduct of its business, having in view the safety, protection and preservation of freights carried by it, and, as well, the protection of itself against fraud, injury and undue risk and liability. It may require that shippers shall deliver their articles to be transported within a reasonable time next before, in the order of business, the same shall be put on the vehicle or means of transportation,—usually railroad cars,—and sent on the way to their destination. The shipper has no right to compel the defendant to accept freights an unnecessarily and unreasonably long while before the time of starting the same on the way. Thus, if the train of cars on the railroad should start at 12 o'clock M., the shipper could not compel the defendant to receive ordinary express freight the evening next before that time, and thus compel it to assume the risk of keeping it during the night and morning following. This is so, because the nature of the business does not require that the defendant shall have the freights during that time, and such risk does not come within the nature and purpose of the defendant as a common carrier. It has the right, by appropriate and reasonable regulations, to require that the articles to be shipped shall be delivered to it within the time necessary to enable it to ship the same by the express on its next ensuing trip. Reasonable time to prepare the freight for such shipment must be allowed. No more can be required for the mere convenience or advantage of the shipper, or to enable him to avoid a risk and put the same on the defendant, than justly ought to rest upon himself. If the law were otherwise, the shipper of money, or other things of great value and hazardous in their keeping, might subject the defendant to a risk for hours—in some cases, for a day and night.

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or longer, perhaps—not necessarily or properly incident to its business and duties, and which the shipper himself ought to bear. Thus, one intending to send by the next express \$100,000 in gold coin might, the evening next before the day it would start, at 12 o'clock M., on purpose to avoid risk himself, compel the defendant to assume the risk of keeping the money during the mean time; not because such keeping was incident, or at all necessary, to its business or duties, but to disburden the shipper. It would be alike unnecessary, unreasonable and unjust to thus burden the defendant. We cannot conceive of a reason of justice, of necessity or policy that makes it necessary or proper to do so. The defendant was bound to receive the money tendered to its agent for transportation by the plaintiff within a reasonable time next before the departure of the next express going in the direction of the destination of the money; that is, within such time as the defendant's agent could, in the order of business, receive the money and prepare it for shipment. What such reasonable time is, cannot be determined by any uniform or precise rule. This depends upon a variety of facts and circumstances,—the place, the volume of business done there, the articles to be shipped, and the like considerations. The time must be sufficient to receive and ship the goods by the next express, as above indicated. *McIlas v. Wilmington & W. R. Co.* 88 N. C. 526; *Britton v. Atlanta & C. A. L. R. Co.* Id. 536; 2 Redf. Railroads, chap. 26, § 10 *et seq.*; 2 Parsons, Cont. 5th ed. 174; *Lane v. Cotton*, 1 Ld. Raym. 652.

The plaintiff tendered the money early in the evening next before the day the next express was to go, at 12 o'clock and 45 minutes of that day; and he insists that he had the right then to present and have it received; and, as the agent refused to receive it then, the defendant at once became liable for the penalty prescribed and given by the Statute (Code, § 1964) and sued for in this action. The question whether this contention is well founded or not must be determined by a proper interpretation of the Statute just cited. It prescribes that "agents or other officers of railroads and other transportation companies whose duties it is to receive freights shall receive all articles of the nature and kind received by such company for transportation whenever tendered at a regular depot, station, wharf or boat landing, and shall forward the same by the route selected by the person tendering the freight under existing laws; and the transportation company represented by any person refusing to receive such freight shall be liable to a penalty of \$50; and each article refused shall constitute a separate offense."

It is conceded that the material words, "when-ever tendered," used, are not to be taken literally. To so treat them would lead to practical and ridiculous absurdity. As employed, they do not imply at any and all times,—when the agent is taking his meals, while he may be reposing at night, at midnight or daybreak, or at sunrise, or on Sunday. These words must receive a reasonable and just interpretation, in the light of the business to which the Statute applies, and which it is intended in some measure to regulate. Thus interpreted, we think

they fairly imply whenever the freight shall be tendered to the agent or officer of the company in the regular, orderly course of business, when the articles to be shipped ought to be received for that purpose; that is, within the time it is the duty of the carrier, having in view its nature and purpose, to receive the freight tendered. These words do not imply that the carrier shall receive the freight so tendered, and keep it in a warehouse for an indefinite and unnecessary length of time before, in the order of business, it can be shipped on the way to its destination. It is not the business of such companies, as common carriers, to thus store and keep freight. It is their business and purpose to transport it promptly; and the purpose of the Statute is to compel them to do this by imposing penalties in case they fail to do so. It was not the purpose of the Legislature to enlarge the scope of the duties and purposes of such companies. There is nothing in the Statute that so provides in terms, or by just implication. The simple purpose was to compel them to a prompt and faithful discharge of their common-law duties. This court has so repeatedly declared. *Branch v. Wilmington & W. R. Co.* 77 N. C. 347; *Whitehead v. Wilmington & W. R. Co.* 87 N. C. 255.

In this view the words "whenever tendered" must mean "whenever tendered" as I have pointed out above. This seems to me to be the only reasonable meaning of the words as employed. Any other interpretation of them would leave their meaning so loose and indefinite as to render their application impracticable.

Other words of the Statute, as well as its spirit, strengthen the view I have thus expressed. The Statute applies to companies "whose duties," not simply in the sense of business, are to receive freights; to receive them, in the order of business, when they must be received to be promptly shipped on the way. Such freights must be "tendered at a regular depot, station," etc., the shipper "tendering the freights under existing laws," not simply under statutory regulation, but, as well, under general principles of law applicable, such as that which requires that freights shall be received only within a reasonable time next before they are to be sent on the way to their destination. The interpretation I have given these words harmonizes, too, with the other statutory

provision (Code, § 1963) prescribing rules of transportation for railroad companies, wherein it is provided that such companies "shall furnish sufficient accommodation for the transportation of all such passengers and property as shall, within a reasonable time previous thereto, be offered at the place of starting," etc. This provision is simply in affirmance of a general principle applicable, and it indicates the spirit and purpose of sundry statutory regulations that apply to railroad companies, and other companies that are common carriers, including that under consideration. It is said that this interpretation of the Statute would not accommodate the convenience of persons who might occasionally go a considerable distance to ship money, or other like things. This objection is without force. It was not the duty of common carriers to provide for such exceptional cases; and, as we have seen, the Statute does not enlarge the scope of this duty. Its purpose is to compel a due discharge of the same. All shippers are placed on the same and equal footing; and it is their duty to learn and observe the orderly course of business. It is their own neglect if they will not. In the absence of any particular regulation as to the time freights should be tendered, the law provides that it shall be done within such reasonable time as will enable the carrier to ship the goods on the way by the next express after the tender.

The precise rule and practice of the defendant to be observed in receiving freights for shipment does not appear; but it does appear affirmatively that the plaintiff did not tender the money to be shipped to the agent within a reasonable time next before the departure of the next express going in the direction of the destination of the money. It was tendered fifteen or twenty hours or more before the next departure,—a night intervening. The agent expressly notified the plaintiff of the rule and that he would receive the money if tendered the next morning. The defendant had the right to decline to receive it until the next day, in the forenoon. It was not bound to receive and keep it for the plaintiff during the night. If it had been received the next morning, ample time—several hours—would have been afforded to prepare it in all respects for shipment by the next express.

MINNESOTA SUPREME COURT.

John C. CAMPBELL, *Resp't.*,

v.

Peter ROTERING, *Appt.*, and Charles F. Hummel *et al.*

(....Minn....)

*1. One who executes a bond may be liable

*Head notes by GILFILLAN, Ch. J.

upon it though his name does not appear in the body of it.

2. An action cannot be maintained on a bond conditioned to "fully indemnify and save harmless said J. C. C. from all damages and costs by reason of said claim," etc., and to "pay all costs and damages to which said officer [the obligee] may be put by reason thereof," until actual damage has accrued to the obligee, & c., until he has actually paid such costs and damages.

NOTE.—*Bond of indemnity; validity of execution.*
To charge one as obligor who has signed a bond or written undertaking, it is not necessary that his name should appear in the body of such instrument, 6 L. R. A.

provided the intention that he shall be so charged appears clearly from its terms. *Prattidge v. Jones*, 88 Ohio St. 375; *Citizens Building Assn. v. Cummings*, 14 West. Rep. 536, 45 Ohio St. 664.

(November 30, 1899.)

APPEAL by defendant Rotering, from an order of the Municipal Court of the City of Minneapolis denying a motion for new trial in an action upon an indemnity bond in which judgment had been entered for plaintiff. *Reversed.*

The facts sufficiently appear in the opinion.

Mr. John T. Byrnes, for appellant:

Where a surety signs a bond, purporting to be on behalf of the principal and not executed by the principal, it is void.

State v. Austin, 35 Minn. 51.

At the time of the signing of the bond by appellant it contained the signature of no one, neither did it on the following day, when appellant demanded that his name be taken off the same. The rule that a bond, to all appearances properly executed by all parties named therein, and duly delivered to the obligee, without stipulation or reservation, cannot be avoided by the sureties upon the ground of some condition coupled with its execution, which has not been fulfilled, without notice to the obligee, is not applicable to this case. In this case it is not the deed or bond of the appellant at all.

Cummings v. Thompson, 18 Minn. 246; *Merchants Exchange Bank v. Luckow*, 37 Minn. 542; *Green v. North Buffalo Twp.* 56 Pa. 110; *Schuykill County v. Copley*, 67 Pa. 386; *McHugh v. Schuykill County*, 67 Pa. 391.

There is a vast difference between a bond of indemnity against damages and costs, and that of one against liability. The evidence wholly fails to show that the plaintiff suffered any damages whatever, or incurred any liability. The only reference to any damage or liability is contained in the complaint, which is denied by the answer.

Weller v. Eames, 15 Minn. 461; *Chace v. Hinman*, 8 Wend. 452; *Russell v. Annable*, 109 Mass. 72; *Abbott*, Trial Ev. 510-516.

If anything appears in the body or upon the face of the instrument to indicate or cast suspicion upon the method of the execution of the same, affecting the liability of any of the parties thereto, it is the duty of the obligee to decline to accept it, and thereby protect innocent parties.

Indeed the principle is established by numerous adjudications that if a surety, in witness of his obligation to perform certain covenants and conditions, has affixed his hand and seal to the instrument, and delivered it as his bond, it is adequate to bind him although his name is not mentioned in any part of the body of the bond, but a blank intended for it is left unfilled. *State v. Parsons*, 39 N. C. 230; *Vanhook v. Barnett*, 4 Dev. L. 283; *Danker v. Atwood*, 119 Mass. 148; *Ahrend v. Odiorne*, 125 Mass. 50; *Scheid v. Leishultz*, 51 Ind. 38; *Citizens Building Assn. v. Cummings*, 14 West. Rep. 536, 45 Ohio St. 664.

It is enough if there was a sealing and delivery; of this the jury are to judge, and, upon proof of the handwriting of the obligor, they may presume a sealing and delivery. *Long v. Ramsay*, 1 Serg. & R. 72. See also *Sigfried v. Levan*, 6 Serg. & R. 311; *Templeton v. Com. (Pa.)* 5 Cent. Rep. 462.

It is error to quash a forthcoming bond, on motion, simply because the name of the obligee therein has been misspelled or so written as to make it doubtful as to the person intended. *State v. Halda*, 28 W. Va. 499; *Ambach v. Armstrong*, 29 W. Va. 744.

6 L. R. A.

Greenl. Ev. 564; *Miller v. Stewart*, 22 U. S. 9 Wheat. 680 (6 L. ed. 189); *State v. Churchill*, 48 Ark. 426.

A surety is everywhere deemed a favored debtor, and is a necessity in important business transactions, and the almost universal rule is that he should be favored more than other debtors. The obligee occupies a situation which makes it easy to impose a commensurate penalty upon him for the failure to protect the rights of an innocent surety.

State v. Churchill, 48 Ark. 426.

Mr. S. Myers, for respondent:

A surety is "any person who, being liable to pay a debt, is entitled to be indemnified by some other person who ought himself to have paid it before the surety was compelled to do so."

Wendlandt v. Sohre, 37 Minn. 162.

Appellant became indebted to respondent the moment he gave the bond.

Stone v. Myers, 9 Minn. 803.

That appellant's name did not appear in the body of the bond is immaterial.

Moore v. McKinley, 60 Iowa, 387; *State v. Young*, 23 Minn. 551; *Carroll County v. Rugles*, 69 Iowa, 269; *Ex parte Fulton*, 7 Cow. 484; *Decker v. Judson*, 16 N. Y. 439; *Perkins v. Goodman*, 21 Barb. 218; *Dair v. U. S.* 88 U. S. 16 Wall. 1 (21 L. ed. 491).

Nor is an acknowledgment necessary.

Gale v. Seifert, 39 Minn. 171.

At common law a simple receipt was sufficient; how much more so is this the case where, as in this action, it is a party's solemn promise under seal.

Easton v. Goodwin, 22 Minn. 426; *Mason v. Aldrich*, 36 Minn. 283.

Respondent was not bound to first pay the judgment recovered against him.

Conner v. Reeves, 5 Cent. Rep. 414, 103 N. Y. 527; *Rockfeller v. Donnelly*, 8 Cow. 623; *Chace v. Hinman*, 8 Wend. 452; *Webb v. Pond*, 19 Wend. 423; *White v. French*, 15 Gray, 339; *Warwick v. Richardson*, 10 Mees. & W. 284; *Brandt, Suretyship*, § 192.

The utmost claimed by appellant as to his pretended withdrawal is that after he signed the instrument he told the notary he would not go on the bond; but never was any notice of

It is not essential that there should be as many separate seals annexed to a bond as there are signers, as two or more among any number of signers may adopt one seal, whereby the obligation will become an instrument sealed by all. *Lovelace's Case*, 1 W. Jones, 268; *Citizens Building Assn. v. Cummings*, 14 West. Rep. 536, 45 Ohio St. 664.

In case divers men enter into an obligation, and they all consent and set but one seal to it, it is a good obligation of them all. See *Perkins*, § 184; *Shep. Touch.* 55; *Ball v. Dunsterville*, 4 T. R. 313; *Mackay v. Bloodgood*, 9 Johns. 235; *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 231; *Pequawket Bridge v. Mathes*, 7 N. H. 230; *Bradford v. Randall*, 5 Pick. 496; *Citizens Building Assn. v. Cummings*, 14 West. Rep. 536, 45 Ohio St. 664.

One may adopt the seal of another as his seal. *Bowman v. Robb*, 6 Pa. 302; *Templeton v. Com. (Pa.)* 5 Cent. Rep. 462.

The language of *Brinkerhoff, J.*, in *Stevens v. Allen*, 19 Ohio St. 485, indicating a contrary rule, has been disapproved in *McLain v. Simington*, 37 Ohio St. 484; *Citizens Building Assn. v. Cummings*, 14 West. Rep. 536, 45 Ohio St. 664.

any kind given to respondent of any such claim or any dissatisfaction upon appellant's part. Intention, unless known to obligee, is immaterial.

Carroll County v. Ruggles, 69 Iowa, 269.

Neglect of the principal, whose name appeared in the bond, to sign, would not relieve sureties.

Bollman v. Pasewalk, 22 Neb. 761.

Parol evidence is inadmissible to change the character of a bond.

Coots v. Farnsworth, 61 Mich. 497; *Berkey v. Judd*, 84 Minn. 398; *Cowel v. Anderson*, 33 Minn. 374.

Gillilan, Ch. J., delivered the opinion of the court:

In this case the plaintiff, a police officer of the City of Minneapolis, and as such authorized to execute writs and process issuing from the municipal court of that city, received an execution issued from said court, and levied the same upon personal property. Another than the execution debtor claimed the property from the plaintiff, and thereupon the creditor in the execution as principal, and the other defendants herein as sureties, executed to the plaintiff an indemnifying bond. The defendant Rotering, the appellant, objects to this bond that, although signed and sealed by him, his name does not appear in the body of it. But it is not always essential, in order to bind one by a contract, that his name shall appear in the body of it, if there is enough in its terms, in connection with the signing, to show that he intended to be bound. For instance, where, as in this case, it reads: "We," then stating the obligation or undertaking, it is, if there be nothing else to show the contrary, the contract of the parties who execute it. For what purpose does the party sign and seal, except to be bound by it? See *Ex parte Fulton*, 7 Cow. 484; *Decker v. Judson*, 16 N. Y. 439; *Perkins v. Goodman*, 21 Barb. 218; *Dair v. U. S.* 83 U. S. 16 Wall. 1 [21 L. ed. 491].

There is not enough in the mere fact that Rotering's name was not in the body of the bond to put the obligee on inquiry, so as to charge him with notice that, after signing and sealing, and before delivery, the former refused

to let it go any further, if such were the fact.

The condition of the bond is: "Now, therefore, in case the said C. F. Hummel shall fully indemnify and save harmless said J. C. Campbell, police officer, from all damages and costs by reason of said claim of said above-named claimant, and shall pay all costs and damages to which said police officer may be put by reason thereof then this obligation shall be void," etc. According to all the authorities, an undertaking to "indemnify and save harmless" gives no right of action until the party indemnified is actually damaged, *i. e.*, has been compelled to pay and has paid, by reason of the thing against which or consequences of which he is indemnified. The doubt on this bond arises upon the words, "and shall pay all costs and damages to which said police officer may be put by reason thereof." Are they to be construed as an undertaking to prevent him becoming liable for damages and costs, or discharge or acquit him from such liability if it accrue against him, or are they intended only to indemnify him against damage?

In *Weller v. Barnes*, 15 Minn. 461 (Gil. 376), the bond was to indemnify against "legal liability," and it was urged that it was an undertaking to prevent liability accruing against the obligee, or to discharge and acquit him from it, if it had already accrued. But the court held it an indemnity only against actual damage, and that a judgment recovered against the obligee, not paid, did not show actual damage. In this case the expression, "costs and damages to which said officer may be put," is not stronger than the terms of the bond in that case. Could the officer be said to be put to costs and damages, when he has become liable to but has not paid them? We think not. A slight change in the phraseology might produce a different result; as, if it were to pay all costs and damages which he may become liable to, or (perhaps) which he may incur. In such case, the obligation to pay would be fixed by the obligee's becoming liable. But, as it is, we think the obligation was to pay the obligee, not to pay somebody else; and it was fixed only when he had sustained actual damage, *i. e.*, had been compelled to pay.

Order reversed.

PENNSYLVANIA SUPREME COURT.

Nannie R. COLLINS, *Appt.*,

v.

CHARTIERS VALLEY GAS CO.

Mary L. OSBON, *Appt.*,

v.

CHARTIERS VALLEY GAS CO.

(.....Pa.....)

1. The distinction between the rights in

surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location and course.

2. Damages for injuries to wells of clear fresh water by the rising and mixing therewith of salt water from a lower stratum, caused by boring for gas or oil, may be recovered from the party boring, if he knew or ought to have known of the existence of the stratum of fresh water, and of the deeper stratum of salt

NOTE.—Action of damages for nuisance.

An action will lie against an individual or private corporation maintaining a nuisance, by one who has suffered special damage therefrom. *Mehrfhof Bros. Brick Mfg. Co. v. Delaware, L. & W. R. Co.* 51 N. J. L. 58.
6 L. R. A.

An individual can only maintain an action for damages by reason of a nuisance when some right of his own has been invaded. *Henry v. Newburyport*, 5 L. R. A. 179, 149 Mass. 582.

The construction and use of gas-works, the percolations from the refuse of which pollute and

water, as well as of the fact that drilling through them would almost inevitably mix the two, and could, at a reasonable expense, have shut off the salt water from the fresh and thus prevented the injury.

(January 6, 1890.)

CERTIORARIS *sur* appeals by plaintiffs from judgments of the Court of Common Pleas No. 2 of Allegheny County in favor of defendant in actions brought to recover damages for the alleged pollution by defendant of plaintiffs' wells. *Reversed.*

Plaintiffs each owned a lot of ground with a dwelling-house thereon, in the Borough of Glenfield. Upon each lot was a well of clear, good, pure and healthy water, sufficient for all domestic purposes.

The defendant Company was engaged in boring for oil and gas, and in 1887 began boring a well a short distance from plaintiffs' water wells, upon land held by it under an oil and gas lease.

The drill struck the veins of water which supplied plaintiffs' wells at a distance of about seventy to ninety feet below the surface, and at something over 700 feet from the surface it struck heavy veins of salt water which came towards the surface and mixed with the fresh water that supplied plaintiffs' wells and rendered the water in such wells unfit for use.

Plaintiffs respectively brought suits to recover damages for the injury to their wells, which were tried together by agreement of the court and counsel, and judgments having been rendered for defendant, the plaintiffs took these appeals. Further facts appear in the opinion.

Messrs. S. U. Trent and James S. Young, for appellants:

He who negligently or maliciously diverts or corrupts a subterranean stream, whether it is distinctly defined or subsists in the nature of percolation, so as to deprive his neighbor of it, is liable in damages.

Chasemore v. Richards, 5 Hurlst. & N. 990, 7 H. L. Cas. 849; *Ang. Watercourses*, § 114, *m*; *Whentley v. Baugh*, 25 Pa. 528; *Haldeman v. Bruckhart*, 45 Pa. 514; *Lybe's App.* 106 Pa. 626; *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 118 Pa. 126; *Hetrich v. Deachler*, 6 Pa. 32; *Miller v. Miller*, 9 Pa. 74.

There is a distinction between the diversion of streams and the corrupting of them, whether surface or subterranean, and whether known and defined, or unknown and subsisting as percolations, and greater care must be exercised to prevent the corruption of waters than the diverting of them.

Hodgkinson v. Ennor, 4 Best & S. 229; *Frazier v. Brown*, 12 Ohio St. 294, 312; 3 Am. L. Reg. N. S. 240, in *note* as stated in *Angell on Watercourses*, 114 J; *Tenant v. Goldwin*, 2

Ld. Raym. 1089, 1 Salk. 21, 860, 6 Mod. 311, Holt, 560.

Messrs. Kennedy & Doty, for appellee:

"If, without an intention to injure an adjacent owner, and while making use of his own lands for any suitable and lawful purpose, the owner cuts off, diverts or destroys the use of an underground spring, or current of water, which has no known and defined course, but has been accustomed to penetrate and flow into the land of his neighbor, he is not thereby liable to any action for the decrease or stoppage of such water."

Washb. Easem. § 864; *Angell, Watercourses*, § 114, *a, et seq.*; *Pennsylvania Coal Co. v. Sanderson*, 4 Cent. Rep. 475, 118 Pa. 126; *Haldeman v. Bruckhart*, 45 Pa. 514; *Wheatley v. Baugh*, 25 Pa. 528; *Brown v. Illius*, 27 Conn. 84; *Frazier v. Brown*, 12 Ohio St. 294; *Johnstown Cheese Mfg. Co. v. Veghte*, 69 N. Y. 16; *Acton v. Blundell*, 12 Mees. & W. 324; *Chasemore v. Richards*, 7 H. L. Cas. 849; *West Cumberland Iron & Steel Co. v. Kenyon*, L. R. 11 Ch. Div. 782.

Mitchell, J., delivered the opinion of the court:

The dividing line between the right to use one's own and the duty not to injure another's is one of great nicety and importance, and frequently of difficulty. The Pennsylvania decisions have endeavored with unusual care to preserve the substance of both rights as far as their sometimes inevitable conflict may permit.

With regard to the use and control of flowing water and of watercourses, the case of *Pennsylvania Coal Co. v. Sanderson*, 118 Pa. 126, 4 Cent. Rep. 475, definitively settled the rule that for unavoidable damage to another's land in the lawful use of one's own, no action can be maintained. No other result seems possible without restricting the uses derogating from the full enjoyment, and diminishing the value of property. But the rule does not go beyond proper use and unavoidable damage. It is thus clearly expressed in the opinion of our brother Clark: "Every man has the right to the natural use and enjoyment of his own property; and if, whilst lawfully in such use and enjoyment, without negligence or malice on his part an unavoidable loss occurs to his neighbor, it is *damnum absque injuria*" (p. 146).

That this is the rule as to surface streams was conceded by the defendants below, but they contended that as to subterranean waters, or at least as to percolations and hidden streams, an owner was not bound to pay any attention to the effect of his operations within his own land upon the land of others. The learned judge below, though seeing and expressing the force of the reasons for a uniform rule applicable to both classes of waters, felt himself so far constrained by adjudicated cases that he directed

make the water in the wells of an adjoining land owner unfit for household purposes and for the use of stock, is a nuisance, and the party injured thereby is entitled to damages. *Pennscola Gas Co. v. Pebley* (Fla.) 5 So. Rep. 593.

If the water of a well is rendered impure by an escape of gas therein, the fact that other causes contributed to make it unfit for use is not a bar to an action, but may be shown to affect the amount 6 L. R. A.

of damages. *Sherman v. Fall River Iron Works Co.* 5 Allen, 213.

Petroleum oil, like subterranean water, is included in the idea which the law attaches to the word "land," and is a part of the soil in which it is found. *Hall v. Reed*, 15 B. Mon. 479; *Kier v. Peterson*, 41 Pa. 357; *Peterson v. Kier*, 2 Pittsb. Rep. 191; *Chicago & A. Oil & Min. Co. v. U. S. Petroleum Co.* 57 Pa. 83; *Stoughton's App.* 88 Pa. 193.

a verdict for the defendant. We have therefore to examine the cases to see what the true distinction is between surface or visible, and subterranean waters, and whether different principles are applicable to the rights in them respectively or the same principle with only such modifications as may be necessary in practical application.

In *Wheatley v. Baugh*, 25 Pa. 528, the plaintiff had a spring upon his property, which he had used in his tannery for more than twenty-one years when defendant opened a mine on his adjacent land, and put in a steam pump to take out the water with the result of drying up the plaintiff's spring. It was held that plaintiff had no cause of action. This case settled the law on the subject of percolating waters, and has not since been questioned.

It was followed in *Haldeman v. Bruckhart*, 45 Pa. 514, but was restated rather narrowly by Justice Strong, thus: "In that case it was ruled that where a spring depends for its supply upon filtrations or percolations of water through the land of an owner above, and in the use of the land for mining or other lawful purposes the spring is destroyed, such owner is not liable for the damages thus caused to the proprietors of the spring, unless the injury was occasioned by malice or negligence. To such percolations or filtrations, then, the inferior owner has no right. This was all that was necessary to the decision of the case." He then criticises the rest of the opinion in *Wheatley v. Baugh* as dictum, and formulates the rule again in the following terms: "A proprietor of land may in the proper use of his land for mining, quarrying, draining or any other useful purpose, cut off or divert subterranean water flowing through it to the land of his neighbor, without any responsibility to that neighbor."

These forcible statements of the rule are, as I apprehend, the main ground of the contention, on behalf of the defendant in the present case, that an owner is not bound to pay any regard to the effect of his operations on subterranean waters. But this contention overlooks the qualification, made in all the cases, that there must be no negligence.

The opinion of Chief Justice Lewis in *Wheatley v. Baugh* is as able, elaborate and convincing a discussion of the subject as can be found reported, and in it the necessary and unavoidable character of the damage is explicitly insisted on. "When the filtrations are gathered into sufficient volume to have an appreciable value, and to flow in a clearly defined channel, it is generally possible to see it, and to avoid diverting it without serious detriment to the owner of the land through which it flows. But percolations spread in every direction through the earth, and it is impossible to avoid disturbing them without relinquishing the necessary enjoyment of the land." p. 532. "The owner of a spring, although his right is imperfect where the supply is derived through his neighbor's land, has nevertheless a privilege subordinate only to the paramount rights of such neighbor; and it is only when the fair enjoyment of those paramount rights requires its destruction that he is bound to submit to the deprivation." p. 535.

And even in *Haldeman v. Bruckhart*, which is the most strongly expressed of all the deci-

sions in favor of the rights of the proprietor on his own land, it is clear that the same qualification is not lost sight of although not prominently put forward. "A surface stream," says Strong, J., "cannot be diverted without knowledge that the diversion will affect a lower proprietor. Not so with an unknown subterranean percolation or stream. One can hardly have rights upon another's land which are imperceptible, of which neither himself nor that other can have any knowledge. . . . These appear to us very sufficient reasons for distinguishing between surface and subterranean streams, and denying to inferior proprietors any right to control the flow of water in unknown subterranean channels upon an adjoining's land. They are as applicable to unknown sub-surface streams as they are to filtrations and percolations through small interstices."

And in *Lybe's App.* 106 Pa. 634, it is said: "The rule is that wherever the stream is so hidden in the earth that its course is not discoverable from the surface, there can be no such thing as a prescription in favor of an adjacent proprietor to have an uninterrupted flow of such stream through the land of his neighbor."

On the other hand, where the subterranean water is not hidden, but has a defined flow which is known or ascertainable, rights in it will be treated on the same basis as rights in a surface stream. *Whetstone v. Bouser*, 29 Pa. 59.

It is therefore clear from the principles and the reasoning of all the cases that the distinction between rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location and course.

The principle of *Pennsylvania Coal Co. v. Sanderson* is precisely the same as that of *Wheatley v. Baugh*, and is of general application. It is that the use which inflicts the damage must be natural, proper and free from negligence, and the damage unavoidable. On the question of negligence the question of knowledge is always important and may be conclusive. Hence the practical inquiry is, first, whether the damage was necessary and unavoidable; secondly, if not, was it sufficiently obvious to have been foreseen, and also preventable by reasonable care and expenditure?

In *Pennsylvania Coal Co. v. Sanderson* the damage was unavoidable. In *Wheatley v. Baugh* it was not ascertainable beforehand. Hence the plaintiff had no cause of action in either case. Later cases following *Wheatley v. Baugh* have held that injury to springs, wells, etc., supplied by mere percolation, was not actionable, and the reason has always been the same, that the damage could not be foreseen or avoided. If the boundaries of knowledge have been so enlarged as to make an end of the reason, then *cessante ratione, cessat ipso iure*.

Geology is a progressive, and now in many respects a practical, science; and, as truly remarked by the learned judge below, in his opinion on the motion for a new trial, since the decisions in *Acton v. Blundell*, 12 Mees. & W. 324, and *Wheatley v. Baugh*, probably more deep wells have been drilled in Western Pennsylvania than had previously been dug in the

entire earth in all time. And that which was then held to be necessarily unknown or merely speculative as to the flow of water underground, has been by experience in such cases as this reduced almost to a certainty."

If this is the state of knowledge at the present day—if the existence of a stratum of clear water and its flow into wells and springs of the vicinity, and the existence of a separate and deeper stratum of salt water which is likely to rise and mingle with the fresh when penetrated in boring for oil or gas, are known, and the means of preventing the mixing are available at reasonable expense—then clearly it would be a violation of the living spirit of the law not to recognize the change and apply the settled and immutable principles of right to the altered conditions of fact. The learned judge in his charge said, "there is evidence from which the jury could fairly find that the defendant when the well was drilled knew or ought to have known, if it had exercised any reasonable judgment or investigated or paid attention to it, that the boring of this well in the way it was done, without shutting off the salt water from the fresh water, would almost inevitably ruin these and other wells in the immediate vicinity. And I think there is evidence from which the jury could fairly find that the defendant could, with the outlay of a small amount of money, have

shut off the salt water from the fresh water so that it could not have done any injury."

If the jury had found the facts, as this charge assumes that they fairly might on the evidence, then the plaintiff had made out a case of negligence and was entitled to recover. Negligence in this sense is the absence of such care and regard for the rights of others as a prudent and just man would and should have in the same situation. If the plaintiff showed that the injury was plainly to be anticipated, and easily preventable with reasonable care and expense, he brought himself within the exception of all the cases from *Wheatley v. Barugh to Pennsylvania Coal Co. v. Sanderson* inclusive.

It may be well to say that in cases of this nature juries should be held with a firm hand to real cases of negligence within the exception, and not allowed to pare down the general rule by sympathetic verdicts in cases of loss or hardship from the proper exercise of clear rights. The danger of such result is not to be ignored, but we cannot, on that account, shut the door to suitors entitled to redress for genuine wrongs. The duty to maintain the line firmly where justice and law put it is in the first instance and chiefly upon the trial courts.

Judgment reversed, and venire de novo awarded.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Julian A. HOLMES

v.

TURNERS FALLS LUMBER CO. *et al.*

((...Mass....))

1. A reference to an auditor in a writ of entry "to examine the claims and vouchers and hear the parties thereon" includes all claims made by the parties, and therefore embraces a disputed question as to division lines.
2. Power to refer a cause at issue, under Mass. Pub. Stat., chap. 150, § 61, "whether the form of the action is contract, tort or replevin," is not restricted to actions of the forms specified, but extends to all civil proceedings at law including a writ of entry.
3. Statements as to boundaries made by an officer of a corporation while negotiating a sale or lease of real estate, which he had authority to sell or lease, may be proved after his death against the corporation or its subsequent grantees.
4. Declarations of the treasurer of a corporation, who had no authority to bind it by his statements, may be admissible if made in the course of negotiations for the corporation by himself and the president, and in the presence of the latter, who did not dissent therefrom, where the declarations of the president would be competent evidence.
5. A general objection to declarations of two persons whose statements are not distinguished is insufficient to question the admissibility of the declarations of one of them.
6. The possession of a tenant beyond the boundaries of the land contained in the lease, even if he believes that he is occupying only the land demised, will not be the possession

of the landlord, if the latter never had possession of the land or claimed it.

7. Neither the mortgagor nor his grantees holds adversely to the mortgagee until he has distinctly disclaimed holding under him, and asserted title in himself.
8. An assignee of a mortgage for collateral security can, as against the mortgagor and those who claim under him, execute a power of sale as fully as if the assignment were absolute.
9. Land may be sold in parcels to separate purchasers at one sale under a power in a mortgage if the sale is made in such a manner as to obtain the most money for the land.

(January 4, 1890.)

ON defendants' exceptions. *Overruled.*

This was a writ of entry against the Turners Falls Company and the Turners Falls Lumber Company in the Superior Court, Franklin County, to recover the possession of and try the title to a strip of land lying on the easterly side of the Connecticut River at Turners Falls. The action was by order of court referred to an auditor, and to the admission of his report in evidence an exception was taken.

The facts appear in the opinion.

Messrs. George D. Robinson, Samuel T. Field and Franklin G. Fessenden, for demandant:

The court has power to appoint auditors in such cases, even though the parties to the suit object.

Clark v. Fletcher, 1 Allen, 53.

The words "whether the form of the action is contract, tort or replevin," in Pub. Stat.,

chap. 159, § 51, do not limit the effect of the section.

This section, so far as material to this case, is a re-enactment of Gen. Stat., chap. 121, § 46.

It did not restrict the class of cases which might be referred to auditors. It has been said by the courts to extend so as to embrace all causes at issue.

Quimby v. Cook, 10 Allen, 82—a bill in equity to redeem from mortgage; *Corbett v. Greenlaw*, 117 Mass. 167,—petition to enforce mechanics' lien.

Declarations of a deceased former owner of land are admissible, even though they make in his favor.

Daggett v. Shaw, 5 Met. 223; *Wood v. Foster*, 8 Allen, 24; *Niles v. Patch*, 18 Gray, 254; *Long v. Colton*, 116 Mass. 414.

Declarations of a party in disparagement of his title are admissible against him.

Church v. Burghardt, 8 Pick. 327; *Kellenberger v. Sturtevant*, 7 Cush. 465; *Flagg v. Mason*, 2 New Eng. Rep. 162, 141 Mass. 64.

And the rule extends to declarations made by a former owner, under whom the present owner claims.

Tyler v. Mather, 9 Gray, 177; *Osgood v. Coates*, 1 Allen, 77; *Blake v. Everett*, 1 Allen, 248; *Chapman v. Edmonds*, 8 Allen, 512; *Pickering v. Reynolds*, 119 Mass. 111; *Simpson v. Dix*, 181 Mass. 179; *Rowell v. Doggett*, 8 New Eng. Rep. 756, 143 Mass. 483.

A corporation must always act through agents; and the rule is that admissions or acts of agents, made or done while in the performance of duty, are the admissions and acts of the corporation.

Morse v. Connecticut River R. Co. 6 Gray, 450; *Blanchard v. Blackstone*, 102 Mass. 349; *Gott v. Dinamore*, 111 Mass. 45; *Lane v. Boston & A. R. Co.* 112 Mass. 455; *McGenness v. Adriatic Mills*, 116 Mass. 177; *Wiggin v. Boston & A. R. Co.* 120 Mass. 201; *Green v. Boston & L. R. Co.* 128 Mass. 221; *Richmond Iron Works v. Hayden*, 132 Mass. 180; *Kirkstall Brewery Co. v. Furness R. Co. L. R.* 9 Q. B. 468; *Parrott v. Watts*, 47 L. J. N. S. C. P. Div. 79; *The Solway*, L. R. 10 Prob. Div. 137.

The cases in which it has been held that declarations of agents are not admissible were decided on the grounds that the declarations were not made within the scope of the employment, or that they were made after the particular transaction was ended.

Burgess v. Wareham, 7 Gray, 345; *Blanchard v. Blackstone*, *supra*; *Boston & M. R. Co. v. Ordway*, 1 New Eng. Rep. 721, 140 Mass. 510; *Williamson v. Cambridge R. Co.* 8 New Eng. Rep. 750, 144 Mass. 148.

It was not only the mortgagee's right, but also his duty, to sell in parcels, if by so doing a better sale could be made. It appears by the affidavit that the premises divided into parcels in this way "would sell for the highest price."

Olcott v. Bynum, 84 U. S. 17 Wall. 44 (21 L. ed. 570); *Jones*, Mort. 1858, 1859.

The power of sale was full. The sale was made in good faith. The mortgagors were not prejudiced.

Pryor v. Baker, 133 Mass. 459.

Messrs. **Bond & Mason and Austin De Wolf**, for defendants:

If the court had authority to appoint an auditor, he should have confined his report to such subjects as were expressly embraced in the order appointing him. He had no power to report upon the division line, and his report in this matter was not admissible in evidence.

Jones v. Stevens, 5 Met. 378; *Flint v. Hubbard*, 1 Allen, 252.

An agreement between the parties that an auditor may consider and report upon every item of the matters submitted to him according to his judgment does not confer upon him any additional powers.

Flint v. Hubbard, *supra*.

Nor does the fact that both parties went into evidence before the auditor on the matter of the division line confer additional powers. Parties cannot, by an implied assent, confer power which they cannot confer by express consent.

Jones v. Stevens, *supra*.

If one of the findings of an auditor is erroneous in matter of law, or in excess of the authority conferred by the rule of reference, the jury should be instructed accordingly, and so much of the report stricken out.

Briggs v. Gilman, 127 Mass. 530.

An agent's declarations are admissible in evidence against his principal only when they are a part of the *res gesta*.

Woods v. Clark, 24 Pick. 85; *Cooley v. Norton*, 4 Cush. 98.

These alleged declarations were not admissible as a part of the *res gesta*.

Nutting v. Page, 4 Gray, 581.

The president of the Company was merely its agent, and his declarations are like those of an agent of an individual.

Ang. & A. Corp. ed. 1883, § 809.

The declarations of the president of the Company were not the declarations of a person who owned the land. It does not appear that he had the interest of a stockholder of the Company. A person may be president of a company and not be a stockholder.

Pub. Stat. chap. 106, § 25; Gen. Stat. chap. 60, § 5; *Wight v. Springfield & N. L. R. Co.* 117 Mass. 226.

All declarations made by an agent while negotiating a transaction for another are not evidence against the principal and those claiming under him.

Fairlie v. Hastings, 10 Ves. Jr. 127; *Hannay v. Stewart*, 6 Watts, 459.

It has been held that neither the treasurer nor the individual directors of a corporation were authorized to admit that the condition of a contract had been performed and that the money was due under it.

Tripp v. New Metallic Packing Co. 137 Mass. 503.

The possession of the Turners Falls Lumber Company, under the lease of the Turners Falls Company, was the possession of the Turners Falls Company.

Melvin v. Proprietors of Locks & Canals, 5 Met. 15.

Field, J., delivered the opinion of the court: Since the enactment of the Revised Statutes the demandant in a writ of entry is entitled to recover rents and profits, although damages therefor are not specifically claimed in the writ; and the tenant, if he make the claim, is entitled

to an allowance for improvements, and the amount of both these claims may be assessed by a jury. Pub. Stat. chap. 173, §§ 12-35. *Raymond v. Andrews*, 6 Cush. 265.

On December 1, 1886, the superior court referred the present cause to an auditor. The rule recites that it appears, upon an examination of the issue, that the trial of said action will require an investigation of accounts, and an examination of vouchers by the jury, and therefore the court appoints "Edward E. Lyman of Greenfield, in said county, an auditor to examine the claims and vouchers, and hear the parties thereon, and make report thereof to the court; and if either of the parties shall neglect to appear before the auditor, after due notice given of the time and place appointed for hearing them, the auditor may proceed *ex parte*."

When this rule was entered, the tenants had pleaded *nul disseisin* and has filed a claim for an allowance for improvements. Pending the hearing before the auditor, the parties filed an agreement in writing "that all questions concerning rents and profits and the value of improvements by the tenants shall be postponed till after the trial of the question of title, to be determined by an assessor."

The hearing proceeded and the auditor subsequently made and filed his report, in which he found that both tenants had disseised the demandant of a portion of the demanded premises, which he defined by metes and bounds. The demandant at the trial offered this report in evidence. The tenants objected to its admission on two grounds: "first, that there is no authority to appoint an auditor in a real action;" and, "second, that the matter of the division line was not included in the reference to the auditor." The exceptions then state that, "it appearing to the court that no exception had been taken to the order referring the case to an auditor, and that all parties had appeared before the auditor and proceeded to a full hearing, and no objection was made till the report was offered in evidence, the court admitted the auditor's report. The tenants excepted."

It may be that it was competent for the court to find, on the facts which appeared, that the parties had consented that the cause should be referred to an auditor, with the usual powers, and that a reference of a cause to an auditor by consent of parties may be made by rule of court as well as a reference to an arbitrator or a referee; and that it was too late for the tenants to take this objection when they made it, even if the court had no authority to appoint an auditor in a real action. See *Kimball v. Amesbury Baptist Society*, 2 Gray, 517.

We prefer, however, to consider the principal question. The history of the practice of referring causes to auditors is examined in *Holmes v. Hunt*, 122 Mass. 505, and in *Locke v. Bennett*, 7 Cush. 445. The first statute on the subject is Stat. 1817, chap. 142, and it is entitled "An Act for Facilitating Trials in Civil Causes." It provided "that whenever in any action before the supreme judicial court or any circuit or other court of common pleas, it shall appear to said courts that an investigation of accounts or an examination of vouchers is necessary for the purposes of justice between the parties, it shall be lawful for the said courts to appoint an auditor or auditors to

state the accounts between the parties and to make report thereof to the courts as soon as may be," etc.

The first statute authorizing the appointment of masters in chancery is Stat. 1826, chap. 109, § 4. *Lyman v. Warren*, 12 Mass. 412, decided in 1815, was an action of debt on a probate bond in which the defendant confessed a forfeiture, and "prayed to be heard in chancery," on the amount for which execution should issue, and the court, with consent of the parties, appointed three persons as auditors, "to examine and take and state the accounts in the action." The opinion indicates that the appointment of auditors in such a suit was not unknown in practice, although at that time there was no statute authorizing either the appointment of auditors or masters in chancery.

The phraseology of Stat. 1817, chap. 142, shows that it was the intention of the Legislature to authorize the courts named in the Act to appoint an auditor or auditors in any civil action in which "an investigation of accounts or an examination of vouchers" was necessary. The Revised Statutes, chap. 96, §§ 25-31, are a re-enactment of Stat. 1817, chap. 142, "with the addition of some practical details, but without any material change," as the commissioners say in their report which was adopted by the Legislature. Section 25, Id., provides that "whenever a cause is at issue, and it shall appear that the trial will require an investigation of accounts, or an examination of vouchers by the jury," the court may appoint one or more auditors to hear the parties and examine their vouchers and evidence, and to state the accounts and make report thereof to the court.

In *Whitwell v. Willard*, 1 Met. 216, decided in 1840, a majority of the court held that the Revised Statutes did not authorize the court, without the consent of the parties, to appoint an auditor in an action against an officer for not attaching numerous articles of personal property, and Shaw, Ch. J., said that the issue "involves no question of debtor and creditor, no examination of book accounts or other vouchers, no relation in which one party is accountant to the other, or in which any question of account can come collaterally in issue." He also said that "the court would not be understood to intimate that the authority to appoint auditors to examine vouchers and state an account depends upon the form of the action, and may not extend to an action sounding in tort."

The opinion in *Locke v. Bennett*, *supra*, perhaps suggests that the court were not entirely satisfied with the decision of the majority in *Whitwell v. Willard*. See *Rich v. Jones*, 9 Cush. 822; *Kimball v. Amesbury Baptist Society*, *supra*.

Stat. 1856, chap. 202, did not purport to repeal pre-existing statutes, but it provided that "whenever a cause is at issue in any court, whether the form of the action be contract, tort or replevin, the justice of the court before whom the same is pending may in his discretion appoint one or more auditors to hear the parties, and report upon such matters therein as may be directed by the said court, and the report in such case shall be prima facie evidence upon such matters only as are expressly embraced in the order of the court."

Gen. Stat., chap. 121, §§ 46-50, were in

tended, as stated in *Fair v. Manhattan Ins. Co.*, 113 Mass. 320, to be "a condensed re-enactment of the earlier statutes."

Stat. 1883, chap. 197, provided that "justices of police courts shall have no power to send any case to an auditor unless both parties shall assent thereto in writing." This, and the sections of the General Statutes which have been cited, were re-enacted in Pub. Stat., chap. 159, §§ 51-55.

Pub. Stat., chap. 159, § 51, provides that "when a cause is at issue, whether the form of the action is contract, tort or replevin, a police district or municipal court, where both parties assent thereto in writing, and any other court in its discretion, may appoint one or more auditors to hear the parties, examine their vouchers and evidence, state accounts and report upon such matters therein as may be ordered by the court," etc.

The question is, whether the clause "whether the form of the action is contract, tort or replevin," restricts the authority of a court to appoint an auditor to these divisions of personal actions. We are of opinion that it does not. An action of waste, an action of ejectment, a writ of entry upon disseisin, and a writ of dower, are, in our practice, mixed actions, in which damages are recovered as well as the possession of land; and the appointment of an auditor in these actions is often as necessary for the purposes of justice as in personal actions. The writ of entry to foreclose a mortgage has been held to resemble a suit in equity as much as an action at law, and there is especial need, in such an action, for the appointment of an auditor.

The original Statute of 1817 authorized the appointment of auditors in any civil action, but it restricted them to an investigation of accounts. The Statute of 1856, chap. 202, was passed for the purposes of extending the authority of auditors to hear and report upon any matters in a cause upon which they were directed by the court to report. As the investigation of accounts would arise usually, although not exclusively, in actions of contract, and as the appointment of auditors before the Statute of 1856, chap. 202, had generally been made in actions of contract, the clause, "whether the form of the action be contract, tort or replevin," was inserted to show that the Legislature did not intend to confine the appointment of auditors to any particular form of personal actions. It may be true that the Legislature in making this enactment had in mind only personal actions, but the principal clause of the Statute is general and must be held to include any cause at issue, and this Statute has been incorporated with the re-enactment of the Statute of 1817, which in terms gave authority to appoint an auditor in any civil action.

In *Corbett v. Greenlaw*, 117 Mass. 167, no doubt was expressed of the power of the court to appoint an auditor in a petition to enforce a mechanics' lien. Indeed in *Quimby v. Cook*, 10 Allen, 82, which was a bill in equity to redeem land from a mortgage, the court referred the case to an auditor to state the accounts between the parties, and the question raised was, whether the auditor in his report had exceeded his powers; and the court says that "by Stat. 1856, chap. 202, re-enacted in Gen. Stat., chap. 14, § 6 L. R. A.

§ 46, the power (of auditors) is extended so as to embrace all causes at issue in every court, whatever may be the form of action," etc.

It is not necessary, however, in the present case, to determine whether under existing statutes a court can appoint auditors in an equity suit. It may be said that the existing statutes seem to indicate that masters are to be appointed in suits in equity, and auditors in civil actions at law. Pub. Stat., chap. 159, §§ 46-55, and Stat. 1817, chap. 143, relate to actions, and the Statute of 1817 provides that the report of the auditor or auditors "shall, under the direction of said court, be given in evidence to the jury, subject, however, to be impeached by evidence from either party," and this language is not directly applicable to suits in equity.

At the time this Statute was passed the equity jurisdiction of the supreme judicial court was extremely limited, and it may be doubted whether the Legislature intended by this Statute to authorize the appointment of auditors, as distinguished from masters in chancery in suits in equity; and since the passage of Stat. 1826, chap. 109, there has been no need of auditors in suits in equity, whatever may have been the early practice in equity in this Commonwealth.

However this may be, we think that the existing statutes were intended to authorize the supreme judicial and superior courts to appoint an auditor or auditors in all civil proceedings at law, and that the appointment of an auditor in the case at bar was within the power of the court.

The rule to the auditor in the present case was not drawn in a form the most appropriate to the action, but it directs the auditor "to examine the claims and vouchers and hear the parties therein, and make report thereof to the court," and we think that this includes all the claims made by the parties to the action.

It appears in the exceptions that the demandant claimed title to the land "on the east of the centre line of the road referred to in the deed from Stoughton to the Turners Falls Company in 1857, and in the deed from Stoughton to Holmes and Wood in 1869," and "claimed no land west of" this centre line; and that the tenants "claimed no title to any land east of the centre line of said road." It does indeed appear that the tenants claimed that the westerly boundary of the demandant's land was to the centre of the old road, southerly from a point where a line drawn from the bound under the old mill, and running it 45° E., crossed the old road, and thence northerly on said line to the east side of said road, and thence on the east side of the road to the northerly end of the demanded premises. The difference between these statements is that in one the centre line of the old road constitutes the entire westerly boundary line of the demandant's land, and in the other it constitutes only a part of that boundary.

The demandant's title is as follows: Timothy M. Stoughton conveyed certain lands, including the land in dispute, to Holmes and Wood, by deed dated April 10, 1869, and on the same day Holmes and Wood gave Stoughton a mortgage on the same lands. Both these deeds were recorded June 14, 1869. Certain parcels, not including the land in dispute, were released

from this mortgage by Stoughton, and thereafter on May 22, 1877, the mortgage was assigned by Stoughton to Peleg Adams, and Adams on February 28, 1882, entered on the lands, then included in the mortgage, for breach of condition, and on March 18, 1882, acting under the power of sale contained in the mortgage, sold all the land then included in the mortgage, in separate parcels to different purchasers, selling one parcel to the demandant, and on April 1, 1883, Adams executed and delivered a deed of this parcel to the demandant.

The tenant's title to this and the adjoining land is as follows: Stoughton, by deed dated October 6, 1857, conveyed certain land to the proprietors of the upper locks and canals, on Connecticut River, and this corporation by Stat. 1866, chap. 275, became the Turners Falls Company. The easterly line of this land was the road leading to the ferry. On October 3, 1867, the Turners Falls Company gave Holmes and Wood a twenty years' lease of this land or some of it, in which was included a tract of land which was bounded "easterly by the Ferry Road." This lease was assigned by Holmes and Wood to the Turners Falls Lumber Company on May 11, 1872, and on the same day Holmes and Wood gave a written lease of a tract of land, which included the land in dispute, to the Turners Falls Lumber Company, for twenty years from October 3, 1867. The tract was bounded "westerly and southerly by land of the Turners Falls Company," etc. At this time Holmes and Wood owned the equity of redemption in the land demised by them, subject to the mortgage to Stoughton. The parcels of land described in these two leases adjoined each other, and the Turners Falls Lumber Company was therefore, until October 3, 1887, the lessee of the parcel of land which the demandant claimed, and was, for the same time, the assignee of the lease of the adjoining parcel of land which belonged to the Turners Falls Company. The westerly boundary of the demandant's land was the easterly boundary of the land of the Turners Falls Company, and their boundary, for a part at least of the distance, was the road leading to the ferry. The Turners Falls Lumber Company was, until October 3, 1867, in possession of both parcels under these leases.

The principal dispute between the parties at the trial was as to the location of this Ferry Road at the time when the Turners Falls Company and Holmes and Wood respectively acquired their titles from Stoughton.

For the purpose of showing where this road was in 1867, which was in part, at least, the easterly boundary of the land of the Turners Falls Company, the demandant put in the testimony of Nathaniel Holmes, of statements made to him in May, 1867, concerning the easterly boundary of this land, by Alvah Crocker and Wendall T. Davis, "while they were on the highway adjoining the premises," and were in negotiation for the lease, which was given October 3, 1867, by the Turners Falls Company to himself and Wood. It is said, and not denied, that Crocker and Davis had deceased before the trial.

The exceptions state that "at this time Alvah Crocker was president and Wendall T. Davis was treasurer of the Turners Falls Com-
6 L.R. A.

pany, and the same persons named in the votes of the Company and in the testimony of Nathaniel Holmes. It is argued by the counsel for the Turners Falls Company that Davis was not treasurer at this time, although he became treasurer before the lease was executed, and he referred at the argument to certain pages in the records of that Company, but the records referred to are not before us. In the exceptions, as we understand them, it appears that he was treasurer, and, if it were material to the decision, we should take the exceptions in this respect to be true unless they were amended.

The Turners Falls Company was authorized to make a lease of its lands. See Stat. 1866, chap. 275, § 3.

Its by-laws adopted September 1, 1866, provided as follows: "He [the president] may make such leases and contracts of waterpower and sales or leases of land as he may see fit, subject to the instruction or approval of the directors. The president and treasurer are hereby authorized to sign such deeds and documents as may be necessary to consummate such sales and leases, and to affix the corporate seal thereto." The directors at a meeting held September 1, 1866, voted "that the president be and hereby is authorized, for and in behalf of this board of directors, to make contracts for such labor and materials as may be needed in building our works, and also to sell or lease the lands or waterpower of this Company, and with the treasurer to execute deeds and leases in writing therefor, and attach the seal of the Company thereto, with authority to make legal acknowledgment of the same in behalf of the Company." The other votes of the Company, recited in the exceptions, apparently were subsequent to the conversation testified to by Holmes. The lease was, we infer, executed by Crocker as president, and Davis as treasurer, in behalf of the Company. The question is, whether the declaration of these officers of the Turners Falls Company, in regard to the boundary line of its land, made near to and in sight of the land, while negotiating a lease of it, are admissible against that Company, and also against the Turners Falls Lumber Company, the assignee of the lease.

It is argued that the declarations of Crocker and Davis are, in effect, the declarations of a deceased owner of land while in possession, which are admissible against him and his subsequent grantees to prove the boundaries of his land at the time he made the declarations. See *Rowell v. Doggett*, 143 Mass. 483, 8 New Eng. Rep. 756; *Flagg v. Mason*, 141 Mass. 64, 2 New Eng. Rep. 163; *Long v. Cotton*, 116 Mass. 414; *Chapman v. Edmands*, 8 Allen, 512.

A corporation must act through agents. In this case there was evidence that Crocker, the president, had full authority to sell or to lease the lands and waterpower of the Company, the treasurer executing with him the deeds or leases. We think that this implies that he had an authority, on behalf of the Company, to point out the boundaries of the land to be sold or leased, and that his statements made when negotiating a sale or lease must be regarded as the statements of the Company, and that they are admissible against the Company, and, as he has since deceased, that they are admissible against subsequent grantees of the Company.

It may be doubtful whether the statements of the treasurer can be regarded as the statements of the Company, but it appears that the president and the treasurer were together when the statements were made, and the witness does not distinguish between the statements made by each; and evidence of statements made by the treasurer in the presence and hearing of the president, and not denied by him, would be some evidence that the president assented to what the treasurer said. The objection of the tenants to the admission of the evidence was general; and if the tenants intended to ask the court to distinguish between the statements of the president and those of the treasurer, it was their duty specifically to have called the attention of the court to the distinction, and to have asked a ruling upon it.

For the same reason the other objections cannot be considered which are now taken, namely, that the by-laws and the vote of the directors, which have been cited, were not warranted by the charter or by the notice of the meetings at which they were passed. The full records of the corporation, or of the directors, are not before us. The stockholders subsequently ratified the lease given to Holmes and Wood. It was competent for the jury to find that Crocker, at the time he made the statement, was acting under the votes which had been passed; and we do not know that the demandant would not have been able to produce evidence which would have removed these objections, if they had been made known at the time.

The pertinency of the evidence concerning the easterly boundary of the land demised by the Turners Falls Company was that this boundary was in whole or in part the westerly boundary of the land claimed by the demandant. This evidence did not tend to contradict the lease, because that bounded the land demised "easterly by the Ferry Road," but did not define the location of that road.

The tenants also asked the court to instruct the jury "that if the Turners Falls Company by its tenant, the Turners Falls Lumber Company, was in possession of any portion of the premises described in the plaintiff's writ, claiming title thereto, at the time of the sale of the premises to the plaintiff, the plaintiff cannot recover in this suit any of the property so claimed, and so in possession of the Turners Falls Company at the time of said sale." Adams was the assignee of the mortgage given by Holmes and Wood on April 10, 1869, and recorded on June 14, 1869, and he "made open, peaceable and unopposed entry on the portions of the premises described in said mortgage, not heretofore released by the mortgagee or by said Adams for the purpose by him declared, of foreclosing said mortgage for breach of the condition thereof," on February 28, 1882, in the presence of two witnesses, who signed a certificate of such entry, and swore to it before a justice of the peace on the same day, and it was duly recorded on March 4, 1882. He also duly advertised the lands mortgaged, excepting those portions which had been released, for sale at public auction on the premises on said February 28, pursuant to the power of sale contained in the mortgage. The sale was adjourned to March 18, 1882, when the parcels

were sold separately on the premises, the lot last described in the mortgage being sold to the demandant.

The advertisement of the lands states that "the sale will be in parcels, or entire, as will be most beneficial to the parties in interest, or of such part only as will satisfy the claim secured by the mortgage." The affidavit of the sale, made by Adams, states: "I offered by Samuel J. Lyons, a duly licensed auctioneer, said premises for sale in three parcels, or entire, as the same should sell for the highest price; and for want of bidders for said premises, and at the request of the parties in interest, said sale was adjourned," etc., and that at the adjournment, "as no one would bid more for the entire estate than for the estate in parcels, the same was sold by said auctioneer in three parcels, to wit," etc.

The deed given by Adams is dated April 1, 1882, and is acknowledged and recorded on the same day. The exceptions state that this deed was delivered in Greenfield. The point intended to be raised by the tenants is that, if Adams was disseised at the time the deed to the plaintiff was delivered, then, as it was not delivered upon the land, nothing passed by the deed.

It is not very probable that Adams was disseised between the time when he entered for breach of condition, which was February 28, 1882, or the time when he made the sale on the premises, which was March 18, 1882, and the time when he delivered the deed, which was April 1, 1882; but it is possible. The tenants did not claim title by disseisin to the land included in the mortgage.

So far as the Lumber Company occupied under the lease from Holmes and Wood, it occupied under mortgagors whose title was subject to the mortgage held by Adams. So far as it occupied under the lease of the Turners Falls Company, which had been assigned to it, it occupied under a title to which Adams as assignee of the mortgage had no claim. As the parcels adjoined each other, but as the boundary between them was uncertain, it is possible that the Lumber Company may have occupied the land demanded, or some of it, under the belief and claim that it was included in the lease given by the Turners Falls Company, of which it was the assignee.

The requests of the tenants proceed upon the theory that if the Lumber Company, at the time of the sale, was in the possession of the demandant's land, claiming title thereto, this was a disseisin by the Turners Falls Company. But no evidence is recited that the Turners Falls Company ever claimed title to any part of the land which the demandant claimed. The evidence of the declarations of the officers of this Company was put in by the demandant to show that that Company claimed that the boundary line was where the demandant claimed it to be. No evidence appears that the Turners Falls Company put Holmes and Wood, or the Lumber Company, into the possession of any of the demandant's land, and the lease by the Turners Falls Company purported to bound the land demised easterly by the Ferry Road. If, after the Lumber Company took possession under this lease, it claimed the boundary to be further to the east; and if it occupied some of

the demandant's land under a claim of right derived from the lease of the Turners Falls Company, which had been assigned to it, this is not a disseisin by the Turners Falls Company; if it is a disseisin at all, it is a disseisin by the Lumber Company. The tenants' request ought not therefore to have been given in the form in which it was made.

If one person disseises another of land, and while in possession leases the land to a tenant, who continues to occupy it under his lease, the adverse possession of the tenant may be tacked to that of the landlord, and the possession of the tenant may be said to be that of the landlord; but if the landlord never had possession of the land, or claimed title to it, and did not include it in the lease, the possession of the tenant beyond the boundaries of the land contained in the lease is not the possession of the landlord, even although the tenant believes that he is occupying only the land demised. *Melvin v. Proprietors of Locks & Canals*, 5 Met. 15.

It is settled that a mortgagee of land may be disseised by a stranger, and that while he is disseised he cannot make a valid assignment of his mortgage. *Dadmun v. Lamson*, 9 Allen, 85.

It is said in the opinion that "whether this ancient rule of law is consistent with the present mode of transfer of title to real property, and is well adapted to the condition and wants of the community, is a question for the legislative branch of the government." It may perhaps at some time deserve further consideration, whether a mortgagee, in a power-of-sale mortgage, who enters on the land for breach of condition, and then sells it at public auction upon the land pursuant to the power, does not convey a good title even although the deed is delivered a few days after the sale, and is not delivered upon the land, and he is disseised at the time of the delivery.

It has been held that "exclusive possession by a mortgagor, and those claiming under him, with a claim of exclusive ownership, does not of itself amount to a disseisin of the mortgagee so as to invalidate a transfer of the mortgage title," or the valid execution of a power of sale contained in a mortgage. *Murphy v. Welch*, 128 Mass. 489; *Johnson v. Bean*, 119 Mass. 271; *Lincoln v. Emerson*, 108 Mass. 87; *Sheridan v. Welch*, 8 Allen, 106; *Hunt v. Hunt*, 14 Pick. 374.

The instructions of the presiding justice upon the question of disseisin are open to the criticism that they assume that there was some evidence that the Turners Falls Company claimed to hold the land demanded, under Holmes and Wood, an assumption that would undoubtedly have been corrected, if the attention of the justice had been called to it. But, in substance, the instructions, we think, are correct. These instructions first define with substantial accuracy what constitutes a disseisin by a stranger, and then go on to define what constitutes a disseisin of a mortgagee by a mortgagor, or by those claiming under him. The presiding justice instructed the jury that to constitute a disseisin of a mortgagee by a mortgagor, or those claiming under him, it must be made known to the mortgagee that the mortgagor or his grantees made some claim adverse to the

mortgagee. There are expressions in our reports to the effect that a mortgagor cannot disseise his mortgagee.

In *Lennon v. Porter*, 5 Gray, 318, it is said that "it is well established that a mortgagor, especially after entry, cannot disseise his mortgagee or defeat his right of possession. All such acts are held to be done in subordination to the title of his mortgagee."

In *Sheridan v. Welch*, *supra*, it is said that "there is nothing in the agreed statement of facts to show that any claim adverse to the mortgage was known to the mortgagee, and the facts do not show that he was disseised;" and there is a similar statement in *Murphy v. Welch*, *supra*.

The statement of the law, generally made, is that "neither the mortgagor nor his grantee holds adversely to the mortgagee until he has distinctly disclaimed holding under him, and asserted title in himself." 8 Washb. Real Prop. 5th ed. p. 154.

This, we think, is the correct rule, and it was substantially the rule laid down by the presiding justice. *Tripe v. Marcy*, 39 N. H. 439; *Medley v. Elliott*, 62 Ill. 532; *Maxwell v. Hartmann*, 50 Wis. 660; *Parker v. Banks*, 79 N. C. 480; *Coldcleugh v. Johnson*, 34 Ark. 312; *Coyle v. Wilkins*, 57 Ala. 108; *Martin v. Jackson*, 27 Pa. 504; *Zeller v. Eckert*, 45 U. S. 4 How. 295 [11 L. ed. 932].

Whether the occupation of the mortgagor and those claiming under him may not be of such a character as, of itself, to give notice to the mortgagee that they repudiate his title, and claim title adversely to him, or whether in all cases the mortgagee must be shown to have had actual notice or knowledge of such a claim, we think need not be decided in this case. If the tenants intended to raise these questions, they should have specifically asked the court to rule upon them, if there was any evidence which, in their opinion, made it necessary or proper that the law in this respect should be determined.

The Turners Falls Lumber Company asked the court to rule that the foreclosure of the mortgage was not valid, because the premises were sold in three parcels, and that said Company had a right to redeem, and it asked the court to order a conditional judgment. The court declined to so rule, and ruled that these questions "were immaterial at this stage of the case." The Lumber Company has argued its exceptions to this refusal and ruling. It contends that a tenant for years has a right to redeem; and that although the term has now expired, the right to redeem must be determined as of the date of the writ, which was March 3, 1883. The Company filed its motion for conditional judgment on June 30, 1887. See Pub. Stat. chap. 81, § 3.

We see no ground for the motion. In the case as reported in *Holmes v. Turners Falls Co.*, 142 Mass. 590, 3 New Eng. Rep. 177, the court did not find it necessary to decide whether there had been a valid execution of the power of sale. The contention then was that Adams alone could not execute the power because the mortgage had been assigned to him to hold "as collateral security." But the assignment conveyed to Adams the legal title to the mortgage, and we do not see why, as against the mort-

gagor and those claiming under him, he could not execute the power as fully as if the assignment had been absolute. Several distinct parcels of land were included in the mortgage, and we see no reason why they could not be sold at one sale to separate purchasers. This is

often the best method of selling different parcels of land, and it is not suggested that Adams did not make the sale in such a manner as to obtain the most money for the land.

Exceptions overruled.

OREGON SUPREME COURT.

PORTLAND LUMBERING & MANUFACTURING CO., *Appt.*,

v.

CITY OF EAST PORTLAND, *Resp.*

(....Or....)

*1. By section 1, art. 6, of the Charter of the City of East Portland, the common council of said City has full power, among other things, to improve the sidewalks, pavements, streets and all parts of streets within the limits of

*Head notes by STRAHAN, J.

the City, making full or partial improvements thereof, and to determine and provide for everything necessary or convenient to the exercise of the authority therein granted.

2. The power to contract inheres in every corporation, and is co-extensive with its corporate powers.

3. The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong.

(Thayer, Ch. J., dissents.)

NOTE.—Corporations; power to make contracts.

Corporations can make only those contracts which are required to effectuate the purposes of their creation. *Blair v. Perpetual Ins. Co.* 10 Mo. 562; *Beach v. Fulton Bank*, 3 Wend. 578.

Whatever, under the charter of a corporation and the general laws applicable to it, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited. *Green Bay & M. R. Co. v. Union Steamboat Co.* 107 U. S. 100 (27 L. ed. 418).

Corporations may enter into any obligation or contract essential to the transaction of their ordinary affairs, the same that a natural person could do, unless restrained by law. *McKiernan v. Lenzon*, 56 Cal. 61.

Contracts entirely foreign to the objects and purposes of the creation of the corporation are void; contracts in excess of its powers in some particulars may be valid, unless against public policy on account of such excess. *Germantown Farmers Mut. Ins. Co. v. Rhein*, 43 Wis. 420; *Rock River Bank v. Sherwood*, 10 Wis. 220; *Farmers & T. Bank v. Harrison*, 57 Mo. 508.

A contract not within the scope of the powers conferred on a corporation cannot be made valid by the assent of the shareholders, nor by a partial performance. *Thomas v. West Jersey R. Co.* 101 U. S. 53 (25 L. ed. 962).

Doctrine of ultra vires.

The doctrine of *ultra vires* should not be allowed to prevail where it would defeat the ends of justice or work a legal wrong. *Union Water Co. v. Murphy's Flat Fluming Co.* 22 Cal. 620; *Morris & E. R. Co. v. Sussex R. Co.* 20 N. J. Eq. 542; *Whitney Arms Co. v. Barlow*, 63 N. Y. 62. See note to *Scranton Electric Light & Heat Co's App.* 1 L. R. A. 285, 122 Pa. 154; *Rockhold v. Canton Mas. Mut. Benev. Soc.* (111.) 3 L. R. A. 420; *Bissell v. Michigan Southern & N. J. R. Co.* 22 N. Y. 263-280; *Bradley v. Ballard*, 55 Ill. 419; *Holmes v. Shreveport*, 81 Fed. Rep. 119-121.

An act is *ultra vires* when it is not in the power of the corporation to perform it; or when the corporation cannot perform it without the consent of certain persons; or when it cannot perform it for some specific purpose. *Miners Ditch Co. v. Zellerbach*, 37 Cal. 578; *McPherson v. Foster*, 43 Iowa, 66.

When the act is *ultra vires*, in the sense that it is 6 L. R. A.

not within the scope of the powers under any circumstances, the defense is in general available; as all persons are presumed to know, from the law of the corporate existence, that the corporation has no power to perform the act. *Franklin Co. v. Lewiston Sav. Inst.* 68 Me. 43; *Davis v. Old Colony R. Co.* 131 Mass. 258; *Alexander v. Cauldwell*, 88 N. Y. 480; *Seligman v. Charlottesville Nat. Bank*, 3 Hughes, 647; *Mechanics & W. Mut. Sav. Bank & Bldg. Asso. v. Meriden Agency Co.* 24 Conn. 159. See *Abbott v. Baltimore & R. Steam Packet Co.* 1 Md. Ch. 542; *National Trust Co. v. Miller*, 33 N. J. Eq. 155; *Gunn v. Central R. Co.* 74 Ga. 509.

But when the act is *ultra vires* with reference to the rights of certain parties without whose consent the corporation is not authorized to perform it, or with reference to some specific purpose when it is not authorized to perform it, the defense may or may not be available according to the circumstances. *Miners Ditch Co. v. Zellerbach*, 37 Cal. 542; *Ballett v. Brown*, 108 Pa. 546; *Sheldon H. B. Co. v. Eickemeyer H. B. Mach. Co.* 90 N. Y. 807.

The unauthorized act of artificial persons with limited powers is applicable to individual action. *National Pemberton Bank v. Porter*, 125 Mass. 336. See *Schipper v. Aurora*, post, 312.

†A decision was originally reached in this case affirming the judgment of the court below, the opinion by Thayer, Ch. J., having been filed July 1, 1899. Subsequently a rehearing was granted, and after argument the court reached the conclusions announced above.

The syllabus and opinion originally delivered are given below. [Rep.]

The city charter of the City of East Portland empowered its common council to improve the streets within the limits of the City; prescribed a particular mode to be pursued in the exercise of the power conferred; directed that the cost of making the improvements be assessed upon the lots and parts of lots abutting upon the street improved; and authorized the work to be let by contract. Held, that the mode to be prescribed for the exercise of the power constituted the measure of the power; that the common council had no authority to let a contract for doing the work, and pay the price therefor out of the general funds of the City; that an attempt to let a contract for doing the work without complying with the require-

(October 1, 1880.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County sustaining a demurrer to the complaint in an action to recover upon a contract for the improvement of a street in defendant City. *Reversed.*

The facts are fully stated in the opinions.

Mr. J. C. Moreland for appellant.

Messrs. J. V. Beach and *R. & E. B. Williams*, for respondent:

No action will lie on the warrants as such, for they are all drawn on a special fund and are not negotiable, and at best merely evidence.

Argenti v. San Francisco, 16 Cal. 256; *Martin v. San Francisco*, 16 Cal. 285; *North Pacific Lumbering & Mfg. Co. v. East Portland*, 14 Or. 8.

The charter of East Portland confers upon the corporation certain well-defined powers and duties. Most of these powers, including that to improve the streets, can be exercised only in the way pointed out by said charter.

North Pacific Lumbering & Mfg. Co. v. East Portland, *supra*.

Two things must combine to create the duty of the City to collect the assessment for a street improvement: (1) a valid and binding contract for the improvement; (2) completion of the improvement according to such contract. No such agreement was ever made for this improvement because the very first step taken by the

council, to wit, giving the notice of the proposed improvement, was fatally defective.

Hawthorne v. East Portland, 13 Or. 280; *Springfield Milling Co. v. Lane County*, 5 Or. 265; *Zottman v. San Francisco*, 20 Cal. 97.

It would be contrary to reason to say that this contract does not bind the adjacent property which is made primarily liable for improvements, but that it binds all the other property in the City, which would be the effect of charging the expense upon the general fund.

Murphy v. Louisville, 9 Bush, 189; *Saxton v. St. Joseph*, 60 Mo. 158; *Swift v. Williamsburgh*, 24 Barb. 427; *Brady v. New York*, 16 How. Pr. 432; *Craycraft v. Selma*, 10 Bush, 707.

The City should not be subjected to a general judgment, unless it can afterwards reimburse itself by an assessment.

1 Dill. Mun. Corp. 8d ed. § 482; *Hahn v. Bellevue* (Ky.) 3 S. W. Rep. 132; *Daly v. San Francisco*, 72 Cal. 154.

Strahan, J., delivered the opinion of the court:

This is an action to recover against the defendant for the agreed price and value of certain materials furnished by the plaintiff for the defendant, and used in the improvement of one of its streets by the direction of its common council. The third amended complaint states the facts upon which the plaintiff relies, in substance, as follows:

ments of the charter authorizing such contract to be let was a nullity; and that no liability against the City attached on account of the work done in the improvement of the street without such compliance, in the absence of any other provision in the charter rendering it primarily liable therefor. *Held*, that the City would not become liable upon an implied contract for work done in the improvement of a street, where it had no power to enter into an express contract for that purpose.

THAYER, Ch. J.:

The appellant herein, a private corporation, commenced an action against the respondent, a municipal corporation, to recover money claimed to be due upon a contract for the improvement of L Street, in said City. The respondent demurred to the appellant's complaint in the action, which demurrer the circuit court sustained, and gave judgment thereon in favor of the respondent, which is the judgment appealed from.

It appears from the complaint that the City of East Portland, in 1883, let two contracts for the improvement of said street, by the terms of which a certain amount of money was to be paid therefor, upon completion of the work, "by warrants to be drawn upon the fund to be collected and paid into the city treasury for that purpose." The contracts were completed, and the warrants issued to the contractors. The warrants required the treasurer to pay the amount for which they were drawn "out of the special fund for the improvement of L Street, assessed upon certain of the lots and blocks abutting upon said street." The notice of the proposed improvement of the street, required by the charter of the City to be given as preliminary to ordering the improvement, and letting the contract to do the work, was set out in the complaint; and it is conceded to be the notice which the said circuit court and this court have heretofore adjudged defective and void. I think we may infer from the allegations of the complaint that after the improvement of the street was completed, and 6 L. R. A.

the said warrants issued, the common council of the City was prevented from collecting the whole amount of the assessments upon the property assessed, in consequence of the defectiveness of such notice; and hence a deficiency occurred which prevented the payment of the entire sum for completing the improvement, and which has occasioned the litigation. The question, therefore, to be determined is whether the City became liable, under the circumstances, to pay the expense of the improvement.

The appellant's counsel contend that, as the common council of the City is invested with authority to improve the streets within it, and has power to determine and provide everything necessary and convenient to accomplish that end, it has primary power over that subject, and that such power stands upon a different footing from one the execution of which is specifically circumscribed and limited. To apply this principle to the case in hand, the counsel must necessarily claim that the common council of the City has general authority to improve its streets, and that it is optional whether it will pay the expense of such improvement out of the general fund of the City, or from a fund raised by an assessment upon the lots and blocks abutting upon the street improved. It is evident that, if the common council possesses authority to the extent suggested, the City may become liable to a contractor for the contract price of an improvement, although the contract were let upon the terms that the price should be paid out of a fund to be raised by local assessment. In such a case the obligation to raise the fund would bind the City. The common council having a general authority to contract for the improvement of a street, the failure to comply with conditions authorizing the assessment of the costs of the improvement would not affect the rights of the contractor. He in that case could well say to the City: "You contracted with me to do the work. I agreed, it is true, to receive my pay therefor out of a special fund which your agent tacitly agreed to raise, and it is not my fault

That the plaintiff is a private corporation, and the defendant a public municipal corporation. That on the 8th day of September, 1888, the common council of the City of East Portland duly passed a resolution to improve L Street, in said City, from Water Street to Twelfth Street, in said City, in pursuance of which the following notice was published for the full time and in the manner required by the city charter:

IMPROVEMENT OF L STREET.

Notice is hereby given that the common council of the City of East Portland propose to improve L Street from the west line of Water Street to the center line of Twelfth Street as follows: By building an elevated roadway and sidewalk of full width from Water Street eastward to the bank of earth elevated between Third and Fourth Streets; and from such point eastward to Fifth Street, by laying, where the same may be required, a plank roadway of full width, with sidewalk; and, from Fifth Street eastward to Asylum Slough, by laying a gravel roadway, full width, with wooden gutters and crosswalks where required; by building an elevated roadway and sidewalk of full width across Asylum Slough; and, from Asylum Slough to Twelfth Street, by laying a gravel roadway, full width, wooden gutters, sidewalks and crosswalks. All of said improvements to be on the established grade, and cost of same to be assessed to adjacent property. By order of the common council.

J. T. Stewart, Auditor and Clerk.

that it was not raised." The City, under such circumstances, would occupy the same position of a natural person transacting his affairs through an agent.

But it cannot be maintained that the City of East Portland, in reference to the improvement of streets within its boundaries, occupies any such status as suggested. The streets belong to the public. The City has no proprietorship in them. They are improved for the benefit of the public and adjoining property owners. The cost of the improvement is assessed upon abutting property because it is supposed to be thereby benefited to the extent of such cost. The common council in the affair is merely an agent for the public and the property owners referred to. It has no discretion whatever in the matter, except to propose the making of the improvement; its authority is purely statutory. It is empowered by the charter to "improve the sidewalks, pavements, streets and parts of streets within the limits of the City, making full or partial improvements thereof." But the mode by which the power is to be exercised is specifically pointed out in the charter. It is required, when it proposes to make such improvement, to cause notice thereof to be given by publishing a notice for fifteen days previous to the undertaking of the improvement in certain newspapers. The notice must specify with convenient certainty the street or part of street proposed to be improved, and the kind of improvement to be made. Within ten days from the final publication of such notice the owners of a majority of the property adjacent to such street, or part thereof, as the case may be, may make and file with the recorder of the City a written remonstrance against the proposed improvement, and thereupon the same shall not be further proceeded with or made. There is another section in the charter which authorizes proceedings for the improvement of a street to be taken without giving

That no other notice was given for such improvement, and said resolution was substantially the same as the said notice. That afterwards, on the 15th day of October, 1888, the said common council passed an ordinance (No. 825) entitled "An Ordinance to Provide the Time and Manner of Improving L Street," which ordinance is as follows:

"The City of East Portland does ordain as follows: Whereas, the common council or board of trustees of the City of East Portland has, at different times, made partial improvements on L Street, in the City of East Portland; and whereas, the common council now proposes to make a full improvement of said street from the west line of Water Street to the center line of Twelfth Street: Therefore the City of East Portland does ordain as follows: Section 1. The proposed full improvement of L Street from the west line of Water Street to the center line of Twelfth Street, as hereafter provided, shall be completed on or before the first day of February, 1884, due notice thereof having been given by publication, as will more fully appear by the proof thereof duly presented and filed in the office of the auditor and clerk. Sec. 2. The improvement of said street shall be made as follows: By building an elevated roadway and sidewalks, full width of streets, in accordance with the plans and specifications made by the city surveyor, and filed with the recorder of said City, and adopted by the common council, October 15, 1888, from the west line of Water Street eastward to the land or earth elevation between Third and

the fifteen days' notice referred to, whenever the owner or owners of two thirds of the adjacent property shall in writing petition the council therefor. The common council of the City is not authorized to make any improvement of a street therein otherwise than subject to the conditions herein mentioned, and, it being only the creature of the Statute, it has no power except that contained in the Act incorporating the City; and the mode in which it is required to exercise the power there given it "constitutes the measure of the power." *Zottman v. San Francisco*, 20 Cal. 102; *Murphy v. Louisville*, 9 Bush, 193; *Springfield Milling Co. v. Lane County*, 5 Or. 272.

According to this view, which is sustained upon both principle and authority, the mode here indicated is the only one which authorized the common council to let contracts for the improvement of said L Street; and the notice of the intended improvement being defective, as we held in *Hawthorne v. East Portland*, 13 Or. 271, it follows that no valid contracts for that purpose were ever let. It is therefore very difficult to find any reasonable grounds upon which the liability of the City to the contractor or his assignee, the appellant, can attach. No such liability can possibly arise out of any implied obligation upon the part of the City, as it had no power to create an express one.

The appellant's counsel insists that an irregularity in the proceedings, which might avoid the assessment, will furnish no defense to the City, when sued for doing the work, and cites in support of that view *Moore v. New York*, 73 N. Y. 238. As the City of East Portland could not make itself liable on any such contract, I do not see how it could be made so in consequence of the irregularity referred to. That is the difference between this case and that of *Moore v. New York*. In the latter case the city could not have been obligated to pay for the work which the Croton aqueduct board contracted

Fourth Streets, and from such point eastward to Fifth Street, by laying a plank roadway full width, with plank gutters and sidewalks, and from Fifth Street to Asylum Slough by making a gravel roadway of full width, with plank gutters, side and cross walks, and by building an elevated roadway and sidewalks of full width of said street, in accordance with the plans and specifications made by the city surveyor, and filed with the recorder and auditor, and adopted by the common council, October 15, 1883, and from the Asylum Slough eastward to the center line of Twelfth Street by making a graveled roadway of full width, with plank gutters and side and cross walks. Sec. 3. All of said improvements to be upon the established grade, and made in accordance with ordinance No. 397 of the City of East Portland, and entitled 'An Ordinance Relating to the Improvements of Streets.' Sec. 4. All of said improvements shall be made at the expense of the adjacent property, and shall be completed to the satisfaction of the committee on streets and public property, the city surveyor and street commissioners. Sec. 5. The contractor shall take control of the work during its progress, and he shall be responsible for any accident occasioned by carelessness or neglect."

That said ordinance was duly approved by the mayor of said City, and afterwards on the 10th day of November, 1883, the City, acting by and through its committee on streets and public property, by virtue of ordinance No.

397, entitled "An Ordinance Relating to the Improvement of Streets, and Letting Contracts Therefor," approved August 9, 1883, entered into a contract with C. L. Spore to improve said L Street abutting upon blocks Nos. 140 and 162, among others, a copy of which contract is hereto attached, and marked "A," and made a part hereof, and at the same time made a contract similar in terms, except the prices were different, with Keenan & Hamilton, for the improvement of L Street abutting on blocks 88 and 100. That said Spore and Keenan & Hamilton duly furnished bonds for the faithful completion of said work. That thereafter, and within the time required by said ordinance, said Spore and Keenan & Hamilton duly completed the work required by said contract upon said street opposite the said blocks 83, 100, 140 and 162, and that afterwards the said City and the said Spore and the said Keenan & Hamilton met together, and had a settlement for and concerning the work done under said contracts opposite the said blocks Nos. 83, 100, 140 and 162, and there was found to be due to the said Spore the sum of \$1,944.80, and to the said Keenan & Hamilton the sum of \$442.70, and that thereupon the said City issued its warrants, as follows:

\$79.86. East Portland, Or., March 5, 1884.

To the Treasurer of the City of East Portland: Pay to C. L. Spore or bearer seventy-nine $\frac{86}{100}$ dollars out of the special fund for the

to be done. The common council of the city had attempted to authorize the board to let the contract, but, owing to an irregularity or informality in the action of the common council in passing the ordinance for the pavement of the avenue, it was claimed that the board did not have authority to let it. The work, however, had been performed, and the city had the benefit of it, and the court intimated strongly that under the circumstances it might be estopped from availing itself of the benefit of the irregularities in the exercise of power conferred, or that there might be a ratification of the contract. The court, however, held that the ordinance was valid. That, of course, was conclusive of the case; and consequently all that was said about estoppel and ratification was in fact mere dicta, though it was in line with a number of cases upon that point.

But I do not think that any court has ventured so far as to hold that a municipal corporation will become liable in any case upon a contract which it had no power to make in the outset. The common council of the City of East Portland had no authority, as we have endeavored to show, to make a contract for the improvement of a street in that City, whereby it could bind itself to pay the cost thereof out of the general fund of the City, and yet this court is asked to hold that it is liable upon such contract. Such, at least, would be the effect of our decision if we were to decide that the appellant was entitled to recover in the action brought in the circuit court. The appellant's counsel appears to claim that, as formal contracts were signed, by the language of which the City agreed to pay the contractor "by warrants to be drawn upon the fund to be collected and paid into the city treasury for that purpose," a duty devolved upon the city authorities to supply that fund. This doubtless would be so if the writings, which purported to be contracts, were such in fact. But under the circumstances they were not contracts; they had no validity. The common council did not

give the requisite notice of the proposed improvement; consequently all that was done between it and the contractor in reference to that matter was a mere nullity. This may be regarded a harsh rule, as against the contractor, who would not be supposed to know when he entered into the contract to improve the street but that the requisite notice of its proposed improvement had been given. The court, however, does not make the rule. The Legislature made it. It provided the mode which the common council of the City should pursue in the improvement of streets, and the court has no right to adopt a different one. If the Legislature had seen fit to empower the City to cause such improvements to be made at its own cost, to be paid as its debt, we could very consistently determine it liable to pay for such work although the proceedings authorizing the letting the contract to do the work were irregular, and void even; as the result of our decision in that case would not be to shift the liability from parties which the law had designated to a party incapable under the laws of creating it originally, and thereby thwart the evident intention of the Legislature. If the mode prescribed in the charter which requires the cost of the improvement of a street to be assessed upon the property adjacent thereto has not been pursued, and injustice is occasioned thereby, the Legislature could probably remedy it by directing a new assessment to be made upon the property benefited. That branch of the government has ample authority to cure any defects arising from a failure to comply with the requirements of an act which it could have dispensed with in its adoption, but the courts have no other alternative than to administer the provisions of existing statutes. It was the duty of the appellant's assignor, when he bid for the work, and executed the stipulations to perform it, to ascertain whether or not the common council had complied with the conditions of the charter which authorized it to be let. The judgment upon demurrer must therefore be affirmed.

improvement of L Street, assessed upon lot 8, block 162, for the improvement of said street.

I. N. Saunders, Mayor.

Attest: J. T. Stewart, Recorder.

Then follows a large number of other warrants in like form and in varying amounts, each one payable out of the fund for the improvement of L Street assessed upon some lot or lots, either in block 88, 100, 140 or 162, and amounting in the aggregate to the sum of \$2,387.50. That each of said warrants was duly presented to the treasurer of East Portland, and payment thereof refused for want of funds to pay the same. That each of said contracts, as well as each of said warrants issued, and all claims thereunder, was duly assigned to the plaintiff, and that plaintiff is now the owner and holder thereof. That at various times since said warrants were duly presented for payment, and payment thereof refused by the defendant, and that the defendant was also requested to provide a fund for the payment of said warrants, which it refused to do. That the City has failed, neglected and refused to cause the said several sums to be assessed to the said several lots and blocks named in said warrants to be collected, except that the owner of block No. 140 paid into court for the benefit of said City the sum of \$100, and the owners of block 162 paid into this court the sum of \$100 for the benefit of said City. That said sums were paid on account of said improvements, and were received by said City on account thereof, and were paid by said owners in payment upon their said assessments. That the total amount assessed by said City of East Portland for the improvement mentioned in said ordinance for the improvement of L Street was \$17,489.69. That there has been paid into the city treasury on account of said improvements the sum of \$11,117.62, all of which has been paid out by said City upon other warrants issued for said improvements, except the sum of \$200, collected as herein set forth. That the payment of all said sums upon other warrants, to the exclusion of the plaintiff's said warrants, was wrongful, and without authority of law. That said City refuses to take any further steps to collect said money, or to pay said warrants or any part thereof.

By the terms of the contracts entered into, by the City, with the contractors, and which are annexed to the complaint as a part thereof, the City agreed and obligated itself to pay for the work according to certain rates specified, by warrants to be drawn upon the fund to be collected and paid into the city treasury for that purpose.

To this complaint the defendant demurred, for the reason that the same does not state facts sufficient to constitute a cause of action. The demurrer was sustained by the court, and a final judgment entered against the plaintiff for costs, from which judgment this appeal is taken.

1. By article 6, § 1, of the Amended Charter of East Portland (Laws 1885, p. 814), it is among other things provided: "Section 1. The common council is authorized and empowered to lay out, establish, vacate, widen, extend and open streets or parts of streets, and alleys or parts of alleys, in said City, and to appropriate

private property for that purpose, and to alter or establish the grade of any street or part thereof, and to improve the sidewalks, pavements, streets and parts of streets, within the limits of the City, making full or partial improvement thereof. And it has full power to determine and provide for everything necessary and convenient to the exercise of the authority herein granted." Section 2 of article 6 is as follows: "Sec. 2. When any improvements mentioned in the preceding section are to be made, the council shall cause the recorder to give notice of the same by publishing a notice for fifteen days previous to the undertaking of such improvement in some daily or weekly newspaper published in the City of East Portland, or in the City of Portland. Such notice must specify with convenient certainty the street or part of street proposed to be improved, or of which the grades are proposed to be established or altered, and the kind of improvement to be made."

Section 3 authorizes the owners of a majority of the property adjacent to such street, or part thereof, as the case may be, to make and file with the recorder, within ten days from the final publication of such notice, a written remonstrance against the proposed improvement, grade or alteration thereof, and thereupon the same shall not then be further proceeded with or made. Section 4 empowers the council, if no such remonstrance be made, at its earliest convenience, within six months from the final publication of such notice to establish the proposed grade, or alteration thereof, or to commence to make the proposed improvement as thereafter provided.

Section 5 of said article is as follows: "Sec. 5. In case the notice be for the improvement of a street, or part thereof, the council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or part thereof liable therefor its proportionate share of such cost. And if the council shall adjudge that any such lot or part of lot would not be benefited by the improvement in the full sum of the cost of making the same upon the half of the street abutting upon such lot or part of lot, the council shall assess upon such lot or part of lot, as its proportionate share thereof, such sum only as it shall find the lot or part of lot to be benefited by such improvement."

Section 6 directs that when the probable cost has been ascertained and determined, the council must declare the same by ordinance, and direct its clerk to enter a statement thereof in the docket of city liens as provided in the next succeeding section. Section 7 defines the docket of city liens, and prescribes the effect of entries therein. Section 9 prescribes the manner in which the auditor shall ascertain the ownership of property in the City to be affected by this tax. Section 10 prescribes a notice of fifteen days before a sum of money assessed for a street improvement is collectible, and how such notice must be given, and what it shall contain. Section 11 prescribes when and under what circumstances a warrant may issue for the collection of such tax; and sections 12, 13, 14, 15, 16 and 17 prescribe what the warrant shall contain, and the manner of executing it, and on what terms and how property

sold for such tax may be redeemed. Section 18 prescribes that, if the benefits to accrue to a particular lot shall not be equal to the cost of making such improvement, the excess of the cost over and above the benefits received shall not be paid out of the general fund of the City. Section 19 relates to the cost of improving at the intersection of streets. Section 20 declares the effect of a tax sale under the preceding sections. Section 21 authorizes anyone having a lien on any lot by a judgment, decree or mortgage, after any such tax becomes delinquent, to pay the same, and add the amount to his lien.

Section 22 provides: "Sec. 22. The council must provide by ordinance for the time and manner of doing the work on any proposed improvements, subject only to the following restrictions: (1) After proper notice the work must be let to the lowest responsible bidder; but a bid by the owner or owners of all the property in a block fronting on a street proposed to be improved must be accepted if as low as any other bid, and the council may provide for the rejection of any or all bids deemed unreasonable, and that the bid of any person who has before bid or contracted for such work, and been delinquent therein, shall not be received. The council shall provide for taking security by bond for the faithful performance of any contract let under its authority, and the provisions thereof shall be enforced by an action in the name of the City of East Portland." Section 23 provides what shall be done upon the completion of the work; and section 24 provides for a further assessment against the piece of property, where the first was insufficient to pay the cost thereof. Section 25 provides for returning the surplus to the lot-owner in case more money was collected than was necessary. Section 26 provides that moneys collected upon assessments for improvements shall be kept as a separate fund, and in no wise used for any other purpose whatever. The other sections of the article relate to the subject of street improvements, but they in no manner affect the questions presented by this record.

The only question presented for our consideration is the question of the City's liability under the facts above stated. In *Hawthorne v. East Portland*, 18 Or. 271, this court had some of the facts growing out of the improvement of L Street before it. In that case it was held that because the notice given by the council of the proposed improvement contained the words "by laying, where the same may be required, a plank roadway," etc., the city failed to create a lien upon the abutting property for the cost of such improvement. It is now insisted that by reason of such defective notice the City is in no manner liable for the material or labor used in making the improvements, although the contractors fully performed their agreement, and completed the work according to the plans and specifications for the same.

By turning again to section 1, art. 6, of the Charter, *supra*, it will be seen that the common council possesses plenary power, among other things, "to improve the sidewalks, pavements, streets and parts of streets, within the limits of the City, making full or partial improvement thereof; and it has full power to

determine and provide for everything necessary and convenient to the exercise of the authority herein granted."

Power could hardly be conferred in more comprehensive terms; and, standing alone, there could be no doubt that, in the exercise of this power the council would have authority to provide money that might be necessary from any source from which it is authorized by its charter to raise money for corporate purposes; to pay for any such improvements money would be both necessary and convenient for such a purpose. Waiving, for the present, any reference to the subsequent provisions of the charter, let us follow for a short time some of the authorities which seem to have a bearing on this subject.

Maher v. Chicago, 88 Ill. 266, is a case where the plaintiff did work for the city in dredging and deepening the river in front of certain lots, with the understanding that he should be paid from special assessments to be made upon the property for that purpose. The courts decided that no special assessments could be made for such purpose, but the city was held liable. In passing upon the city's liability the court said: "Unless we assume that the council issued its warrant to compel the payment of money under pretense of liquidating a liability, which they intended afterwards to deny, —an assumption we would by no means make, —then we must regard it as settled that that body, by a deliberate official act, appropriated the plaintiff's work, and acknowledged it to create a valid debt against the city. To hold otherwise would be to hold that the council was endeavoring to raise money, by a compulsory process, upon pretenses that were false. The action of the mayor and other officials may not have bound the council, but by this proceeding it recognized and ratified that action, and deliberately bound itself."

So in *Leavenworth v. Mills*, 6 Kan. 288, it was said: "The contractor and his representatives had no authority to sell said lots, nor to enforce the payment for the contractor's services in any other manner from the lot-owners. The lot-owners are never directly or primarily liable to the contractor for grading done by him. They are liable to the city only, and the city is primarily liable to the contractor." Further on the court says: "In this case the city did not take the necessary steps to relieve itself from liability to the contractor, and hence the judgment of the court below, against the city and in favor of the representatives of the contractor, for the value of the grading, was correct."

Leavenworth v. Stille, 18 Kan. 589, is another case where the city was held liable for grading in a case where it undertook to provide for the payment by special tax, but the assessment was void by reason of some informality. The property in front of which the grading was done belonged to Stille's wife, but he did the grading under a contract with the city. In disposing of the case the court said: "Stille petitioned, along with others, for the grading to be done. He sometimes, in speaking of the real estate, called it his. It is claimed that he did not do the full amount of the grading that he agreed to do, and that some of it was not in the street; but it was done where the city en-

gineer instructed that it should be done, and just as the city engineer instructed that it should be done; and the city engineer afterwards inspected and accepted the work, and made a report thereof to the city council, and the city council regularly confirmed the engineer's report, and levied a tax to pay for the grading. . . . But the city never provided any means for the collection of said tax. It is true, the city treasurer sold some of the property on said street to pay said tax, but the sale was unauthorized and void."

So in *Kearney v. Covington*, 1 Met. (Ky.) 339, it was held, where a person was employed by a city council to do work on a public street under an agreement that he should be paid for it when completed by a tax on the lot-owners, that if the city fails to adopt such measures as the charter requires to render the lot-owners responsible it is liable to the contractors. In this case the city failed to comply with the charter, so as to make the tax collectible upon which the plaintiff relied for payment. It was accordingly enjoined, and it was held that in such case the city was liable.

Morgan v. Dubuque, 28 Iowa, 575, is another case very much in point. The plaintiff was to be paid for the work when the city collected the cost of it from the owners of adjoining lots. The court says: "Under the contract with the plaintiff, the city was bound to collect the assessments within a reasonable time after the work was done, and pay the plaintiff. A failure to do so would render the city liable to pay the stipulated price for the work. The burden of proof of diligence rests upon the city."

So in *Louisville v. Hyatt*, 5 B. Mon. 199, the contractor expressly agreed to look to the lot-owners, and not to the city. A certain ordinance upon which the contractor and the city relied proved to be invalid. In disposing of this phase of the case the court said that any intention or agreement or stipulation, on the part of the undertaker, that he would look to the lot-owners and not to the city for remuneration, was founded, not upon the understanding that he was to get no compensation if the lot-owners were not bound to make it, but on the understanding, based upon the acts and representations of the agents of the city, and upon her express undertaking, that such orders had been and would be made by the mayor and councilmen as were effectual to secure it for them. If the mistake on the subject was mutual, it was produced by the assumption on the part of the city, through her agents, that the orders were effectual. The facts upon which their efficacy depended were peculiarly within their knowledge, and the undertaker was not bound to inquire further, but was authorized to confide in their assumption. And *Guthrie v. Louisville*, 6 B. Mon. 575, is to the same effect.

Craycraft v. Selvig, 10 Bush, 696, seems to lay down a different rule; but an examination of that case will show that the earlier Kentucky cases from which I have made some extracts are expressly approved, and that the difference was created by an amendment to the charter of the City of Louisville, which provided that "in no event shall the city be liable for such improvement [of streets] without having the right to enforce it against the property

receiving the benefit thereof." It is proper, in this connection, to remark that the charter of the City of East Portland contains no such limitation.

Memphis v. Brown, 87 U. S. 20 Wall. 289 [22 L. ed. 264], is a case where the construction of the charter of the City of Memphis came under review in the Supreme Court of the United States. In that case the charter provided that "the board of mayor and aldermen shall have power to improve, preserve and keep in good repair the streets, sidewalks, public landings and squares of the city." The charter further provided that the city may require lot-owners to improve the streets fronting the lots, and that, should any owner fail to comply with any ordinance requiring him to repair, grade and pave the same, the mayor and board of aldermen may contract with some suitable person for repairing, grading and paving the same, and pay therefor, and collect the amount of the lot-owner. In construing these provisions of the charter the court said: "General power and authority over the subject is by law given to the city, and the power also vested in the city to require that the cost may be assessed upon the adjoining owner does not impair the power of the city itself to do the work. It is permissive merely. The city may require the owner to pay, but it is not compelled to do so."

In principle, *Michel v. Police Jury*, 8 La. Ann. 123, seems to be almost identical with the case under consideration. In that case authority to make a road and levy on the plantation of Collins Blackman was adjudicated to the plaintiff. He took his executory proceedings against the land, which were enjoined on the ground that notice had not been duly given to the proprietors according to the police regulations of the parish. On the failure of his recourse against the land, he sued the police jury, and obtained a verdict for the amount of the adjudication, and this recovery was sustained. Many other authorities declare the same principle. *Knapp v. Hoboken*, 38 N. J. L. 371; *Argenti v. San Francisco*, 16 Cal. 255; *Eilert v. Oshkosh*, 14 Wis. 586; *Atchison v. Byrnes*, 22 Kan. 65; *Bill v. Denver*, 29 Fed. Rep. 344; *San Francisco Gas Co. v. San Francisco*, 9 Cal. 453; *State Board of Agriculture v. Citizens Street R. Co.* 47 Ind. 407; *Thayer v. Boston*, 19 Pick. 511; *Hahn v. Bellevue* (Ky.) 3. S. W. Rep. 182; *Moore v. New York*, 73 N. Y. 238; 2 Dill. Mun. Corp. § 986; *Baldwin v. Oswego*, 2 Keyes, 182; *Cumming v. Brooklyn*, 11 Paige, 596; *Frush v. East Portland*, 6 Or. 281; *North Pacific Lumbering & Mfg. Co. v. East Portland*, 14 Or. 8; *Imler v. Springfield*, 80 Mo. App. 669.

After the most careful examination of this case that I have been able to give it, and after considerable doubt and hesitancy, I have reached the conclusion that, under the facts disclosed by the amended complaint, the City is liable, and this upon the decided weight of authority. The power and duty is enjoined upon the common council of the City to improve the streets, and to keep them in a suitable state of repair. Permission is given to levy the cost of such improvement on the adjacent property, but it is nowhere declared in the charter that it must do it in that way, or

that it is precluded from doing it in any other. And where the City has proceeded in the utmost good faith with its improvements, and the contractor has fulfilled all of his engagements with the City, I am unwilling to say that he shall not be paid because of a technical defect in the notice, which ordinary judgment and sagacity could hardly guard against. Besides, I do not think, under the charter, this technical defect in the notice destroyed or impaired the power of the City to contract. That power inheres in every corporation, and is co-extensive with its corporate powers; but in this instance we do not have to depend on implication. The power is conferred in the plainest and most comprehensive terms. The defendant's claim is not that the general power did not exist, but there was a slight departure from the authority conferred in the particular already pointed out, and for that reason the whole proceeding was *ultra vires* and void. Under the circumstances of this case, I am unable to accede to this argument. Nor is a corporation always, and in every way, allowed to avail itself of this plea.

Said Allen, J., in *Whitney Arms Co. v. Barlow*, 63 N. Y. 62: "The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."

The respondent relies upon *Springfield Milling Co. v. Lane County*, 5 Or. 265. That was a case where a superintendent of a bridge with power to let a contract for its construction and superintend it, purchased lumber without authority, and used it in the construction of the approaches to the bridge, and it was held that Lane County was not liable on two grounds: (1) it was a case where the letting must have been to the lowest bidder; and (2) Powers, the superintendent, exceeded his authority. The principle of the case does not seem to me to be controlling here.

Saxon v. St. Joseph, 60 Mo. 153, is another case relied upon by the defendant. That was a case where the common council adopted a resolution ordering the city engineer to let a contract for macadamizing a street, without the concurrent action of the mayor, and it was held the city was not liable, the court holding that the concurrence of the mayor was necessary to give any validity to the proceeding.

Swift v. Williamsburgh, 24 Barb. 427, is another case relied upon by the defendant. In that case the city was not authorized to take any proceeding whatever to open, regulate, grade or pave any street or avenue, except upon petition signed by one third of the persons owning land situated within the assessment limits. The council proceeded without such petition, and the city was held not liable, and properly so. In that case the court expressly draws the line of distinction between cases where a general power is conferred and one where it is of a more limited nature, and cites *Weimore v. Campbell*, 2 Sandf. 344, and *Manice v. New York*, 8 N. Y. 130, as examples.

McCullough v. Brooklyn, 23 Wend. 458, is another case relied upon by the defendant. That was a case where the corporation took the land of the plaintiff for a street, which it was authorized to do, and to assess the damages upon 6 L. R. A.

the property benefited. The complaint alleged every fact except the payment of the award, but the court held that this fact ought also to have been averred. The court further held in that case that it was the duty of the common council to take the necessary measures to have the sums assessed collected, and for the neglect of that duty an action on the case would lie.

After this examination of the preceding part of the charter, and of the authorities, we can better appreciate the force and meaning of section 5, art. 6, of the Charter. So much of that section as is supposed to be controlling by the defendant's counsel is as follows: "In case the notice be for the improvement of a street or part thereof, the council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot or part thereof liable therefor its proportionate share of such cost." A different form of expression is used in the succeeding sections in reference to the assessments upon lots. When the probable cost of the improvement has been ascertained and determined, and the proportionate share thereof, for each lot or part of lot, has been assessed as herein provided, the council must declare the same by ordinance. Section 6. The docket of city liens is a book in which must be entered, etc. Section 7. These forms of expression are not necessarily conclusive, but I think, where the meaning of the charter is not free from doubt, they have weight in determining the question.

There are two cases in this court involving the liability of the City of East Portland under its charter for work done on its streets to improve the same. The first is *Frush v. East Portland*, *supra*. In passing on this case the court says: "It will be observed that, though the improvements were local, there is nothing in the contract to show that it was in the minds of the contracting parties at the time the same was entered into that a special and local tax was to be resorted to in order to raise the fund from which the warrants were to be paid. The contract provided simply that the respondent should do certain work at a stipulated price, and that, upon its completion and acceptance, the city would pay him the contract price through the instrumentality of warrants to be drawn upon a fund which the city agreed to provide for the purpose of liquidating the same."

The force of this language is too plain for controversy. It clearly recognizes the power of the City to create a liability against itself for work in improving its streets, and for which it may be generally liable without first making a local assessment from which alone the liability is to be discharged. And in *North Pacific Lumbering & Mfg. Co. v. East Portland*, *supra*, this court felt compelled to adhere to *Frush v. East Portland*. So that in every view of the subject, whether on the construction of the charter alone, or the general principles of law, or the adjudged cases in this court, the defendant is liable on the facts before us.

The judgment of the court below must therefore be reversed, and the cause remanded for further proceedings.

Lord, J., concurring:

For the purposes of this case it may be ad-

mitted that a municipal corporation cannot contract in any other mode than is authorized by its charter. When, to make a contract for the improvement of a street, and to provide the funds to pay for it, the charter prescribes it shall only be done by local assessments on the abutting property, this amounts to a direct inhibition against making any contract for such improvements only as such mode is pursued, and the failure or omission of the city to create the fund from the sources indicated to pay for such improvements, when made, will not subject the city to any general liability therefor. The reason is plain. As the city is without any general power to contract for and provide the funds to pay for such improvements, except by way of local assessments, it necessarily results that it cannot be subject to any general liability. To subject the city to a general liability, there must be some general power under which it would be authorized to raise the funds to pay for such improvements. But where such general power is conferred, and an improvement is projected to be paid for out of funds to be derived from local assessments, and the city authorities upon whom is devolved the duty neglect or fail to take the requisite proceedings to create the lien which is to supply the funds to pay for such improvement, the improvement being within the scope of the general power of the corporation, independent of the special mode by local assessments, such neglect or omission, after the improvement is made, will subject the city to a general liability to pay therefor.

By the charter of East Portland the trustees are authorized and empowered to improve streets, parts thereof, etc.; and to do this it is expressly given full power to provide everything necessary to the exercise of the powers granted, which necessarily includes the right to levy taxes and pay for such improvements of its streets out of the general fund. In a word, the general power is given to make street improvements, and to provide the means of paying therefor. In addition to this, there is also conferred the power to make such improvements, etc., of streets by means of local assessments, or the creation of liens upon the property of abutting owners, as prescribed by section 2 *et seq.* As this last mode involves that kind of interference with individual right of property as subjects it to liens for local assessments upon the theory of benefits received, such powers can only be exercised where it is expressly conferred, and the mode of its exercise prescribed. Hence, to enable the City to make improvements by means of local assessments upon the adjoining property, it was necessary to expressly confer the power and the mode of its exercise, as without it the City would be confined to the general power. Such special mode of making such improvements, and supplying the funds to pay for them, is not, therefore, exclusive, but it was inserted in the charter *ex rei necessitate*,—because it must be there to authorize the City to make such improvements by local assessments; but its existence does not abate or nullify the general power conferred, as both may co-exist without conflict, and be exercised as justice may require. So that, according to my view, there is the general power conferred on the corporation

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to make such improvement of streets or parts of streets, and to pay therefor without resort to the special mode by local assessments. And if the corporation contract for such improvements, and the improvements are made, but are to be paid for by local assessments upon abutting property, and the City fails to perform its duty by doing the acts prescribed by the charter to supply such fund, such negligence or omission of duty will subject it to a general liability.

In *North Pacific Lumbering & Mfg. Co. v. East Portland*, 14 Or. 6, 7, while the personal opinion was expressed that the city did not have any power to contract for a street improvement, it was held that where it undertook to provide for the payment of such improvement by local assessments, but failed or neglected to perform the required acts intended to supply such fund, a general liability attached in consequence thereof. The language of *Mr. Justice Thayer* in that case is: "I do not think it [the city] has any power to enter into any such engagements for the improvement of a street; but it does undertake to perform all the acts required by the charter intended to supply the requisite fund to defray the expense attending it; and a failure to comply with any of the requirements of the charter by which the fund may be realized would subject it to a general liability."

My concurrence in that result rests upon the principle that the right to subject the City to a general liability is based upon the general power conferred to make such improvement, and to defray the expenses thereof out of the general fund; for if the City has not such general power, but is confined exclusively in making and defraying the expenses of such improvements to the fund derived from local assessments upon abutting property, there would be no authority, even though there was a failure to perform all the required acts intended to provide such fund, and to subject the acts to a general liability. It would be *ultra vires*, and, in my judgment, the case in 14 Or. *supra*, could not be sustained. The right to subject the City to a general liability finds its authority in the general power conferred to make such improvements; as without it such improvements could only be authorized in the special mode prescribed, which would necessarily be exclusive, and could only be paid for out of the funds derived from local assessments. Unless, therefore, the City has the general power to make such improvements, the court could not subject it to a general liability, as it did in the case referred to, where the fund to pay for such improvements was to be derived from local assessments, which failed, by reason of neglect, to comply with the requirements of the charter. But, according to my construction of the charter, I understand the City has the general power expressly conferred to make such improvements, and to do all acts or things necessary to effect that object, as well as the special power to make such improvements, and to defray the expenses attending it by local assessments upon the abutting property; and when such special power has not been pursued by reason of neglect or omission of the city authorities to take the proper steps to create the fund to pay for the improvement, when the contract for such

improvements has been fully performed on the part of the contractor, that the City may be subject to a general liability, because the improvement made, and of which the City has the benefit, was within the scope of its general powers, and for which the City could have provided and paid out of the general funds. It may be true that it imposes some hardship when an improvement is projected, the expenses of which are to be defrayed by local assessments, that all should be taxed for the failure of the city officers to do their duty; but it is a greater hardship that he who performs the labor or supplies the materials, or both, for making such improvements, and of which the City has the possession and benefit, should go without his pay, especially when the evil complained of may be remedied by procuring proper legislative authority to make a valid reassessment of the property in view of an assessment that is insufficient or defective, and thereby provide for reimbursement.

Thayer, Ch. J., dissenting:

I am unable to concur in the opinion of the majority of the court delivered herein. My dissent, however, is from the premises from which the opinion is deduced. The premises claimed are that the City of East Portland has, under its charter, general power to improve its streets, and defray the expenses thereof out of the general fund of the City. If this were so, then there would be no ground of disagreement between my learned associates and myself. But it seems to me that no one can carefully read the charter and arrive at such a conclusion. The charter does empower the common council of the City, among other things, "to improve the sidewalks, pavements, streets and parts of streets, within the limits of the City, making full or partial improvement thereof." Section 1, art. 6, Charter.

If this section stood alone, it might warrant the assumption claimed, but the subsequent provisions of the charter point out the mode in which the power is to be exercised, which, under all rules of construction in such cases, becomes the measure of the power conferred.

Section 2, same article of the Charter, provides as follows: "When any improvements mentioned in the preceding section are to be made the council shall cause the recorder to give notice of the same by publishing a notice for fifteen days previous to the undertaking of such improvement," etc. "Such notice must specify with convenient certainty the street or part of street proposed to be improved, or of which the grades proposed to be established or altered, and the kind of improvement to be made." Section 3, same article, provides that, "within ten days from the final publication of such notice, the owners of a majority of the property adjacent to such street or part thereof, as the case may be, may make and file with the recorder a written remonstrance against the proposed improvement, grade or alteration thereof, and thereupon the same shall not then be further proceeded with or made." Section 4, same article, provides that "if no such remonstrance as provided for in the preceding section be made, the council at its earliest convenience, within six months from the final publication of the notice mentioned in section 2, of this

article, may establish the proposed grade or alteration thereof, or commence to make the proposed improvement, as herein provided."

These several sections of the charter, taken together, show to my mind, beyond any doubt, that the common council of the City has no authority to improve any of the streets thereof, or to establish or alter the grade of any street, without causing the notice to be published as provided in said section 2; and then the proposed improvement of a street, or establishment or alteration of the grade of a street, may be defeated by remonstrance, as provided in said section 3. The claim by the majority members of the court, that publishing the notice and complying with the other conditions of the charter is only necessary where the cost of the improvement is made chargeable upon the property adjacent to the street, cannot be maintained. There is no language in the charter which warrants any such construction, nor will such a doctrine logically hold together. The requirement of publication of the notice applies the same to the proposed establishment or alteration of the grade of a street as it does to the improvement of a street, and the cost of the former is not chargeable upon adjacent property in any case. Section 30, same article, provides in express terms that "the cost of establishing or altering the grade of any street or part thereof shall be paid out of the general fund of the City."

It follows, therefore, that if the improvement of a street could be made chargeable upon the general fund of the City, the publication of the required notice of the proposed improvement would be necessary in order to confer power upon the common council to undertake such improvement. Again, section 27, same article, provides when such notice may be dispensed with. It says: "The proceedings authorized by this article for the establishment or alteration of a grade, or the improvement of a street or a part thereof, may be taken and had without giving the notice prescribed in section 2 of this article, whenever the owner or owners of two thirds of the adjacent property shall in writing petition the council therefor."

When the charter declares expressly in what cases the notice need not be given, ought this court to undertake to say that the notice need not be given in any other case? It will be an unfortunate period in civil affairs when the officers of a public corporation are accorded the right to bind the corporation except in the manner specifically pointed out by law.

But the charter of the City of East Portland, I maintain, provides that the cost of the improvement of the streets within its limits shall be made chargeable upon the adjacent property, and that no part of it can rightfully be paid out of the general fund of the City, except in the establishment of the grade and one other special instance.

Section 5 of said article 6 of the Charter provides as follows: "In case the notice be for the improvement of a street or part thereof, the council may proceed to ascertain and determine the probable cost of making such improvement, and assess upon each lot, or part thereof, liable therefor, its proportionate share of such costs. And, if the council shall adjudge that any such lot or part of lot would not be benefited

by the improvement in the full sum of the cost of making the same upon the half of the street abutting upon such lot or part of lot, the council shall assess upon such lot or part of lot, as its proportionate share thereof, such sum only as it shall find [the] lot or part of lot to be benefited by such improvement."

Section 18, same article, provides: "Each lot or part thereof, within the limits of a proposed street improvement, shall be liable for the full costs of making the same upon the half of the street in front of and abutting upon it, and also for a proportionate share of the cost of improving the intersections of two of the streets bounding the block in which such lot or part thereof is situated, unless the council shall have determined that such lot or part thereof will not be benefited by such improvement in the full sum of such costs, in which case such lot or part thereof shall be liable for so much of said cost only as the council shall have found the same to be benefited thereby; and the further cost of making said improvement in excess of the benefits so found shall be paid from the general fund of the City."

These two sections show unmistakably that the cost of the improvement of a street is to be borne by the adjacent lot-owners, except, where the council shall determine that a lot or part thereof will not be benefited by such improvement in the full sum of the costs of making the same upon the half of the street in front of and abutting upon it, then it shall only be liable for so much thereof as the council has determined that it was benefited by the improvement; "and the further cost of making said improvement, in excess of the benefits so found, shall be paid from the general fund of the City." It would be very remarkable, it seems to me, if the whole cost of a street improvement could be made chargeable against the general fund of the City, when the charter points out where a portion of it can be paid therefrom, and makes the lot-owners liable for the payment of the entire residue. The expression of one thing, in such cases, is generally supposed to be the exclusion of another.

But again, section 29, same article, provides: "The common council is authorized to repair any improved street or part thereof whenever it deems expedient, and the cost of the same shall be paid out of the street repairing fund, such repairs to be made under the direction of the street commissioner, and paid for accordingly."

The clear inference from this latter section is that the common council is not authorized to repair an unimproved street. Nor has the common council authority to improve a street which has been once improved. Section 28, art. 6, of the Charter, is decisive upon that point. Taking these several provisions of the charter together, it is apparent that the Legislature intended by the Act to provide a specific mode for the improvement of the streets of the City, and to designate the class of persons who should bear the main burden of it; and, having prescribed the manner in which it shall be done, no argument need be produced to prove that the common council of the City cannot pursue any other course. Nor did the common council attempt in this case to follow any other mode than that pointed out in the charter, but

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it failed to comply with the requirements of that instrument, and hence its efforts in that direction were a nullity. Its acts were no more binding upon the City than upon the lot-owners whose lots abutted upon the street proposed to be improved.

Newbery v. Fox, 37 Minn. 141, is a very similar case to this. There it seems, from the facts disclosed in the opinion, that the town council of Taylors Falls, a municipal corporation, entered into a contract with one Fox for the grading of a street; that Fox did the work in good faith, and was told by the members of the council before he did the work that he had a good and valid contract. But it appeared that the contract was entered into without any order having been first made requiring the owners of the real estate, or occupants of such real estate, in front or adjacent to where the improvement was made, to make or cause it to be made, or opportunity given them to make it. This failure upon the part of the town council was held fatal to the contract. The court there said (Dickinson, J.) that "not only was the party entering into this contract legally chargeable with notice that by the public charter the authority of the council was thus restricted, but the allegations in the complaint that the plaintiff warned the defendant that the contract was void before he commenced to perform it are admitted by the answer. The doctrine of *ultra vires* has, with good reason, being applied with greater strictness to municipal bodies than to private corporations, and, in general, a municipality is not estopped from denying the validity of a contract made by its officers, when there has been no authority for making such contract."

It was claimed upon the rehearing that the contract attempted to be made on behalf of the City of East Portland, and the parties who undertook to make the improvement, although void as to the lot-owners, was good as between the City and the contractors, and the majority members of the court seem to sanction that theory. Such a view is altogether too artificial for my comprehension. How a single agreement can be valid and binding, and at the same time utterly void, is past my understanding. I am aware that different obligations may arise out of a general transaction which affects different parties, and that some of them may bind and others not; but how a proceeding instituted by the agents of a public corporation, acting under mere statutory authority, can bind the corporation, when it is irregular and void as to the parties mainly interested in the affair, and upon whom the statute casts the primary liability, I am unable to discover. I think it is a wholesome doctrine that parties who attempt to contract with such agents should be required to ascertain whether or not the agents are authorized to make the contract before proceeding to perform it. That doctrine had the approval of this court in *Springfield Milling Co. v. Lane County*, 5 Or. 265. The court there said: "This rule may sometimes work a hardship upon a contractor who, without having considered whether the law has been complied with or not, has performed labor or furnished material for a public corporation, and expects compensation therefor, the same as if it had been done or furnished for a private individual.

But nevertheless the authorities hold that a contractor, no less than the officers of a municipal corporation when dealing in a matter expressly provided for by law, must see to it that the law is complied with. Where work is done without authority upon the streets of a city liability does not follow because the streets may be improved thereby or their use continued. Such continued use constitutes no such evidence of acceptance as to create a liability against the corporation."

The financial condition of our cities is bad enough now; and, if their officers are allowed loose rein to engage in enterprises and create obligations against them without regard to restrictions as to the mode of procedure to be pursued, irretrievable bankruptcy and ruin will certainly follow. I think the judgment appealed from should be affirmed.

ALABAMA SUPREME COURT.

MOULTON, *Appl.*,
v.
STATE OF ALABAMA.

(...Ala....)

A witness cannot be asked, even on cross-examination, concerning his knowledge of the conduct, or of particular acts, of a defendant or other person whose character is involved in the issue.

(November 23, 1899.)

APPPEAL by defendant from a judgment of the City Court of Mobile convicting him upon an indictment for larceny. *Reversed.*

The case sufficiently appears in the opinions. *Mr. John E. Mitchell* for appellant.

Mr. W. L. Martin, Atty-Gen., for the State.

McClellan, J., delivered the opinion of the court:

Appellant, defendant below, was convicted on an indictment charging him with larceny from a tug-boat, under section 8789 of the Code. On the trial defendant introduced one Chandler, who testified that he knew the general character of the accused in the neighborhood in which he lived, and that it was "very good." This witness, on cross-examination, was asked by the solicitor whether he "didn't know that the defendant used to run away from home for weeks and months at a time, and his father had to send and bring him back," and replied: "Yes; he used to go off for a week or so at a time, but I used to tell his father where he was; and this is all I ever heard against him."

The defendant objected to the interrogatory, and moved to exclude the answer, but both his objection and motion were overruled, and the evidence allowed to go to the jury. This action of the court was duly excepted to, and is now presented for our consideration.

The doctrine is too familiar to require support, from a citation of texts or adjudged cases, that character, good or bad, can only be established by evidence of general reputation. The issue involved, when it is sought to influence the verdict of jurors by inviting their consideration of the good character of the defendant, embraces no element of conduct, but is met and filled solely by the repute in which the person inquired about is held in the community in which he lives. Conduct doubtless is, in all cases, to a greater or less degree the basis of reputation,—the efficient cause of whatever im-

pression has been made on the community touching the qualities of the man; but it is this resultant of conduct, and not conduct itself,—whether regard be had to a general course of life or to particular acts,—which may go to the jury in a given case to aid them in arriving at a just conclusion as to the fact, and in some instances the degree, of guilt. The law draws no inferences, nor permits the jury to indulge in speculations, as to guilt or innocence, in respect to the act charged, from the fact that the accused has or has not been guilty of other acts,—except in certain cases, wholly foreign to the question of character; or that his walk in life has been exemplary or the reverse. And a witness to character cannot speak of particular acts, or even the course of conduct of the person inquired about, but is confined to a statement of general reputation in the neighborhood in which he lives. The rule applies with equal force to original and rebutting testimony. The issue is good or bad repute, and to this each party is confined. Similarly, the cross-examination of a character witness must be conducted within the limits of this inquiry. The cardinal rule applicable to cross-examination is that while it may take a wider range in the case than was covered by the examination in chief, and even elicit facts not before in evidence, it must still "relate to facts in issue, or relevant, or deemed to be relevant, thereto." *Stoudenmeier v. Williamson*, 29 Ala. 558; 2 Brick. Dig. 549, § 125.

It is manifest that where good or bad repute is the issue, and this issue is incapable of being solved, either way, by evidence of conduct or particular acts, such evidence is wholly beyond the inquiry, and irrelevant. The only exception to the general rule last stated, which bears any relation to the matter we are considering, is that irrelevant questions, which tend to test the accuracy, veracity or credibility of the witness, may sometimes be asked on cross-examination.

It is inconceivable that the accuracy or credibility of a witness, who has testified to a fact which does not in any degree rest in evidence of conduct, can be impeached by any sort or amount of proof as to conduct. There is a class of questions which are admissible only on cross-examination, and are competent solely under this exception; but they raise no inquiry as to the conduct of the person whose character is in issue. Since it is the opinions of a man's neighbors which constitute the character which may become the subject of judicial investiga-

tion, the expression of those opinions is often the best and most direct evidence of character, addressing itself primarily to the mind of the witness, and forming the basis of his statement before the jury. So, too, rumors and reports which the witness has heard respecting the man whose character he deposes to, naturally serve to form the general estimate, and to evidence it to the witness. Opinions, therefore, and rumors and reports, concerning the conduct or particular acts of the party under inquiry, are the source from which in most instances the witness derives whatever knowledge he may have on the subject of general reputation; and, as a test of his information, accuracy and credibility, but not for the purpose of proving particular acts or facts, he may always be asked, on cross-examination, as to the opinions he has heard expressed by members of the community, and even by himself as one of them, touching the character of the defendant or deceased, as the case may be, and whether he has not heard one or more persons of the neighborhood impute particular acts, or the commission of particular crimes, to the party under investigation, or reports and rumors to that effect. Our decisions fully sustain the competency of this kind of testimony. *De Arman v. State*, 71 Ala. 351; *Ingram v. State*, 67 Ala. 67; *Jackson v. State*, 78 Ala. 472; *Teaney v. State*, 77 Ala. 38.

But this court has never held that it was proper, even on cross-examination, to elicit the witness' knowledge of the conduct or of particular acts of a defendant, or other person whose character is involved in the issue; but, on the contrary, its expressions are in perfect harmony with all the text-writers who touch on the point, and with an unbroken line of cases adjudged by courts of last resort, and which are uniform to the effect that such evidence is incompetent and inadmissible. *Engleman v. State*, 2 Ind. 91; *Redman v. State*, 1 Blackf. 96; *Com. v. O'Brien*, 119 Mass. 345; *Peterson v. Morgan*, 116 Mass. 350; *Gordon v. State*, 8 Iowa, 415; *State v. Arnold*, 12 Iowa, 487; *Reg. v. Rowton*, 10 Cox, Crim. Cas. 25; *Teese v. Huntington*, 64 U. S. 23 How. 2 [16 L. ed. 479]; *Whart. Crim. Ev.* § 61.

The court below erred, therefore, in allowing the testimony objected to to go to the jury.

We have carefully examined the other exceptions reserved, but discovered no error in the rulings on the trial other than that pointed out above.

The judgment of the city court is reversed, and the cause remanded.

Subsequently an application for rehearing was filed, and after consideration *Somerville, J.*, delivered the opinion of the court:

We are urged to reconsider our ruling, made in this case, in which we held that particular facts could not be elicited by the State on cross-examination to rebut or weaken evidence of the defendant's good character. It has often been held that, on direct examination, the evidence must be confined to general reputation, and that no evidence is allowed of particular acts of good or bad conduct, either to sustain or to impeach character. *Jones v. State*, 76 Ala. 9; *Hussey v. State*, 87 Ala. 121.

To thoroughly comprehend the scope of this rule we must understand the reasons on which 6 L. R. A.

it is founded, which are the following: (1) Every person is supposed to be capable at any time of sustaining his general reputation, but it would be unreasonable to expect anyone to be prepared, without special notice, to answer an assault on his character imputed by particular facts of bad conduct. (2) To allow such evidence, moreover, would lead to the mischief of raising any number of collateral issues, the trial of which might be almost interminable, and otherwise objectionable as diverting the mind of the jury from the main issue. 2 Taylor, Ev. 8th Eng. ed. § 1470.

The purpose of the inquiry being to ascertain the general credit which a man has obtained in public opinion,—whether justly or unjustly, is not the question,—the evil and injustice of opening on his head a Pandora's box of specific indictments, of which he had no notice, and which he had no opportunity to answer, would be just as great on cross-examination as on the examination in chief. The objection goes to the nature of the evidence, and not to the time or mode of its introduction.

It is true that we have held that one is competent to testify to the good character of another whom he has known sufficiently well for years, although he has never heard such character discussed. That is not on the principle that such testimony is based on the witness' knowledge of particular acts of honesty or charity or humanity, or of other good conduct, but on the well-known fact that "the best character is generally that which is the least talked about." This is mere negative evidence of good character, which is frequently the most satisfactory kind. *Hussey v. State*, 87 Ala. 122.

In several cases we have said, in general terms, that, while particular acts of bad conduct are not admissible to assail character on the direct examination, a witness deposing to general character may be cross-examined as to particular facts in order to test the soundness of his opinion, and elicit the data on which it was founded. *Jackson v. State*, 78 Ala. 471; *Steele v. State*, 83 Ala. 20.

The same is said generally by the text-writers on the laws of evidence. 1 Taylor, Ev. § 352; 2 Starkie, Ev. *304.

By this is meant, not the truth of such particular facts, but circulating rumors of them, which form a part of the general repute, and help to make up one's good or bad character. This principle is illustrated by the old case of *Reg. v. Wood*, 5 Jur. 225, where a witness for a defendant who was charged with highway robbery, having testified to his good character, was asked on cross-examination whether he had not heard that the prisoner was suspected of having committed a robbery in the neighborhood a few years before. It was objected that this was a particular fact, raising a collateral issue. The objection was overruled by *Baron Parke*, who observed: "The question is not whether the prisoner was guilty of that robbery, but whether he was suspected of having been implicated in it. A man's character is made up of a number of small circumstances, of which his being suspected of misconduct is one."

This court has made many rulings of a similar kind, and on a like principle, which will be found cited in the opinion of *Judge McClellan* in this case.

So fully was this rule established in England prohibiting evidence of the truth of particular facts affecting character, even on cross-examination, that it was deemed necessary at one time to introduce a single exception to it by statute. This Statute provided that if upon the trial of any person for a crime, he should give evidence of his good character, it should be lawful for the prosecutor to introduce in rebuttal the conviction of such person of a previous offence or offences. But even this exception has been recently repealed, as we find stated in 1 Best, Ev. (Morgan's ed.) § 261, *note v*. The only case holding a contrary view,

which we have anywhere found, is that of *State v. Jerome*, 83 Conn. 266. There the prisoner had put in issue his character for chastity in an indictment for rape. On cross-examination the court allowed one of the defendant's witnesses to be asked whether a lewd woman had not been an inmate in his house, as a fact conducing to prove that the defendant kept a house of ill fame. This case is not well considered, and is unsupported by authority.

The court is of one mind, that the application for rehearing should be denied.

NEW YORK COURT OF APPEALS.

PEOPLE of the State of New York, *ex rel.*
Thomas C. PLATT, as President, etc., *Appt.*,
v.

Edward WEMPLE, Comptroller, etc., *Respnt.*

(.....N. Y.)

1. A company formed and doing business within this State, which was organized by a number of individuals signing articles of agreement by which the concern was described as a "joint-stock company," and which provided for continuance a certain number of years, for a capital stock divided into shares, represented by certificates or scrip and assignable in the usual manner; which provided further that the business should be managed by a board of directors, that suits should be brought in the name of the president, and all deeds should run to and be made by him, and that the death of members less than a majority interest of the whole should not dissolve the company,—is either a "corporation, joint-stock company or association," within the provisions of chap. 542, Laws 1880, which provides for the taxation of such concerns, and is therefore liable to taxation under that Act, although the articles of agreement contain no reference to any statute under which the company was organized, and the statute providing for such organizations was not in fact passed until after the agreement was prepared.

2. The word "incorporated," as used in

Laws 1880, § 3, amended by Laws 1881, chap. 390, providing that every company incorporated under any law of this State shall be subject to a certain tax, is not to be confined to an association brought into being according to the formality of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations the enabling provisions of the Statute.

3. A tax upon the corporate franchise or business of express companies organized or doing business within the State, to be computed upon their capital stock or its valuation, is neither in form nor substance obnoxious to the Federal Constitution, as interfering with commerce.

(November 23, 1889.)

APPEAL by relator from an order of the General Term of the Supreme Court, Third Department, confirming upon certiorari the proceedings of the comptroller imposing a tax upon the franchise and business of a certain alleged corporation under the provisions of Laws 1880, chap. 542. *Affirmed.*

The opinion sufficiently states the case.

Mr. W. W. MacFarland, for appellant:

The third section of the Act of 1881 embraces only incorporated companies.

People v. Gold & Stock Teleg. Co. 98 N. Y. 67.

The term "joint-stock companies" is, and

NOTE.—Tax on franchises or business of express companies.

A state tax on gross receipts of a corporation has been held not a tax on commerce, but a tax on the franchise, and in the nature of a tax on general income. *Western U. Tel. Co. v. Mayer*, 28 Ohio St. 521; *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 234, 239 (21 L. ed. 184, 185); *State v. Philadelphia, W. & B. R. Co.* 45 Md. 361; *Osborne v. Mobile*, 83 U. S. 16 Wall. 481 (21 L. ed. 472); 1 *Desty, Taxn.* 225, 227.

It is not a violation of the constitutional provision confiding to Congress the power to regulate commerce. *State Tax on Railway Gross Receipts*, *supra*; *Am. U. Exp. Co. v. St. Joseph*, 66 Mo. 675; *Columbia Conduit Co. v. Com.* 90 Pa. 307; *Southern Exp. Co. v. Hood*, 15 Rich. 66; *Western U. Tel. Co. v. Mayer*, *supra*. See *Dubuque v. Chicago, D. & M. R. Co.* 47 Iowa, 196.

Where the tax imposed is only a tax on the privilege of doing business within the State, it is not in violation of the Constitution; so the tax on a franchise is lawful. *Baltimore & O. R. Co. v. Maryland*, 9 L. R. A.

88 U. S. 21 Wall. 456 (23 L. ed. 678); *State Tax on Railway Gross Receipts*, 82 U. S. 15 Wall. 234, 294 (21 L. ed. 184, 185); *State Freight Tax Case*, 82 U. S. 15 Wall. 277 (21 L. ed. 182); *Society for Savings v. Coite*, 73 U. S. 6 Wall. 606 (18 L. ed. 902); *Osborn v. U. S. Bank*, 22 U. S. 9 Wheat. 859 (6 L. ed. 233); *Brown v. Maryland*, 25 U. S. 12 Wheat. 444 (6 L. ed. 687); *Erie R. Co. v. Pennsylvania*, 88 U. S. 21 Wall. 497 (23 L. ed. 596).

The annual tax imposed upon certain classes of corporations is not laid upon the money and receipts of such corporations, but upon their franchises, the amount of the net earnings or income being resorted to simply as a just measure of the tax that should be paid for the enjoyment of the franchise. *Phila. Contrib. for Ins. v. Com.* 98 Pa. 48.

Where there is no intention to obstruct or prohibit interstate business it is not unconstitutional. *Memphis & L. R. R. Co. v. Nolan*, 14 Fed. Rep. 532.

A State may authorize a municipal corporation to impose a license or privilege tax on an express company (*Ibid.*), although it is engaged in interstate commerce. *Western U. Tel. Co. v. State*, 55 Tex. 314.

from the beginning has been, a generic name for all business corporations (Ang. & A. Corp. § 113), and they are recognized under that name by many statutes of this State,—among others Laws 1849, chap. 808; Laws 1867, chap. 91; Laws 1868, chap. 290; Laws 1855, chap. 155; Laws 1881, chap. 599.

On the other hand numerous statutes, commencing with the Act of 1849, chap. 258, recognized these unincorporated associations commonly also called "joint-stock companies" according to their true legal character.

See *Bray v. Farwell*, 81 N. Y. 608.

The relator is not an incorporated company, and therefore is not liable to the tax upon capital stock.

Marbled Iron Works v. Smith, 4 Duer, 874; *Bell v. Streeter*, 1 N. Y. Transcript, N. S. 6; *Witherhead v. Allen*, 3 Keyes, 564; *Schuyler-ville Nat. Bank v. Vanderwerker*, 74 N. Y. 234; *Bray v. Farwell*, 81 N. Y. 608.

Such associations are mere copartnerships and not corporations.

Commercial Teleg. Co. v. Smith, 47 Hun, 494; *Whitman v. Hubbell*, 80 Fed. Rep. 81; *McKeon v. Kearney*, 57 How. Pr. 349; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Marbled Iron Works v. Smith*, *supra*; *Bodwell v. Eastman*, 106 Mass. 525; *Lot v. Dinmore*, 3 Mass. 45; *Frost v. Walker*, 60 Me. 468; *Bacon v. Dinmore*, 42 How. Pr. 377; *Taft v. Ward*, 106 Mass. 518; *Chapman v. Barney*, 129 U. S. 677 (32 L. ed. 800); 2 Bell, Com. of Scotland, 519; 3 Kent, Com. 24; *Parsons*, Partn. chap. 18, bk. 5, chap. 1, § 1079; *Lindley*, Partn. 5; 1 *Parsons*, Cont. 7th ed. 162.

The tax imposed by the third section of the Act is unconstitutional. No organization or individual enterprise for the purpose of carrying on interstate commerce can be prohibited from conducting that business in any State.

Pensacola Teleg. Co. v. Western U. Teleg. Co. 96 U. S. 1 (24 L. ed. 708).

No tax can be levied upon interstate commerce by any State in any manner or form, nor can any fees be exacted for the exercise of that right, which is not a state, but a national, privilege.

Cook v. Pennsylvania, 97 U. S. 566 (24 L. ed. 1015); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 158); *Western U. Teleg. Co. v. Texas*, 105 U. S. 460 (26 L. ed. 1067); *State Freight Tax Cases*, 82 U. S. 15 Wall. 232 (21 L. ed. 146); *Pickard v. Pullman Southern Car Co.* 117 U. S. 84 (29 L. ed. 785); *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 498 (30 L. ed. 698); *Fargo v. Michigan*, 121 U. S. 280 (30 L. ed. 888); *Phila. & S. Steamship Co. v. Pennsylvania*, 122 U. S. 326 (30 L. ed. 1200); *Leloup v. Port of Mobile*, 127 U. S. 640 (32 L. ed. 811); *People v. Gold & Stock Teleg. Co.* 98 N. Y. 87.

Mr. Clarence A. Seward filed a brief on behalf of the Adams Express Company:

The tax imposed under section 8 of chap. 861 of 1881 is a tax upon corporate franchises and business; it only embraces corporations.

People v. Home Ins. Co. 92 N. Y. 828; *People v. New London Equitable Trust Co.* 96 N. Y. 393; *People v. Gold & Stock Teleg. Co.* 98 N. Y. 67; *Matter of Miller*, 110 N. Y. 222.

The relator is not a corporation, nor exercising a corporate franchise or business. Co. 6 L. R. A.

partners for the transportation of property cannot constitute themselves a corporation.

Willcock, Corp. 21; 1 Bl. Com. 472; 2 Kent, Com. 276; *People v. Utica Ins. Co.* 15 Johns. 882; *Beatty v. Marine Ins. Co.* 2 Johns. 109.

There can be no corporation except by authority for incorporation in some Act of the Legislature.

Walsh v. Brooklyn Bridge, 96 N. Y. 438.

A partnership or association is not a corporation because organized by ownership in shares or joint stock.

8 Stephens, Com. 181; 3 Kent, Com. 25; *Burrill*, Law Dict. title *Joint Stock Assn.*; *Commercial Telegram Co. v. Smith*, 47 Hun, 506.

The conferring upon voluntary associations of one or more of the powers which at common law are included in a grant of incorporation does not incorporate them nor constitute them in any proper meaning of the term corporations.

Warner v. Beers, 23 Wend. 103.

Even if an association of seven or more, suing and holding property in the name of an officer and having transferable shares, is thereby deemed to possess any corporate powers, it is not a corporation, under the Acts of 1849, 1851, 1858.

Bacon v. Dinmore, 42 How. Pr. 368; *New York v. Smith*, 4 Duer, 874; *Niagara County Supra. v. People*, 7 Hill, 507; *Witherhead v. Allen*, 3 Keyes, 562; *Sander v. Edling*, 18 Daly, 1; *McKeon v. Kearney*, 57 How. Pr. 349; *Betts v. Betts*, 57 How. Pr. 855.

Under Code Civ. Proc., § 1919, as well as under the previous Statute, a voluntary association, such as the relator, though suing or sued in the name of an officer as permitted by the Statute, is not a corporation.

Commercial Co. v. Smith, 47 Hun, 506; *Chapman v. Barney*, 129 U. S. 677 (32 L. ed. 800); *Whitman v. Hubbell* (N. Y.) 80 Fed. Rep. 81; *Taft v. Ward*, 106 Mass. 518; *Boston & A. R. Co. v. Pearson*, 128 Mass. 445; *Imperial Ref. Co. v. Wyman*, 6 R. R. & Corp. L. J. 94.

Where persons having common or similar interests in the subject matter of controversy are so numerous that all cannot conveniently be joined, one or more may sue or be sued as representing himself and all the others.

Mann v. Butler, 2 Barb. Ch. 862; *Smith v. Scornmstedt*, 57 U. S. 16 How. U. S. 288 (14 L. ed. 942); *Van Vechten v. Terry*, 2 Johns. Ch. 197; *Niven v. Spickerman*, 12 Johns. 401; *Chamberlain of London's Case*, 8 Coke, 62 b.

Associations may be entitled to take advantage of the Statute without any particular organization; it is not necessary that they have written articles.

Schuyler-ville Nat. Bank v. Vanderwerker, 74 N. Y. 234.

An interpretation of the Taxing Laws of New York, which excludes a portion of the citizens who are engaged in business as copartners, and includes only a minor fraction of copartners engaged in a particular business, and that simply by reason of the fact of the strength of their domestic organization, is unconstitutional and void.

Gordon v. Cornes, 47 N. Y. 612.

The unconstitutionality of the Statute, if construed as applicable to associations of seven

or more, whether it be applied only to those who have actually sued or been sued, and held or conveyed property in the officer's name, thus exempting others equally within the Acts of 1849, etc.; or whether it be extended to all associations of seven or more, thus taxing all groups of seven engaged in business, and exempting all groups of six or less,—is equally clear. Either construction violates that fundamental rule which secures equality before the law.

Corfield v. Coryell, 4 Wash. C. C. 380; *Slaughter House Cases*, 83 U. S. 16 Wall. 118 (21 L. ed. 422); *San Mateo Co. v. Southern Pac. R. Co.* 8 Am. & Eng. R. R. Cas. 11; *People v. New York Comrs.* 76 N. Y. 71; *Columbus Esch. Bank v. Hines*, 8 Ohio St. 10; *People v. New London Equitable Trust Co.* 96 N. Y. 395.

Messrs. Charles F. Tabor, Atty-Gen., and William A. Poste, Dep. Atty-Gen., for respondent:

Chapter 543 of the Laws of 1880 was one of a series of statutes all aimed at the same end—the obtaining revenue from a new source—the taxation of such business enterprises as by reason of aggregate character enjoy the privileges of bodies corporate and the advantages of perpetual succession, a taxation not of their property but of their privileges and business, based upon the dividend-earning power of their capital stock.

People v. Spring Valley Hydraulic Gold Co. 92 N. Y. 386; *People v. Home Ins. Co.* 92 N. Y. 328.

The United States Express Company is subject to the taxation prescribed by section 8 of the Act of 1880. It is a joint-stock company and is organized under the Laws of the State of New York, and derives its principal powers and privileges from such laws. At common law a joint-stock association could not, without becoming actually incorporated, obtain perpetual succession, nor the right to issue transferable stock.

3 Anderson, *History of Commerce*, 81; 6 Encyclop. Brit. article *Company*; Taylor, *Joint-Stock Companies Statutes*, Appendix; *Queen v. Whitmarsh*, 23 L. J. 185.

The arrogation and exercise of all powers that had a tendency to produce a perpetual succession were forbidden to joint-stock associations at common law.

Duvergier v. Fellows, 5 Bing. 248; *Blundell v. Winsor*, 8 Sim. 601.

Such company has by its own acts and uniform policy placed itself upon and profited by the very statutes which it now seeks to ignore, and has attained its present power and wealth by taking advantage of such statutes, and should not now be heard to say that such statutes did not give it its present powers and advantages. Were it not for the permission given to joint-stock companies to acquire and hold real estate for the purpose of their business the title to such lands as the association might acquire would be subject to all the burdens and liabilities attaching to partnership lands, such as the enforcement of the liens of judgment and widow's dower.

Atkins v. Saxton, 77 N. Y. 195; *Hawley v. James*, 5 Paige, 451; *Bigelow, Estoppel*, 582; *Van Hook v. Whitlock*, 26 Wend. 48; *People*

v. Murray, 5 Hill, 468; *Smith v. Sheeley*, 79 U. S. 12 Wall. 358 (20 L. ed. 430).

Within the scope of the legislation of 1880, 1881—the taxation of corporate and aggregate privileges and franchises—the United States Express Company is to be considered as a corporation; and those privileges being the results of the legislation of the State, the company is to be considered as a corporation organized and incorporated under the laws of the State. No precise form of words, nor even an express grant of corporate powers, is necessary to form a corporation. *Grant, Corp.* 5; *Thomas v. Dakin*, 22 Wend. 94.

If there be granted by the State to individuals such property rights or franchises, or imposed upon them such burdens, as can only be properly held, enjoyed, continued or borne, according to the terms of the grant, by a corporation, the intention to create such corporate entity is presumed.

Conservators v. Ash, 10 Barn. & C. 849; *Denton v. Jackson*, 3 Johns. Ch. 320; *Liverpool Ins. Co. v. Massachusetts*, 77 U. S. 10 Wall. 566 (10 L. ed. 1029); *Sanford v. N. Y. Supra.* 15 How. Pr. 173; *Waterbury v. Merchants U. Exp. Co.* 50 Barb. 157; *Westcott v. Fargo*, 61 N. Y. 542; *Fargo v. McVickar*, 55 Barb. 440; *Fargo v. Louisville, N. A. & O. R. Co. (Ind.)* 6 Fed. Rep. 787.

The Legislature may raise revenue by special taxes upon all kinds of business trades and enterprises.

Cooley, Taxn. 7; *People v. Brooklyn*, 4 N. Y. 419; *Stuart v. Palmer*, 74 N. Y. 183; *People v. New London Equitable Trust Co.* 96 N. Y. 387; *Portland Bank v. Athorp*, 13 Mass. 252; *Re McPherson*, 6 Cent. Rep. 781, 104 N. Y. 306.

The legislation does not offend the Federal Constitution. It is a tax on a franchise, and not a tax on property.

People v. Home Ins. Co. 92 N. Y. 344; *People v. New London Equitable Trust Co.* 96 N. Y. 387.

The decisions of the United States Supreme Court sustain the power of a State to impose a tax upon a corporate franchise.

Hamilton Mfg. Co. v. Mass. 73 U. S. 6 Wall. 638 (18 L. ed. 906); *Delaware Railroad Tax*, 85 U. S. 18 Wall. 206 (21 L. ed. 688).

State legislation is not forbidden in matters either local in their nature or only indirectly affecting commerce, or resulting in practical assistance thereof. Congress, by its non-action in such matters, virtually declares that for the time being, and until it sees fit to act, they may be controlled by the state authority.

Mobile Co. v. Kimball, 102 U. S. 691 (26 L. ed. 238); *Munn v. Illinois*, 94 U. S. 113 (24 L. ed. 77); *Packett Co. v. Catlettsburg*, 105 U. S. 559 (26 L. ed. 1169).

It is perfectly competent for a State to impose a license fee, either directly or through one of its municipal corporations, upon ferry keepers living in the State for boats which they use in conveying passengers and goods across a navigable river to and from a landing in another State; and such a tax is not a regulation of or interference with interstate commerce within the meaning of the Constitution.

Wiggins Ferry Co. v. East St. Louis, 107 U. S. 365 (37 L. ed. 419); *Wheeling, P. & C.*

Transp. Co. v. Wheeling, 99 U. S. 273 (25 L. ed. 412). See *Ratterman v. Western U. Teleg. Co.* 127 U. S. 411 (32 L. ed. 229); *Western U. Teleg. Co. v. Mass.* 125 U. S. 530 (31 L. ed. 790); *Delaware Railroad Tax*, 85 U. S. 18 Wall. 204 (21 L. ed. 886).

Danforth, J., delivered the opinion of the court:

This case arises upon an application made by the relator as president of the United States Express Company for a certiorari requiring the comptroller of the State to return to the supreme court his proceedings relating to the imposition of a tax on the franchise or business of that company, to the end that such proceedings might be set aside, and that in the mean time the collection of the tax be stayed. So far as is material to the question raised upon this appeal, the return of the comptroller showed that prior to the 9th of April, 1888, that officer called upon the Express Company to report as to the amount of its capital stock employed within this State, for the purpose of enabling him to adjust the taxes and penalty due from it to the State under the provisions of the Act, chap. 542 of the Laws of 1880, entitled: "An Act to Provide for Raising Taxes for the Use of the State upon Certain Corporations, Joint-Stock Companies and Associations," as amended by subsequent Acts (chap. 361, Laws 1881; chap. 501, Laws 1885); that the company refused to comply with his demand, and he from such data as he could procure did assess and fix the taxes and penalties recited in the relator's application. It was thereupon stipulated by the relator and the comptroller that the only question to be argued by either party should be whether the relator was liable for the tax provided for by the third section of the Act of 1880, *supra*, and the Acts amendatory thereof, and upon hearing of the matter before the General Term of the Supreme Court in the Third Department the application of the relator to vacate the assessment was denied and the proceedings of the comptroller were ratified and confirmed.

From the order then made this appeal is taken by the relator. The discussion is necessarily limited to the point presented by the stipulation already referred to.

The Express Company was composed of individuals who signed an agreement purporting to have been made April 22, 1854, but which by its terms was to take effect on the 1st of May, 1854, and continue in force for ten years thereafter. On November 24, 1859, the articles were amended by the associates so as to continue in force for twenty years from the 1st of May, 1864, and on January 23, 1884, the directors, under power conferred upon them by the associates, passed a resolution continuing the existence of the company for twenty years from May 1, 1884. The association was formed for the purpose of carrying on a forwarding agency, banking, exchange and insurance business between such cities and towns of the United States and those of other countries as the directors or their successors might specify.

It is described in the articles as a "joint-stock company," its capital declared to be

\$500,000, divided into shares of \$100 each, subject to increase or decrease as the board of directors might think proper but represented by certificates or scrip signed by the president and secretary of the Company, and countersigned by the treasurer. These shares are made assignable without restriction from one person to another in the usual form in person or by attorney and may be forfeited by order of the directors for causes set forth in the agreement. The property and business of the Company is to be managed by a board of five directors, who from their own number might elect a president, vice-president and secretary, and, except by their permission, "no shareholder in" the Company can use or sign its associate name; in short into their hands the management of the whole business of the Company is intrusted. The directors are also empowered to declare dividends from the net earnings of the Company as they may from time to time deem expedient.

Deeds and other instruments of conveyance or as security are to run to the president, and all suits at law or in equity in favor of the Company are to be brought in his name. It is also provided that the death of no member or any number of members less than a majority of the interest of the whole shall operate as a dissolution of the Company, but its business shall continue as if no death had occurred.

It seems obvious from these articles that the arrangement consummated by them has little in common with a private partnership, for they provide for a permanent investment of capital, the right of succession, the transfer of property by an assignment of the certificate of ownership and the prosecution of suits in the name of one person. The Company has therefore the characteristics of a corporation, and, so far as it can, it assumes to itself an independent personality, and asserts powers and claims privileges not possessed by individuals or partnerships. It is precisely such an association as, when formed without authority from Parliament, was declared in England to be illegal and void, and to be "deemed a public nuisance," (6 George I. chap. 18, § 18), the Statute in this respect following, it was said, the common law, and enforcing its rules by the imposition of penalties. *Buck v. Buck*, 1 Camp. 547; *Rees v. Stratton*, Id. 549, note; *Josephs v. Pebrer*, 3 Barn. & C. 639.

It was held in *Duvergier v. Fellows*, 5 Bing. 248, that there can be no transferable shares of any stock except the stock of corporations or of joint-stock companies created by Acts of Parliament, affirmed in 10 Barn. & C. 826, and 1 Clark & F. 89; and to the same effect is the decision in *Blundell v. Winsor*, 8 Sim. 601.

It is not necessary, however, to assert in what cases such a combination of individuals would now be deemed illegal at common law; for the Statutes of the State render the arrangement possible, and in our opinion the association in question is within their purview.

By the Act of 1849, chap. 258, § 1, a joint-stock company or association was authorized "to sue and be sued in the name of the president and treasurer," with like effect as if the names of the associates were stated in the proceedings. It was extended in 1851. Laws 1851, chap. 455; Laws 1853, chap. 153.

On March 31, 1854, a bill was introduced into the Legislature (see Senate Journal of that date) and passed April 15, 1854 (Laws 1854, chap. 245), entitled "An Act to Amend, and in Addition to the Several Acts Relative to Joint-Stock Associations," the first section of which declared that (§ 1), "whenever, in pursuance of its articles of association, the property of any joint-stock association is represented by shares of stock, it may be lawful for said associations to provide, by their articles of association, that the death of any stockholder or the assignment of his stock shall not work a dissolution of the association, but it shall continue as before, nor shall such company be dissolved except by judgment of a court for fraud in its management, or other good cause to such court shown, or in pursuance of its articles of association;" and, (§ 2), that "said association may also, by said articles of association, provide that the shareholders may devolve upon any three or more of the partners the sole management of their business."

A further Act was passed in 1867, chap. 289, authorizing "joint-stock companies and associations to purchase, hold and convey real estate," and declaring that all conveyances thereof should be made to the president of the Company, who might hold and convey the same free from any claim thereon against any of the shareholders, or any person claiming under them.

In view of the capacities and attributes with which, as we have seen, the United States Express Company is endowed, and in view also of the statutes which legalize its assumed capacities, and make valid and effective its asserted right of succession, its distinctive name, and the alienability of its shares, we find nothing to warrant the contention of the appellant that it is a mere partnership, existing only under its articles of agreement and association. It is true these articles contain no reference to any statute of the State as one under or by which the Company was organized; yet by the very Constitution of the body itself, and the privileges and powers which it can only exercise by virtue of those statutes, it must be taken to belong to one of those classes of artificial beings described in the Act of 1880, *supra*, as a "corporation, joint-stock company or association."

The several persons composing it are made into a collective body and are given capacity in its name, and not their own, to take, grant, sue and be sued. Thus they are united, or organized, or incorporated. The death of a member causes no interruption, and the power of continued existence of this one body and its organized or corporate action is derived from no inherent power of one or all of its members, but from the law which sanctions the union. It is doing business within this State, and because it was also formed under the laws of the State it is within the Act. Nor does it seem to us that this construction is at all at variance with the literal and precise language of the Act. It declares (§ 8 of the Act of 1880, as amended in 1881, chap. 361): "Every corporation, joint-stock company or association whatever, now and hereafter incorporated or organized under any law of this State, or now or hereafter incorporated or or-

ganized by or under the laws of any other State or country, and doing business in this State ('with certain exceptions not now material'), shall be subject to and pay a tax as a tax upon its corporate franchise or business into the treasury of this State annually, to be computed," according to certain specified circumstances, upon the capital stock or its valuation made in accordance with the provisions of the first section of the Act.

The first section thus referred to makes it "the duty of the president or treasurer of every association, corporation or joint-stock company, liable to be taxed on its corporate franchise or business as provided in § 8, to make a report to the comptroller" of its capital and dividends, and, if no dividends, then of circumstances which prevent an appraisal. The phraseology of both sections,—the first, "every association, corporation or joint-stock company," and the third, the same words differently arranged,—embraces the United States Express Company," and its relation to the class is not changed by the subsequent limitation implied by the words "incorporated under any law of this State." The word "incorporated" as here used, is not to be taken in a technical or restricted meaning and confined to an association brought into being according to the formality of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations of business the enabling provisions of the statutes.

In the case before us the agreement which brought many persons into one artificial body was so framed as to accomplish that end, and in proposing to conduct its affairs by the power given to it in the mode prescribed by the Legislature they must be deemed, for the purposes of the Act in question, to be incorporated, that is formed or united, under the law of the State, whether the artificial body be termed a corporation, a joint-stock company, or association.

Nor is the principal question altogether new. In *Waterbury v. Merchants Union Express Co.* 50 Barb. 158, the nature and legal character of the defendant, a joint-stock association created in like manner with the one before us, was held to have all the attributes of a corporation, and all its incidents except a common seal. The statutes from 1849 to 1867, *supra*, were examined and held to confer the qualities which distinguished a corporation from a partnership, and to establish the relations of a member of the association as those of a stockholder in a corporation, and not those of an individual in a partnership, and that in controversies affecting them the analogies afforded by laws and jurisprudence in the case of corporations should be followed, and not those derived from a simple partnership.

In *Westcott v. Fargo* (president of the same company), 6 Lans. 319, a like discussion was had upon circumstances calling for a decision as to the nature and character of the association. A shareholder sued the company for the loss of freight intrusted to it. It was set up as a defense that the plaintiff as such shareholder was one of the owners of interest in the express company; but the court held otherwise, that it was no valid objection that the plaintiff was a member of the company, say-

ing, "the action is against the corporation;" and so the plaintiff prevailed. Upon appeal the case came in this court, *Westcott v. Fargo*, 61 N. Y. 542, and again the issue was distinctly presented. The appellant contended that the plaintiffs could not maintain an action upon a contract between themselves and the association of which they were members; that their remedy was in equity for an accounting, as in partnership cases; while for the respondent it was argued that "joint-stock companies, organized under the statutes of the State, are corporations, not partnerships."

This court also examined the statutes relating to joint-stock companies, *supra*, and came to the conclusion that they conferred powers and privileges of corporations not possessed by individuals or partnerships.

We do not overlook the contention of the learned counsel for the appellant that the articles of agreement and association of the Express Company already contained the provision embraced in the Act of 1854, *supra*, and were therefore part of the fundamental law of the company. No doubt parties are, in general, deemed to contract with reference to the state of the law as it existed at the time of making the contract; but certainly there is nothing to prevent them from doing so with reference to a state of the law which did not then exist, and more especially is this so if it appears that by the terms of the agreement that changed condition of the law might reasonably be expected.

The Act of 1854 was proposed to the Legislature as early as March. It was passed and became a law on the 15th of April, and although by force of the Statute, 1 Rev. Stat.

title 4, part 1, chap. 7, 157, § 12, it did not take effect until twenty days thereafter, it was apparently in contemplation of the parties when on the 22d of April, and therefore after its passage, they prepared an agreement embodying the terms and language of the Statute; but however that may be, the period of its new or extended existence began in 1854 when the law was in full force. The agreement which effected it might well be deemed equivalent to a new and original organization. I do not, however, regard this fact as essential. It is not an answer to the operation of the Statute that the agreement constituting the joint-stock association was prepared antecedent to the time when it took effect. It is enough that the powers which it provided for, and assumed to exercise, were thereby ratified and made valid. Thenceforth it acted under and by virtue of the Statute.

Second. We are also of opinion that the tax sought to be enforced is neither in form nor substance obnoxious to any provision of the Federal Constitution. It interferes in no respect with commerce with foreign nations, or among the several States. It is confined to capital employed in this State by an entity existing under its laws, and the manner in which its value shall be assessed and the rate of taxation are matters of legislative discretion. In no aspect does it profess "to regulate commerce," nor in any proper sense has the legislation in question that effect.

We therefore agree with the Supreme Court, and think its order should be affirmed.

All concur, *Andrews, J.*, in the result.

TENNESSEE SUPREME COURT.

J. C. LAWRENCE

v.

INGERSOLL *et al.*, *Appts.*

(.....Tenn.)

1. An injunction prohibiting members of a municipal board from meeting and

acting without giving a certain person notice, and permitting him to act with them, is not mandatory.

2. The legality and validity of an election by the mayor and aldermen of a city by ballot, where no other official is in terms directed to declare or certify it, and no provision is made for a contest, may be inquired into by mandamus to compel recognition of the claimant's title.

NOTE.—*Vota; majority; quorum; casting vote.* This case and the one next following, *Rushville Gas Co. v. Rushville*, post, 815, by their sharp conflict add interest to some questions which do not often come before the courts.

The weight of authority is to the effect that a majority vote need not be a majority of all those present, if it has a majority of those voting and a quorum is in fact present. *Launtz v. People*, 113 Ill. 187; *First Parish in Sudbury v. Stearns*, 21 Pick. 148; *Booker v. Young*, 12 Gratt. 308; *State v. Green*, 37 Ohio St. 227; *Bax v. Monday*, Cowp. 530; *Oldknow v. Wainwright* (or *Rex v. Foxcroft*), 2 Burr. 1017, 1 Wm. Bl. 229; *State v. Chapman*, 44 Conn. 600.

Those present who do not vote acquiesce in an election made by those who do. *Oldknow v. Wainwright* (or *Rex v. Foxcroft*), 2 Burr. 1017, 1 Wm. Bl. 229.

A member present and not voting is to be counted as present in determining whether the affirmative votes were a majority of those present. *Com. v. Wickersham*, 66 Pa. 134.

6 L. R. A.

Votes viva voce when the law requires them to be by ballot are nullities, and a majority of those actually cast by ballot, however few, is sufficient if a quorum is present. *Com. v. Read*, 2 Ashm. 261.

But where a charter requires a majority of all members elected a vote of less than this, though a majority of all voting, is not sufficient. *San Francisco v. Hazen*, 5 Cal. 169; *McCracken v. San Francisco*, 16 Cal. 591; *Pimental v. San Francisco*, 21 Cal. 851.

A statute requiring "a majority vote of the qualified members present" is not satisfied by a less number, though it is a majority of all actually voting. *State v. Fagan*, 42 Conn. 32.

So where by law a majority of the voters were required for fixing church rates, a vote of a minority was insufficient though the majority refused to fix any rate at all. *Gosling v. Veley*, 4 H. L. Cas. 679, reversing 7 Ad. & El. N. S. 406.

A vote of two thirds of a city council means a vote of two thirds of the body as legally constituted by the presence of a quorum, and not two thirds of the whole number of members. *Warnock v.*

3. Four ballots are not sufficient to elect an officer by an official board when eight members are present, although one blank vote is cast.
4. The majority of those present at a meeting of a select body consisting of a definite number of voters must concur in order to do any valid act, in the absence of a special provision.
5. A declaration of a presiding officer that a certain person is elected as the result of a ballot, which, without his vote, was not sufficient to elect for lack of a majority of the members present, is not equivalent to casting his own vote in favor of such person.
6. No ratification of an election declared by a municipal officer to a municipal board, on a vote which in fact did not make an election, can be made except by another ballot, where the board has no power to elect except on ballot.
7. The statement of the recorder of a municipal board, in a paper, that he was not required to make, notifying a person of his election to office, that it was done by order of the board, is not evidence of that fact.

(Turney, Ch. J., dissents.)

(October 19, 1889.)

APPEAL by respondents from a decree of the Chancery Court of Knoxville in favor of complainant in a proceeding to compel respondents, as members of the board of education, to recognize complainant as a member of such board, and to prohibit them from meeting and taking action as such board without giving him an opportunity to be present. *Reversed.*

The facts are sufficiently stated in the opinion.

Messrs. J. W. Caldwell and Ingersoll & Peyton for appellants.
Messrs. Taylor & Hood for appellee:

Snodgrass, J., delivered the opinion of the court:

The bill in this cause was filed by J. O. Lawrence claiming to be a duly elected and qualified member of the board of education of the City of Knoxville, for an injunction against defendants and the other four members of said board, to prohibit the meeting and action of said board without him, and to compel defendants, by mandamus, to recognize him as a member of the board, and permit him to take part in its proceedings, upon allegations of refusal of defendants so to do. The injunction issued, and, on final hearing, mandamus was awarded as prayed for. Respondents appealed, and assigned errors. Two preliminary questions are made, which need to be briefly noticed before disposition of the real merits of the controversy. One of these is made by respondents, and is an objection to the power of the court to issue a mandatory injunction, upon the assumption that the one issued in this case is such. The other question is made by complainant, and goes to the right of the court to inquire into the legality and validity of his election in this proceeding. Respecting the first question, it is sufficient to say that the injunction is not mandatory. The injunction prohibited the meeting and action of defendants without giving complainant notice, and permitting him to act with them. It did not command his admission, except that if respondents proceeded to act, it prohibited their acting, but authorized them to avoid this prohibition on compli-

Lafayette, 4 La. Ann. 419. *Contra*, Logansport v. Legg, 20 Ind. 315. (But in the latter case the language of the statute required a "concurrence of two thirds of the members.")

"Two thirds of each House," whose assent is necessary to pass an Act of incorporation, in Mich. Const. 1835, art. 12, § 2, means two thirds of the members present and voting when there is a quorum. Southworth v. Palmyra & J. R. Co. 2 Mich. 287.

So the words "two thirds of each branch of the Legislature," within a provision as to submitting proposed constitutional amendments, mean two thirds of each House duly constituted by the presence of a quorum, and not necessarily two thirds of all the members. Green v. Weller, 82 Miss. 650; State v. McBride, 4 Mo. 303.

Where the charter makes the common council consist of the mayor and twelve aldermen, and requires a vote to be passed by two thirds of the "members elect," the mayor is not counted and eight votes are sufficient. Mills v. Gleason, 11 Wis. 470.

Quorum.

It is an established general rule that a majority constitutes a quorum of a body consisting of a definite number of persons, and that the act of a majority of a quorum is the act of the body, unless otherwise determined by its constitution. *Ex parte Willcocks*, 7 Cow. 402; *Damon v. Granby*, 2 Pick. 353; *Kingsbury v. Centre School Dist.* in *Quincy*, 12 Met. 90; *Price v. Grand Rapids & I. R. Co.* 18 Ind. 58; *State v. Jersey City*, 27 N. J. L. 493; *State v. Farr*, 47 N. J. L. 208; *State v. Dellesceline*, 1 McCord, L. (S. C.) 52; *Com. v. Read*, 2 Ashm. 261; *State v. Green*, 37 Ohio St. 227; *State v. Huggins*, Harper, L. (S. C.) 139; *Rex v. Miller*, 6 T. B. 268; *Rex v. Bellringer*, 4 T. B. 810; *Rex v. Headley*, 7 6 L. R. A.

Barn. & C. 496; *Blacket v. Blizard*, 9 Barn. & C. 861; 5 Dane, Abr. 150; *Kyd, Corp.* 111; *Ang. & A. Corp.* § 205; *Kent, Com.* 233; *Cushing, Legis. Assem.* § 247.

This rule applies in the case of corporations. *Sargent v. Webster*, 13 Met. 497; *Buell v. Buckingham*, 16 Iowa, 234; *State v. Chute*, 34 Minn. 135; *Cahill v. Kalamazoo Mut. Ins. Co.* 2 Doug. (Mich.) 124; *Columbia Bottom Levee Co. v. Meier*, 39 Mo. 53; *Booker v. Young*, 12 Gratt. 303; *Madison Ave. Baptist Ch. v. Baptist Ch. in Oliver St.* 5 Robt. 649.

Action taken by less than a quorum is void. *Price v. Grand Rapids & I. R. Co.* 18 Ind. 58; *Union R. Co. v. Reeve*, 15 Ind. 237; *Logansport v. Legg*, 20 Ind. 315; *State v. Porter*, 12 West. Rep. 634, 113 Ind. 79.

An election by a minority of the stockholders of a corporation is legal where the others are restrained from voting by injunction. *Brown v. Pacific Mail Steamship Co.* 5 Blatchf. 525.

Where the proper presiding officer of a meeting composed of an indefinite number is prevented by violence from acting, those who withdraw with him to another convenient place may act although they are only a minority of those originally assembled. *Field v. Field*, 9 Wend. 594.

Where four out of eighteen members were either disqualified, dead or refused to qualify, eight constituted a quorum. *State v. Huggins*, Harper, L. (S. C.) 139.

But where three village trustees were necessary for a quorum, two could not act although two others were present if the latter were disqualified from voting. *Coles v. Williamsburgh*, 10 Wend. 659.

A majority of the members of a prudential committee of a school district may lawfully act. *Kingsbury v. Centre School Dist. in Quincy*, 12 Met. 90.

Where three persons were appointed to select a

ance with conditions which they could or could not accept, as they saw proper, and was clearly not mandatory. It therefore becomes irrelevant and unimportant to discuss the question of the right to issue mandatory injunctions, and the extent to which they may go.

As to the second question stated, it is equally clear that the chancellor had the right to determine the legality and validity of the election under which complainant claimed title to the office, for the exercise of the powers of which he sought the aid of the court. His election depended alone upon the action of the board of mayor and aldermen as embodied in the record made of it by them. The notification, called a "certificate," issued to him by the recorder, is of no force or validity, because not required by law. But, if it were, it could only embody the result of the record of the election, and could not add to its efficacy in the least, or change its effect. All the provisions made in the charter of Knoxville respecting this election, pertinent to the point now being considered, are that it shall be made by the mayor and aldermen, by ballot. No other official is in terms directed to declare it, or to certify it, nor is any provision made for a contest. In such case it is well settled that the legality and validity of such election may be inquired into, in any proceeding, by mandamus, to compel other persons to recognize the claimant's title to the office, or when he seeks to enter into it, or otherwise assert his right to act as duly elected. 6 Am. & Eng. Cyclop. Law, 384, 385, and cases cited; *Marshall v. Kerns*, 2 Swan, 68; *Pucket v. Bean*, 11 Heisk. 600; *Lewis v. Watkins*, 3 Lea, 181, 182.

These questions out of the way, we come to the real question in the case. Was the complainant elected, and is he therefore entitled to

compel the defendants to admit and recognize him as a member of the board? To determine this it is necessary to examine his claim to election, and then ascertain if, under the law, it is well founded. To support the first, he shows the following record of the minutes of the proceedings of the board of mayor and aldermen, in addition to the notification or certificate of the recorder, before referred to, and indorsement thereon of the recorder that complainant had taken the oath required by law:

"At a call meeting of the board of mayor and aldermen of the City of Knoxville, held Friday, Jan. 27, A. D. 1888, there were present, and answering roll-call, Aldermen Selby, Barry, Hockenjos, Jones, Albers, House, Perry and McDaniel. Mayor Luttrell called Mayor-Elect Condon and Ex-Mayor Fulcher and Alderman S. B. Boyd to take seats on mayor's stand. (The following proceedings were had, to wit): The minutes of the meetings of the board of January 6, January 25 and January 26 were read and approved. On motion of Alderman Albers the board took a recess of five minutes. Mayor Luttrell resumed the chair, and called the board to order. Alderman Perry moved to go into an election of the city school board, to fill out the unexpired term of Hon. M. J. Condon, resigned. Motion carried. Mayor Luttrell appointed Aldermen McDaniel and Barry as tellers, and Alderman Perry to take up the votes. Alderman Perry nominated F. L. Fisher. Alderman Jones nominated Rev. J. C. Lawrence. The ballot was taken, and it was found that J. C. Lawrence had received four votes, and F. L. Fisher three votes, and a blank without any name was also found, and thrown out. Mayor Luttrell declared J. C. Lawrence legally elected as a member of the city school board of educa-

site for a town building, rather as agents than as a committee, two only could not act against the dissent of the other. *Damon v. Granby*, 2 Pick. 363.

Where a certain number are expressly required by statute to be present, action cannot be taken in the absence, although wrongful, of any one of them. *Ex parte Rogers*, 7 Cow. 523.

An election under a charter by which a majority of a definite number of corporators is required to be present can be had only where a majority of the whole number is present, although some vacancies exist. *Rex v. Devonshire*, 1 Barn. & C. 609; *Rex v. Bower*, 1 Barn. & C. 492; *Rex v. May*, 4 Barn. & Ad. 843; *Rex v. Morris*, 4 East, 17; *Rex v. Ballinger*, 4 T. R. 810; *Rex v. Miller*, 6 T. R. 268.

Where the number for a quorum is an aliquot part of the assembly of which the whole number is fixed by its constitution, vacancies in this number do not reduce the number required for a quorum. *Cushing*, Legis. Assem. § 261.

Indefinite number of voters.

Where the number of voters is indefinite the general rule is that a majority of those assembled is sufficient. *Rex v. Varlo*, Cowp. 250; *Fleld v. Fleld*, 9 Wend. 304; *Verbeck v. Scott*, 71 Wis. 59.

A majority of the religious society within the meaning of a statute authorizing action "in pursuance of the wishes of a majority of the members of such society, expressed at a church election, etc.," means a majority of those present and voting. *Craig v. First Presbyterian Church*, 88 Pa. 42.

The words "a majority of the voters" or "two thirds of the qualified voters" of a certain district, 6 L. R. A.

or similar words in a statutory or constitutional provision as to an election, mean a majority, or two thirds, as the case may be, of those actually voting, and do not require a majority of all who might have voted. *Carroll County v. Smith*, 111 U. S. 556 (23 L. ed. 517); *Cass County v. Johnston*, 95 U. S. 390 (24 L. ed. 413); *St. Joseph Twp. v. Rogers*, 83 U. S. 16 Wall. 644 (21 L. ed. 828); *People v. Warfield*, 30 Ill. 159; *People v. Wiant*, 48 Ill. 263; *People v. Garner*, 47 Ill. 246; *Taylor v. Taylor*, 10 Minn. 107; *Bayard v. Klinge*, 16 Minn. 249; *Everett v. Smith*, 23 Minn. 53; *State v. Renick*, 37 Mo. 270; *State v. Binder*, 38 Mo. 450; *Sanford v. Prentice*, 28 Wis. 858; *County-Seat of Linn County*, 15 Kan. 500; *Louisville & N. R. Co. v. Davidson County Court*, 1 Sneed (Tenn.) 637. *Contra*, *People v. Brown*, 11 Ill. 473; *Chester & L. N. G. R. Co. v. Caldwell County*, 72 N. C. 493.

The cases of *Hawkins v. Carroll County*, 50 Miss. 735; *State v. Sutterfield*, 54 Mo. 391; *Southerland v. Goldsboro*, 96 N. C. 49; *Duke v. Brown*, Id. 127, and *McDowell v. Massachusetts & N. Const. Co.* Id. 514, — hold that where registration of voters must be made in order to vote, such words as "two thirds of the qualified voters" mean two thirds of the whole number entitled to vote and not merely of those voting; but in this construction they are in conflict with *Cass County v. Johnston* and *Carroll County v. Smith*, *supra*.

"A majority of legal voters voting at a general election," within a constitutional provision for township organization, means a majority of all voting at that election, and not merely of those voting on that question. *State v. Lancaster County*, 3 Neb. 474.

tion, to fill out the unexpired term of Hon. M. J. Condon, resigned. Some discussion was had, after which Alderman Perry moved to reconsider said vote and election. Seconded by Alderman Albers. The ayes and noes were taken on roll-call, Aldermen Selby, Hockenjos, Albers and Perry voting aye, and Aldermen Barry, Jones, House and McDaniel voting no.—4. Mayor Luttrell decided the motion lost. On motion of Alderman Barry, the board adjourned until nine o'clock to-morrow morning. [Signed] Approved: Jas. C. Luttrell, Mayor.

"City of Knoxville, Tenn., Jan. 31, A. D. 1888. Mr. J. C. Lawrence: At the regular meeting of the board of mayor and aldermen of the City of Knoxville, held January 27, A. D. 1888, you were chosen and elected as a member of the board of education, to fill out the unexpired term of said office of Martin J. Condon, resigned. By order of the board, C. C. Nelson, Recorder. Enrolled, 1-12-89, bk. 2, p. 45."

"J. C. Lawrence came before me and took oath of office as required by the new charter, January 31, 1888. C. C. Nelson, Recorder."

Upon this record and these statements of the recorder he bases his claim to the office and right to a peremptory mandamus. No question is made that the oath said to have been taken is not shown to have been done by this indorsement, nor upon the notification or certificate as such. The question is only made, as to the latter, that the recorder had nothing to do with the election, or certifying it, and that the certificate does not affect the question; and this is true. This brings us to the second subdivision of the real question, that is, to determine whether, under the law, he was in fact elected.

To same effect where the words were "a majority of the votes cast." *State, Omaha & S. O. St. R. Co. v. Beckel*, 22 Neb. 158.

A provision for a tax when "a majority of the electors of said township at some regular election shall vote in favor" means a majority of all voting at the election, and not merely of those voting for or against the tax. *Enyart v. Hanover Twp.* 25 Ohio St. 618.

"A majority for" a bounty which can be given by a vote of township means a majority of those cast on that question, although not a majority of those cast for township officers at the same election. *Marion County v. Winkley*, 29 Kan. 38.

A vote of 5,000 on a special question at an election where 13,000 votes were cast for city officers is not a vote of a majority of the legal voters. *State v. Winkelmeier*, 35 Mo. 108.

"A majority of all the votes cast at such election" in a constitutional provision as to extending suffrage was held in Wisconsin to mean a majority of those cast on that subject. *Gillespie v. Palmer*, 20 Wis. 544.

But "a majority of the electors voting at such election" held for choosing senators and representatives in a provision as to amending a state constitution has been held to mean a majority of those voting for senators and representatives, and not merely of those voting for the amendment. *State v. Foraker*, post, —, 47 Ohio St. —, 23 Ohio L. J. 104; *State v. Babcock*, 17 Neb. 138.

The words "a majority of said electors shall ratify," in a provision for amending the State Constitution, have been also held to mean a majority of those voting at that election and not merely of

The provisions of the charter in relation to the election are found in several sections of the Act of June 10, 1885, entitled "An Act to Reduce the Incorporating the City of Knoxville, and the Various Amendments Thereto, to One Act, and to Amend the Same." Section 68 of this Act provides that there shall be a board of education for the city, to consist of five members,—citizens of the town, and not members of the board of mayor and aldermen.

"Sec. 64: The board of education shall be elected by the board of mayor and aldermen, from the citizens and qualified voters of the town by ballot; and the term of office of each member shall be five years."

"Sec. 3. . . . The board of mayor and aldermen shall be composed of nine aldermen."

"Sec. 4. . . . The mayor shall not vote, except in case there shall be a tie vote on any question, and then he shall by his vote decide the question."

"Sec. 5. . . . It shall require a majority of the members of the board to form a quorum for the transaction of business."

No provision being made for the filling of vacancies in the board of education, this defect was remedied by an ordinance as follows: "In case any vacancy shall occur in the board of education, the unexpired term of such member vacating shall be filled by an election by the board of mayor and aldermen, as soon as practicable after such vacancy occurs."

These are all the provisions of the charter or ordinances of the City necessary to be noticed. They are those under which the election was held, and the provisions of which must determine its validity, no other law existing in our statute which affects the question. It is observed that there are nine aldermen, who, with

those voting for or against the amendment. *State v. Swift*, 69 Ind. 505.

Casting vote.

In respect to the effect of declaring the vote a distinction may possibly be drawn between the main case of *Lawrence v. Ingersoll* and the following case of *Rushville Gas Co. v. Rushville*, post, 315, in the fact that the vote in the former was by ballot. It is said in the little manual, *Roberts' Rules of Order*, § 40, that a presiding officer must vote, if at all, where the vote is by ballot, before the tellers begin to count the votes. If this be so (and the larger manuals seem to be silent on the point), the effect of his declaration of the result might well be held of no effect as a casting vote.

The decision in *Rushville Gas Co. v. Rushville*, post, 315, that the presiding officer's declaration that the vote is carried, is equivalent to a casting vote, where his vote is necessary to decide the question, is sustained by *Launtz v. People*, 113 Ill. 137.

On a vote of twenty-two against twenty-two, with one blank, no casting vote can be given. *State v. Chapman*, 44 Conn. 600.

A mayor presiding over a city council may give a casting vote for an officer nominated by him under a statute giving him authority to "appoint by and with the consent of the council," if the votes of the council are equally divided. *Carroll v. Wall*, 35 Kan. 36.

A declaration by a presiding officer that a resolution is lost will not be sufficient to defeat it, if the vote was sufficient to carry it. *Charlton v. Holliday*, 60 Iowa, 391.

A declaration that a man was elected is of no avail where the vote was in fact against him. *State v. Fagan*, 42 Conn. 32.

the mayor, are to make the election, if all are present, the mayor having no vote, as no tie could result; that if less than nine are present, but a majority of that number, then those present may elect; but, if equally divided in an election, the mayor may cast the deciding vote,—the only contingency in which his act can affect the question. In the election now being considered a majority (eight) were present, and participating in the election. This appears both in the recitals of the records hereinbefore shown and in the fact that seven ballots were cast for the candidates, and one blank ballot. It remains now to inquire, What is the effect of this action on the part of this board, acting through its eight members and authorized quorum? In determining this question, it must be borne in mind that we are not examining the effect of an election of an indefinite number of electors, as the vote of the body of the people of the city, or the vote of any indefinite number of people, in a popular election; for the rule governing the one is entirely different from that governing the other. In the case of general or special elections by the vote of the people,—by the vote of an indefinite number,—the common-law rule is that a plurality of votes elects. That is, the candidate getting more votes than any other is elected, although he does not get a majority of the votes cast, and hence it makes no difference that there are absent voters or blank votes cast. They do not change the fact that one candidate receives a plurality; and cannot do so, in the very nature of things. *Cooley, Const. Lim.* 5th ed. 779. See also 770 and 771.

Mr. Cooley treats alone the subject of popular elections, the scope of his work not including elections by governing bodies of corporations. This is not only the rule at common law, but it is so by statute in this State; and hence, in our elections by the people, the candidate who gets the highest number of votes is elected. And this rule is applied to corporate action, where the corporate power resides in the inhabitants or citizens at large, and where they meet and act in their primary capacity,—and, hence, indefinite numbers. 1 Dill. Mun. Corp. §§ 208-215.

It is equally well settled, and indeed is not open to controversy, that when an election is to be made by a definite body of electors, as members of a board of aldermen, that, "in the absence of special provision, the major part of those present at a meeting of a select body must concur, in order to do any valid act." 1 Dill. Mun. Corp. § 220.

"When, therefore," adds the author, "it appeared that thirteen ballots were cast, when the members present were only entitled to give twelve votes, of which seven were for one person and six for another, there is no election; and the council, though it has declared that the person receiving seven votes was duly elected, may rescind its action, and proceed to a new election," etc. *Ibid.*

And this common-law rule as to majorities, he declares, is applied to governing bodies of municipal corporations, where not specially regulated by charter or statute. Sections 216, 217.

We have seen that it is not only not differently regulated by the charter of Knoxville, or 6 L. R. A.

other statute of Tennessee, but that the charter provides for the transaction of business only by a majority of a quorum, and gives the mayor a right to vote when the majority thereof cannot decide, thereby conclusively showing that a majority must concur, or there is no result.

A different rule, as we have seen, and we repeat, prevails at common law where the election is by an indefinite number of electors, in which a plurality of votes is sufficient for an election. These rules, and their distinctions, are very forcibly and clearly stated in the able treatise on elections in the sixth volume of *American and English Encyclopædia of Law*, as follows: "The only way to defeat the election of a candidate at an election where the number of electors is indefinite, or where the law does not require a majority of all the members of body having a definite number, as opposed to a majority of those voting, is by voting for another candidate; and the fact that a majority enters a protest against the minority candidate voted for at a regularly called election will not defeat the election, if no other candidate is voted for. This rule does not apply to cases where the elective body consists of a definite number, and a majority of the members is required for an election. In such cases a refusal to vote, or a blank vote by a majority, will defeat an election." Page 831.

We have heretofore seen that under this charter a majority of the quorum is required. This author shows, further, that the rule respecting the election by a definite number in a municipal body extends also to other bodies of definite numbers, as legislative, etc., and shows that in such a case a majority must concur, and vote for the candidate, in order to elect him. Quoting several cases and instances of high authority, he says, illustrating: "By section 15 of the Revised Statutes of the United States it is provided that all votes for senators shall be by *viva voce* vote of members of the Legislature, and, by section 27, that all votes for representatives in Congress must be written or printed ballots; and that all votes received or rendered contrary to such action shall be of no effect. It has been held that when there is no provision of law making a plurality sufficient for an election a majority of the votes cast must be for a candidate, in order to elect him." *Id.* 332, citing *State v. Fagan*, 42 Conn. 35.

He cites several cases sustaining the text, the notes being as follows: "In the absence of any Act of Congress on the subject, a State may pass a law, or a joint or concurrent resolution of the Legislature, requiring a majority of all the members elected to both branches of the Legislature to elect a senator of the United States; and in such a case, where twenty-nine votes are given for one candidate, and twenty-nine blank votes were given, it was held that this did not constitute an election. *Fyles v. Mallory*, 2 Cong. El. Cas. 603; Senate El. Cas. 148." And again: "In 1866, in the *Stockton Case*, in New Jersey (Senate El. Cas. 264), it appeared that there was no law in the State regulating the election of senators, and there had been a practice of regulating the election of all officers by resolution of the convention; and at the convention for the election

of senators in 1865 a resolution was adopted that a plurality of the members present might elect. The judiciary committee, reporting through Senator Trumbull, decided in favor of the validity of the election; but the resolution was amended by the close vote of 22 to 21, and the candidate was declared not elected. It was claimed by some of the senators that "the parliamentary law required a majority to elect, and this could only be changed by a law or resolution of the House, acting in the legislative capacity." 332.

Thus it appears by concurrence of text-book, judicial, senatorial, congressional and legislative authority, that the rule is settled that a majority of a definite body present and acting must vote for a candidate, in order to elect him, and that it is not sufficient that he receive a plurality of votes cast, or a majority, if blank ballots are excluded. His claim must not depend upon the negative character of the opposition, but upon the affirmative strength of his own vote; that it is not sufficient that a majority were not cast against him, to be elected. The majority must be cast for him. "So, if a board of village trustees consists of five members, and all, or four, are present, two can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote. Their assenting to the measure voted for by the two will not make it valid. If three only were present, they would constitute a quorum. Then, the votes of two, being a majority of the quorum, would be valid. Certainly so, where the three are all competent to act." 1 Dill. Mun. Corp. § 217.

These authorities answer the proposition, urged by complainant, that the blank vote must not be considered, and it must be treated as though only seven votes were cast, and he got four. It is true that the blank vote cannot be, in the technical sense, a ballot, but it is, nevertheless, an act of negation,—affirmative in showing that another voter acted, negative in determining the majority. It was one of eight, attempted to be cast with the purpose of not supporting complainant, and is only to be counted in showing that he did not get a majority, just as would have resulted had it been an illegal vote,—as being for two candidates, or otherwise.

But complainant's case would be no better if that vote was entirely disregarded, because the record otherwise shows that eight aldermen were present; and, without reference to their vote, he must have received five votes in order to be elected. The roll-call shows eight present. On the vote to reconsider eight voted. Indeed, it is not anywhere pretended by complainant that they were not all present and participating; and, nowhere the contrary affirmatively appears. But it is said that the mayor declared the election carried, and that this is equivalent to a vote for him; and, with four votes for him and four not for him, the mayor's vote or action makes the election. There are several answers to this, all conclusive: *first*, the mayor had no right to vote, as there was no tie; and, *second*, he did not vote; *third*, his action, declaring the result, without voting, would not make an election, because the law does not allow him to declare a candidate, even

on a tie, elected, without voting at all. He could only, in such cases, vote, and make an election; and, when he does this, it makes it, even though he should then declare the candidate not elected.

A still further argument is made, however, that the board appears to have ratified it, and this should be treated as giving validity. The answers to this are, if possible, even more conclusive. They are: *First*. That the board has not power to elect, except by ballot. There was never but one ballot cast, and, if that did not make it, no election could otherwise be made. *Second*. The board did not ratify it. On the contrary, four members voted to reconsider, and therefore against ratification, and four for it. This, at least, while unimportant, was not an affirmation. It was, at most, but a tie, which the mayor might by his vote have decided. He did not choose to vote, but, instead, declared the matter lost. In both instances the mayor refused or failed to vote, and contented himself with declaring that the results stood accomplished without his vote. We are not presenting the parliamentary question, or attempting to show that four against four would rescind any legal action: We are only showing that no majority ever in any way voted to ratify an election. The argument need not be repeated here that this meant nothing, and accomplished nothing. The law is that they could not make an election by ratification, and the fact is they did not.

In addition to the effort to reconsider, it is said, as evidence of ratification, that on the notification, called a "certificate," of the recorder, in which he advises complainant of his election, he appends to that statement the words, "by order of the board," and that this is evidence of ratification. Having shown that ratification could not make, or make valid, an election, it is perhaps superfluous to deal with the evidence of it; but, having denied the fact, it is proper not to overlook this point, as bearing on the question of fact as to whether or not any act of the board was an attempted ratification. We have seen that the recorder has nothing to do with the election, either to make or declare or certify it, under the charter. This whole paper, including indorsement, therefore, goes for nothing. His statement, in a paper that he was not required to make, that it was done by order of the board, would not prove that fact, of course; and no other evidence of it is offered. He may, and doubtless did, think himself authorized to make it, and may have been ordered to do so; but no such order is produced, and nothing else proves it.

The construction herein given to the charter regulating municipal elections and the action of municipal boards is not only sound in law, but in policy. It would be of the most injurious consequence to hold that municipal bodies could make elections or appropriate money, legislate rights away or pass measures affecting vast property interests, by less than an affirmative vote of an acting majority. It is going sufficiently far to allow them to vote by majority of a quorum present; but if, by legislative act or judicial construction, they should be authorized to act by a majority of a quorum, there would be no safeguards effectual to protect the public, within the scope of

their authority. It is equally salutary to provide, by following well-founded principles and precedents, that what they will not or do not in fact do by vote they shall not accomplish by declaring it done without vote.

Reverse the decree, and dismiss the bill, with costs.

Turney, Ch. J., dissenting:

The charter of Knoxville provides: "The board of education shall be elected by the board of mayor and aldermen, from the citizens and qualified voters of the town, by ballot, and the term of office of each member shall be five years."

On the 27th of January, 1888, the board of mayor and aldermen met. A motion "to go into an election for a member of the city school board, to fill out the unexpired term of Hon. M. J. Condon, resigned," was carried. There were present the mayor and eight aldermen, who constituted at that time the entire board. The ballot was taken, when it was found that J. C. Lawrence had received four votes, F. L. Fisher three votes; and a blank was found, without any name on it, which was thrown out. The mayor declared Lawrence elected. Motion to reconsider was lost. Lawrence was notified of his election, and on January 31st took the oath of office before the recorder, having received from the board a certificate of election. The members of the board of education refused to permit Lawrence to sit and serve with them. Whereupon he filed his bill, alleging his title to the office; asking that it be declared by decree; praying that defendants be required to give him notice of the meetings, and permit him to be present; that they be enjoined from meeting, or transacting any business of the board of education, without giving him notice and permitting him to be present and participate. There was demurrer, which fully presents every question of jurisdiction in the chancery court, which was overruled,—properly, as we hold.

There can be, in our opinion, no valid reason why a chancery court may not exercise its injunctive powers to restrain an unlawful act, or, as here, what seemed to be a lawful act performed in an unlawful manner. The bill did not seek, nor the fiat restrain the meetings of the board, and the transaction of its business. The restraint went only to the extent of inhibiting such action by four members of the board without notice and permission to complainant to be present and take part, his bill making a prima facie case of a right and duty on his part to do so. It is difficult to see why a court having the power to prohibit action may and does not have the power, derived in the same way, to command action. The reason for the one applies with like force to the other. If the court may restrain a wrong, it may command a right. Then, if complainant was a duly elected member of the board, he was entitled to his voice therein; and the chancery court had the jurisdiction to enforce his claim.

So far, the court is a unit. The question of his election arises. Under the facts stated, a majority is of opinion there was no such election as the charter contemplates, and in support relies in part on 1 Dill. Mun. Corp. § 220, which is: "In the absence of special provision,

the major part of those present at a meeting of a select body must concur, in order to do any valid act." This is construed to mean that the candidate must have a majority of the votes of all present, entitled to vote; and that, while the seven voting constituted a quorum for the transaction of any business of the board, there was not the majority of all present, and, therefore, no election, and complainant is entitled to no relief under his bill. I do not assent to this conclusion, and am of opinion that, even under the rule laid down by Mr. Dillon, there is an election. There was no dissent to the motion for an election; therefore, to hold it as was done was "a valid act," to which there was a concurrence, not only of the "major part," but of all present. If it was necessary that all the aldermen present should vote, then I am of the opinion such necessity was conformed to,—that eight votes were cast, although one of the ballots was a blank. If the blank can be regarded at all, it must be as an expression of indifference by the alderman who cast it as between the two nominated candidates, and, therefore, as an expression of consent that he who shall receive a majority of those actually voting should be the elected member of the board of education; and, if the blank was considered at all, such was the interpretation of the mayor, when he declared Lawrence elected. Such was the interpretation of the board, refusing to reconsider, and also in the unchallenged certificate of election furnished by the recorder, "by order of the board," with objections from no one. To my mind, it is clear that no account should be taken of the blank ballot, nor of the nominal presence of the alderman who cast it. He might have retired from the room, in which event, I understand, it is to be agreed that a majority of the seven voting would have made an election. His absence would, of itself, make the "action" of the "major part present, valid." The question then is, Was it necessary that his absence should have carried him out of sight or hearing? I think not. When he determined, after voting that an election be held, that he would take no part in the election, he, in legal contemplation, absented himself from the board, and did not change that contemplation by dropping a blank in the ballot-box, any more than would the failure of a qualified voter, present at the polls of a town or city election, to cast a vote, nor any more than the casting a blank by such voter would change the result. Both would be failure to vote. Both would be absence from the election as a voter. No weight should be attached to the fact that he voted for an election to be held at that meeting. That would not make him present for the election any more strongly than it would make him present for an election on the next or any subsequent day. Nothing can constitute a presence but participation. It was by acts signifying a full acquiescence in the action of the majority voting.

Judge Cooley, in his work on Constitutional Limitations, 3d ed. § 14, states the rule more strongly against the defendant than I have done. He says: "In most of the States a plurality of the votes cast determines the election. In others, as to some elections, a majority. But, in determining upon a majority or plurality, the

blank votes, if any, are not to be counted; and a candidate may therefore be chosen without receiving a plurality or majority of voices of those *who actually participate in the election.*" (Italics mine.) Under this rule, the blank is not to be counted. The presence of him who cast it was not necessary to a quorum, to make an election. If he had been in fact absent, it is admitted, the election would have been lawful and free from objection. If *Judge Cooley* is right, it follows, although we may hold that the casting a blank ballot was a participation in the election, still complainant, having a majority of such number as was authorized to elect, was elected, notwithstanding the presence and participation of him who cast the blank which is not to be counted. If there had been five present at the election, with three voting for one man and two for another, or two voting blank or not voting at all, the election

would never have been complete. Here were seven actually voting, and one not; and we are asked to count the blank against the complainant. We may as well, by the same process of reasoning, count it for him. The juster rule is not to count it at all. It seems to me the rule cited from *Judge Cooley* is the one this State should adopt, in the first case of the kind arising in our courts. The blank was nothing,—should be counted for nothing. Without it, or its author, there was a complete quorum; and their action should be affirmed. If a quorum may hold an election, a majority of that quorum may make an election. Under rule laid down by the majority, is it not in the power of one man to defeat an election? When he sees that his vote for his favorite will make a tie, as the mayor cannot cast his vote, so if he—the voter—desires a defeat, he can accomplish it by a blank.

INDIANA SUPREME COURT.

RUSHVILLE GAS CO., *Appt.*,

v.

CITY OF RUSHVILLE *et al.*

(....Ind.....)

1. The votes of a majority of a quorum of a city council are sufficient to carry a measure when a quorum is present, although an equal number who are present refrain from voting.
2. The refusal of half the members of a council to vote when all are present will not defeat action when a majority of those necessary for a quorum vote in favor of a measure.
3. The declaration of a presiding officer that a resolution is adopted is equivalent to a casting vote in its favor if the other votes are equally divided.
4. The title of an Act which is "An Act in Relation to the Lighting of Cities and Towns, and Furnishing the Inhabitants Thereof with the Electric Light," etc., is sufficient to cover a provision giving a city council power to make contracts for lighting the streets.
5. A city council is authorized to buy and operate the plant and machinery necessary for the production of electric lights for the use of the city under a provision of an Act that it shall "have power to light the streets," etc., with electric or other form of light.
6. Bonds may be issued by a city to pay for property lawfully purchased in the absence of any statutory or constitutional prohibition, although they could not lawfully be issued to be placed in the market for sale to obtain money.

(December 10, 1899.)

APPEAL by plaintiff from a judgment of the Circuit Court for Rush County sustaining a demurrer to the complaint in an action brought to enjoin the making of a contract by the defendant City for the purchase of an electric light plant and machinery, and to enjoin the issuance of bonds to pay for the same. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Ben L. Smith, C. Cambern,*
6 L. R. A.

Thomas J. Newkirk and **U. D. Cole** for appellant.

Messrs. Arthur B. Irvin, City Atty., William A. Cullen, George H. Puntenney and John D. Megee for appellees.

Elliott, J., delivered the opinion of the court:

The mayor of the City of Rushville appointed a committee, composed of the members of the common council, to investigate and report upon the question of the expediency of buying an electric light plant and machinery. The committee in due time reported to the common council in favor of making the purchase. On the 8d day of April, 1899, action was taken on the report at a regular meeting at which all of the members of the common council were present, and the following resolution was introduced: "Resolved, that the report of the special committee relating to lighting the City be adopted, and that the officers therein named be instructed to sign the contract named therein."

Three of the six members composing the common council voted in favor of the resolution, but the other three members, although present, declined to vote, and the mayor declared that it was adopted. By virtue of this resolution the City is about to enter into a contract with the companies named in the report for the purchase of an electric light plant, and the power to run it, for which the City is to pay the sum of \$10,150. Acting under the resolution, the Edison Manufacturing Company has put up poles, strung wires on them, and placed in operation a system of electric lights, and the City will buy the plant and machinery unless enjoined. The City has contracted with the Buckeye Engine Company for a steam-engine and appliances to be used in operating the machinery of the Edison Company plant, at a cost of \$2,200. Unless enjoined, the City will issue bonds to pay for the plant, machinery, engine and appliances.

The meeting at which the resolution was adopted was a regular one, attended by all the members of the common council, and all who

voted at all voted in favor of the resolution. The question, therefore, is, Does the fact that three of the members present declined to vote authorize the conclusion that the resolution was not legally adopted? In our judgment it does not. The rule is that if there is a quorum present, and a majority of the quorum vote in favor of a measure, it will prevail, although an equal number should refrain from voting. It is not the majority of the whole number of members present that is required. All that is requisite is a majority of the number of members required to constitute a quorum. If there had been four members of the common council present, and three had voted for the resolution, and one had voted against it, or had not voted at all, no one would hesitate to affirm that the resolution was duly passed; and it can make no difference whether four or six members are present, since it is always the vote of the majority of the quorum that is effective. The mere presence of inactive members does not impair the right of the majority of the quorum to proceed with the business of the body. If members present desire to defeat a measure, they must vote against it, for inaction will not accomplish their purpose. Their silence is acquiescence, rather than opposition. Their refusal to vote is, in effect, a declaration that they consent that the majority of the quorum may act for the body of which they are members.

The rule we have asserted is a very old one. The doctrine is thus stated by one of the earliest writers on municipal corporations: "After an election has been properly proposed, whoever has a majority of those who vote, the assembly being sufficient, is elected, although a majority of the entire assembly altogether abstain from voting, because their presence suffices to constitute the elective body; and if they neglect to vote it is their own fault and shall not invalidate the act of the others, but be construed an assent to the determination of the majority of those who do vote." Willcock, *Mun. Corp.* pt. 1, § 546.

In a recent American work it is said: "Those who are present, and who help to make up the quorum, are expected to vote on every question, and their presence alone is enough to make the vote decisive and binding, whether they actually vote or not. The objects of legislation cannot be defeated by the refusal of anyone to vote when present. If eighteen are present, and nine vote, all in the affirmative, the measure is carried, the refusal of the other nine to vote being construed as a vote in the affirmative so far as any construction is necessary." Horr. & B. *Mun. Ord.* § 43.

The principle involved is asserted in many cases. *State v. Green*, 37 Ohio St. 237; *Launis v. People*, 113 Ill. 187; *Cass County v. Johnston*, 95 U. S. 369 [24 L. ed. 417]; *St. Joseph Twp. v. Rogers*, 83 U. S. 16 Wall. 644 [21 L. ed. 323]; *State v. Renick*, 37 Mo. 270; *Eberett v. Smith*, 22 Minn. 53; *Oldknow v. Wainwright*, 2 Burr. 1017; *Rez v. Bellringer*, 4 T. R. 810; *First Parish in Sudbury v. Stearns*, 21 Pick. 148.

We cannot agree with appellant's counsel in the construction which they place upon the words of Judge Dillon found in section 279 of his work on Municipal Corporations, for, as we read what the author says, it is directly against

the appellant. What is said by Judge Dillon is this: "So if a board of village trustees consists of five members, and all or four are present, two can do no valid act, even though the others are disqualified by interest from voting, and therefore omit or decline to vote; their assenting to the measure voted for by the two will not make it valid. If three only were present, they would constitute a quorum; then the votes of two, being a majority of the quorum, would be valid; certainly so, where the three are all competent to act."

In the first sentence Judge Dillon refers to cases where there is not a quorum present, because there is not the requisite number of qualified members in attendance. He is speaking of the effect of the presence of disqualified persons in that sentence, not of the effect of a vote of the majority of a quorum composed of qualified members of the body. In the last sentence he speaks of a case where there is a qualified quorum present, and he instances such a case as we have here, for here four would be a quorum, and, according to his rule, three of the four could adopt a measure if there were no opposing votes.

The case referred to by the author in support of the proposition embodied in the first sentence quoted is that of *Coles v. Williamsburgh*, 10 Wend. 659. In that case three of five town trustees were disqualified from voting, and there was, of course, no quorum of competent members, and consequently no capacity to act. The court said: "The Act requires three out of the five, or a majority, to make a quorum. If there were but three present, then the votes of two, being a majority, would be valid. Here were five trustees, three of whom were incompetent to vote, by the Act; and being so, it seems to me, so far as the vote was concerned, they were not trustees for any purpose." It is obvious, therefore, that no such case was before the court as that now before us; for here all the members were present, and the measure was adopted by a majority vote of the quorum.

One of the cases cited in support of the proposition contained in the second sentence of the section quoted by us is that of *Warnock v. Lafayette*, 4 La. Ann. 419, wherein it was held that a statute requiring a two-thirds vote to pass a measure meant two thirds of the quorum present, and not two thirds of the entire membership of the city council. Another case cited is *Buell v. Buckingham*, 16 Iowa, 284, in which the opinion was written by Judge Dillon himself, and where it was held that a majority of a bare quorum may bind the corporation. The opinion quotes with approval from the opinion of Lord Mansfield in *Rez v. Monday*, Cowp. 538, this language: "When the assembly are duly met, I take it to be clear law that the corporate act may be done by the majority of those who have once regularly constituted the meeting." The opinion also approves Chancellor Kent's statement that "a majority of the quorum may decide." 2 Com. 298.

The decision in the case of *State v. Porter*, 118 Ind. 79, 12 West. Rep. 634, lends no support to the appellant's argument, and the reasoning of the court is strongly against it. The point actually decided was that no act could be lawfully done unless a quorum was present, but it was said: "The general rule is that

when a council or collective body, consisting of a given number of members, is authorized by statute to do an act, or to transact business, authority is thereby given to that body to act upon the subject committed to it, or to transact the business which it is authorized to conduct, whenever a majority of the members thereof are lawfully present. *Cush. Parl. Law*, § 247.

"The body cannot act without the presence of a quorum, and the act of the quorum is the act of the body. *State v. Wilkesville Twp.* 20 Ohio St. 288; *McFarland v. Orary*, 6 Wend. 298."

The logical sequence, from the premises thus laid down, is that the vote of the majority of the quorum present is effective. In *Hamilton v. State*, 8 Ind. 452, this court quoted with approval the statement of the court in *Downing v. Rugar*, 21 Wend. 182, that "where the authority is public, and the number is such as to admit of a majority, that will bind the minority after all have duly met and conferred together;" but denied its application, because the statute required all the members of the body to be present at its meetings, and all were not present. The doctrine of *Hamilton v. State* is therefore not opposed to the later cases, but, on the contrary, is in harmony with them; for it recognizes the general rule that, where the statute does not otherwise provide, a majority of the quorum may, when a quorum is present, lawfully transact business.

The case of *State v. Edwards*, 114 Ind. 581, 14 West. Rep. 88, is not in point; for what was there decided is that a county auditor had no right to vote upon a resolution, although he had a right to vote in case an effort to elect a county superintendent results in a tie. It would not benefit the appellant if we should hold that the councilmen present, and not voting, did, in effect, oppose the resolution, and, certainly, the utmost that can, with the faintest tinge of plausibility, be claimed, is that their votes must be counted as against the resolution. It is inconceivable that their silence should be allotted greater force than their active opposition would have been entitled to have assigned it had it been manifested. If we should assume that their votes are to be counted against the resolution, then the mayor had the casting vote, and he gave it in favor of the measure by declaring the resolution adopted. This is so expressly decided in *Small v. Orne*, 79 Me. 78, 8 New Eng. Rep. 620. But we think that the law is as stated by Willcock, and that the members present and not voting assented to the adoption of the resolution.

We have no doubt that the common council had power to contract for lighting the city, or to furnish light from works of which it is or may become the owner. The power exists under the General Act of incorporation. But we need not rest our decision upon that Act, for the authority is conferred by an Act entitled "An Act in Relation to the Lighting of Cities and Towns, and Furnishing the Inhabitants thereof with the Electric Light and Other Forms of Light, and Providing for the Right of Way and the Assessment of Damages, and Declaring an Emergency." *Elliott's Supp.* § 794.

The object of this Act is single, and it embraces but one subject. The subject is that of

light, and the object that of enabling the citizens to obtain electric or other lights. The Act is similar in its general scope and effect to Acts providing for furnishing towns and cities with water, natural gas and artificial gas, and it is not obnoxious to any constitutional objection. Whatever was germane to the subject of the Act—that is, the subject of light—it was proper to embody in the bill. We have no doubt of its constitutionality. The first section of the Act provides that the common council of any city shall "have power to light the streets, alleys or other public places with the electric light or other form of light, and to contract with any individual or corporation for lighting such alleys, streets and other public places with the electric light, or other form of light;" and this provision, taken in itself, is broad enough to authorize the common council to buy and operate the necessary plant and machinery. But statutes are not to be considered as isolated fragments of law, but as parts of one great system. *Bradley v. Thirton*, 117 Ind. 255; *Morrison v. Jacoby*, 114 Ind. 84, 12 West. Rep. 187, 18 West. Rep. 890; *Chicago & A. R. Co. v. Summers*, 118 Ind. 10, 12 West. Rep. 205; *Robinson v. Rippey*, 111 Ind. 112, 9 West. Rep. 807; *Humphries v. Davis*, 100 Ind. 274.

If there were any doubt as to the meaning of the Act it would be removed by considering it, as it is our duty to do, in connection with the General Act for the incorporation of cities, for that Act confers very comprehensive powers upon municipal corporations as respects streets and public works, and contains many broad general clauses akin to those which *Judge Dillon* designates as "general welfare clauses."

Our own decisions fully recognize the doctrine that municipal corporations do possess, under the General Act, authority as broad as that here exercised, and the operation of that Act is certainly not limited or restricted by the Act of 1883. *Wood v. Mears*, 12 Ind. 515; *Richmond v. McGirr*, 78 Ind. 192; *Anderson v. O'Conner*, 98 Ind. 168; *Leeds v. Richmond*, 102 Ind. 872.

Where a municipal corporation has authority to purchase property it may issue its bonds in payment, unless there is some statutory or constitutional prohibition. *Miller v. Dearborn County*, 66 Ind. 162; *Second Nat. Bank v. Danville*, 60 Ind. 504; *Daily v. Columbus*, 49 Ind. 169; *Floyd County v. Day*, 19 Ind. 450; *Lafayette v. Cox*, 5 Ind. 88.

In the case of *Richmond v. McGirr*, *supra*, it was said: "As to the kind and form of the evidence and obligations to be executed the council, in the exercise of a sound discretion, must determine, and their determination, in the absence of fraud, is final." Many authorities are cited in support of this ruling, and it is undoubtedly correct, as applied to municipal corporations of such a class as cities and counties, but not as applied to school corporations, and like corporations with very limited powers.

The decision in the case of *Aurora v. West*, 22 Ind. 88, has no relevancy to the question here under discussion; for there the question was as to the power of the city to incur a debt in aid of a railroad company, while here the question is as to the authority of the city to issue bonds in payment for property it had power to purchase.

The case of *State v. Hauser*, 68 Ind. 155, does not decide that a city may not issue bonds to pay for water-works purchased. What it decides is that a city may not issue and sell bonds in order to obtain money to construct water-works. The difference between that case and this is very broad and very plain. Here bonds are to be issued to pay for property purchased; there they were issued to be placed in the market for sale. Issuing bonds to pay for property purchased is a very different thing from issuing bonds to obtain money.

Judgment affirmed.

Bernhard SCHIPPER, *Appt.*,

v.
CITY OF AURORA.

(....Ind.....)

1. One contracting for a certain compensation to perform work for a municipal corporation in connection with a public improvement is bound to take notice that the corporation may at any time change the plan of the work or even abandon it altogether, and he cannot recover damages for the refusal of the corporation to complete its improvement, even although the effect of such refusal is to deprive him of the compensation agreed upon.
2. But if such corporation in making an improvement wholly within its power enters into a contract beyond its authority, but not prohibited by statute or public policy, for the performance of work thereon, it cannot, after work has been done thereunder which in-

ures to its benefit, refuse to complete the contract without making compensation to the one conferring the benefit, at least for the value of the labor done.

(November 22, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dearborn County sustaining a demurrer to the complaint in an action brought to recover damages for breach of, and compensation for work done under, a certain contract. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Roberts & Stapp for appellant.

Messrs. Holman & Holman for appellee.

Mitchell, J., delivered the opinion of the court:

Bernard Schipper brought this suit to recover damages for the breach of a contract made by him with the City of Aurora, and to recover for work done under the contract. The court sustained a demurrer to the complaint, and the propriety of this ruling is the only question presented on this appeal. It appears that Litinary Street, in the City of Aurora, terminates at the top of the north bank of the Ohio River, and that, in order to carry the surface water which collected on that and other streets from the top of the bank at the south end of the street down to the surface of the water in the river at low-water mark, so as to prevent the washing out of the bank, the city authorities, in the year 1878, determined to construct a stone gutter of suitable width, on a line with the extension of

NOTE.—Municipal corporation, liability on its contracts.

It is a general and fundamental principle of law, that all persons contracting with a municipal corporation must, at their peril, inquire into the power of the corporation or its officers to make the contract, and a contract beyond the scope of the corporate power is void, although it be under the seal of the corporation. *Marsh v. Fulton Co.* 77 U. S. 10 Wall. 678 (19 L. ed. 1040); *Leavenworth v. Rankin*, 2 Kan. 357; *Horn v. Baltimore*, 30 Md. 218; *Bridgeport v. Houston* 12 Co. 15 Conn. 475, 498; *Haynes v. Covington*, 13 Smedes & M. 408; *Taft v. Pittsford*, 28 Vt. 236; *Montgomery v. Montgomery & W. Pl. Road Co.* 31 Ala. 78; *Pa. D. & M. Steam Nav. Co. v. Dandridge*, 8 Gill & J. 243, 313; *Hodges v. Buffalo*, 2 Denio, 110; *Baltimore v. Eschbach*, 18 Md. 276, 282; *Baltimore v. Reynolds*, 20 Md. 1; *Dill v. Wareham*, 7 Met. 438; *Branham v. San José*, 24 Cal. 535, 602; *Sturtevant v. Alton*, 8 McLean, 338; *Wallace v. San José*, 29 Cal. 183; *State v. Kirkley*, 29 Md. 85, 111; *Bateman v. Ashton-under-Lyne*, 3 Hurlst. & N. 832; *State v. Haskell*, 20 Iowa, 275.

Persons will not be protected on contracts with a public corporation which are not made according to law. *Maokey v. Columbus Twp.* (Mich.) 15 West. Rep. 340.

Their acts, when beyond the scope of their authority or done in a manner unauthorized, are in general nugatory and not binding on the corporation. *Ramsay v. Western District Council*, 4 U. C. Q. B. 374; *Harr. Manual*, 2d ed. p. 20; 1 Dillon, *Mun. Corp.* 464.

The fact that the agent made false representations in relation to his authority and what he had already done will not aid those who trusted to such representations to establish a liability on the part of his corporate principal. *Baltimore v. Eschbach*, 18 Md. 276; *Baltimore v. Reynolds*, 20 Md. 1; *Delafield v. Illinois*, 2 Hill, 159, 174, 28 Wend. 192, affirming *Illinois v. Delafield*, 8 Paige, 531, restraining unauthor-

ized sale of bonds; *Hodges v. Buffalo*, 2 Denio, 110; *Halstead v. New York*, 3 N. Y. 430; *Boom v. Utica*, 2 Barb. 104; *Bensselaer Co. v. Bates*, 17 N. Y. 242.

Where a corporation has received the benefit of a transaction, it should be estopped from repudiating the obligation therefor. *Chicago v. Cameron*, 9 West. Rep. 507, 120 Ill. 447.

A municipality, unless prohibited by its charter, is liable for services rendered it by a person employed by one assuming to act in its behalf, where such services are rendered with the knowledge of its officers. *Beers v. Dallas City*, 16 Or. 334.

The contractor has a right to sue the corporation where, in consequence of its neglect, it would be nugatory to proceed against the owners of the property. See *Michel v. Police Jury*, 9 La. Ann. 67; *Newcomb v. Police Jury*, 4 Rob. (La.) 233; *Michel v. Police Jury*, 3 La. Ann. 123; *Leavenworth v. Mills*, 6 Kan. 238; *Reock v. Newark*, 33 N. J. L. 129.

Persons who furnish money, labor or materials to the municipality, which are actually used in the work and retained by it, become equitably entitled to recover therefor. *Bicknell v. Widner School Twp.* 73 Ind. 501; *Wallis v. Johnson School Twp.* 75 Ind. 368; *First Nat. Bank v. Union School Twp.* 75 Ind. 861; *Fine Civil Twp. v. Huber Mfg. Co.* 83 Ind. 121; *Sheffield School Twp. v. Andrews*, 56 Ind. 157; 1 Dillon, *Mun. Corp.* § 464; *Bass Foundry & Mach. Works v. Parke Co.* 15 West. Rep. 105, 115 Ind. 244.

Where a contractor is obliged to stop work for a municipality before its completion, because the appropriation therefor is exhausted and the constitutional limit of municipal indebtedness has been reached, he is not entitled to damages for the depreciation of property, machinery, etc., and the loss of profits consequent upon the necessary abandonment of the contract. *Drhew v. Altoona*, 121 Pa. 401, 22 W. N. C. 229.

Power to contract for local improvements, *acta ultra vires*. See *Portland L. & M. Co. v. East Portland*, *ante*, 290.

the center of the street down the slope of the bank, a distance of 250 feet. In order to carry its plans into execution, the City obtained a grant from James W. Gaff, who owned the land constituting the bank of the river, by which it became authorized to construct and maintain the proposed gutter, and also to build and maintain abutments and stone walls necessary to protect the street on the land owned by Gaff. Afterwards, in the year 1875, having constructed the gutter as proposed, for a distance of 100 feet upward from low-water mark, the City leased the ground acquired from Gaff to the plaintiff for a period of ten years, to be used for a private landing. The latter agreed, as a consideration for the lease, to fill in with earth on each side of the gutter then constructed, and thereafter to be completed, to the width of fifty feet. It is averred that the plaintiff filled in over 5,000 cubic yards of earth along the sides of that part of the gutter which had been completed; that the filling and paving so done by the plaintiff cost, and was of the value of, \$1,000; that it benefited the City to an amount exceeding the cost of the work, by protecting and holding in place that part of the gutter which had been completed. The plaintiff charges that the City refused to complete the work according to the agreement, and in conformity with the plans and specifications adopted; that, instead of carrying the paved gutter up to the top of the bank, it constructed wooden culverts or chutes, through which the water was conducted from the top of the river-bank down to the point where the gutter had been completed at the time the lease was made. It is averred that if the gutter had been completed according to the plan proposed, and in the manner agreed upon, the ground leased, when filled as contemplated, would have constituted a desirable landing or wharf, but that in the condition in which it was left it was of no value whatever; and that the expense incurred and labor performed by plaintiff had been wholly lost, to his damage, etc.

It is contended, in support of the judgment below, that the City of Aurora exceeded its power in attempting to lease the tract of land, over which it had acquired an easement to conduct the surface water from the streets of the City by means of gutters, to the plaintiff, for his exclusive use as a private landing; and that, since the contract was void as a lease, all the auxiliary covenants are discharged. It is conceded that if the appellant had paid money into the city treasury he would be entitled to recover it, in the proper form of action; but it is said he has parted with nothing,—the City has simply changed its plan, and remained inactive; hence there is no right of recovery in an action for damages for a breach of the contract. The facts, as we view them, make a case of a different complexion. Cities have authority to construct sewers and drains for the protection and improvement of the streets, and, as incident to that power, they have the right to acquire land in the ordinary methods, in order to carry out the principal power. 2 Dill. Mun. Corp. §§ 574, 575.

The City had the unquestioned power to acquire an easement in the land subsequently leased to the appellant, as an outlet for its drains or sewers. *Leeds v. Richmond*, 102 Ind. 372. 6 L. R. A.

It was also within the undoubted discretion of the City to adopt proper plans, and provide for the construction of such sewers or drains as in the judgment of its officers were fit and necessary to carry the water off the streets.

The facts stated show that the City had adopted a plan which contemplated the construction of a stone gutter commencing at low-water mark, and extending, with increasing width, a distance of 250 feet, to the top of the bank. For the protection of this work, it was necessary to fill in on either side with earth. The appellant agreed to make this filling in consideration of the grant of an exclusive privilege to use the ground for a private wharf. After doing work which it is averred cost more than \$1,000, and which inured to the benefit of the City, the authorities changed the plan so as to render the work done by the appellant utterly valueless to him in the creation of a private landing.

It is not necessary that we should inquire into the power of the City to make the lease in question. We have seen that it had the power to acquire the ground and construct the work proposed. If we concede that the lease was void, and conferred no privilege on the appellant, it by no means follows that the City may retain the benefit of the work performed without paying, at least, what it would have cost to protect the gutter which it had constructed. Where a city or municipality receives the benefit of money, labor or property upon a contract made without due formality, or which it had no authority to make, and which it refuses to execute, it will nevertheless be liable to the person conferring the benefit to the extent of the value of what has been received and appropriated, unless the contract was prohibited by statute, or in violation of public policy. *State Board of Agriculture v. Citizens Street R. Co.* 47 Ind. 407; *Logansport v. Dykeman*, 116 Ind. 15, 15 West. Rep. 127.

As was said in *Brass Foundry & Mach. Works v. Parks Co.* 115 Ind. 235-244, 15 West. Rep. 105: "When a corporation has received the money or property of an individual, under color of authority, and has appropriated it to its necessary and beneficial use, it will not be heard to assert its want of power to pay the value of what it has received, and still retains." *Dill v. Wareham*, 7 Met. 488; *Hitchcock v. Galveston*, 96 U. S. 341 [24 L. ed. 659].

The case last cited is directly in point, and the principles which ruled the decision control our judgment. The City of Galveston, proposing certain street improvements, entered into a contract for the construction of the work, agreeing to pay for it by delivering to the contractors certain bonds to be issued by the City. Subsequently the City refused to issue the bonds, or pay for the work, on the ground that the agreement to issue bonds was *ultra vires*, and void. Conceding that the contract was inoperative so far as it related to the issuing of the bonds of the City, it was held that it was lawful in other respects, and that the City was liable for the work done under it.

So, without inquiring into the power of the City to make the lease in question, since it was confessedly within its power to make the improvement upon which it had entered, and to cause the work done by it to be protected, the

work of the church, yet it is in no sense the church itself.

See *Gilmer v. Stone*, *supra*, and *Coart v. Mandeville*, referred to in 82 Gratt. 365.

A corporation chartered by one State, and not forbidden by the law of its being, may exercise within any other State the general powers conferred by its own charter, unless prohibited from so doing by the laws or public policy of the latter State.

Morawetz, Priv. Corp. 502, 518; *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 521 (10 L. ed. 274); *Ang. & A. Corp.* § 278; *Covell v. Colorado Springs Co.* 100 U. S. 55 (25 L. ed. 547).

The work of Christian Education is certainly not "under the ban of government in Virginia," but is encouraged whether the work is carried on here (Acts 1858-54, chap. 107, p. 65; Acts 1855-56, chap. 277, p. 190, and Acts 1874-75, p. 16, incorporating "The Trustees of the Protestant Episcopal Theological Seminary and High School in Virginia," "The Trustees of the Union Theological Seminary in the County of Prince Edward," and "The Trustees of the Protestant Episcopal Education Society," 80 Va. 718), or out of the State.

Roy v. Rowzie, supra.

Requests to foreign incorporations of missionary societies were upheld in *Missionary Society of M. E. Church v. Calvert*, 82 Gratt. 357, and also in *Coart v. Mandeville*, referred to by Judge Burks in 80 Va. 754, to an Episcopal Missionary Society incorporated in New York, embracing every member of the Protestant Episcopal Church in the United States.

word of mouth. *Robnett v. Ashlock*, 49 Mo. 171.

Where a testator devised property to his nephew A, and died, leaving two nephews of that name, one legitimate and the other not, parol evidence was inadmissible to show that he intended that the illegitimate nephew was to take. *Appel v. Byers*, 96 Pa. 479.

Parol evidence cannot be received to show that by such a general term as "nephews," the testator meant to include illegitimate nephews, unless it appears that there were no legitimate nephews; in which case the ambiguity would be explainable by parol evidence. *Brower v. Bowers*, 1 Abb. App. Dec. 214.

Declarations of testator.

Declarations made by a testator after the making of his will are admissible only in cases of latent ambiguity, and then only from necessity, for the purpose of preventing the devise from being declared void for uncertainty (*Cotton v. Smithwick*, 66 Me. 360), or for the purpose of showing that he did not understand that he had executed it. *Canada's App.* 47 Conn. 450.

Any declaration of intention on the part of a testator, different from that expressed in the will, is incompetent as evidence, unless it was communicated to the legatee, assented to by him, and such assent acted upon by the testator. *Williams v. Vreeland*, 32 N. J. Eq. 734.

Evidence of testator's parol declarations is not admissible to show whether or not by the word "children," in his will, he meant to include grandchildren. *Chenault v. Chenault*, 10 Ky. Law Rep. 840.

Oral declarations of a testator are inadmissible to prove the extent of the interest that, by his will, he intended to give to a devisee. *Kirkland v. Conway*, 116 Ill. 438.

6 L. R. A.

Messrs. George M. Harrison, H. St. G. Tucker and J. R. Tucker, for appellees:

A bequest in Virginia to a foreign corporation prohibited in Virginia by her Constitution and against the policy of her laws is null and void, even though the incorporation was legal and constitutional in the domicile which created it.

Paul v. Virginia, 75 U. S. 8 Wall. 181 (19 L. ed. 360); *Bank of Augusta v. Earle*, 38 U. S. 18 Pet. 521 (10 L. ed. 274).

See, on whole subject, *Morawetz, Priv. Corp.* chap. 8, § 500, especially §§ 505 and notes, 508 and notes, 510-515; *Bank of Marietta v. Pindall*, 2 Rand. 473, 474; *Rungan v. Coster*, 39 U. S. 14 Pet. 123 (10 L. ed. 882); *Chamberlain v. Chamberlain*, 43 N. Y. 433; *Myers v. Manhattan Bank*, 20 Ohio, 301-303; 1 Minors' Inst. top p. 578; *Christian Union v. Yount*, 101 U. S. 358 (25 L. ed. 889), and cases there cited; *Wilson v. Perry*, 29 W. Va. 169; *Story, Conf. L.* §§ 479, 491 et seq.; *Atty-Gen. v. Mill*, 3 Russ. 328, 5 Bligh, N. R. 593, 2 Dow. & C. 898; *Wharton, Conf. L.* §§ 241, 577; 2 Perry, Tr. 2d ed. § 741; *Smart v. Prujean*, 6 Ves. Jr. 560; *De Themines v. De Bonnoval*, 5 Russ. 289; *Goodman v. Goodman*, 3 Giff. 643; *Munro v. Saunders*, 6 Bligh, N. R. 468; *Curtis v. Hutton*, 14 Ves. Jr. 537; *Birtwhistle v. Vardill*, 7 Clark & F. 895; *Cowardin v. Universal L. Ins. Co.* 32 Gratt. 447; *Bascom v. Albertson*, 34 N. Y. 584; *Hollis v. Drew Theological Seminary*, 95 N. Y. 166; *Bard v. Poole*, 12 N. Y. 505; *Milnor v. New York & N. H. R. Co.* 53 N. Y. 363; *Stetson v. New Orleans City Bank*, 2 Ohio St. 174; *Lewis v. Bank of Kentucky*, 12 Ohio, 132;

Parol evidence of testator's declarations is not admissible to show that a legacy to the "Nursery" was intended for the Providence Shelter for Colored Children, to which he had never contributed and which was never popularly known as the Nursery. *Wood v. Hammond*, 16 R. L.—, 17 Atl. Rep. 324.

Declarations or instructions of the testator are inadmissible for the purpose of showing what the testator meant by the provision of the will. *Lewis v. Douglass*, 14 R. I. 607; *Stevens v. Vancleave*, 4 Wash. C. C. 232; *Jackson v. Sill*, 11 Johns. 215; *Richards v. Dutch*, 8 Mass. 514; *Farrar v. Ayres*, 5 Pick. 409; *Crocker v. Crocker*, 11 Pick. 266; *Brown v. Saltonstall*, 3 Met. 427; *Tucker v. Seaman's Aid Society*, 7 Met. 207.

Upon the question of undue influence, declaration of the testator respecting the conduct of the favored legatee toward him was held inadmissible as evidence of acts constituting undue influence. *Rusling v. Rusling*, 36 N. J. Eq. 608.

Parol evidence to remove latent ambiguities.

To remove latent ambiguities, statements of the testator are admissible, although no part of the *res gestæ*, nor made at the execution of the will, nor in the presence of a devisee or legatee. *Lynch v. Lynch*, 1 Lea, 523.

Parol evidence, or evidence *dehors* the will, is not admissible to vary or control the terms of the will, although it is admissible to remove a latent ambiguity. *Grimes v. Harmon*, 85 Ind. 193. Compare *McCray v. Lipp*, Id. 116.

An ambiguity may be explained by evidence of the testator's declarations at the time when the codicil was drawn, showing that these ten pages were the whole will. *Burge v. Hamilton*, 72 Ga. 568.

Declarations of the testator at the time of executing the will are admissible to show his intent,

Lathrop v. Scioto Com. Bank, 38 Am. Dec. 484; *St. Clara Academy v. Sullivan*, 56 Am. Rep. 776.

Richardson, J., delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of Augusta County, rendered on the 4th day of June, 1887, in the cause wherein John B. Guthrie and others were plaintiffs and Guthrie's executor and others were defendants.

The bill was filed by John B. Guthrie, claiming to be an heir-at-law of Hugh G. Guthrie, deceased, on his own behalf and on behalf of the other heirs of said decedent, against the executors of said Hugh G. Guthrie, for the purpose of having a judicial construction of the will of the decedent, and especially of the ninth clause thereof, and to contest the validity of the bequest thereby made, which clause is in these words:

"After paying off all my debts and the foregoing legacies, I bequeath and will all the money left or remaining in the hands of my executors, as soon as collected, to be paid to the secretary of the Board of Foreign Missions of the Presbyterian Church in the United States, and known as 'Southern Presbyterian Church.'"

The bill charges as to this clause "that the beneficiary therein is vague, uncertain and unknown, and has no real existence, and never has had, and that your honor cannot create and raise up a hand where none before existed, to secure the bounty of the testator."

where a latent ambiguity exists. *Morgan v. Burrows*, 45 Wis. 211, following *Ganson v. Madigan*, 15 Wis. 145.

A testator, by will, gave a legacy "to my grand-niece, Fanny R. Gibson." He left a niece by that name, and a grand-niece, her daughter, named Fanny Gibson. It was held a case of latent ambiguity, and that, the mother being the nearest of kin, a presumption arose that she was intended. *Gallup v. Wright*, 61 How. Pr. 236.

A testator devised "lot number 6, in square 408, together with the improvements thereon erected." There was such a lot, but testator did not own it, but he did own lot number 3, in square 406. It was held that here was a latent ambiguity, admitting of parol evidence to apply the devise to the latter lot. *Patch v. White*, 117 U. S. 210 (29 L. ed. 890).

The testatrix devised two lots and a gore "on the southerly side of Forty-Ninth Street, near Eighth Avenue." Extrinsic evidence showed that testatrix owned no property on Forty-Ninth Street, but did own property on 149th Street; that persons living above 100th Street drop the one hundred and designate the lot by the remaining figures. Held, that the devisee under the will took the two lots in question. *Peters v. Porter*, 60 How. Pr. 423.

A will providing that certain proceeds be "equally divided among the legatees already named, share and share alike," is not so ambiguous as to make parol evidence admissible to construe it, by having named legatees in two preceding items. *Carson v. Searcy*, 68 Ga. 550.

A devise of the testator's "home plantation" cannot be explained by evidence of what he called and considered his home plantation, the will itself showing on its face no ambiguity. *McDaniel v. King*, 90 N. C. 597.

To identify the beneficiary.

Parol evidence is admissible to show who was in-
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By a decree in the cause of December 9, 1886, the Trustees of the General Assembly of the Presbyterian Church in the United States and Rev. M. H. Houston, the secretary of the Committee of Foreign Missions of said Church, were, on their petition, admitted as parties defendant, and this petition was treated as an answer to the bill, and an inquiry was at the same time ordered to ascertain who are the beneficiaries under said ninth clause, and to what person or corporation the said legacy should be decreed, with directions that, in making such inquiry, parol evidence and evidence of the surrounding circumstances be allowed, showing, or tending to show, what the testator intended by the language used in said clause.

The order of reference was executed by Commissioner John M. Kinney, who, on the 4th of May, 1887, returned his report, an able and exhaustive one, and with it the evidence upon which he based his conclusions. By this report it appears that "the Trustees of the General Assembly of the Presbyterian Church in the United States" was a body corporate under the laws of North Carolina, and that Rev. M. H. Houston was the secretary of the Committee of Foreign Missions of said Church, and was intended to be described by the testator by the language: "The secretary of the Board of Foreign Missions of the Presbyterian Church in the United States, and known as 'Southern Presbyterian Church,'" which was the way in which the said committee and Church were popularly known in the community in which the testator lived, and there-

tended in a bequest (*Re Cahn*, 8 Redf. 31), or to show whom testator intended as his executor. *Colette's Estate*, 1 Myrick, Prob. Rep. (Cal.) 116.

A testator gave in his will \$1,000 to each of four of his namesakes, the last of whom he described as "Samuel G., son of Captain John F. Slaughter." There was no such person. It was held that parol evidence was admissible to show that the testator meant Samuel G., son of Captain John F. Hawkins. *Hawkins v. Garland*, 76 Va. 149.

Under a bequest "to my nephews, Harmon and Joseph Baldwin," it may be shown that the testator had no nephews by those names, but did have nephews by other names. *Taylor v. Tolen*, 38 N. J. Eq. 91.

Where there are two parties claiming a legacy, neither of whom bears the name of the legatee in the will, and it is uncertain which is the one intended by the testator, proof of all the facts and circumstances is admissible. *Washington & Lee University's App.* 111 Pa. 572. *Hall's App.* 112 Pa. 42.

But when the name of a legatee is perfectly descriptive and plainly written, the court is not warranted in intermeddling, even though satisfied that the testator did in fact make a mistake. *Dunham v. Averil*, 45 Conn. 61.

In order to show that a legatee or devisee is not incompetent to take under a will because of being a subscribing witness, evidence is admissible that his name, which is subscribed in the place where witnesses usually subscribe their names, was not written there with the intention of becoming a witness. *Boone v. Lewis*, 103 N. C. 40.

To identify the land devised.

Parol evidence is admissible to identify lands devised, and establish the devisee's title, although the description given in the will is imperfect. *Jones v. Dove*, 6 Or. 188; *Cox v. Cox*, 91 N. C. 256.

fore the commissioner concluded and reported "that the legacy bequeathed to the secretary of the Board of Foreign Missions of the Presbyterian Church, etc., should be decreed to the Trustees of the General Assembly of the Presbyterian Church in the United States, for the use and benefit of the Executive Committee of Foreign Missions of said corporation." And the commissioner also returned with his report a copy of the North Carolina Act of Incorporation, by which it appeared that said corporate body was empowered "to take and hold all such estate, property and effects as may be acquired by gift, purchase, devise or bequest, to aid and enable the said General Assembly of the Presbyterian Church to undertake and carry on the work of Christian education, of foreign and domestic missions, of the publication of such books, tracts and papers as are connected with the diffusion of the religious literature and learning," etc. And by said Act of Incorporation it is also provided "That if the General Assembly should establish any committees, boards or agencies, for any of the purposes recited in section first, the same shall be held and deemed to be branches of this incorporation," etc. It also appears by the commissioner's report that this corporation had not reached, including this bequest of something over \$4,000, the limit to which it was restricted by its charter. To this report of the commissioner the plaintiffs excepted.

The cause, having been matured, came on and was heard at the June Term, 1887, when the said circuit court decreed "that the bequest under the will of Hugh G. Guthrie, deceased, to the secretary of the Board of Foreign Missions of the Presbyterian Church in the United States, commonly known as the Southern Presbyterian Church, is null and void and of no effect, and that the same is properly distributable among the next of kin of said Hugh

G. Guthrie, deceased, according to the Laws of Descent and Distribution." And from that decree the Trustees of the General Assembly of the Presbyterian Church in the United States and M. H. Houston, secretary of the Executive Committee of Foreign Missions of the Presbyterian Church in the United States, obtained an appeal.

After a most careful consideration of the authorities and the elaborate arguments of counsel, written and oral, we arrive at the conclusion, without hesitation, that there is not room for a rational doubt that this case is, in every essential particular, ruled by the case of the *Protestant Episc. Ed. Society v. Churchman*, 80 Va. 718, and that the decree of the court below should be reversed, as having no foundation in either law or reason.

In the *Churchman Case*, as in this, the bequest was to a corporation, and for purposes within the scope of the corporate powers and duties, both being charitable bequests to religious uses. In that case there was a slight discrepancy in the description of the donee of the charity, but by parol proof of the circumstances surrounding the testator his meaning and intention were made clear, and this it is competent to do in such cases. See *Roy v. Rowzie*, 25 Gratt. 605.

The same defect exists in the present case. The language of the testator is: "After paying off all my debts and the foregoing legacies, I bequeath and will all the money left or remaining in the hands of my executors, as soon as collected, to be paid to the secretary of the Board of Foreign Missions of the Presbyterian Church in the United States, and known as 'Southern Presbyterian Church.'" In reference to this clause, it is charged in the bill of complainants that the beneficiary is vague, uncertain and unknown, and has no real existence, and never had, and that the court cannot cre-

When by the description in a devise of land the particular tract intended is doubtful, parol evidence is admissible to show what tract was intended. *Jones v. Quattlebaum* (S. C.) 9 S. E. Rep. 982.

In a case of a devise, the testimony of the scrivener who drew the will, that words were inserted in the will by him, as an additional description to distinguish the premises from the testator's other property, is not inadmissible. *Grisoom v. Evens*, 40 N. J. L. 402.

A devise of "sixty acres, se. 25, toon 7, and forty acres, se. 24, toon 8, Jasper County," refers to sections and towns, and parol evidence is competent to show the township and range of the lands. *Chambers v. Watson*, 60 Iowa, 330.

In determining what land passes by a will, it may be shown that the testator adopted a certain line between two tracts as the true line. *Smith v. Denison*, 112 Ill. 367.

Not admissible to supply omissions.

Parol evidence is not admissible to supply any omissions or defects in a will, which may have occurred through mistake or inadvertence; it is admissible only where there is a latent ambiguity. *Taylor v. Maris*, 90 N. C. 619.

A mistake in the description in a will of land therein devised cannot be corrected by extrinsic evidence, in the absence of anything in the will indicating the mistake. *Funk v. Davis*, 103 Ind. 281.

The plaintiff's complaint stated in substance that the testator had borrowed money of his wife, to \$ L. R. A.

buy the "northeast quarter of the southeast quarter" of a section of land, agreeing to devise the land to her for life with remainder to her children; that he executed his will, intending to conform to that agreement, but by mistake the will described the land as the "northeast quarter of the southwest quarter," and that he owned no such land, and no other land than the lot misdescribed. Parol evidence of such facts was inadmissible. *Judy v. Gilbert*, 77 Ind. 96.

A testator requested his executors "to sell and dispose of the following described land," but left out the description. Evidence that he owned a parcel of land not specifically disposed of was not admissible to supply the missing description. *Crooks v. Whitford*, 47 Mich. 283.

Extraneous testimony is incompetent to supply an unintentional omission, or to contradict an expressed intention in a will. *Caldwell v. Caldwell*, 7 Bush, 515.

But extrinsic evidence is admissible to determine whether a disconnected woodland was included in a testator's devise. *Black v. Hill*, 32 Ohio St. 318.

So parol evidence is admissible to prove a mistake in a devise as to the number of fields occupied in the part of land devised. *Coleman v. Eberly*, 76 Pa. 197.

Parol evidence of written instruments generally. See *Ferguson v. Rafferty* (Pa.) 6 L. R. A. 33, note.

Charities and charitable uses and trusts. See *Stratton v. Physio-Medical Inst.* 5 L. R. A. 33 and note, 145 Mass. 503.

ate and raise up a hand where none before existed, to receive the testator's bounty; and upon this ground they invoke the decree of the court declaring the bequest null and void. This contention rests upon no other or higher ground than that the testator describes the beneficiary as the "secretary of the Board of Foreign Missions," etc., when the true designation is "secretary of the Executive Committee of Foreign Missions," or simply "Executive Committee of Foreign Missions," of which committee the Rev. M. H. Houston is secretary.

The Trustees of the General Assembly of the Presbyterian Church of the United States, by their president, James Hemphill, and M. H. Houston, secretary as aforesaid, answered the bill, denying the alleged invalidity of the bequest, demonstrating that the beneficiary was thoroughly identified, and claiming the bequest as due to said trustees for the use of said Committee of Foreign Missions, all of which is made clear by Commissioner Kinney, in his able and exhaustive report, which is thoroughly sustained by the evidence before him, and by the law governing the case, but which the court below unfortunately rejected, instead of adopting and making it the basis of the only proper decree that could be rendered in this case.

Commissioner Kinney, in the course of an able review of the testimony before him, among other things, says: "It is proven that the testator, Hugh G. Guthrie, deceased, was for thirty years or more a member of the congregation of 'Tinkling Springs Church,' in Augusta County, which church was a part of the Lexington Presbytery, and said presbytery was a constituent part of the several General Assemblies hereinbefore described, and is now, and was at the death of the testator, a part of the 'General Assembly of the Presbyterian Church in the United States,' and popularly known as the Presbyterian Church South or 'Southern Presbyterian Church;' that said testator was a communicant member of said Tinkling Springs Church for many years, and also an elder in said church for a long time before and up to his death; that he was known to be very zealous in all church work, but especially interested in foreign missions, and had been heard to express his purpose to leave a bequest to that cause, and that at all times during his life while connected with the church, he had contributed liberally to that charity," etc. The commissioner in his report, in referring to the objection, and the only objection, urged against the validity of this bequest—to wit, its vagueness and uncertainty as to the beneficiary, says: "It is true—proven and admitted by all parties—that the chartered name of the agency of the defendant corporation, created for the purpose of conducting the work of foreign missions, is 'the Executive Committee of Foreign Missions.' But it is equally true that every Presbyterian knows that agency by the name used by the testator—viz., 'the Board of Foreign Missions'—and that it was so known for many years before the incorporation in 1866. It is commonly spoken of by laymen, elders and ministers of the church as 'the Board of Foreign Missions,' and it is proven that the executive officer of this agency is known by the same persons, and technically styled in the said charter, as 'the

secretary,' so that commissioner is of opinion, and so finds, that this bequest is not invalid because of the mere misnomer of this agency of the defendant corporation; and that being so, it follows that the second ground of objection—viz., that the beneficiary is so vague and uncertain as to be unknown, etc.—cannot be sustained for the reason that the beneficiary, 'the secretary of the Board of Foreign Missions,' etc., is as well known as a person could well be designated, conceding that the 'Board' and 'the Executive Committee' are the same thing." And then the commissioner adds, and with the utmost propriety, that "commissioner cannot see how anyone could have the slightest difficulty in fully identifying the beneficiary under this ninth clause of the will, in the light of the evidence and surrounding circumstances."

There appears in the record a copy of the charter granted by the Legislature of the State of North Carolina to "the Trustees of the General Assembly of the Presbyterian Church in the United States," which charter was accepted and ratified by said General Assembly on the 11th day of February, 1866.

The first section of this charter recites "that Thomas C. Perrin (and others therein named) 'and their survivors,' etc., be, and they are hereby, constituted a body politic and corporate, by the name and style of 'the Trustees of the General Assembly of the Presbyterian Church in the United States,' and by the name and style aforesaid shall be able and capable to take and hold all such estate, property and effects as may be acquired by gift, purchase, devise or bequest, to aid and enable the said General Assembly of the Presbyterian Church to undertake and carry on the work of Christian education, of foreign and domestic missions, of the publication of such books, tracts, etc., as are connected with the diffusion of religious literature and learning, etc., and all the said estate, property and effects that shall be acquired by the said trustees and their successors at any time shall be held, used and disposed of according to the direction of the General Assembly aforesaid, provided that the property, real and personal, held or possessed by said corporation shall not exceed \$2,000,000."

By the fourth section of said charter it is enacted "that if the General Assembly shall establish any committees, boards or agencies, for any of the purposes recited in the first section, the same shall be held and deemed to be branches of the corporation; and if any gift, grant, devise or bequest shall be made to the 'Trustees of the General Assembly of the Presbyterian Church in the United States,' for the use of such committees, boards or agencies, the same shall be good and effectual to pass to such objects, whenever the donor, grantor, bargainor or testator shall name the aforesaid corporation in general terms."

Thus, not only at the date of testator's death, but at the date of his will, and long anterior thereto, there was this corporate hand in existence, with lawful authority to receive and use this and like charitable donations for the purposes for which the corporation was created, one of which was to carry on the charitable work of foreign missions; and it was to aid in

this work that the testator made the bequest in question.

In the answer of the trustees and of M. H. Houston, before referred to, it is said that previous to the late civil war there existed a body of Christians known as "The Presbyterian Church in the United States of America," which embraced in its membership citizens of each of the United States. Their system of church government consisted of a session for each congregation, which was composed of a minister and the elders of the congregation; a number of congregations composed a presbytery, and a number of presbyteries composed a synod, usually co-extensive with state boundaries; and all of the presbyteries constituted a General Assembly, in which the whole Church was represented, and which constituted a bond of union between all the churches, with power to supervise the affairs of the whole Church, and to institute and direct the agencies deemed necessary and proper for the accomplishment of the church work. In furtherance of the work of the church the General Assembly, at an early day, committed parts of its work to certain members selected from time to time for the purpose and constituted into boards, among which was a board of foreign missions, having charge of the work of missions in foreign lands.

Upon the breaking out of the late war the Presbyterians within the bounds of the Southern States composing the Confederacy, together with the Presbyterians of Potomac and Winchester, previously belonging to the Synod of Baltimore, determined to separate from "The Presbyterian Church in the United States of America," and sent commissioners to an Assembly which met in Augusta, Georgia, on the 4th of December, 1861, and organized under the name of "The General Assembly of the Presbyterian Church in the Confederate States of America." At the end of the war this body, at its session in Macon, Georgia, commencing the 14th of December, 1865, changed the name of the church it represented to "The Presbyterian Church in the United States," and the said church, since its said corporation in 1861, has been popularly known as "The Presbyterian Church South" or "The Southern Presbyterian Church," and "The Presbyterian Church in the United States of America," from which it separated, has been known as "The Presbyterian Church North" or "The Northern Presbyterian Church."

At the said meeting in Augusta, Georgia, in December, 1861, "the General Assembly of the Presbyterian Church in the Confederate States of America" determined, among other things, upon "the organization of a permanent agency for conducting foreign missions," and in pursuance thereof—

"Resolved, That this General Assembly proceed to appoint an executive committee, with its proper officers, to carry on this work, and that the character and functions of this committee be comprised in the following articles as its constitution—viz.:

"Art. 1st. This committee shall be known as the Executive Committee of Foreign Missions of the Presbyterian Church in the Confederate States of America. It shall consist of a secretary, who shall be styled 'the secretary of foreign missions,' and who shall be the com-

mittee's organ of communication with the Assembly, and with all portions of the work intrusted to the committee," etc.

That upon the change of the name of the Church in 1865 there was a corresponding change of the name of this committee, but as the members of the Presbyterian Church had been accustomed to call the agencies of the Church, before the separation, "boards," the corresponding agencies of the Southern Church afterwards were frequently called, and were popularly known, by the name of "boards," instead of "executive committees," the two being substantially the same thing.

In the light of these facts, averred to have been taken from the minutes of the General Assembly of the Presbyterian Church South, and which are in no way controverted, the contention, and the only one raised by the bill, that the bequest in question must be treated as null and void, because of vagueness and uncertainty as to the beneficiary, dwindles into utter insignificance. And this being the only question raised by the pleadings and evidence in the cause, the case might appropriately end at this point, with a decree reversing the decree of the court below and establishing the validity of the bequest. But in the argument here new propositions are advanced, and they are both novel and untenable. It seems to be conceded by counsel for the appellees that the bequest in question is one to the Executive Committee of Foreign Missions of the Presbyterian Church in the United States, and is therefore a bequest to the corporation chartered by the Legislature of North Carolina. This proposition no one will deny; but it is further insisted, and with apparent earnestness, that in incorporating the Trustees of the General Assembly of the Presbyterian Church in the United States the Legislature of North Carolina, in effect, incorporated the Southern Presbyterian Church; that such a corporation is repugnant to article 5, section 17, of the Constitution of Virginia, and is against the policy of her laws.

The provision of the Constitution referred to reads: "The General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law."

One of the counsel for the appellant corporation (Mr. Henry), in his printed argument, gives a correct and valuable historical review of the legislation in Virginia bearing upon and truly interpreting this provision in our Constitution. He says: "While Virginia was a Colony the Protestant Episcopal Church of England was established by law, and her vestries exercised corporate powers. The convention which declared Virginia independent adopted, on the 12th of June, 1776, a Bill of Rights as the foundation of her government, the 16th section of which declares: 'All men are equally entitled to the free exercise of religion according to the dictates of conscience.' Subsequently, by a series of Acts which need not be mentioned in detail, the disestablishment of the Episcopal Church was made complete, as will be shown by the Acts passed January 24, 1799, and the 12th of January, 1802, which will be found in the Code of 1819, vol. I., p. 78, etc.

"The Act of January 24, 1799, repeals all the Acts on the statute books relating to the Episcopal Church, and declares the Act for Establishing Religious Freedom, passed December 16, 1785, to be a true exposition of the principles of the Bill of Rights and Constitution; and the Act of January 12, 1802, took for the public the glebe lands held by the Church. The Constitution adopted in 1880 embodied the said Act for the Establishment of Religious Freedom in section 2 of article 8, and the Constitution adopted August 1, 1851, repeated this in section 15 of article 4, and, in section 83 of same article, provided 'that the General Assembly shall not grant a charter of incorporation to any church or religious denomination, but may secure the title to church property to an extent to be limited by law.' The present Constitution has the same provisions upon this subject. See §§ 14, 17, of art. 5.

"During the contest between the Established Church and the Dissenters, which ended in the disestablishment, the Episcopal Church, among its frequent memorials to the Legislature, presented one on the 4th of June, 1784, which prayed 'that an Act may pass to incorporate the Protestant Episcopal Church in Virginia, to enable them to regulate all the spiritual concerns of the Church after its form of worship, and constitute such canons, by-laws and rules of government and good order thereof as are suited to their religious principles, and, in general, that the Legislature will aid and patronize the Christian religion.' House Journal, 86.

"This was responded to at the next session, and on the 17th of November, 1784 (House Journal, 27) it was resolved, that Acts ought to pass for the incorporation of all societies of the Christian religion which may apply for the same.' And, in addition, the body passed 'An Act Incorporating the Protestant Episcopal Church' (Henning, 11, 582), which provides that the ministers and visitors of said Church shall be a corporation, and shall manage all the affairs of the said Church, both temporal and spiritual. This Act was violently assailed, and was repealed at the October session, 1786, by an Act in the following words:

"I. Be it enacted by the General Assembly, That the Act entitled "An Act for Incorporating the Protestant Episcopal Church" shall be, and the same is hereby, repealed, saving to all religious societies the property to them respectively belonging, who are hereby authorized to appoint, from time to time, according to the rules of their sect, trustees, who shall be capable of managing and applying such property to the religious uses of such societies. And to guard against all doubts and misconstructions,

"II. Be it further enacted and declared, That so much of all laws now in force as prevents any religious society from regulating its own discipline shall be, and is hereby, repealed." Henning, 12, 266.

"By the said Act of the 12th of January, 1802, confiscating the glebe lands, it was provided (see Code 1819, vol. I., p. 81) 'that nothing herein contained shall authorize a sale of the churches and the property therein contained, or the church-yards, nor in any manner affect any private donation made prior to the first day of January, 1777, for church and other purposes, where there is any person in

being entitled to take the same under any private donor, nor to affect the property of any kind which may have been acquired by private donations or subscriptions by the said Church since the date last mentioned.'

"On the 30th of January, 1806 (Sess. Acts, p. 42), it was enacted 'that all previous donations for charitable purposes, which were to have been controlled and managed by a vestry, should thereafter be managed and controlled by overseers of the poor of the county or town in which they were to be exercised, and they shall apply the same in such manner as may have been directed by the donors.'

"On the 8d of February, 1842 (Sess. Acts, p. 60), it was enacted that real estate conveyed for the use and benefit of any religious congregation as a place of public worship should be held by trustees for such purpose, endowed with certain corporate powers, and the circuit and superior courts were authorized to appoint such trustees. At the revision of 1849, the Act of the 30th of January, 1806, and that of the 8d of February, 1842, the latter enlarged so as to embrace cemeteries, residences of ministers, and books and furniture to be used in public worship or by the ministers, were re-enacted (chap. 77, §§ 3-17, Code 1849), and the same provisions have been continued in the Code of 1860, chap. 77, and in the Code of 1873, chap. 76, with the limit of property enlarged.

"During the period subsequent to the Revolution the Legislature has from time to time incorporated trustees to hold the property acquired and used for different purposes in church work—notably, for the education in seminaries of candidates for the ministry; and on the 8th of March, 1873 (Sess. Acts, p. 116), certain persons were incorporated, under the style of the Presbyterian Committee of Publication, one of the committees of the Southern Presbyterian Church, who were authorized to hold and manage all property, real and personal, acquired for the use of the said committee, not exceeding \$200,000 and one half acre of land in the City of Richmond, the vacancies in the body to be filled from the members of the said Committee of Publication. Indeed, the overseers of the poor authorized to hold certain church property were a corporation. Code 1860, § 9, chap. 51.

"The validity of the said Act of the 8th of March, 1873, was called in question and sustained in the case of *Wilson v. Perry*, 29 W. Va. 169."

From this historical review of the legislation touching the subject, it is perfectly clear that it never occurred to the Legislature of Virginia that to incorporate church agencies, essential to the accomplishment of church work, was the same thing as the incorporation of the churches, respectively, in whose interests such corporate agencies have been created and still exist. Indeed, there is nothing in the provision of the Constitution in question that could by possibility give the least support to the argument that the bequest in this case is repugnant thereto. That provision simply forbids the incorporation of any church or religious denomination, but at the same time it authorizes the Legislature to secure the title to church property to an extent to be limited by law. The constitutional provision restricting the amount of church prop-

erty to limits to be prescribed by law was wisely designed to empower the Legislature to guard against the too great accumulation of such property—a precaution equally taken as regards all corporate bodies created by state laws and authorized to acquire and hold certain property for corporate purposes, and having an indefinite existence. The reason of the restriction to limits thus to be prescribed is clearly and truly stated in the preamble to the said Act of January 24, 1799 (Code 1819, vol. 1, p. 78), entitled "An Act to Repeal Certain Acts, and to Declare the Construction of the Bill of Rights and Constitution Concerning Religion as Follows: Whereas the Constitution of the State of Virginia hath pronounced the Government of the King of England to have been totally dissolved by the Revolution, hath substituted in place of the civil government so dissolved a new civil government, and hath in the Bill of Rights excepted from the powers given to the substituted government the power of reviving any species of ecclesiastical or church government in lieu of that so dissolved, by referring the subject of religion to conscience; and whereas the several acts presently recited do admit the Church established under the regal government to have continued so subsequently to the Constitution, have bestowed property upon that Church, have asserted a legislative right to establish any religious sect, and have incorporated religious sects, all of which is inconsistent with the principles of the Constitution and of religious freedom, and manifestly tends to the re-establishment of a national Church," etc. Then follows the Act which repeals, by its title, every statute deemed inconsistent with said preamble. Clearly, this legislative construction of the Bill of Rights is the foundation of all subsequent legislation in Virginia, whether constitutional or statutory, concerning religion in this State. It, in unmistakable terms, declares that the Bill of Rights, by referring the subject of religion to conscience, has taken away from the civil government the power of reviving any species of ecclesiastical or church government, and that the incorporation of any church or sect is inconsistent with the Constitution and Bill of Rights, and tends to the re-establishment of religion by law, when the policy of the State is to abstain from any interference with the religion of its citizens. In other words, it proclaims, as one of the grand results of the Revolution, that Church and State are perpetually divorced, as set forth in the memorable words of the Bill of Rights, as follows:

"Religion, or the duty we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and therefore all men are equally entitled to the free exercise of religion, according to the dictates of conscience."

It is plain to the commonest understanding that, in order to the dissemination of the Christian truths, the education of men in Christian principles, and the spread of Christianity, the churches, of whatever faith or form of worship, must have, for the accomplishment of their great work, a secular as well as a spiritual vitality, money and property being essential to Christian education and to the diffusion of Christian knowledge, literature and principles.

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In order to more effectually secure the great end in view, our government refers the subject of religion to the conscience of individuals, and leaves each sect to depend for its support upon free and purely voluntary contributions. Hence, while all effort to regulate religion by law, or to impose by law any particular faith or form of worship, or to compel anyone to contribute to the support of any religious sect, is forbidden by the Constitution, yet churches or religious associations are recognized and treated, though unincorporated, as bodies entitled, under our form of government, to enjoy the benefits of property, which property, like that of all other citizens, whether individuals, associations of individuals or corporations, should be protected and secured to them by law. And it is in recognition of this sacred right that our Constitution authorizes, and in the very provision relied upon by counsel for the appellees, the Legislature to secure the title to church property to an extent to be limited by law. And it was in furtherance of the same great principle of right that the Legislature of North Carolina incorporated the Trustees of the General Assembly of the Presbyterian Church in the United States, the appellant corporation here. It is worse than idle to contend that the incorporation of said trustees was, in effect, the incorporation of the Church. It might almost as well be contended that because the chief articles of export from the State of North Carolina are not the same as those of Virginia and many other States of the Union, therefore she is not a qualified member of the Union, and is excluded from the benefits of the law of comity prescribed by the Federal Constitution. And it would be equally plausible were it contended that a Virginia bequest to a citizen of North Carolina would be in violation of the said 17th section of article 5 of the Constitution of Virginia.

But, before drawing strained and unwarranted conclusions from the Constitution of Virginia, to defeat this bequest to a North Carolina corporation, it would have been better to ascertain first that this bequest is repugnant to the Constitution and laws of the State of North Carolina. But this impossible task the learned counsel for the appellees did not undertake.

The argument that this bequest is in violation of the Virginia Constitution, if it proves anything, proves far too much for the object in view. In the light of repeated enactments of the Virginia Legislature, incorporating agencies for the carrying on church work, it would prove either that the Virginia Legislature has habitually violated the Constitution by incorporating similar church agencies, or that the unquestioned legislative policy has been to incorporate all churches by the incorporation of such agencies. Take, for example, the Act of February 28, 1854, incorporating the Protestant Episcopal Theological Seminary, prescribing as its property limit 250 acres of land and \$250,000 worth of property; the Act of December 20, 1855, incorporating the Union Theological Seminary, belonging to the Presbyterian Church, and fixing the same property limit; the Act of January 8, 1875, incorporating the Trustees of the Protestant Episcopal Education Society in Virginia, and

limiting its property to \$250,000. Each of these is but a corporate agency for the accomplishment of church work; and if the North Carolina Act in question is, in effect, the incorporation of the Church, the same is necessarily true as to each of them. But the fact is, neither the one nor the other amounts to the incorporation of a church. The corporations named in the North Carolina Act are not described as members of any church, nor are they authorized to exercise any religious functions. The objects of the corporation consist in "taking and holding all such estate, property and effects as may be acquired by gift, purchase, devise or bequest, to aid the General Assembly of the Presbyterian Church to undertake and carry on the work of Christian education; of foreign and domestic missions; for the publication of such books, tracts and papers as are connected with the diffusion of religious literature and learning; for the relief of indigent ministers and the widows and children of deceased ministers, and all other benevolent objects of the Church, and of building up and supporting churches of their faith and worship in the United States." "And said property is to be held, used and disposed of according to the directions of the General Assembly aforesaid." Thus the corporation is distinct from the Church, and is made subject to the direction of its General Assembly. The duties of the corporation, other than the mere details of government incident to all corporations, are confined to the management of certain property of the Presbyterian Church, and under its direction. No control of the spiritual or religious affairs of the Church is given to the corporation. It is therefore but a legal device to secure "the title to church property," and might, without question, have been granted by the Virginia Legislature, if domiciled in this State, under said section 17, article 5, of our Constitution. Indeed, as already shown, every object of this North Carolina corporation has been approved and uniformly fostered, as shown by numerous legislative enactments. Take, for example, the work of Christian education as conducted by our theological seminaries; that of foreign and domestic missions, carried on under the Act of February 14, 1872, incorporating the Board of Foreign Missions of the Baptist Church; the publication of religious literature, carried on under the Act of March 8, 1873, incorporating the Presbyterian Committee of Publication; the relief of invalid ministers and their families, afforded by the Act of January 16, 1886, incorporating the Trustees of the Baptist Ministers' Relief Fund of Virginia; the benevolent objects, under the Act of March 1, 1856, incorporating the Young Men's Christian Association of Richmond, and numerous other Acts incorporating benevolent societies; and the Acts of Assembly are full of them. So, too, as to the building up and supporting churches in the United States, which is but a branch of domestic missions, and a repetition at home of what is done abroad through the agency of foreign missions.

In the case here the testator does not attempt to vest in a foreign corporation real estate in Virginia, but makes a simple bequest of money to be paid to a foreign corporation. It 6 L. R. A.

is not pretended by counsel for the appellees that this corporation is prohibited by the Constitution of North Carolina from taking and using the money bequeathed in this case. Indeed, it seems impossible to discover any reason for defeating this bequest which would not equally apply had the bequest been to a citizen of North Carolina.

Roy v. Rowzie, 25 Gratt. 612, was the case of a Virginia bequest to a theological seminary chartered by the Legislature of South Carolina. This court held the bequest valid; and Judge Moncure, delivering the unanimous opinion of the court, remarked: "Even if it could be said that the passing of our law forbids the execution of such a trust in this State, there is certainly nothing in the policy of the law of South Carolina, where the trust created in this case was intended to be executed, which forbids it. And the will having been executed and admitted to probate according to the law of this State, the domicile of the testatrix, the fund would have to be paid over to the foreign corporation, to be administered according to the law of that State. The authorities cited by the counsel for the appellants fully sustain this proposition. *Hill, Trustees*, 458, 468, and the cases cited in the *notes*, and *Chamberlain v. Chamberlain*, 48 N. Y. 424, decided in 1871.

"If the law of Virginia prohibited a bequest to a theological seminary, wherever situate, and whether incorporated or not, then certainly such a bequest would be invalid, no matter where the object might be located, whether in or out of the State."

We have, therefore, not only the legislative, but the judicial, interpretation, standing solidly against the position assumed by counsel in respect to said 17th section of article 5 of the Virginia Constitution and the alleged policy of our law. In this respect the above quoted remarks of Judge Moncure are absolutely conclusive, and put an end to this branch of the case.

But, in order to break, if possible, the chain of legislative and judicial construction that binds them, counsel for the appellees undertake to treat this bequest as invalid, because it is "an indefinite charity for religious purposes;" and, to sustain this remarkable contention, the doctrine announced in *Galleo v. Atty-Gen.* 3 Leigh, 450, has been appealed to, and is insisted upon as still being the law of charities in this State, though this court decided directly the other way in the case of the *Protestant Epis. Ed. Society v. Churchman*, 80 Va. 718. And, in order to break the force of the opinion in that case, counsel assume that, while the opinion assails the doctrine laid down in *Galleo v. Atty-Gen.*, "the decision does not touch it." This is a matter easily disposed of. The bequest in the *Churchman Case* was "to the Trustees of the Protestant Episcopal Education Society of Virginia, to be used exclusively for educating poor young men for the Episcopal ministry, upon the basis of evangelical principles as now established." This bequest was held void by the Circuit Court of Augusta County, upon two grounds—first, because to a corporation, not absolutely for its own use as a corporate body, but in trust, to be exclusively used for the purposes therein named; and, second, because the uses and trusts declared by

the testator "are null and void, being religious in their nature and too vague and indefinite to be upheld under the law of this State, or to be administered by a court of chancery, even if said trusts were merely educational." In the effort to maintain this most erroneous decree counsel for the appellees confidently relied upon *Gallego v. Atty-Gen.* and like cases following it. The objection, then, that the bequest was invalid, because religious in character, was not only fairly made, but was sustained in the court below, and was insisted on in this court. This court, however, reversed the decree of the circuit court on both grounds. This objection is so aptly and completely answered by the Hon. W. W. Henry, of counsel for the appellants in this case, that we approve and adopt his language. He says: "Decisions are held to be precedents 'as to points actually in issue between the parties.' *Lewis v. Thornton*, 6 Muf. 94. And in the *Churchman Case* the power of the court to enforce the bequest as a religious charity was one of the points in issue. Had the learned counsel noticed what Judge Tucker said on this subject in *Gallego v. Atty-Gen.* 3 Leigh, 469, he would hardly have made this objection. In the case of *Phila. Baptist Asso. v. Hart*, 17 U. S. 4 Wheat, 1 [4 L. ed. 499], Judge Marshall said that the case might have gone off on the ground that the action was not brought by the Attorney-General, the plaintiffs on the record not having a right to sue. But he deemed it more satisfactory to discuss the case in all its bearings (pp. 50, 51). It was objected in *Gallego v. Atty-Gen.* that the opinion of Judge Marshall was, therefore, extrajudicial. On this point Judge Tucker said: 'I do not consider it extrajudicial. The question discussed fairly arose, and was properly decided, after having been laboriously examined.' And so it must be held as to the doctrine of religious charities in this case."

The contention of counsel for the appellees that this case is not ruled by the *Churchman Case*, and that *Gallego v. Atty-Gen.* is still the law of charities in Virginia, is but a repetition of the erroneous view taken by Judge Tucker in the last-named case as to the policy of our law in respect to charities for religious uses. It is broadly asserted that charities had their origin in the Statute of 43 Elizabeth; that it was in force in Virginia, and was repealed in 1792, and that since the repeal courts of equity in Virginia have been without jurisdiction to enforce charitable bequests. Let us see what the Supreme Court of the United States says on the subject.

In *Russell v. Allen*, 107 U. S. 168 [27 L. ed. 397], decided in 1882, Mr. Justice Gray, in delivering the opinion of the court, gives the substance of all the cases on charities previously decided by that court, and, in commenting on *Phila. Baptist Asso. v. Hart*, the source of all our trouble in Virginia on this subject, he says that the case "was decided upon an imperfect survey of the early English authorities, and upon the theory that the English law of charitable uses, which, it was admitted, would maintain the bequest, had its origin in the Statute of Elizabeth, which had been repealed in Virginia. That theory has since, upon a more thorough examination of the precedents, been clearly shown to be erroneous," citing *Vidal v. Girard*, 43 U. S. 2 How. 127 [11 L. ed. 205]; 6 L. R. A.

Perin v. Carey, 85 U. S. 24 How. 465 [16 L. ed. 701]; *Ould v. Washington Hospital for Foundlings*, 95 U. S. 808 [24 L. ed. 450].

In the last-named case Mr. Justice Swayne, speaking for the court, after referring to the doubts once entertained upon the subject, says that "upon reading the Statute 43 Eliz., chap. 4, carefully one cannot but feel surprised that the doubts thus indicated ever existed. The Statute is purely remedial and ancillary. . . . The learning developed in the three cases mentioned (*Vidal v. Girard*, *supra*, *Fontain v. Ravenel*, 58 U. S. 17 How. 369, 15 L. ed. 80, and another case) shows clearly that the law as to such cases, and the jurisdiction of the chancellor, and the extent to which it was exercised, before and after the enactment of the Statute, were just the same."

Other decisions and eminent text writers holding the same views might be referred to, but these are all-sufficient to refute the argument that charities had their origin in the Statute of 43 Elizabeth.

But it is insisted that the decision in *Vidal v. Girard*, and the long line of decisions of the same court following it, have no application to the Virginia doctrine in respect to charities, as laid down in *Gallego v. Atty-Gen.*; that *Vidal v. Girard* is founded upon "old musty records exhumed for the occasion, and unknown even to the English judges." This is a suicidal argument, especially in view of the fact that, in almost the same breath that the English precedents are thus scoffed at, the same counsel appeals to this court to uphold the doctrine laid down in *Gallego v. Atty-Gen.*, upon the ground of its sanctity by reason of age and undisturbed repose; and the argument is pushed to the unreasonable extent of claiming that, inasmuch as long years elapsed, during which that decision was uniformly acquiesced in, the people in the mean time having adopted a new Constitution, therefore that doctrine should be regarded as having been engrafted upon the fundamental law of the State. This is truly a novel position. It suggests a curious mode of embalming error. It will be a dark day for the old Commonwealth when it shall become the accepted doctrine that to remodel her Organic Law is to perpetuate all the previous errors of her courts.

As respects the scope and legitimate effect of the decision in the *Churchman Case* but little need be said. The opinion in that case was prepared after the most thorough investigation, in which every available source of information was consulted, lest some landmark of the law, firmly embedded in principle, might receive the rude touch of judicial action without due consideration. It was in this spirit that the opinion of Judge Tucker in *Gallego v. Atty-Gen.* was reviewed, and the doctrine therein announced overruled. In the *Churchman Case*, as in this, objection was made to the validity of the bequest on the ground of its religious character. Guided by the highest authorities known to the law, it was shown that the decision in *Gallego v. Atty-Gen.* was but an adoption of the views of Chief Justice Marshall in *Phila. Baptist Asso. v. Hart*, when it had been established beyond controversy that he was mistaken, and that the Supreme Court of the United States, in *Vidal v. Girard*, had refused the doctrine laid down in *Phila. Baptist Asso. v. Hart*, and has since

uniformly adhered to the doctrine announced in *Vidal v. Girard*, except, according to the course of that court, in cases arising in Virginia, and supposed to be controlled by the doctrine laid down in *Gallego v. Atty-Gen.*; that the supposed policy of the law which was, by Judge Tucker, assumed to exist in Virginia, was not only not the law of this State, and never had been, but was directly opposed by every legislative enactment quoted and relied on by him to sustain it; that the doctrine of charitable trusts did not originate with the Statute of 43 Elizabeth, but existed at common law, and that the Statute was purely remedial and ancillary, and in no way changed the chancery jurisdiction over charities; that the Statute of Elizabeth was local, not general, and was not repealed by the General Repealing Act of 1793, but that, even if it was a general, and not a local, Statute, and was in force in Virginia, and was repealed, even then the saving clause in the Repealing Act preserved to the people of Virginia all the benefits of the Statute so alleged to have been repealed.

It is obvious, therefore, that the Statute of 43 Elizabeth, whether ever in force in Virginia or not, is entirely foreign to the question under consideration, as much so as if that Statute had never existed even in England.

It is also contended by counsel for the appellants that the common-law jurisdiction of chancery over charities was prerogative, not ordinary; that there is no prerogative chancery jurisdiction in Virginia, and that, therefore, the doctrine of the *Girard Will Case* has no application in this State. This argument concedes that chancery courts in England had jurisdiction over charities by virtue of the common law, but derived that jurisdiction from regal authority.

In England the King was, so to speak, the foster father of chancery, and, in its infancy and struggles for jurisdictional authority, helped it out of many a hard place. But it can make no difference whether in England the jurisdiction was prerogative or ordinary. The sole question is, Did the jurisdiction revert on the 8d of July, 1776, when, by the ordinance of the Virginia Convention, the common law, except when changed by statutes, was adopted?

And in the persistent effort to revive the doctrine laid down in *Gallego v. Atty-Gen.* it is argued that there has been more judicial opposition to religious than to secular charities. This is doubtless true of some judges, and even of some church members; but this only proves that now, as in days past, men, even professing Christians, are to be found who are much more jealous of the Church than of its great adversary. It does not prove that such opposition has amounted to a refusal to execute religious charities. And so far from there being in the policy of our law anything like hostility to religious charities, the uniform policy of our legislation has been to encourage and foster charities for educational and religious purposes. This has been especially the case as to legislation on the subject subsequent to the decision in *Gallego v. Atty-Gen.* The startling doctrine announced in that case seemed for a while to paralyze even the legislative arm of the government, but finally, shocked at the idea that church grounds and houses of worship, and

even Christian burial-grounds, were not secure, the Legislature rallied, and in 1839 and 1843 passed Acts securing certain property to religious uses, and, from time to time, since 1843, with constantly increasing liberality, similar Acts have been passed, until now, it may be said, and with credit to the Christian sentiment of our people, that the enforcement of charities like that here involved is in full accord with the policy of our law. Moreover, the decisions of this court in late years, and prior to the *Churchman Case*, show a decided tendency to repudiate the doctrine of *Gallego v. Atty-Gen.*, *Roy v. Rowzie*, *supra*; *Missionary Society of M. E. Church v. Calvert*, 32 Gratt. 357, and *Cozart v. Mandeville*, which was never reported, but is referred to by Judge Burks in his reported argument in the *Churchman Case* [80 Va. 754]. In all of these cases bequests to religious corporations were upheld.

In *Missionary Society of M. E. Church v. Calvert* the bequests were to "The Missionary Society of the Methodist Episcopal Church," a corporation created by the State of New York, and with these directions: "It is my will that all my executors shall pay to the Missionary Society above stated shall be paid to the Indian Mission by that Society, of New York, and the receipt of the treasurer shall be to that effect," etc. And the testator directed that the proceeds of the sale of the estate given to his wife for life "shall be paid over at her death to the said Missionary Society, at New York, for the benefit and [to be] applied to the Indian Mission." These were held to be valid bequests.

It is useless to pursue the subject further. It is not true that the bequest in this case is forbidden by either the spirit or letter of section 17, article 5, of the Virginia Constitution; nor is it true that it is repugnant to the policy of our law; nor is it true that the doctrine asserted in *Gallego v. Atty-Gen.* is now, or ever was, law in this State. That doctrine was intended to be, and was, repudiated and overturned in the *Churchman Case*. It was but a precedent, and, though it was more or less adhered to as such until repudiated, it never was law.

In the introductory note to Parsons' late and valuable work on the Principles of Partnership it is said: "A precedent, it must be borne in mind, is nothing but an experiment. If the proposition justifies itself, the principle stands, but if subsequent investigation shows that the proposition is unsound, it is set aside and replaced by the true principle." And in a note the learned author says: "In strictness, the decision of a judge is not law for succeeding cases; it is only evidence of the law. It is the testimony of a witness who is presumed to be learned and capable, explaining what the law actually is on the point in question. It decides the particular case, but it does not of necessity decide similar ones that follow. The succeeding judge may reject the testimony of his predecessor as erroneous; he may find that the law was not in fact what his predecessor declared it to be; he may therefore overrule the prior decision,"—citing Hadley, *Roman Law*, pp. 68, 69.

These remarks are founded upon a philosophical principle essential to the very life of the law; and it was by the application of this prin-

ciple that the Supreme Court of the United States, in *Vidal v. Girard*, retraced its steps and reversed the erroneous principle it had promulgated in *Phila. Baptist Assn. v. Hart*. And this court in *Galleo v. Atty-Gen.*, having not only adopted but aggravated that error, should in like manner have corrected itself.

It only remains to say that, inasmuch as the fourth section of the charter of the legatee corporation, the Trustees of the General Assembly of the Presbyterian Church in the United States, provides "that if the General Assembly shall establish any committees, boards or agencies, for any of the purposes recited in section 1, the same shall be held and deemed to be branches of this corporation," etc.; and it appearing that the "Executive Committee of Foreign Missions" was created by said General Assembly, and exists as a branch of said incorporation, and that by the words, "Board of Foreign Missions," etc., the testator meant the "Executive Committee," etc., it is clear that it is a valid bequest to said corporation, as a gift to a branch of a corporation is, *ex necessitate rei*, a gift to

the corporation. And the commissioner of the court below having properly found these facts, and also that the bequest is sufficiently definite in all respects, and capable of being executed, and that the same should be decreed to said corporation for the use of said "Executive Committee," of which Rev. M. H. Houston is a member and also the secretary and executive officer; and the report of said commissioner having been excepted to because of said finding, and the court having sustained the exception and decreed the bequest to be null and void, and the fund bequeathed to be distributable among the heirs-at-law of the testator, it is equally clear that in so decreeing the said circuit court was plainly in error. We are therefore clearly of opinion to reverse the said decree and enter a decree here declaring said bequest valid and payable to said corporation for the use aforesaid, and to remand the cause to said circuit court to be further proceeded in according to the views expressed in this opinion.

Decree reversed.

MARYLAND COURT OF APPEALS.

John VAN BIBBER, *Appt.*,

v.

Margaret A. REESE.

(.....Md.....)

- 1. Land descended or devised may be purchased in good faith and for value, free from its conditional statutory liability for debts of the decedent, when the records of the orphans' court show a final settlement of the personal estate and full payment of all proved debts and costs of administration together with a balance in the hands of the personal representative, although the statutes do not expressly make any saving of the rights of bona fide purchasers or fix any time for terminating such liability.**
- 2. The records of the courts are notice to everyone, and all persons are bound to know the facts they disclose.**

(December 18, 1889.)

A PPEAL by defendant from a decree of the Circuit Court of Baltimore City, in favor of plaintiff in an action to enforce specific performance of a contract to purchase real estate. *Affirmed.*

The facts are fully stated in the opinion.

Argued before Alvey, *Ch. J.*, and Robinson, Bryan, Stone and McSherry, *JJ.*

Messrs. William Pinkney Whyte and George L. Van Bibber, for appellant:

Real estate in the hands of the grantee of a devise is still liable to the creditors of a devisor for any debts outstanding over and above the proceeds of the devisor's personal estate.

When a purchase is made of the devisee of a deceased debtor, the purchaser is bound to take notice of the existence of claims against him, and the state of the personal assets of the deceased. He cannot defend his title upon the ground that he had no notice of debts, or the insufficiency of personal assets to pay them.

Gibson v. McCormick, 10 Gill & J. 105; New Code, art. 16, § 188.

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Want of notice of outstanding debts affords no protection to the purchaser.

Green v. Early, 39 Md. 231.

The vendee should have a title which shall enable him not only to hold his land but to hold it in peace, and, if he wishes to sell it, to be reasonably sure that no flaw or doubt will come up to disturb its marketable value.

Gill v. Wells, 59 Md. 493. See also *Dorsey v. Hobbs*, 10 Md. 413.

Messrs. John P. Poe and Frank Gosnell, for appellee:

Lands in Maryland are only liable for the claims against the decedent when he "does not leave sufficient personal estate to pay his debts and costs of administration."

1 Code, art. 16, § 188, p. 195; Act 1785, chap. 72, § 5; *Warefield v. Owens*, 4 Gill, 364.

The proof is clear that there is a surplus of personalty in the hands of the executrix, after payment of all debts, costs of administration and the legacy of \$500, amounting to \$7,704.10. The administration account is evidence of this, and is also prima facie evidence of the sufficiency of the personalty to pay all debts.

Gist v. Cockey, 7 Harr. & J. 134.

This balance would first have to be resorted to by creditors before recourse could be had to the realty.

Dugan v. Hollins, 11 Md. 78.

And even should the personalty be wasted, the remedy would be against the executrix and her bond.

Wyse v. Smith, 4 Gill & J. 296; *Griffith v. Frederick Co. Bank*, 6 Gill & J. 445.

The appellant being a bona fide purchaser for value, the land in his hands is not liable for debts; creditors, if any, would be remitted to their rights against the devisee personally, and the fact that the devise is from husband to wife has no significance whatever.

3 and 4 Wm. and Mary, chap. 14; Alex. Br. Stat. 573; *Campbell's Case*, 2 Bland, Ch. 238; *Potter v. Gardner*, 25 U. S. 12 Wheat. 500 (6 L. ed. 707); *British Mut. Invest. Co. v. Smart*,

L. R. 10 Ch. App. 567; *Corser v. Cartwright*, L. R. 7 H. L. 731; *Spackman v. Timbrell*, 8 Sim. 253; *Lanier v. Griffin*, 11 S. C. 566; *Coleman v. Winch*, 1 P. Wms. 775.

McSherry, J., delivered the opinion of the court:

The bill in this case was filed by the appellee against the appellant to procure the specific performance of a contract for the sale of real estate located in the City of Baltimore. The facts upon which the main and the important question here involved depends are these: Edwin Reese, the husband of the appellee, died on November 23, 1887. By his last will and testament, which was admitted to probate by the Orphans' Court of Baltimore City shortly after his decease, he bequeathed to his father a legacy of \$500, and made his widow his sole residuary devisee and legatee, and appointed her executrix. Letters testamentary were issued to her, and she at once gave notice, under art. 93, § 109, of the Code, to the creditors of her deceased husband's estate warning them to exhibit their claims, properly authenticated, on or before the 31st day of May, 1888. She subsequently made report to the orphans' court that she had given this notice, and her report was ordered to be recorded pursuant to §§ 110-112 of art. 93 of the Code. On the 2d of November, 1888, she settled an account in the orphans' court. By this account it appears that she paid all the debts proved against the estate, and many others, and the legacy of \$500, and the costs of administration, and there remained in her hands a balance amounting to \$7,704.10. This balance belonged to her as residuary legatee. In addition to the personal estate included in this account Mr. Reese owned in fee simple at the time of his death a house situated in the City of Baltimore. This house, which is the real estate involved in the pending litigation, the appellee acquired under the will of her husband. On the 3d of September, 1888, Mrs. Reese sold the house to the appellant, Dr. Van Bibber, for \$25,000, and on the 20th day of the same month he took possession of it. We make no reference to the circumstances under which possession was taken, because they have no relation to the only question which we deem it necessary to consider and decide.

Shortly after the memorandum of sale was signed, it was suggested that possibly Mr. Reese owed debts beyond the amount of the personal estate left by him, and that, therefore, his creditors might follow his real estate and subject it to the payment of those debts, even though the appellant had purchased it from the devisee, and had paid her for it in full. This suggestion, after much fruitless negotiation, ultimately led Dr. Van Bibber to decline complying with the agreement of September 3, and on January 8, 1889, Mrs. Reese filed the bill now before us, for a specific performance of that contract. The relief prayed was granted by the Circuit Court of Baltimore City, and a decree was signed accordingly. From that decree Dr. Van Bibber has appealed.

Section 188, art. 16, of the Code gives rise to the main controversy in the case. That section, which is a codification of the Act of 1785,

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chap. 73, § 5, and its various amendments, provides that "where any person dies, leaving any real estate in possession, remainder or reversion, and not leaving personal estate sufficient to pay his debts and costs of administration, the court, on any suit instituted by any of his creditors, may decree that all the real estate of such person, or so much thereof as may be necessary, shall be sold to pay his debts, etc."

By the common law, as is well known, the heir of a deceased debtor was only bound for the payment of the specialty debts of his ancestor, because of the express terms of the obligation, and then only in respect and to the extent of the real assets descended. And if the debtor, instead of suffering his real estate to descend to his heirs, devised it to any person; or if the heir aliened the land before an action was brought against him,—the creditor was without a remedy. To obviate this injustice the Statute of 3 and 4 Wm. and Mary, chap. 14, was enacted and the heir and devisee were made liable to the extent of the value of the land so acquired and then sold by them, though the land itself in the hands of a bona fide purchaser from either of them was declared to be entirely free from the claims of the decedent's creditors. But the legislation of this State, as embodied in the section quoted by the Code, goes much farther and makes the land devised or descended liable to be sold for the payment of any demand due to the decedent, if the personal estate left by him should be insufficient to discharge all his debts and the costs of administration. Obviously this liability is not absolute but only conditional. It depends upon the insufficiency of personal assets. Now, the practical and important question before us is, How long does that liability continue? Or, in other words, Is there any point of time after which the heir and devisee may sell the land to a bona fide purchaser without the latter incurring the risk of having the real estate so purchased by him sold afterwards for the payment of the ancestor's or the testator's debts? If there be such a point of time, what is it? This precise question has never been decided by this court.

Whilst there is not in the Code, as in the Statute of 3 and 4 Wm. and Mary, any express saving in favor of a bona fide purchaser, there must, of necessity, be some point of time when land descended or devised may be said to be free from this conditional liability. To hold otherwise would, substantially, convert the section quoted into a prohibition upon the alienation of such land—an effect manifestly never contemplated or intended by the framers of that legislation. Such property would be placed extra *commercium* almost indefinitely; because as long as there remained a possibility that debts might appear there would remain a like possibility that the property would be made liable for their payment, no matter in whom the title might chance to be. It would not be difficult to suggest numerous instances where liability might arise on a guardian's or a trustee's bond many years after its date; or on other obligations which might mature at very distant periods,—these possible claims would be sufficient to prevent conveyances for years and years, in palpable contravention of the general policy of the law, which

disfavors unlimited restraints on alienations. It may fairly be concluded, then, that there is some point of time after which a bona fide purchaser may safely purchase such devised or descended real estate. Now when can he do so?

We have said that the land of the decedent is, under the express language of the Code, only contingently or conditionally liable to be sold for the payment of his debts. His personal estate is the primary fund to which resort must be had. If that be sufficient, a court of equity has no jurisdiction to decree a sale of his real estate for the payment of his debts. It is consequently only when it appears to the court that the personal assets are not sufficient that its jurisdiction can be exercised. The law has created a different tribunal for the administration of the personal estate of a decedent. It has pointed out with exactness and particularity what course is to be pursued, from the grant of letters testamentary or of administration down to the final settlement of the estate in the orphans' court.

By § 109, art. 93, creditors are to be notified to file their claims within six months. This enables the executor or administrator to ascertain the extent of the indebtedness. Under other sections he is required, within limited periods, to return and file in the orphans' court inventories of the whole personal estate to the end that its value may be known, and that it may be applied, if necessary, to the payment of debts. Under section 1, after the notice provided for in section 109 has been given, the executor or administrator may, within twelve months after the date of his letters, make a settlement of the personal estate; and the manner of his proceeding is carefully and minutely defined in the various sections of that article. He is then required to make oath or affirmation to his account that its verity may receive the strongest possible sanction. When all this has been done in exact conformity with the law, the fact as to whether the personal assets are or are not sufficient to pay the known debts of the decedent and the costs of administration is clearly and formally—though, of course, not conclusively—established in a tribunal having jurisdiction over the administration of that personal estate.

If the final account, thus settled pursuant to all the provisions, safe-guards and requirements of our testamentary system, shows upon its face that the personal estate is sufficient to pay all debts and costs of administration, the sole condition upon which a court of equity may decree the sale of the decedent's real estate for the payment of debts does not then exist. The person entitled to that real estate, either by devise or descent, may undoubtedly then sell or convey it; and the person who then purchases it in good faith from the devisee or heir, without actual knowledge of outstanding and unsettled debts of the decedent, would most assuredly be protected as a bona fide purchaser against any and all creditors of the decedent subsequently presenting or preferring claims. This result is a necessary one and we cannot escape it without adopting the other alternative, viz.: that notwithstanding the personal estate is shown to be amply sufficient, the real estate will still continue subject, indefinitely, to be called on

for the payment of merely possible obligations. We must also treat the settlement in the orphans' court as an idle and meaningless form, importing and signifying literally nothing. That settlement, it is true, is not conclusive but *prima facie* and may be stricken out and avoided when appropriate proceedings are taken for that purpose and properly supported by evidence. But whilst it stands unimpeached and unquestioned it imports verity and furnishes notice that the decedent's real estate is not liable to be sold to satisfy the demands of his creditors.

We hold, therefore, when the records of the orphans' court, made in conformity with the law, show a final settlement of the personal estate, and when the settlement indicates that all proved debts and the costs of administration have been paid in full and that there is still a balance in the hands of the executor or administrator, a purchaser is justified in assuming, if he has not actual knowledge to the contrary, that all debts have been paid, and that the land is exonerated from its conditional liability. Should he, under these circumstances, purchase in good faith and for value from the heir or devisee he will be protected as a bona fide purchaser, in the strictest sense of the term, even though debts amounting to more than the personal estate should afterwards be discovered. The purchaser of a title perfect on its face, for a valuable consideration, takes it discharged of every equity of which he had no notice. *Bigley v. Jones*, 5 Cent. Rep. 670, 114 Pa. 517.

He is, of course, charged with notice of every defect or equity or infirmity which appears in any of the muniments of that title. *Garrard v. Pittsburgh & C. R. Co.* 29 Pa. 154.

Therefore, in *Green v. Early*, 39 Md. 223, the purchaser was charged with notice that the property had passed from the husband to the wife during coverture in prejudice of the rights of the husband's subsisting creditors; and the purchase was consequently held to be subject to the rights of those creditors. But the title here is perfect on its face. The purchaser was undoubtedly bound to know that the property was devised to Mrs. Reese, because an examination of the title will disclose that fact. He was also bound to know that the same property was, in consequence of being so devised, conditionally liable to be sold at the suit of creditors for the payment of the testator's debts. The purchaser is also required to examine the records of the orphans' court where the personal estate has been administered, because the law charges him with notice of every fact which those records disclose with reference to the personal assets. Such an examination will show that the debts of Mr. Reese and the costs of administering his estate have all been fully paid. The purchaser could not possibly extend that examination any farther. Where else ought he to make inquiry? There is nothing, then, in this case to give him the slightest notice that the land purchased by him can ever be reached by creditors of Mr. Reese; because, on the contrary, the information which the records do, in fact, impart is, that there are no unsatisfied creditors at all. The title is not only perfect on its face, but the notice given by the records is that the land is not subject to the conditional liability created by the several

Acts of Assembly forming the section heretofore referred to. It is difficult to imagine a stronger case for the application of the doctrine that a bona fide purchaser, "a favorite in the eyes of the courts of equity" (1 Story, Eq. § 434) will take the land discharged from all equities of which he had no actual or constructive notice.

This conclusion imports no new provision into the new Code, and does not strike out any of the language already there. Keeping in view the state of the common law, and the mischiefs intended to be reached by the Statute 8 and 4 Wm. and Mary, we are fully warranted in adopting that construction of the Code which will give entire effect to the intention of the Legislature, and at the same time will avoid the evil consequences to which a literal adherence to the words of the Statute, without reference to their object, would most assuredly lead.

We do not deem it necessary to cite from the text-writers, or from decided cases, the elementary rules governing the construction of statutes, and which fully sustain the interpretation adopted in this instance, because those rules are too familiar to need a statement of them in this opinion.

The records of the courts are notice to everyone, and all persons are bound to know the facts they disclose. If those records show that the personal estate is insufficient to pay debts, or if they show that the personal estate is still unsettled, notice is thereby imputed to all who may deal with the real estate that the latter is or may be made liable under the Statute, and no one purchasing from an heir or a devisee, under such circumstances, could pretend to be a bona fide purchaser without notice. This is what was decided in *Gibson v. McCormick*, 10 Gill & J. 65. But neither in that case nor in *Green v. Early*, 80 Md. 223, was the exact question now before us passed upon or decided.

In *Gibson v. McCormick*, in disposing of the defense of a purchaser of part of a deceased's real estate from his devisee, that the purchase was for value and without notice of debts, or that the personal estate was insufficient to pay them, the court said: "On the existence of such protection, abstractedly considered, we mean to express no opinion, but to its existence in the circumstances under which it is here claimed, we cannot yield our assent. It is apparent from the answer of Lloyd and his conveyance from Fayette Gibson, that at the time of the conveyance he knew that Fayette Gibson acquired title to the land conveyed as devisee of his deceased father, Jacob Gibson; and whether such fact was actually known to him or not is immaterial. The law imputes such knowledge as necessarily acquired in the examination of the title to the property conveyed to him, and also imputes to him the knowledge of the provisions of the Act of 1786, chap. 72, § 5, which made Jacob Gibson's real estate chargeable with the payment of his debts in the event of his personal estate proving insufficient therefor. Possessing this knowledge, he was put upon the inquiry: it was his duty to have ascertained whether the personal estate was sufficient for the payment of the debts of the deceased. Had he used reasonable diligence in the examination

of this fact, he would have found that when he received the conveyance from Fayette Gibson the executor had passed no account showing the payment of the debts; that there was then pending in Talbot County Court, against the executors of Jacob Gibson, a suit for the recovery of the very debt which the complainant seeks to recover by his present bill; indeed it is manifest from the answer of Lloyd himself that he knew the debts of the deceased had not been all paid out of the personalty."

A portion of this language was quoted with approval in *Green v. Early*, *supra*.

The case before the court in 10 Gill & J. 65, was that of a person purchasing from a devisee with actual knowledge that the personal estate was insolvent. But even had he not had actual notice, the condition of the personal estate as disclosed by the records of the Orphans' Court of Talbot County gave him constructive notice that the debts had not been paid, and he would have been visited with the conveyances resulting from the notice. The court was careful to refrain from expressing any opinion as to whether a bona fide purchaser without notice, actual or constructive, would be protected; that question was not before it at all.

The case of *Zollickoffer v. Seth*, 44 Md. 859, much relied on by the appellant, decides a question totally different from the one involved here. It was held there, though the personal estate had been fully and regularly settled, whereby the executor was exonerated from liability for debts not known to him when he passed a final account in the orphans' court, still the creditor was not without a remedy against the legatees and distributees of the debtor, because the legatees and distributees were not entitled to anything except the surplus of the assets after all the debts were paid. But that is far from being the case at bar. Had the legacy been a specific article of personal property, and had a third person, after the final settlement of the personal estate, purchased that article in good faith from the legatee, and had a creditor of the testator sought to subject the property so purchased, and in the hands of the bona fide purchaser to the payment of the decedent's debts, the case thus presented would have been analogous to the question under consideration here.

The contract between the appellant and the appellee is fully set forth in the bill of complaint and an accompanying exhibit, and is admitted by the answer. As thus presented it is definite, certain and entirely free from ambiguity, and capable of being specifically enforced. *Wilks v. Burns*, 60 Md. 67.

The title which Mr. Reese had is admitted to have been in fee and free from incumbrances and liens. His personal estate has been settled and the records of the orphans' court show a considerable balance in the hands of his executrix, and there is the most explicit proof on her part that there are no other debts due by her husband's estate that she is aware of. Under these circumstances the title which Dr. Van Bibber will acquire from Mrs. Reese will be absolutely impregnable. We have made no allusion to the fact that Mrs. Reese paid a large debt not proved against the estate, but due by her late husband, and that she paid it out of her own funds, because these circumstances can

nave no possible bearing upon the decision of this case in any way whatever.

Though the account passed by Mrs. Reese is called her first account, it was in fact a final account. She accounted therein for the whole of the personal estate, paid all the debts and costs of administration and took credit therefor and exhibited a balance in her hands. She sustained the two-fold character of executrix and legatee, and after the lapse of the time for the settlement of the estate, the law will treat this balance as in her hands as legatee. *Watkins v. State*, 2 Gill & J. 225; *State v. Oeston*, 51 Md. 375.

Where there is nothing left to be done but to make distribution the account is a final one.

Biays v. Roberts, 12 Cent. Rep. 118, 68 Md. 510.

The learned judge of the circuit court, in the opinion filed by him, based the appellee's right to a specific performance on the proposition that one who enters and continues in possession of property under a contract of sale cannot be allowed, whilst thus affirming the contract, to repudiate it by refusing the purchase money. Without expressing any opinion as to whether this doctrine is applicable to the case at bar, we shall affirm the decree for the reasons we have given and upon the broad ground that no creditor of Mr. Reese can ever reach the property by any proceeding whatever.

Decree affirmed with costs.

CALIFORNIA SUPREME COURT.

John BARRETT, *Resp't.*,

v.

MARKET STREET CABLE R. CO., *App't.*

(....Cal....)

1. A passenger on a street car need not tender the exact fare, but must tender a reasonable sum, and the carrier must furnish change to a reasonable amount.

2. Five dollars is not an unreasonable amount for a passenger to tender to the street-car conductor in payment of his fare.

(November 26, 1899.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiff and from an order denying a motion for a new trial in an action brought to recover damages for the forcible ejection of plaintiff from defendant's car. *Affirmed.*

The facts are fully stated in the opinion.

Mr. W. H. L. Barnes for appellant.

Messrs. Stanly, Stoney & Hayes for respondent.

Paterson, J., delivered the opinion of the court:

Action for damages for the forcible ejection of plaintiff from one of defendant's cars. The defense was that the plaintiff had refused to pay his fare, and that, therefore, the defendant was justified in ejecting him. The trial court gave judgment for the plaintiff, and the defendant appeals upon the findings.

The material portions of the findings are as follows: "That while in said car, as such passenger, and when said car was near the corner of Second and Market Streets, the conductor in charge of said car, on behalf of the defendant, did, in the course of his employment as such conductor, demand of the plaintiff the payment of the sum of five cents, being the legal fare and cost of transportation on said car. That said plaintiff did not have in his possession any coin or currency of the exact value of five cents, or any coin of any smaller denomination than a \$5 gold-piece, lawful money of the United States, and plaintiff, in response to said demand of said conductor, offered said

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conductor a \$5 gold-piece, and told said conductor to take his (plaintiff's) fare out of said sum of \$5. That the conductor refused to accept said \$5 gold-piece, informing the plaintiff that he was unable to make change for said \$5 gold-piece, and insisted upon the payment to him by the plaintiff of the exact sum of five cents, at the same time directing plaintiff if he did not produce and pay said sum of five cents to leave the car. That the plaintiff informed the conductor that the \$5 gold-piece was the smallest coin he had; that he was willing to pay his fare, but could not furnish the exact amount; and refused to leave the car upon the demand of the conductor. That thereupon the conductor stopped said car, and called the driver to his assistance, and both of them thereupon seized the plaintiff, and, against his protest, opposition and struggles, forcibly ejected him from said car at the corner of said Second and Market Streets and in so doing inflicted upon plaintiff various bruises and injuries. . . . And the court finds from the foregoing facts alone that the plaintiff did not refuse to pay fare for his transportation on said car, and did not insist upon any right, or supposed right, to be transported free of charge, under any circumstances or upon any condition, and that plaintiff was not ejected or put out of said car for a refusal to pay his fare. And as a conclusion of law, from the foregoing facts, the court finds that the plaintiff is entitled to judgment," etc.

It is stipulated by counsel "that, if plaintiff were entitled to damages, \$500 was a fair and just estimate thereof."

The question on the merits to which counsel have mainly directed their arguments is whether the passenger was bound to tender the exact fare. It is argued for the appellant that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time. Civil Code, § 2187.

And, so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently the

rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." *Id.* § 2169.

This duty, like every other which the law imposes, must have a reasonable performance; and we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that on entering a street car a person should tender the sum of ten cents? Would it be reasonable for the carrier to refuse it? Prior to the Act of 1878, the usual fare was six and one fourth cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the sum mentioned. The Act of 1878 forbids him to "charge or collect a higher rate than five cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at four and one fourth cents, and in such a case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

But it does not follow that the passenger may tender any sum, however large. If he should tender a \$100 bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish a reasonable amount of change must be considered as one which the law imposes from the nature of the business. Section 2188 of the Civil Code provides that "a passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier." The question is whether the findings show a refusal to pay, — whether the tender of a \$5 gold-piece was sufficient.

It is claimed by appellant that the establishment of the rule contended for by the respondent would lead to great inconvenience, and make it the duty of the carrier of persons for hire in street-cars to provide its conductors with sufficient small coin to do a general exchange business with all passengers, thus requiring the Company to intrust to a class of employés who are usually of no pecuniary responsibility large

sums of money. It is further said that if the tender of a \$5 gold-piece is a tender of the amount actually due, and the conductor is bound to receive it and return \$4.95 to the passenger, the same principle would apply to the offer by the passenger of \$10 or \$20 in gold or currency. With the question of convenience, however, we have nothing to do, except in so far as it bears upon the question whether the amount tendered was a reasonable sum,—such as the carrier was bound to accept. It does not follow, if it be established as a rule that \$5 is a reasonable amount to be tendered to a conductor, that \$20 or \$50 is also a reasonable amount and must be accepted. The fears of the appellant are based upon the assumption that passengers generally will contumaciously, to avoid the payment of fare, and require the companies to carry them free, offer coin of a large denomination. But these fears, we think, can safely be set aside upon the theory that a question like this will, as is usual, settle itself by a spirit of mutual accommodation between carrier and passenger. It is a well-known fact that the \$5 gold-piece is practically the lowest gold coin in use in this section of the country.

The case upon which the appellant relies (*Fulton v. Grand Trunk R. Co.* 17 U. C. Q. B. 428), is not quite in point. In that case the plaintiff had boarded a train of cars without a ticket, and when asked for his fare declined paying it, as he said he had not made up his mind how far he should go. The conductor told him that he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him off. The plaintiff then tendered the conductor a \$20 gold-piece, telling him to take his fare, \$1.35, out of it. Under these circumstances the court very properly held that the plaintiff had refused to pay his fare, within the meaning of a statute very much like our own, and that the conductor was justified in refusing to carry him further. The court said: "The general practice is for the passengers to pay at the office, and get tickets, . . . and a person rushing into a car without a ticket has no reason to expect that he will find the conductor prepared to change a \$20 gold-piece, for he relies upon receiving tickets from the parties, or, if money is to be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances."

A distinction ought to be made, we think, between passengers traveling on steam railroads and those traveling on street railroads. Passengers of the former class are expected to prepare themselves with tickets procured at the regular office established at the station where the trains regularly stop. Horse-cars and cable-cars stop at all points along the road at the beck of those desiring to ride, and the conductors do not, as a general thing, expect to receive tickets for the passage.

Judgment and order affirmed.

We concur: **Fox, J., Works, J.**

MINNESOTA SUPREME COURT.

F. J. WILDNER, *Respt.*,

v.

Robert FERGUSON, *Appt.*, and Lillibridge-Bremner Co., Garnishee.

(....Minn.....)

- *1. Where a garnishee proceeding is to be determined on the disclosure alone, no supplemental complaint being filed, and no claim made by a third person, the Statute does not contemplate any findings of fact.
2. Whether one is a "laboring man or woman," within subdivision 11, § 810, chap. 66, Gen. Stat., exempting wages, is, the kind of work done being shown, a question of law, and not of fact.
3. That subdivision means only those whose work is manual.
4. An agent who sells goods by sample is not within its meaning.

(November 30, 1890.)

APPEAL by defendant Ferguson from a judgment of the Municipal Court of the City of Minneapolis in favor of plaintiff in a garnishment proceeding to reach salary due from the garnishee to the appealing defendant. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Noyes & McGee, for appellant:

Subdivision 11, § 810, chap. 66, Gen. Stat. 1878, was not intended to aid debtors in defeating the just demands of their creditors, but was passed in that humane and enlightened spirit of legislation which considers the preservation of the family, and the means of supporting and educating the children, and maintaining the decencies and proprieties of life, as paramount to the temporary inconvenience that the creditor may be subjected to in the collection of his demands.

Grimes v. Bryne, 2 Minn. 89.

In *Bliss v. Smith*, 78 Ill. 359, a case which in its facts parallels the case at bar, the court said: "We have neither the right nor inclination, by judicial construction, to extend its provisions so as to enable the garnisheeing creditor to reach any wages the judgment debtor may thereafter earn."

See also *Hall v. Hartwell*, 3 New Eng. Rep. 68, 142 Mass. 447; *Redington v. Dunn*, 24 N. H. 187; *Collins v. Chase*, 71 Me. 434; *Wade, Attachm.* § 401; *McConnell, Trustee Process*, §§ 113-115, *note*; *Carr v. Fairbanks*, 28 Vt. 806.

Mr. R. H. Day, for respondent:

The appellant is not a laboring man within the meaning of subd. 11, § 810, chap. 66, Gen. Stat. 1878.

Our Statutes designate a laboring man or woman as the one who comes within the Statute, and do not exempt the earnings of every person, as do the statutes of some States,

Wakefield v. Fargo, 90 N. Y. 213.

An agent selling goods by sample cannot be classed as a laborer within the meaning of the Statute.

See *Jones v. Avery*, 50 Mich. 326; *Powell v.*

Eldred, 39 Mich. 552; *Aikin v. Wasson*, 24 N. Y. 432; *Brockway v. Innes*, 39 Mich. 47; *Viele v. Wells*, 9 Abb. N. C. 277; *Short v. Medberry*, 29 Hun, 39; *Dean v. De Wolf*, 16 Hun, 186; *Krauser v. Ruckel*, 17 Hun, 463; *Ericsson v. Brown*, 38 Barb. 390; *Coffin v. Reynolds*, 37 N. Y. 640; *Edgecomb v. His Creditors*, 19 Nev. 149; *Brusie v. Griffith*, 34 Cal. 806; *Dove v. Nunan*, 62 Cal. 400; *State v. Rusk*, 55 Wis. 465.

Gillfillan, Ch. J., delivered the opinion of the court:

This is a proceeding in garnishment, the debtor defendant appealing from the judgment of the court below against the garnishee defendant. The point made by appellant is that the debt reached by the garnishment, being for wages due the appellant, was exempt, under subd. 11, § 810, chap. 66, Gen. Stat. After the court below had filed its decision, directing judgment for the plaintiff, the appellant requested it to find whether, at the times covered by the garnishment, the appellant was a laboring man, within the meaning of subdivision 11, and thereupon the court found as a fact that he was. The appellant claims that that finding is conclusive upon the point. There are two reasons why it is not so:

First. That the Statute regulating garnishments, as it allows judgment against the garnishee on the disclosure alone only when the full disclosure amounts to an admission of indebtedness, or of the possession or control of property, etc., of the defendant, does not contemplate a finding of facts, as in ordinary actions. The disclosure is not the same as a trial of disputed facts in ordinary actions. Where issues are made on a supplementary complaint filed, and perhaps where a claim is made by a third person, a trial must be had as in a civil action, and, if the trial is by the court, it ought probably to state its findings of fact as in ordinary actions. Where the decision of the court below is upon the disclosure alone, it is that we must look to, and not to the court's statement of facts.

Second. Where the occupation of the defendant is shown, whether he comes within the meaning of subdivision 11 is a question of law and not of fact. The appellant was agent for the garnishee, selling its goods by sample, driving about for that purpose with his own horse and buggy, receiving a weekly salary. Subdivision 11 exempts "the wages of any laboring man or woman, or of his or her minor children, in any sum not exceeding \$50, due for services rendered by him or them for and during ninety days preceding the issue of process," etc.

All men who earn compensation by labor or work of any kind, whether of the head or hands, including judges, lawyers, bankers, merchants, officers of corporations and the like, are in some sense "laboring men." But they are not "laboring men" in the popular sense of the term, when used to refer to a man's employment; and that is the sense in which, we must presume, the Legislature used the term.

In *Wakefield v. Fargo*, 90 N. Y. 213, under an Act making stockholders in a corporation liable

*Head notes by GILFILLAN, Ch. J.

for debts due "laborers, servants and apprentices," for services performed for the corporation, the court construed the word "laborers" to refer to those whose services were manual or menial, those who are responsible for no independent action, but who do a day's work or stated job under the direction of a superior; and held that it did not include one who kept the accounts of receipts and disbursements, and, in the absence of the superintendent, had charge and control of the business.

In *Jones v. Avery*, 50 Mich. 326, it was held that a traveling salesman, selling by sample, did not come within the meaning of a constitutional provision making stockholders of a corporation liable for "labor debts" of the corporation. There are many cases holding that contractors, consulting or assistant engineers, agents, superintendents, secretaries of corporations and livery-stable keepers, do not come within the meaning of the term. *Powell v. Eldred*, 39 Mich. 552; *Aikin v. Wasson*, 24 N. Y. 432; *Short v. Medberry*, 29 Hun, 39; *Dean v. De Wolf*, 16 Hun, 186; *Krauser v. Ruckel*, 17 Hun, 463; *Ericsson v. Brown*, 33 Barb. 890; *Coffin v. Reynolds*, 37 N. Y. 640; *Brust v. Griffith*, 84 Cal. 306; *Dove v. Nunan*, 62 Cal. 400.

We do not think the Legislature intended the exemption to operate in favor of any but those who are laboring men or women in the sense that their work is manual. Persons of that class usually look to the reward of a day's labor for immediate or present support, and such persons are more in need of the exemption than any others. This debtor defendant is not within that class.

Judgment affirmed.

STATE OF MINNESOTA, *Respt.*,

v.

David L. ROBINSON *et al.*, *Appts.*

(....Minn.....)

"The provision in the charter of the City of Minneapolis authorizing the city council "to license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, baggage or freight, and to regulate their charges thereon," applies only to those who are engaged in business as carriers of persons or property for hire, and not to those who, not being engaged in such business, merely hire out teams and vehicles to those who have property to transport, the hirer himself using and controlling the team and vehicle.

(November 20, 1890.)

A PPEAL by defendants from a judgment of the Municipal Court of Minneapolis convicting them of violating a city ordinance providing for the licensing of hackmen, etc. *Reversed.*

The case sufficiently appears in the opinion.

*Head note by MITCHELL, J.

NOTE.—See *Chaddock v. Day* (Mich.) 4 L. R. A. 800, note; *Richmond & D. R. Co. v. Reidsville*, 2 L. R. A. 284, note; 101 N. C. 404, 2 Inters. Com. Rep. 416. 6 L. R. A.

Messrs. Steele & Rees for appellants.

Messrs. Albert H. Hall, Robert D. Russell and Moses E. Clapp, Atty-Gen., for respondent:

The protection of its streets is a duty imposed upon a municipality, and that end may be lawfully attained by requiring a license from all persons who use the streets for the transportation of heavy loads which tend to displace, crush and wear out the paving of the streets, or endanger the security of foot passengers; or by regulating the use of vehicles kept and used for hire upon the streets.

Horst & Bemis, Police Ord. §§ 229, 246.

Ordinances imposing a moderate license upon all vehicles used on the public streets have been sustained in the following cases:

St. Louis v. Green, 70 Mo. 562; *Charleston v. Pepper*, 1 Rich. L. 364; *Gartside v. East St. Louis*, 43 Ill. 47; *Cincinnati v. Bryson*, 15 Ohio, 625, 45 Am. Dec. 593.

Similar ordinances imposing license fees upon each car of a railway company have been sustained.

Frankford & P. Pass. R. Co. v. Philadelphia, 58 Pa. 119; *Johnson v. Philadelphia*, 60 Pa. 445.

The court has sustained an ordinance regulating the weight of loads which vehicles may carry through the public streets.

Nagle v. Augusta, 5 Ga. 546.

The ordinance applied to all vehicles which by the manner of their employment made the use of the public streets a direct source of profit or revenue to their owners.

St. Louis v. Woodruff, 4 Mo. App. 169. See *Howland v. Chicago*, 108 Ill. 496; *Knoxville v. Sanford*, 13 Lea (Tenn.) 545; *Brooklyn v. Breslin*, 57 N. Y. 591; *Hannibal v. Price*, 29 Mo. App. 280.

The power contained in the city charter under which this ordinance was enacted authorized this ordinance in terms as clear and unmistakable as could be framed in language. City Charter, chap. 4, § 37.

Mitchell, J., delivered the opinion of the court:

The ordinance under which the defendants were convicted was assumed to be enacted under the provision of the charter of the City of Minneapolis authorizing the city council "to license and regulate hackmen, draymen, expressmen and all other persons engaged in carrying passengers, baggage or freight, and to regulate their charges thereon." The ordinance provides that "no person or persons shall hire out, keep or use for hire, upon the streets of the City of Minneapolis, any vehicle of any description or name whatever, either for the conveyance of passengers, or for the conveying or transportation of goods, wares or merchandise, or other articles, from place to place within said city, without a license so to do." It is unnecessary to consider whether the evidence brings the case within the provisions of this ordinance; for, if it does, we are satisfied that the ordinance would not be authorized by the charter.

The provision of the charter referred to is a grant of police power designed to operate alone upon those who are engaged in business in the city as carriers of persons or property for hire,

and to so regulate them as to prevent extortion, imposition or wrong to strangers or others who employ them for that purpose. This is a rightful exercise of the police power, and one which has never been questioned. As both parties seem to have tried the case upon a somewhat erroneous theory of the law, the evidence as to the nature of defendants' business and their manner of conducting it is not, perhaps, as full or explicit as it might have been. But, as we understand it, the defendants were not at all engaged in business as carriers of persons or property; but they owned a number of wagons and teams, which they hired out by the day to those who had goods

or freight to transport, the hirer himself using and controlling the team, and the defendants charging him in proportion to the time he used it. In short, that the business of defendants was conducted precisely as that of a liveryman, the only difference being that in the latter the team and vehicle are usually hired for the purpose of being used in the transportation of persons, while in the former they were let to be used in carrying property. Thus viewed, the case comes within neither the letter nor spirit of such police regulations as are contemplated by the charter.

Judgment reversed.

KENTUCKY COURT OF APPEALS.

John GARGAN *et al.*, *Appts.*,
v.

LOUISVILLE, NEW ALBANY AND
CHICAGO R. CO.

(....Ky.....)

1. A person owning real property located on a street cannot be deprived, without compensation, of his outlet through such street to other streets in either direction by stopping up the street on either side between his property and the nearest intersecting street, although the part of the street discontinued is not in front of his land.

2. Closing a street between the land of an abutting owner and the nearest intersecting street, without furnishing another convenient and reasonable outlet in that direction, or making compensation for the damages, is taking private property without due compensation.

(October 17, 1889.)

A PPEAL from a judgment of the Louisville Chancery Court in a proceeding to close up a portion of a certain street. *Reversed.*

The facts are stated in the opinion.

Messrs. Dodd & Dodd, J. P. Gregory, Cary & Spindle and C. S. Grubbs for appellants.

Messrs. H. S. Barker and E. F. Trabue, for appellee:

In the absence of any constitutional restriction the Legislature has power to vacate streets and highways, or to invest municipal corporations with this power.

Dillon, Mun. Corp. 666.

An owner of land located on a street has no more interest in the street beyond the bounds of his lot than any other citizen, and has no private remedy for its vacation.

Brady v. Shinkle, 40 Iowa, 576; *Ellsworth v. Chickasaw Co.* 40 Iowa, 571; *Barr v. Oskaloosa*, 45 Iowa, 275; *Shaubut v. St. Paul & S. C. R. Co.* 21 Minn. 502; *Tate v. Ohio & M. R. Co.* 7 Ind. 484; *Smith v. Boston*, 7 Cush. 254; *Bailey v. Culver*, 12 Mo. App. 182; *Wilder v. De Cou*, 26 Minn. 11; *Polack v. San Francisco Orphan Asylum*, 48 Cal. 490; *Transylvania University v. Lexington*, 8 B. Mon. 27.

A public road belongs to nobody but the State, and when the government sees fit to

vacate it, the consequential loss, if there be any must be borne by those who suffer it, just as they would bear what might result by refusal to make it in the first place.

McGe's App. 6 Cent. Rep. 623, 114 Pa. 470.

Prior, J., delivered the opinion of the court:

The charter of the City of Louisville provides "that said city may at any time institute suit in the Louisville Chancery Court for the purpose of closing up any of its streets or alleys dividing any of the squares or lots thereof, and to such suit all the owners of ground on the square or lot shall be made defendants, and if all such defendants are competent to act for themselves, and shall consent to the closing up prayed for, then the court shall render the decree accordingly; but without such consent said court shall hear the proof made by the parties, and, if satisfied that the closing up would be beneficial to said city and not injurious to any party not consenting, shall render a decree closing up such street or alley.

An ordinance of the City of Louisville approved on the 5th of November, 1886, reads: "Be it ordained by the general council of the City of Louisville, that the city attorney be, and he is hereby, authorized and directed to enter the appearance of the City of Louisville to any proceeding that may be instituted in court to procure Columbia Street to be closed from the west side of Fourteenth Street to the west side of the grounds of the Louisville, New Albany & Chicago Railway Company, and to consent on behalf of said city in said proceeding to said portion of said street being closed."

In a few days after the passage of this ordinance the City of Louisville instituted the present action alleging that the closing up of said street as indicated in the ordinance would prove beneficial to the city, and would work no injury to the property holders thereon, reciting the ordinance by which the consent of the city is given, and asking the chancellor to inquire into the facts alleged, and if true that the street be closed, etc.

The Louisville, New Albany & Chicago Railway Company filed its answer and cross-petition against the present appellants, in which it unites with the City of Louisville in asking that Columbia Street be closed for the reason that

it would prove beneficial to the corporation and result in no injury to the property holders.

This is in fact a controversy between the corporation and the appellants whose property borders on Columbia Street, the attorney for the city consenting because he had been so directed by an ordinance of the city council.

The real estate owned by these appellants, and upon which they live, lies between 14th and 15th Streets, and Columbia Street is between Rowan and Duncan Streets.

There is much conflict in the testimony as to the injury sustained by these lot-owners in the event Columbia Street should be closed at the point and in the manner directed by the ordinance.

It is maintained by the Railroad Company or by the city that the mode of ingress and egress to and from this property is in no wise disturbed, and that such is the condition of Columbia Street where the obstruction complained of is said to exist, that travel in vehicles would be dangerous by reason of railroad tracks and the moving of cars that have already in effect, for the purposes of travel, closed this street; still it appears that those living on Columbia Street, and who wish to go east to the main or business part of the city, must first go west on Columbia to 15th Street, and then north or south to some other street and thence east to the center of trade.

The Legislature in giving this power to the city council has been careful to guard the interest of those owning property on a street, and before it can be closed it must appear that it will be of benefit to the city, and not injurious to the owner of the property bordering on the street.

While many of the witnesses say that the appellants ought not to complain because they are not injured, the fact exists that the ingress and egress to and from their houses to 14th Street is closed if this ordinance of the city is enforced, and, as a result, when they wish to travel east on foot or in a vehicle, they must go west, leaving 14th Street behind, and travel to 15th Street. That this works an inconvenience and injury to the lot-owners, who had in the first place but two modes of ingress and egress, is too plain a proposition to be controverted; and besides the fact of the injury is established upon testimony, not in effect disputed, as to the great inconvenience that must necessarily result to the owners of lots bordering on this street and lying between 14th and 15th Streets.

The case of *Bailey v. Culver*, found in 12 Mo. App. 175, is the strongest case referred to by counsel for the appellee in support of the right of the city to close this street either for its own use or for the benefit of the Louisville, New Albany & Chicago Railway Company.

In that case a deflected alley was substituted for a straight one, and the court in substance said that this change was as harmless to the absolute rights of the parties complaining as if the obstruction was on a street in any other part of the city.

The rule laid down in that case accords to the owner of a lot abutting on a public street a vested right to the easement, only in so far as his boundary line extends; and this right, says the court, "is as fully protected against invasion by legislative or municipal agencies as the

right to his home or his farm. But beyond the limits of contiguity with his lot, his rights in the easement are only those of a member of the public at large. If he could claim more than these at a longitudinal distance of fifty feet from his lot, he could claim the same at a distance of a mile or of ten miles."

The court, in the case cited, was using this argument in reference to the facts of the particular case upon the idea, as said in the opinion, that "other egress being still provided for them," etc.

If the owner is confined in his right to the enjoyment of the easement in so far as this lot borders on the street, it then follows that the owners of these lots located on Columbia Street between 14th and 15th Streets may be denied all access to their lots by closing the approach from each end of the street, and the only remedy is a resort to an indictment upon the idea that it constitutes a public wrong and not a private injury. Nor does it follow because this vested right to the easement exists to enable him to approach the streets running north and south in front of the square in which the property is located, that he can assert the same right in regard to all the other streets in the city. The owner has purchased his property located on a street where his approach and egress are unintercepted from the street adjoining. He has an outlet east and west and no other, and to close either or both is a private injury for which he should have redress, unless another way is created that affords him a like convenience; and the mere fact that it may be a few feet longer, or crooked instead of straight, is not such an invasion of his rights as would require the chancellor to interfere or give to him an action at law for damages.

In the case of *Smith v. Boston*, 7 Cr. 255, the owner of lots had sued the city for damages caused by the discontinuance of a part of Market Street. On the trial the court told the jury that the plaintiff was not entitled to damages because neither of his lots abutted on that part of Market Street discontinued. The case went to the Supreme Court of the State, and it was held, *Chief Justice Shaw* delivering the opinion, that the direction given by the trial judge was proper, and that the inconvenience, if any, sustained by the appellant, was not such an injury as entitled him to damages within the true intent of the law.

In that case the court said: "There is obviously a difficulty in laying down a general rule applicable to all cases, but as the petitioner had free access to all his lots by public streets, he was not entitled to recover, although by the change he was obliged to go somewhat further than he otherwise would," and the rule there laid down was followed by the Missouri case, that the damage was limited to some estate bounded on that part of the highway discontinued.

It must be conceded that the two cases cited sustain the judgment below as well as the views of counsel appearing in this court for the city; but after giving to each case the most careful consideration, we are unable to see why such an injury is not direct and specific in its character and easily distinguished from remote and contingent rights that, when disturbed, affect the entire public.

We are aware that the injury resulting from a public nuisance may be greater in degree to one citizen than another, and still the one who is the greatest sufferer must look to a public prosecution to suppress it; but where the damage is direct and immediate, such as depriving the owner of property bordering on a street or alley of the rights of ingress and egress by stopping up one end of the street or alley, and providing no other means of egress to other streets, the party injured is entitled to his action for damages, or the corporation, whether municipal or private, seeking to appropriate the street to its own use, must resort to the writ of *ad quod damnum* and under it compensate the owner for the injury sustained.

This court, since the opinion in the case of *Lexington & O. R. Co. v. Applegate*, 8 Dana, 289, was delivered, has universally held that this right of property in the streets is as inviolable as the property in the lots themselves, and the case of *Transylvania University v. Lexington*, 8 B. Mon. 27, settles the rights of the parties in this case.

In discussing the constitutional question presented in that case, Chief Justice Robertson, speaking for the court, said: "As a private right it must, like that of vicinage, be limited by its own nature and end; that is, chiefly by the necessity of access to and outlet from the ground of each proprietor."

This right, therefore, is not to be determined by the mere fact as to whether the property affected by the obstruction borders immediately on that part of the street obstructed; but, has the owner been deprived of convenient access to, and outlet from, his ground? And "Beyond some such general limit, as to each proprietor of ground in the city, the streets are altogether public highways, and subject like other public roads to alteration," etc.

It was expressly held in the *Transylvania University Case*, *supra*, that this vested right in the street was not co-extensive with all the streets and alleys of the city, but that "the owner of ground on any street in Lexington has a right, as inviolable as it is indisputable, to the common and unobstructed use of the contiguous highway, so far as it may be necessary for affording him certain incidental easements and services and a convenient outlet to other streets. And of this right the Legislature cannot deprive him without his consent or a just compensation in money."

If in the nature of a private right, and such is the doctrine recognized by this court, then any obstruction that deprives the property holder, in a case like this, of the legitimate use

of the street without his consent, or by due process of law, is in violation of his right of property.

We are not to be understood as holding that such is the nature of the right vested in the property holder, as to prevent any change or alteration of a street under proper legislative authority, where there is still left convenient and reasonable access to and outlet from the ground of the owner, for at least this is the right he acquires in the streets or alleys upon which his property is located. Nor is it a question as to the increased or diminished value of his property by reason of an improvement that causes the obstruction. His property might be increased in value by obstructing or closing the whole street, and still if the right of ingress and egress is taken from him wholly or partially, so as to work an injury, it is taking private property without first making just compensation. This right the citizen is entitled to, whether he travels on foot, horseback or in his carriage. It is as sacred to the one as the other, and the fact that teams are not used on the street is no response to the complaint made.

In the case of *Fulton v. Short Route Railway Transfer Co.*, 85 Ky. 640, it was held that "the construction of a railroad on a street was not *per se* an encroachment upon the rights of the abutting lot-owner, but, when deprived of the reasonable use of the street by its construction, he may apply to the courts for relief." It was there held that the construction of an elevated railroad, by reason of the manner of its elevation, was not an unreasonable obstruction. That case sustains the doctrine announced in this case, in holding that individual rights will not be disregarded that public benefits may accrue.

The consent of the city was given to the Railroad Company for the reason, no doubt, that the improvement to be made by the use of the street was regarded as beneficial to the city, and in this view of the case the appropriation by the Railroad was proper if the rights of others were not affected by it. As the case is here presented the city has deprived the appellants of their right to the proper and necessary use of the street by closing it for the benefit of the Railroad Company; and if closed by the city for its own purposes, the same constitutional question would arise. Neither could appropriate the street to the injury of the property holder without making just compensation.

The judgment below is reversed, with directions to dismiss the petition of the city and the answer and cross petition of the Railroad Company without prejudice.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Solon L. WILEY

v.

INHABITANTS OF ATHOL.

(....Mass.....)

1. A guarantee, by one furnishing a water supply, of a sufficient supply to run a certain number of hydrants at the same time and throw full streams over the highest buildings,

6 L. R. A.

is in the nature of a condition precedent, the performance of which is necessary to enable him to recover the agreed price for the use of the water for any period.

2. When a contract has been performed in a substantial part and the other party has voluntarily accepted and received the benefit of the part performance knowing that the contract is not being fully performed, the performance of the residue cannot be insisted on as a

condition precedent to payment for the benefits received from the part performance.

3. The difficulty of determining the measure of damages for failure fully to comply with the terms of a contract for a water supply will not prevent a substantial part performance from changing a warranty which constitutes a condition precedent into an independent covenant.

4. Damages suffered by individuals in their property by reason of failure to furnish a stipulated supply of water to a town cannot be taken into account in determining the damage to the town.

5. A recoupment may be made in a suit for the price of a water supply under a contract, of the damages sustained from plaintiff's failure to comply with the terms of the contract.

6. The records of the votes in a meeting of stockholders, reciting that the object of certain works was to improve the quality of water furnished by the corporation, are admissible to show the purpose of the works voted for, where at the time of this meeting the controversy in suit had not arisen.

(January 2, 1890.)

ON defendants' exceptions. *Overruled.*

This was an action in the Superior Court, Worcester County, to recover the rental of certain hydrants, furnished under a contract for a water supply.

The facts are stated in the opinion.

Messrs. Frank P. Goulding and S. P. Smith, for defendants:

The question whether the performance of a given stipulation in a contract is a condition precedent to recovery against the opposite party depends upon the intention of the parties, to be gathered from the language of the individual instrument itself. The order of the stipulations is of little, if any, consequence.

Howland v. Leach, 11 Pick. 151; *Knight v. New England Worsted Co.* 2 Cush. 271, 286; *Ritchie v. Atkinson*, 10 East, 295; *Seeger v. Duthie*, 8 C. B. N. S. 63; *Croockewit v. Fletcher*, 1 Hurlst. & N. 912; *Louber v. Bangs*, 69 U. S. 2 Wall. 728 (17 L. ed. 768); *Hare*, Cont. 587 *et seq.*

The cases where stipulations and covenants have been held independent, as going to only a part of the consideration, are distinguishable. Those cases are where two distinct and separable things are promised to be done, as two separate pieces of property to be conveyed for a gross sum, and one thing is done, or one piece of property conveyed, and the other not.

Portage v. Cole, 1 Wms. Saund. 320, note 4, rule 3; *Sampson v. Somerset Iron Works Co.* 6 Gray, 120; *Leighton v. Meserve*, 117 Mass. 50; *Knight v. New England Worsted Co.* *supra*.

The following cases are cited upon the general propositions of the dependency of the defendant's obligation to pay the price upon the performance of the stipulation in question:

Gates v. Ryan, 115 Mass. 596; *Hagood v. Shaw*, 105 Mass. 276; *Gardiner v. Corson*, 15 Mass. 500; *Kane v. Hood*, 18 Pick. 281; *Smith v. Brady*, 17 N. Y. 178; *McHurin v. Stone*, 87 Ohio St. 49; *Witherow v. Witherow*, 16 Ohio, 288; *Champlin v. Rowley*, 13 Wend. 258; *Harris v. Liggett*, 1 Watts & S. 301.

An act, the performance of which is stipulated for, cannot be apportioned.

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Ellen v. Topp, 6 Exch. 424; *Louber v. Bangs*, 69 U. S. 2 Wall. 728 (17 L. ed. 768).

It is a distinguishing characteristic of an independent covenant or stipulation that it may be paid for in damages.

Portage v. Cole, 1 Wms. Saund. 320, note (4), 1.

Messrs. W. S. B. Hopkins and Frank Bulkeley Smith, for plaintiff:

Lord Mansfield laid down the rule to be: "Where mutual covenants go to the whole consideration on both sides, they are dependent covenants, the one precedent to the other. But where they go only to a part, where a breach may be paid for in damages, then the defendant has a remedy on his covenant and shall not plead it as a condition precedent."

Boone v. Eyre, 1 H. Bl. 273, note.

In support of our contention we cite generally:

Knight v. New Eng. Worsted Co. 2 Cush. 271-283; *Couch v. Ingersoll*, 2 Pick. 292-300; *Hopkins v. Young*, 11 Mass. 302; *Tiveston v. Newell*, 18 Mass. 406; *Kane v. Hood*, 18 Pick. 281; *Howland v. Leach*, 11 Pick. 154; *West v. Platt*, 120 Mass. 421; *Boone v. Eyre*, 2 W. Bl. 1813; *Huntlocke v. Blacklocke*, 2 Saund. 156; *Bellini v. Gye*, L. R. 1 Q. B. Div. 188; *Campbell v. Jones*, 6 T. R. 570; *Ritchie v. Atkinson*, 10 East, 295; *Havelock v. Geddes*, Id. 555; *Davison v. Guynne*, 12 East, 381; *Storer v. Gordon*, 8 Maule & S. 308; *Fothergill v. Watern*, 8 Taunt. 576; *Bahn v. Burness*, 3 Best & S. 751; *Avery v. Willson*, 81 N. Y. 841; *Louber v. Bangs*, 69 U. S. 2 Wall. 728 (17 L. ed. 768); *Davison v. Von Lingen*, 118 U. S. 40 (28 L. ed. 885); *Norrington v. Wright*, 115 U. S. 203 (29 L. ed. 868).

In several of the above cases the provision was held to be dependent, and a condition precedent on the ground that it went to the essence of the contract; and in a charter-party case, *Norrington v. Wright*, *supra*, Gray, J., said: "In the contracts of merchants, time is the essence."

The town, after acceptance, paid the rental of the hydrants up to January, 1885, that is, for seven and a half years at least.

If the clause is nevertheless construed as a condition precedent, the defendants waived it by such acceptance and performance.

Avery v. Willson, 81 N. Y. 841; *Behn v. Burness*, 3 Best & S. 751; *West v. Platt*, 120 Mass. 421; *Thayer v. Wadsworth*, 19 Pick. 849; *Pust v. Dowie*, 5 Best & S. 20.

The acceptance of the works after trial, and the long performance of the contract on both sides, amount to an equitable estoppel *in pais* against the defendants.

Bigelow, Estoppel, 4th ed. 638.

The following cases are in point, arising as they do on all sorts of contracts, and on varied conditions of fact:

Blake v. Exchange Mut. Ins. Co. 12 Gray, 271, 272; *Hooker v. Hubbard*, 102 Mass. 239; *Daniels v. Edwards*, 72 Ga. 196; *Keyes v. Scanlan*, 68 Wis. 845; *New York L. Ins. Co. v. Eggleston*, 96 U. S. 573-577 (24 L. ed. 841, 843); *Phoenix Ins. Co. v. Doster*, 106 U. S. 30-33 (27 L. ed. 65, 66); *Globe Mut. L. Ins. Co. v. Wolf*, 95 U. S. 836 (24 L. ed. 887).

The evidence admitted against the defendant's objection was rightly admitted. It was

in the nature of the declaration by the company, which is the beneficial plaintiff here, accompanying its acts, which were relied on by the defendants as admissions of matter material to the defense.

Davis v. Coburn, 128 Mass. 377; *Pease v. Brown*, 104 Mass. 291; *Perry v. Porter*, 121 Mass. 523; *Thacher v. Phinney*, 7 Allen, 146.

Field, J., delivered the opinion of the court:

The counsel for the defendant at the argument waived the exception taken to the ruling of the court in respect to the quality and purity of the water required by the contract. The most important exception is to the refusal of the court to rule that the plaintiff, in order to recover, must prove, as a condition precedent, that during all the time covered by the declaration, a sufficient supply of water had been furnished "to run eight hydrants at the same time, and throw full streams of water over the highest building in either village in said Town," and to the instructions given upon this part of the case.

The presiding justice apparently was of opinion that the covenant to "furnish said Town at all times with a full and ample supply of water from said hydrants and from each and all of them for the purpose of extinguishing fires," was the principal covenant; and that the guaranty of a sufficient supply "to run eight hydrants at the same time, and to throw full streams of water over the highest building in either village in said Town," was an independent collateral stipulation; and that if the principal covenant or the guaranty had not been fully performed, this would not defeat the action, but the defendant could recoup any damages which it had suffered as a corporation by reason of the defective performance. The ruling that the guaranty was an independent stipulation was made "on a proper construction of the contract itself and on the evidence as to the practical construction put upon it by the parties themselves."

The evidence was that the contract was executed on June 5, 1876, the selectmen executing it in behalf of the Town, and was ratified by the Town at a town meeting held on June 18, 1876. Subsequently, at a town meeting held on July 7, 1877, the committee of the Town, on water supply, made a report, and the Town then voted to "accept the waterworks, so far as relates to their use by the Town for fire purposes in accordance with report of water committee," etc. This report stated that "the committee have located for use of the Town fifty hydrants, twelve of which are double and thirty-eight single; . . . that they have recently witnessed a trial of said hydrants with hose attached, nearly all of them proving satisfactory, and think," that by making certain changes which had been agreed upon, and "some other changes which the committee may deem desirable, . . . the Town will have a very good fire service," over that part of its territory which is described in the report. The committee recommends "that the Town by vote accept the said hydrants, under the terms of the before-mentioned contract."

There was evidence, that certain "changes had taken place in the works since the vote of 7th of July, 1877," which to an extent, greater

or less, improved "the efficiency of the works over and above what they originally were."

The Athol Water Company was incorporated under Stat. 1877, chap. 21, and it purchased all the property of the partnership, called the Athol Aqueduct Company, and "had succeeded to all the rights and obligations of said firm under said contract." This suit was brought for the benefit of the corporation by the surviving partner of the firm of the Athol Aqueduct Company, and "it was agreed that it was correctly brought as to parties." The defendant apparently has enjoyed the use of the water down to the date of the writ at least, which is December 21, 1887; and it has paid for the use of it down to January 1, 1885, a deduction from the agreed price having been made for the half year ending January 1, 1884. The amount claimed to have become due on July 1, 1885, has been adjusted in some manner by the parties, and the suit is prosecuted to recover for the use of the hydrants from July 1, 1885, to July 1, 1887.

The plaintiff offered evidence "that during the time alleged he furnished the defendant Town at all times with a full and ample supply of pure water from the hydrants referred to in the contract, and from each and all of them, for the extinguishing of fires, in accordance with the interpretation of said contract adopted by the court." The defendant offered evidence "that the supply of water so furnished was not, during some or all the time covered by the claim, full and ample in quantity or pure in quality for the purpose aforesaid, and according to the construction of the contract adopted at the trial." There was also evidence "that the hydrants would not at any time during the time covered by the claim comply with the provision as to throwing eight streams of water at the same time over the highest building in the village."

If the word "guarantee," in the contract, was used in any technical sense, it must have been used for warranty or warrant, because there is no contract of a third person which is guaranteed. If it be taken to mean the same as warrant, then the agreement is to warrant that the specified quantity and head of water shall be furnished.

It is said that the English courts make a distinction between a warranty in a contract of sale of a specific chattel when the title passes unconditionally by the contract, and the warranty is collateral to the sale, and a warranty in an executory contract of sale when the title does not pass by the contract. In the latter case, it is said that by the English law the buyer can refuse to receive and accept the chattel if it does not conform to the warranty, but that in the former case he cannot, although he may recover or recoup his damages for breach of the warranty. By our law the buyer can rescind a contract for breach of warranty if the title has passed, and can return the chattel or refuse to accept it; and if the title has not passed by the contract, he can refuse to accept the chattel if it does not conform to the contract. See *Bryant v. Isburgh*, 18 Gray, 607; *Morse v. Brackett*, 98 Mass. 205.

In an executory contract to sell and deliver in the future certain things described in the contract, the things to be delivered must be

such as they are described, and a warranty of kind, quantity or quality in such a contract is only an agreement that the things delivered shall be of the specified kind, quantity or quality; and if they are not, the buyer can refuse to accept them, because they are not what he has agreed to buy. This is not the rescission of an executed contract by the buyer, but the non-performance of an executory contract by the seller.

In the case at bar the guaranty may be considered either as defining what should constitute "a full and ample supply of water," or as fixing a minimum below which the supply should not be permitted to fall; but upon either construction, the plaintiff must furnish the amount guaranteed in order to perform his part of the contract. It is true that by the contract the Aqueduct Company was to furnish hydrants and lay down water pipes and keep the pipes and works connected with them in repair; but as these things were necessary in order to enable the company to furnish the water, it cannot be held that the defendant would be liable to pay anything for these if the water was not furnished. The furnishing of the water was the principal thing to which everything else was subordinate. See *Bacon v. Parker*, 137 Mass. 309.

We agree, therefore, with the defendant's counsel in his contention that the guaranty was in its nature a continuing condition precedent, the performance of which was necessary to enable the plaintiff to recover semi-annually the price agreed to be paid for the use of the hydrants.

But although conditions precedent must be performed and a partial performance is not sufficient, yet, when a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract was not being fully performed, the latter may thereby be precluded from relying upon the performance of the residue as a condition precedent to his liability to pay for what he has received and may be compelled to rely upon his claim for damages in respect of the defective performance. *White v. Beeton*, 7 Hurlst. & N. 42; *Behn v. Burness*, 8 Best & S. 751; *Carter v. Scargill*, L. R. 10 Q. B. 564; *Pust v. Dowie*, 5 Best & S. 20; *Jonassohn v. Young*, 4 Best & S. 296; *Mill Dam Foundry v. Hovey*, 31 Pick. 417, 448; *Norrington v. Wright*, 115 U. S. 188 (29 L. ed. 366); *Heilbutt v. Hickson*, L. R. 7 C. P. 488. See *Maryland F. & M. Co. v. Lorentz*, 44 Md. 218; *Sampson v. Somerset Iron Works Co.* 6 Gray, 120; *Kenworthy v. Stevens*, 132 Mass. 123; Benjamin, Sales, 4th Eng. ed. p. 547; Leake, Cont. 664.

The foundation of this rule undoubtedly is that it would be unfair that a party should receive and keep a part of what he has bargained for and pay nothing for it, because he has not received the whole. The technical reason given is that a covenantor or promisee must be held to have dispensed with the performance of a condition precedent, as such, if, with knowledge that the condition was not being fully performed, he treats the contract as continuing and takes the benefit of a part performance. There are difficulties in the application of the rule, particularly in determining what consti-

tutes such a part performance as will change the condition precedent into an independent agreement. It seems that the performance must be of a substantial part of the contract and that the acceptance must be under such circumstances as to show that the party accepting knew or ought to have known that the contract was not being fully performed.

There is a further difficulty suggested in the present case, namely, that the contract is of such a nature that there is no satisfactory measure of damages if the full and ample supply of water guaranteed was not furnished. If a full and ample supply was furnished, which yet did not come up to the guaranty, the damages could not be large. If the supply was not full and ample and not up to the guaranty, the Town, unless it had precluded itself by an acceptance of the works, could at any time have given notice to the Aqueduct Company and have refused thereafter to receive the water and to accept a part performance of the contract. If the supply, such as it was, was a substantial benefit to the Town, and the Town continued to receive and use it knowing that it was less than the company had agreed to furnish, the Town ought to pay something for what it has received.

There is a provision in the contract that after the expiration of fifteen years, and within the term of twenty-five years, the company will sell and transfer its rights, title and interest in the reservoir and in the pipes and other property connected therewith, to the Town, at a valuation to be determined by three competent and disinterested men. The works are property and have been treated by the parties as property, the value of which can be estimated. We have no doubt that the value of the use of the hydrants by the Town could be estimated by a jury, if the contract, instead of defining the price, had provided that a reasonable price should be paid. If the Town has received a supply of water, which was found to be useful for the purposes of extinguishing fires, but which was less than the supply which the company agreed to furnish, we have no doubt that it would be competent for a jury to determine the difference in value between the supply actually furnished and that agreed to be furnished. If the Town had paid the company the stipulated price, and then had brought suit to recover damages because the supply of water had not been what the company had agreed to furnish, it cannot be said that it would be impossible to estimate the damages. This case, we think, cannot be taken out of the rule we have stated on the ground that damage for the breach of a contract could not be estimated if the guaranty is regarded as an independent agreement.

Although the exceptions do not show that the company furnished, during all the time alleged, a full and ample supply of water for extinguishing fires, yet we think it appears that the supply was such as to be substantially useful for that purpose, and was received and used by the Town with knowledge of the deficiency in the supply, if there were a deficiency, and without any intimation to the Aqueduct Company or to the Water Company that it refused to receive and accept the water in part performance of the contract. On the facts which appear, we think that the court was right in

holding that the guaranty during the time covered by the declaration must be treated as having become in effect an independent agreement for the breach of which damages might be recouped in the action.

The measure of damages was the difference between the value of the supply of water actually furnished and of that which, by the contract, should have been furnished, estimated with reference to the uses for which it was furnished. Upon the question of these damages, the exceptions do not state that the defendant offered any evidence except that the supply furnished was not full and ample, and was not equivalent to the amount guaranteed. The ruling that the damages suffered by individuals in their property, by reason of the failure to furnish the stipulated supply, could not be taken into account, was undoubtedly correct. The court also ruled that the Town might "recoup any damages" it had suffered as a corporation by reason of the failure to furnish a full and ample supply, and also that it might "avail itself of the breach of the so-called guaranty and of other independent stipulations in the contract to be performed by the plaintiffs in reduction of damages." This ruling is correct as far as it goes. If the defendant desired a more specific statement of the nature of the damages which might be recouped, or of the evidence which would be competent to prove such damages, we think that the defendant should have offered evidence and requested suitable rulings.

It appeared in evidence that in 1882 or 1883 the Athol Water Company laid water pipes towards Cut-Throat Brook, and in 1884 procured the passage of Stat. 1884, chap. 189, and afterwards erected a pumping station at Silver Lake and "connected it with its aqueduct, but soon abandoned it." The defendant's counsel in reply to an inquiry by the court stated that he should contend that these acts were an admission by the corporation and by the plaintiff Wiley, who was then its president, of the insufficiency of the supply as to quantity and quality, then being furnished to Athol under the contract."

The plaintiff's counsel offered in evidence the records of the meeting of the stockholders of the corporation, "to show by the votes then passed, that the object of laying the pipes towards Cut-Throat Brook, and of taking the water of Silver Lake, was to improve the quality, and not to increase the quantity, of the water." The court admitted the record of the votes "which recited in substance that the object of said acts was to improve the quality of the water."

The acts of the corporation were not the acts of its president, and we are not clear that evidence of these acts was competent for the purpose contended for by the defendant; but if it was, we cannot say that the records were not properly admitted to show the purpose for which these acts were done. The votes contained a declaration of the purpose of the corporation in ordering the acts done. The declaration of the purpose is a part of the doings of the corporation by the authority of which the acts were done. It does not appear that at the time these votes were passed, the present controversy had arisen. Apparently it is the 6 L. R. A.

common case of declarations accompanying acts which tend to explain or qualify the meaning of the acts, and which are considered as a part of the *res gesta*.

Exceptions overruled.

P. S. MURRAY *et al.*

v.

Peter ROBERTS.

(....Mass....)

1. Foreign creditors who acknowledge the receipt of a "dividend in matter of composition" in case of a certain insolvent, thereby recognize, ratify and submit to the insolvency proceedings so as to become bound thereby in the same manner as if they were residents of the State.

2. A claim is proved within the meaning of Mass. Pub. Stat., §§ 80 and 81, relating to the discharge of claims proved in insolvency proceedings, when the creditor, with full notice of all that has been done, has accepted a dividend declared thereon although the only proof of the claim and the amount thereof was the schedule of creditors filed by the insolvent.

(January, 1890.)

APPEAL from a judgment of the Superior Court, Worcester County, in favor of defendant on agreed facts, in an action for amount due on account. *Affirmed.*

The defense was a discharge in insolvency proceedings.

The facts are stated in the opinion.

Messrs. Arthur M. Taft and William A.

Gile, for plaintiffs:

The proof of the claim is the basis of jurisdiction of the court of insolvency to discharge a debt of a citizen of another State.

Clay v. Smith, 28 U. S. 3 Pet. 411 (7 L. ed. 723).

The acceptance of a dividend after the discharge is granted does not give jurisdiction to the court before the discharge is granted, unless the claim is proved.

Ibid.

In *Choteau v. Richardson*, 12 Allen, 365, the court decides that a resident of another State can recover judgment and have the execution

NOTE.—*Insolvency, foreign creditors bound by Composition Act.*

That foreign creditors waive their right to object that as to their debt the law relating to composition with creditors is unconstitutional, see *Bigelow v. Pritchard*, 21 Pick. 169; *Fisher v. Currier*, 7 Met. 424; *Gilbert v. Hebard*, 8 Met. 129; *Clark v. Hatch*, 7 Cush. 456; *Marsh v. Putnam*, 8 Gray, 551.

In so far as the cases of *Kimberly v. Ely*, 6 Pick. 440, and *Agnew v. Platt*, 15 Pick. 417, uphold the doctrine that a foreign creditor who voluntarily proves his debt and receives his dividend in insolvency proceedings is not barred by the discharge, they are in conflict with the later decisions. See *Beal v. Burchstead*, 10 Cush. 523.

The debt referred to in Stat. 1884, chap. 236, § 2, is the original debt; and when this cannot be enforced by suit, that which is purely incidental thereto, or which may be made incidental by a decree of the court, cannot be enforced. *McKeown v. Gurney*, 6 New Eng. Rep. 566, 147 Mass. 195.

run against the goods and estate of the debtor, after the discharge of the debtor.

In *Journey v. Gardner*, 11 Cush. 355, the court says a nonresident's debt is discharged by the fact that the creditor has voluntarily proved his debt and become a party to insolvency proceedings under the laws of this State, citing *Clay v. Smith*, *supra*.

We do not overlook the decision in *Eustis v. Bolles*, 6 New Eng. Rep. 82, 146 Mass. 413, in which this court has more recently considered the effect of the acceptance of a dividend in composition upon the constitutional rights of the creditor whose contract was made before the Composition Act was passed.

This is the construction of the Composition Act as affecting citizens of this State who proved their claims and took a dividend therefor. It does not cover the point raised in this case, of a nonresident who has not proved his claim; and the same is true of *McKeown v. Gurney*, 6 New Eng. Rep. 566, 147 Mass. 192.

In *Sylvester v. Dansiger*, 32 Fed. Rep. 1, it was decided that a nonresident, who comes into court to enforce a vendor's lien in the State and court wherein the insolvency proceedings are held, and obtains the sum due thereon, does not thereby become a party to the insolvency proceedings, so as to be concluded by the debtor's discharge.

Messrs. Rice, King & Rice, for defendant:

It must be admitted that the plaintiffs, being residents of another State, cannot be deprived of their right to sue on the contract with the defendant without their consent.

Guernsey v. Wood, 130 Mass. 503, 504.

The case of *Eustis v. Bolles*, 6 New Eng. Rep. 82, 146 Mass. 413, is exactly in point.

The case of *Clay v. Smith*, 28 U. S. 3 Pet. 411 (7 L. ed. 723), is also in point.

Knowlton, J., delivered the opinion of the court:

It has repeatedly been decided that a resident of another State who voluntarily submits himself to the jurisdiction of a court of insolvency, by proving his claim, or otherwise participating in the proceedings, waives his right to object that the Legislature of the State which created the court has no constitutional right to pass a statute which will discharge his debt. *Clay v. Smith*, 28 U. S. 3 Pet. 411 (7 L. ed. 723); *Journey v. Gardner*, 11 Cush. 355; *Eustis v. Bolles*, 6 New Eng. Rep. 82, 146 Mass. 413.

The plaintiffs were duly notified of the pendency of insolvency proceedings against the defendant in this Commonwealth, and of his proposal of composition with his creditors, and of the order of a dividend on the offer of composition; and they wrote to the register of insolvency requesting him to remit the amount of their dividend. On his refusal to send it without having their receipt for it, they sent him a receipt which expressly acknowledged that they received the amount as a "dividend in matter of composition, case of Peter Roberts, insolvent debtor."

This was a recognition by the plaintiffs of the insolvency proceedings, and a ratification of them and submission to them, so far as they purported to make the plaintiffs parties entitled to share in the distribution of assets. The case

is brought within the principle laid down in *Eustis v. Bolles*, *supra*.

The plaintiffs could not avail themselves of the advantages resulting from the proceedings in insolvency without submitting themselves to the consequences which the law imposes on such creditors. If, therefore, by the terms of our Statute, their debt is discharged, the Statute is as binding upon them as if they had been residents of this Commonwealth.

It is argued that a discharge in insolvency does not in terms affect foreign creditors unless they have proved their claims, even though, under Stat. 1884, chap. 236, they have participated in the proceedings, and have accepted a dividend. And it is said that the plaintiffs did not prove their claim. The language of the discharge covers all "debts, which have been or shall be proved" against the debtor's estate, thus including debts proved after the discharge is granted. Pub. Stat. chap. 157, § 80.

Until the passage of Stat. 1884, chap. 236, none but creditors who had proved their claims could receive a dividend, and a claim was said to be proved only when it had been allowed by the court, upon presentation supported by affidavit in the form required. It is only in that sense that the word "proved" is now used in most parts of the Statute. But the question arises whether, in the application of §§ 80 and 81 of Pub. Stat., chap. 157, to a case like the present, it is not used in a broader sense. In construing the discharge, can the claim of the plaintiffs be said to have been proved against the defendant's estate? That was done which obtained for them a dividend from the estate. The presentation of their claim by the defendant in his schedule, and their acceptance of the benefits accruing under Stat. 1884, chap. 236, was equivalent in its results to a formal proof of their claim under the former Statute. To hold that their claim was not proved, would be to permit a foreign creditor to have all the advantages open to creditors residing in our own State, without making them liable to have their debts discharged. It seems to us that, when the defendant, under Stat. 1884, chap. 236, presented to the court a schedule of his creditors containing the name and residence of the plaintiffs, and the amount of their debt; and when, under the law, they were notified of all the proceedings looking to a composition with the creditors and to a discharge of the defendant; and when the schedule was treated by the court as a sufficient verification of their debt to warrant a dividend upon it; and when the dividend was made and deposited in the registry of the court for the plaintiffs and they were notified of it; and when they afterwards, knowing all that had been done, availed themselves of the proceedings and accepted the dividend,—their debt must be deemed to have been proved within the meaning of §§ 80 and 81 of Pub. Stat., chap. 157.

Such a construction of these sections is in accordance with the true spirit and intent of the law, and gives this part of the Statute a proper application to facts which could not exist under the law in force at the time it was enacted.

On the facts agreed, the plaintiffs' debt is barred by the discharge in insolvency.

Judgment affirmed.

A. C. SHAW, Admr. *de bonis non*,
v.

Loman A. SMITH, Admr.

(....Mass....)

A note payable to the "estate" of a certain person, deceased, or order, is not invalid as a promissory note for want of a sufficiently definite payee.

(November 27, 1889.)

ON plaintiff's exceptions. *Sustained.*

This was an action brought in the Superior Court, Hampshire County, by A. C. Shaw, as administrator *de bonis non* of the estate of F. B. Bridgman, against Loman A. Smith, administrator of the estate of Eugene Bridgman, upon the following described instrument:

\$126.00. Belchertown, July 19, 1878.
For value received, I promise to pay F. B. Bridgman's estate or order one hundred twenty-six dollars on demand, with interest annually.
Eugene Bridgman.

Witness: A. Bridgman.

Judgment was given by the court, sitting without a jury, in favor of defendant, on the ground that the instrument was not a promissory note and was therefore barred by the Statute of Limitations; whereupon plaintiff excepted.

Mr. R. W. Lyman, for plaintiff:

That is certain which can be made certain. Broom, Legal Maxims, 7th ed. 623.

This rule has been applied to sustain a deed, in—

Hamilton v. Pitcher, 53 Mo. 834; *Hogan v. Page*, 69 U. S. 2 Wall. 607 (17 L. ed. 854); *Ready v. Kearsley*, 14 Mich. 225; *Shaw v. Loud*, 12 Mass. 447.

The payee may be supplied by necessary and natural intentment.

Ree v. Randall, Russ. & R. C. O. 195; Chitty, Jr. Bills, 838.

A bill addressed, not to any particular person, but merely to a particular house, will be sufficiently certain.

Gray v. Milner, 8 Moore (C. P.) 90, 8 Taunt. 739.

A mistake in the name of the intended payee, as giving him the wrong description, if there is no doubt who was intended, will be immaterial.

Ree v. Boz, 6 Taunt. 325.

If the instrument furnishes the means by which the payee can be certainly ascertained, it is sufficient; therefore if a note be made payable to the administrator of the estate of A, it will be good.

Adams v. King, 16 Ill. 169; *Moody v. Threlkeld*, 18 Ga. 55.

In *Bacon v. Fitch*, 1 Root, 181, a note payable "to the heirs of A," who was then alive, was held sufficient.

If the instrument in suit is not a promissory note at common law, it is such within the meaning of the Statutes, chap. 197, the term "promissory note" there being equivalent to the words "any note in writing," those being the words first used (Stat. 1786, chap. 52, § 5); and no change in the meaning was intended by the use of the term "promissory note."

Grinnell v. Baxter, 17 Pick. 886; *Com. v. Whitney*, 1 Met. 21; *Sibley v. Phelps*, 6 Cush. 172; *Daggett v. Daggett*, 124 Mass. 149; *Almy v. Winslow*, 126 Mass. 342; *Sigourney v. Severy*, 4 Cush. 176; *Pitts v. Holmes*, 10 Cush. 98.

Mr. C. L. Gardner, for defendant:

There is no sufficiently designated payee in the instrument declared on, and therefore it lacks one of the essential elements of a promissory note.

Considering the variety of meanings which attach to the word "estate," and the uncertainty on the face of the instrument as to whether F. B. Bridgman was living or dead at the time it was made, it is unreasonable to contend that the words "F. B. Bridgman's estate" necessarily mean his personal representatives.

1 Daniel, Neg. Inst. § 100; 1 Parsons, Notes and Bills, p. 34; 1 Wait, Act. and Def. art. 8, p. 539; *Lyon v. Marshall*, 11 Barb. 241; *Tittle v. Thomas*, 80 Miss. 122; *Bennington v. Dinmore*, 2 Gill, 348; *Bowles v. Lambert*, 54 Ill. 287.

C. Allen, J., delivered the opinion of the court:

After providing that the ordinary limitation of actions of contract shall be six years, it is enacted in Pub. Stat., chap. 197, § 6, that "none of the foregoing provisions shall apply to an action brought upon a promissory note signed in the presence of an attesting witness, if the action is brought by the original payee or by his executor or administrator;" and by § 7, such an action may be brought within twenty years. The defendant contends that the instrument sued on is not a promissory note, for want of a sufficiently definite payee, and he cites two decisions which sustain him in this contention: *Lyon v. Marshall*, 11 Barb. 241; *Tittle v. Thomas*, 80 Miss. 122.

But we think this is too strict an application of the doctrine that the person to whom a note is payable must be clearly expressed. It is an equally general rule that it is sufficient if there is in fact a payee, who is so designated that he can be ascertained. Story, Bills and Notes, § 86.

The illustrations of the manner in which this rule has been applied are numerous. Thus, written promises have been held to be valid notes or bills of exchange, though made payable to bearer (*Grant v. Vaughan*, 3 Burr. 1516), or to persons designated simply by their office, without naming them; *e. g.*, the treasurer of the First Parish in H., or his successor in said

NOTE.—Commercial paper, payable to estate.

It has been held permissible in commercial paper to make it payable to a deceased person's estate, inasmuch as this would be equivalent to making it payable to his personal representatives. *Hendricks v. Thornton*, 45 Ala. 300; *Tiedeman*, Com. Paper, 39.

Such description of the payee is sufficiently clear, for, under the Statutes of Administration, all choses 6 L. R. A.

in action belonging to the estate of a deceased person are payable to the personal representatives. But the weight of authority is against this view. *Tittle v. Thomas*, 80 Miss. 122; *Bowles v. Lambert*, 54 Ill. 287; *Lyon v. Marshall*, 11 Barb. 243.

Commercial paper may also be made payable to "the heirs of A," or to "A or his heirs," even though A should then be alive. *Bacon v. Fitch*, 1 Root, 181; *Knight v. Jones*, 21 Mich. 161.

office (*Buck v. Merrick*, 8 Allen, 123); the trustees of a particular church (*Noxon v. Smith*, 127 Mass. 485; *Holmes v. Jaques*, L. R. 1 Q. B. 376); the manager of the Provincial Bank of England (*Robertson v. Sheward*, 1 Man. & G. 511); the treasurer general of the Royal Treasury of Portugal (*Soares v. Glyn*, 8 Q. B. 24); the executors of the late W. B. (*Hamilton v. Aston*, 1 Car. & K. 679); the administrators of a particular estate (*Moody v. Threlkeld*, 13 Ga. 55; *Adams v. King*, 16 Ill. 169); the trustees acting under the will of the late Mr. W. B. (*Meggison v. Harper*, 2 Crompt. & M. 822); also to the heirs of a particular person, even though that person was living at the time (*Bacon v. Fitch*, 1 Root, 181; *Lockwood v. Jenup*, 9 Conn. 272; *Cox v. Beltzhoover*, 11 Mo. 142); to a business name adopted by the person in interest (*Bryant v. Eastman*, 7 Cush. 111; *Brown v. Parker*, 7 Allen, 337); and to the steamboat *Juda* and owners. *Moore v. Anderson*, 8 Ind. 18.

So a bill which was indorsed to a person who was already deceased was held valid in the hands of his legal representatives. *Murray v. East India Co.* 5 Barn. & Ald. 204.

More literally in point in the present case, and directly opposed to the two decisions relied on by the defendant, are *Peltier v. Babillion*,

45 Mich. 384, where a written promise, payable to the order of J. V. Mebling's estate, was held to be a good note, and *McKinney v. Harter*, 7 Blackf. 885, which is substantially similar. See also *Storm v. Stirling*, 8 El. & Bl. 832, *S. O. sub nom. Cowie v. Stirling*, 6 El. & Bl. 833; *Yates v. Nash*, 8 C. B. N. S. 561, where a promise to the officer for the time being of a society was held too indefinite, though the general rule as applied in other cases was recognized.

In the case before us the promise was to pay to F. B. Bridgman's estate or order. He was dead, and administrators had been appointed. There could be no doubt that the promise was intended to be one of which the administrators could avail themselves. They were in existence, and were ascertainable. If the administrators of his estate had been made the payees, without naming them, there can be no shadow of question that it would have been sufficient. It savors of too much refinement to hold that the instrument was not a valid promissory note for want of a sufficiently definite payee.

This is the only question presented by the bill of exceptions.

Exceptions sustained.

MICHIGAN SUPREME COURT.

Nelson MATHEWSON *et al.*

v.

John W. HOFFMAN *et al.*, *Appts.*

(....Mich.....)

One who has taken the water of a stream from the original channel, and has continued to divert and enjoy it for a period beyond the limit of the Statute of Limitations as to real actions, cannot afterwards be permitted to restore it to its original state when it will have the effect of destroying or materially injuring the property through or by which it formerly flowed.

(November 3, 1889.)

APPEAL by defendants from a decree of the Circuit Court for St. Joseph County in favor of complainants in a suit to enjoin defendants from returning to its old channel the water of a certain stream which had been diverted therefrom and made to run in a new one. *Affirmed.*

The case is very fully stated in the opinion. *Messrs. Howell, Carr & Barnard* for defendants, appellants.

Messrs. H. P. Stewart and Dallas Boudeman, for complainants, appellees:

The party whose lands are relieved of water diverted therefrom obtains by prescription or adverse user the right to have the waters kept off his lands.

Delaney v. Boston, 2 Harr. (Del.) 489; *Middleton v. Gregorie*, 2 Rich. L. 688; *Woodbury v. Short*, 17 Vt. 387; *Belknap v. Trimble*, 8 Paige, 605; *Shepardson v. Perkins*, 58 N. H. 354; *Ford v. Whillock*, 27 Vt. 265; *Shields v. Arndt*, 4 N. J. Eq. 284; *Norton v. Volentine*, 6 L. R. A.

14 Vt. 239; Washb. Easem. 889; Gould, Waters, § 340; Angell, Watercourses, § 204; *Smith v. Adams*, 6 Paige, 441.

On account of the danger to the health of the complainants and their families this injunction should be allowed to stand.

White v. Forbes, Walk. Ch. (Mich.) 112; *Treat v. Bates*, 27 Mich. 890; *Robinson v. Baugh*, 31 Mich. 290.

Long, J., delivered the opinion of the court:

The bill in this cause is filed by ten complainants against defendants, Dentler and Hoffman, to perpetually enjoin them from removing a certain dam, and thus cause the waters held back by the dam from flowing across the farming lands of complainants. The bill alleges, substantially, that the complainants are severally the owners of certain parcels of real estate particularly described in the bill of complaint, and situated in the Township of Mendon, St. Joseph County, and State of Michigan, and at the time of commencement of this suit were occupying respectively the premises so owned by them. That prior to the year 1844 a natural and perpetual stream of water, called the "Little Portage River," crossed from an easterly direction over the parcels of land owned by them, and emptied into the "Big Portage River," so called, on section 24, in Park Township, which was a point westerly of the lands owned by the complainants. That on the margin of said stream, and across the several parcels of land now owned by the complainants, was a large amount of bottom land, which, while the stream ran through it, was wet and cold by reason of the waters of the streams flowing over and percolating through

such bottom lands, and thereby said bottom lands were made worthless, and could not be made valuable for farming or any other purpose, and that no crops could be raised thereon by reason of the water so percolating through and flowing on said lands; and by reason of said wet lowlands along said stream the public health, and especially the health of the persons living near the same, was detrimentally affected.

About 1844 one Elisha Doane caused to be dug a race from the Little Portage River to the St. Joseph River—the St. Joseph River lying one mile south of where the race intersected the Little Portage River—and this point of intersection was east and up the stream from the lands now owned by the complainants. That after Doane had dug the race he constructed a dam across the Little Portage River at a point where the race intersected it, and stopped the flow of the water of the Little Portage River in its original channel, and diverted the waters of the stream into the artificial channel dug by him. This diversion of the waters of the Little Portage River was made by Doane for the purpose of creating a water power at the Village of Mendon, through which it passed. After the diversion Doane constructed a dam near the St. Joseph River, and took the waters of the Little Portage River through the race, as above stated, and made a waterpower at this point, and on the waterpower mills were built, among others, a flouring-mill, and this, with other machinery, was operated uninterruptedly from 1844 to 1882, when the dam broke away, and has not since been rebuilt; but that the water continued to be diverted from the Little Portage River down through the old race and through the old mill-pond ever since 1844, and still continues. That Doane, and those claiming under him, continued, from a period since 1844 to the present time, to occupy, use and divert the water from the Little Portage River, and have continually diverted it through said race, and thereby removed it from flowing across said lands owned by the complainants, and it has not flowed across the same for a period of about forty-three years prior to the time of filing the bill of complaint. That the diversion of the water of the Little Portage River by said Doane, and those claiming under him, continued peaceably and uninterruptedly, and by the tacit consent of all the parties interested, for more than forty years last past; and that, by the long, peaceable and uninterrupted diversion of said stream of water from flowing across the lands owned by the complainants, their lands have become, and are now, freed, relieved and unincumbered in law from the flowing of the waters of said stream across said lands; and any and all rights of any other persons, which might otherwise have existed, to have the stream of water flow across said lands, have become barred, concluded and estopped by reason of the great length of time during which said diversion has continued.

That complainants became the owners of their several parcels of land since the diversion of the water of the Little Portage River, and they purchased their lands knowing that no stream of water incumbered them, and believing that said stream of water would remain di-

verted in the same manner that it has been so long diverted. That by reason of the diversion of said stream of water from their said lands the low bottom lands adjoining the original bed of the stream have become dry, and in a good condition for cultivation. That complainants have been to considerable labor and expense in preparing and fitting said lowlands upon said respective premises for cultivation, and that they are now, and for years have been, cultivating a considerable portion of the same, raising crops thereon, and such lands have now become the most valued portion of their farming lands; and that while, with the water on, they were worthless, they are now worth \$50-per acre and upwards, and the amount of such lands owned by each aggregate about 380 to 400 acres. That all of their said lands are similarly located to the old channel of the Little Portage River, and would be similarly affected by the return of the water of the stream to the old channel. That they, and those under whom they claim, have uninterruptedly, and for more than forty years last past, enjoyed and occupied their respective parcels of land freed and unincumbered of the waters of said river. That since the diversion of the waters of the Little Portage River, at a point known as "Parkville," about one mile below the point where the Little Portage River originally emptied into the Big Portage, a dam and waterpower has been erected, and on this waterpower several years ago was erected a flouring mill, and which since has been operated, and the same is now being operated, by Franklin Dentler, one of the defendants. That since the diversion of said Little Portage a dam and waterpower were erected across the Big Portage River about eight miles below Parkville waterpower, and a flouring mill was erected on that, and the same is being used by the defendant John W. Hoffman. That said Dentler and Hoffman, defendants, have recently conceived a scheme of diverting the water of the Little Portage River from and out of the channel through which it has so long flowed, as above stated, and to turn back the stream of water again into the old abandoned channel, upon and across the lands of complainants. That defendants, just before the filing of the bill of complaint in this cause, had notified complainants that they proposed to turn the waters back into the old channel as above stated. That the defendants insisted that they had the right to turn the same back, and to use the water for their waterpowers, and they threatened to do so, and would do so, unless they were restrained by injunction.

Complainants further state that the turning of the waters of said stream into the original channel is threatened by defendants, and if done that it will result in irreparable injury to them. That if the waters are so caused to flow in the old channel, across said lands, the same would cause the bottom lands belonging to complainants to become wet and cold, and render them worthless for farming purposes, and they would be valueless for any purpose; and that the crops growing upon said lands would be destroyed, and complainants would be deprived of the use and value of said bottom lands, and each would be damaged more than \$100. That the lands adjoining are low, and

the flow of water is but slight, and as a result the lands would be wet and overflowed by the percolation of the water. That, during the time the old channel has not been used, vegetable matter has accumulated and grown up thereon, and to return the water into the old channel again would result detrimentally to the public health, and especially to the health of the complainants, who reside near the old channel. That the air would thereby be filled with malaria and poisonous gases and foul odors, and complainants' health and comfort thereby detrimentally affected, and that this would continue from year to year, while said waters were so allowed to flow. The bill alleges that the acts threatened by the defendants are unlawful, and against the complainants' rights, and detrimental to the public health generally, and especially to the health of complainants, who live so near the lands thus to be affected. The prayer of the bill is that the defendants be required to answer the bill, but not under oath, and that it be decreed that the complainants' lands above described be freed and unincumbered of and from the waters of the Little Portage River, and that the same cannot be caused to flow in said old channel, across complainants' lands, by the defendants, and that complainants' lands are freed from any servitude of the waters of said Little Portage River that now flow in the above-mentioned channel. That the defendants be perpetually enjoined and restrained from diverting the flow of the water from the Little Portage River, now flowing through the artificial channel, and from causing the same to flow across complainants' land through the original bed of the stream, and from causing any of the waters whatsoever to flow on and across the lands of the complainants; and they also pray for general relief in the usual form.

On filing the bill a temporary injunction was issued December 30, 1887. The answer leaves the complainants to prove the title of the lands claimed by them, and the character and quality of the bottom lands; admits the existence of the Little Portage River; does not deny the diversion of the stream, but says, if the race was dug, it did not obstruct the further flow of the water; and denies that all the water was so diverted; and denies that the diversion was continuous. Defendants also deny that the complainants' lands are freed from the incumbrance, admit the erection of the defendants' mills, and that they have always claimed the water. The answer also admits that they purpose closing up the race and restoring the water to the old channel, but denies that it will injure complainants' land or the public health. By the answer, more fully stated, it is claimed by defendant Franklin Dentler that the flouring mill at Parkville has been operated by him for several years; that it is erected along what is called the "Big Portage," at the point where the Little Portage enters it, and he claims, and always has claimed, that he is legally entitled to the flow of the water of the Little Portage River, in place of a portion of it which is diverted and cut off from the said race.

Defendant Hoffman, for himself, says that the flouring mill has for several years last past been operated by him on the Big Portage River, several miles below Parkville, and he claims, 6 L. R. A.

and always has claimed, the flow of the water for said mill, instead of a portion of it so originally cut off by the digging of said race. And the defendants, further answering, say that, being the owners by purchase of Adams Wakeman of the waters of the Little Portage River at Mendon, and of the lands through which said race is cut, and all franchises and riparian rights of said Wakeman, who was the sole owner of the same at the time of such purchase, they have conceived the idea that they have the right, and propose, to return so much of the waters of the Little Portage River back into the original channel which were so wrongfully, unjustly and injuriously to the mill owners who owned any part of the waters of the Little Portage River, taken from them, which purchase from Adams Wakeman was made a short time ago, and for the purpose of preventing further litigation. And they further say that, by the purchase of said lands, franchises and riparian rights of Adams Wakeman, they are entitled to the use of the waters so wrongfully diverted, as they claim, and to return said waters to the original channel, whatever its effect may be upon the lands of complainants; and that complainants knew that these lands were subject to the rights and flow of said waters.

On the hearing in the court below a decree was entered granting a perpetual injunction, according to the prayer of the bill. Defendants appeal.

It is claimed on the part of the complainants that the evidence on their part establishes beyond all controversy the following propositions: *First.* The ownership of the lands described in the bill by the respective parties, and that they have owned and occupied them for many years; that the homes of all of them are situated near the bottom lands involved in the case; and that the complainants, and those under whom they claim, have owned and occupied these lands in the neighborhood of forty years, continuously. *Second.* It is shown beyond all question that prior to 1844, while the water was flowing through the lowlands adjoining the stream of the Little Portage, all the lands adjoining such stream were impregnated and soaked with water to such an extent that they were substantially valueless; that nothing could be raised on them; that the soil was of such a nature that water passed easily and freely through it; that a goodly portion of the land was covered with wild flags; and that the only thing ever obtained from it while the stream flowed through it was the ordinary wild or marsh grass, of very little value for any purpose, and often it became necessary to carry this off, because the water prevented driving teams upon the land to get it. The land, in its original state, was substantially a waste. *Third.* The fact is also proven, without contradiction, that about 1844 the water of the Little Portage was turned at a point north of Mendon Village, and caused to run through an artificial channel dug by Mr. Elisha Doane, and, after being so turned, it was dammed up before it reached the St. Joseph River, thus forming a waterpower, on which were located, and for many years were operated, mills of various kinds, such as carding-mills, turning lathes, sawmills, planing-mills, chair factories and gristmills. *Fourth.* It is shown

by a great amount of testimony that after this diversion the flow of the stream at an ordinary stage of water was substantially all through the artificial channel. During times of freshets, and when more than the ordinary water was coming down the stream, the water would overflow all the lowlands, including that of complainants, but these freshets were of short duration, and usually in the spring and fall, and these still continue in the same manner as formerly; but this did not and does not interfere with the complainants in the cultivation of their lands. *Fifth.* The diversion of the water from these lands had a very beneficial effect upon them. The creek bottom was composed of the decayed vegetable matter usual along the streams of this State. Water passed quickly through it, and so long as the stream had passed the channel the soil remained saturated with water to such an extent that nothing of value could be grown upon it. When the water was removed all of this was changed. The lands soon became dry. The owners of it, at considerable expense to themselves, cleared it up of such underbrush and obstructions as were on it, and the result was that it became not only good farming land, but in fact the best in that portion of the country. Better crops were raised upon it than upon any of the upland; and this, in a section of the country that cannot be excelled in the State in fertility of its soil.

We think these propositions are fully established by the evidence. Under the facts so established, the claim of the complainants is that they are entitled to the use of their lands, freed from this incumbrance, on either one of three theories: (1) That there has been a grant and agreement by and between the lower proprietors and the person digging the race that he should take the water off these lands and keep it off. (2) That they have gained the prescriptive right to have the water kept off their land by the undisputed and uninterrupted use of the land free from the water for the period required by law for that purpose. (3) That they have continued to occupy the lands freed from the water for such a length of time as that they are now protected in their use by the Statute of Limitations and adverse possession and user, and that defendants have no longer the right to dispossess them of any part of their lands for the purpose of running the water across them.

We are satisfied from the evidence that all three of these propositions are sustained, and that defendants have now no right to take down the dam, and cause the waters of the Little Portage River to flow across complainants' lands. Prior to 1844, and, perhaps for a period less than twenty years thereafter, the complainants and their grantors had the right to the flow of those waters through their natural channel, which was across their lands, and making their way into the Big Portage. During that year this dam was erected, and has been kept and maintained ever since, causing all these waters, except during the spring and fall freshets, to flow through an artificial channel, then cut from the stream above complainants' lands to and through the Village of Mendon, and the waters flowing thence into the St. Joseph River. These waters, so diverted from the natural bed of the stream, have been used by

the defendants and their grantors from that time until the present, and the diversion has been continuous, exclusive and adverse to the complainants, and all the land owners below where the dam was erected to the Big Portage. Defendants make some claims that the proofs show an interruption of the use of the waters during some period of this time, that the dam was not constantly maintained, and that a portion of the waters were thus permitted to flow down the channel of the old stream. We find no evidence in the record that would warrant the assumption that the dam was out for any length of time, or that the parties using the waters for mill purposes at the Village of Mendon ever abandoned its use, or assented to have it carried back into the old channel. This use has been continuous, open and notorious, and the defendants and their grantors have had the exclusive use and enjoyment of these waters ever since the erection of this dam, so far as the complainants are concerned, and such use has been adverse to the complainants. During all this time the complainants, as well as all others who might have an interest in the use of these waters below the dam, have acquiesced, so far as shown by this record, in the use made by the parties diverting and using it. Nothing more is requisite to establish the right, at least, of the parties who have so long continued its use.

If complainants had filed their bill to remove the dam, and claimed the right to have the waters flow again through the old channel, under the facts proven in this case, such claim must have been denied, for the facts show a prescriptive right in the defendants to have the waters continued to flow through the channel made in 1844. The rights of the complainants and their grantors in these waters were cut off when the dam was first constructed, and the computation of time begins when the injury or invasion of the owners' rights begins. The use by the defendants and their grantors being continuous, exclusive and adverse, and the complainants having acquiesced, such use and enjoyment would ripen into a right after the lapse of twenty years. It follows that these rights and duties must be reciprocal. If complainants could not compel the return of the waters into the old channel, and defendants' use had ripened into a right to have the waters carried through the artificial channel, made in 1844, by what reasoning can it be claimed that the defendants may, as a matter of right, compel the complainants to again receive the waters through its original channel, and permit it to flow across their farms? The defendants must stand in the shoes of their grantors, having no other or greater rights, so far as the property through which the waters now flow is concerned; and their right to have the water carried again into the Big Portage, to be used by them for milling purposes, is no greater than their grantors' to that property, all of whom have acquiesced in the use made of the water at Mendon.

The complainants also have the same rights of protection from the overflow of their lands by this water as their grantors. Such inchoate right passes by a sale, and the successive owners are in privity with each other. *Leonard v. Leonard*, 7 Allen, 277. The complainants and their

grantors, for more than forty-five years, have enjoyed their estates freed from these waters, and they cannot now be compelled to receive them. The defendants have no more right, under the circumstances, to change the water from the artificial channel back into the original channel than they would to turn it into any other channel, or across the land of any other person. The new channel has become the channel of the stream.

The exclusive enjoyment of water in a particular way for twenty years, without interruption, becomes an adverse enjoyment sufficient to raise presumption of title against a right in any other person which might have been, but was not, asserted. This rule must be reciprocal, and one who has taken the water from the original channel, and has continued to divert and enjoy it for a period beyond the Statute of Limitation as to real actions cannot afterwards be permitted to restore it to its original state when it will have the effect to destroy or materially injure the property of those through or by which it formerly flowed. *Belnknap v. Trimble*, 8 Paige, 605.

Defendants' counsel contends that rights in a stream of water cannot be lost by mere abandonment. It is true that rights may not be

lost by mere nonuser, but such rights may be lost by long-continued adverse enjoyment by others. *Gould, Waters*, § 329.

Defendants' counsel also contends that this is a navigable stream, within the ruling of this court in *Moore v. Sanborne*, 2 Mich. 519; *Rice v. Ruddiman*, 10 Mich. 140; *Thunder Bay River Booming Co. v. Speechly*, 81 Mich. 386; and that the public have rights therein, and therefore the doctrine of prescription is not applicable. The stream itself does not bear evidences of navigability, within the ruling of these cases, and the defense, under the pleadings and proofs taken in the case, is not rested upon any such claim. The defendants claim the right to turn the stream back into the old channel for their own private use, and because they have acquired all the rights of Adams Wakeman at Mendon.

The case need not be discussed at greater length, as we are satisfied, from the whole record, that the complainants are entitled to the relief prayed.

The decree of the court below was in accordance with the prayer of the bill, and must be affirmed, with costs.

The other Justices concurred.

PENNSYLVANIA SUPREME COURT.

James A. KNOX'S APPEAL.

(.....Pa.....)

1. The precatory form of a testamentary writing is immaterial, where it has the essential element of being a disposition of property to take effect after death, although it is

in form merely a request, instead of a command addressed to no specified person by name, but plainly to those [who should have possession or control of the property.

2. The first name only may be a sufficient signature to a will, where it is clearly intended as a complete execution of the instrument.

NOTE.—Precatory words in will, effect of.

Precatory words expressive of a wish or desire may in certain instances create a trust or impose a charge, and as a general rule they turn upon one inquiry, whether the alleged bequest is so definite as to amount and subject matter as to be capable of execution by the court, or whether it so depends upon the discretion of the general devisee as to be incapable of execution without superseding that discretion. *Phillips v. Phillips*, 112 N. Y. 204; *Lawrence v. Cooke*, 7 Cent. Rep. 101, 104 N. Y. 662; *Warner v. Bates*, 98 Mass. 277; *Malim v. Keighley*, 2 Ves. Jr. 532; *Brasher v. Marsh*, 15 Ohio St. 103; *Cook v. Ellington*, 6 Jones, Eq. 371.

Expressions of desire accompanying a devise or bequest are prima facie obligatory, and create a trust unless the actual intention appears different. 1 Jarman, Wills, 385, and Bigelow's note; *Malim v. Keighley*, 2 Ves. Jr. 333, *Knight v. Boughton*, 11 Clark & F. 513; *Knight v. Knight*, 3 Beav. 148; *Briggs v. Penny*, 3 Macon. & G. 546; *Hawkins, Wills*, 159; 2 Story, Eq. Jur. § 1068; *Brasher v. Marsh*, 15 Ohio St. 103; *Warner v. Bates*, 98 Mass. 274; *Cole v. Littlefield*, 35 Me. 445; *Harrison v. Harrison*, 2 Gratt. 1; *McKonkey's App.* 13 Pa. 233; *Erickson v. Willard*, 1 N. H. 217; *Van Ameer v. Jackson*, 35 Vt. 173.

If such words are addressed to an executor, they are more clearly imperative. *Burt v. Herron*, 66 Pa. 400; *Schouler, Wills*, 621.

Generally speaking, where property is given by testament to some person who is recommended, requested or wished to dispose of it after

a certain manner, this wish, request or recommendation is commonly considered imperative and equivalent to creating a trust. 1 Wms. Exrs. 108, and cases cited; *Passmore v. Passmore*, 1 Phillim. 216; *Brunson v. King*, 2 Hill, Ch. 490; *Knight v. Boughton*, 11 Clark & F. 513; *Schouler, Wills*, 270.

Words of recommendation, request, entreaty, wish or expectation, addressed to a devisee or legatee, will make him a trustee for the person or persons in whose favor such expressions are used; provided the testator has pointed out, with sufficient clearness and certainty, both the subject matter and the object or objects of the intended trust. See *Re Pinckard's Trusts*, 4 Jur. N. S. 1041, 27 L. J. N. S. Ch. 422; *Reeves v. Baker*, 18 Beav. 373; *Macnab v. Whitbread*, 17 Beav. 299; *Smith v. Smith*, 2 Jur. N. S. 967; *Hood v. Oglander*, 34 Beav. 523; *Story, Eq. Jur. § 1068 et seq.*; *Hill, Trustees*, 73; *Wms. Exrs. 6th Am. ed. 143, note y*; *Perry, Tr. § 112*; 2 Redf. Wills, 415; *Harding v. Glyn*, 1 Atk. 449, 2 White & T. Lead. Cas. Eq. 1857; 1 Jarman, Wills, 680.

Trust created by precatory words.

Three conditions must concur in order that the power be deemed a trust, or that the specified beneficiaries take trust interests by implication in default of appointment: (1) imperativeness of request that the donee execute the power; (2) certainty of subject matter; and (3) certainty of object. *Lines v. Darden*, 5 Fla. 51; *Gilbert v. Chapin*, 19 Conn. 342; *Briggs v. Penny*, 3 Macon. & G. 554; *Harding v. Glyn*, 1 Atk. 449, 2 White & T. Lead. Cas.

(January 6, 1890.)

APPEAL by contestant from a judgment of the Orphans' Court of Allegheny County sustaining a decision of the register of wills admitting to probate a paper purporting to be the last will and testament of Harriet S. Knox, deceased. *Affirmed.*

Harriet S. Knox died suddenly on October 27, 1888, at the residence of her father, Felician Slataper, in the City of Pittsburgh. At the time of her death and for some time previous thereto she had been living apart from her husband. Shortly after her death a paper was found in the room which she occupied up to the time of her death, wholly in her handwriting, written with a lead pencil upon three sides of an ordinary folded sheet of note paper, and bearing the signature "Harriet," of which the following is a copy:

A few little things I would love to have done. Always keep Vicie and Pet, if possible. Mama to have everything she wants, with a few exceptions of remembrances. Please let sister have my house rent as long as she may live, then may my little namesake have it. The money in Pittsburgh Savings Bank for Bessie, but just let it be until she is eighteen years old. Please send something I have painted to Miss Judkins, also to Lee. A box in attic I have fixed for Dollie Good, and please Mama always remember her, and help her whenever you can. My diamond pin and largest stone ring and bracelets for Mama. The next size stone in ring for Bessie, also locket and chain, and the next for Harriet, also

Auntie's locket not to have until old enough to appreciate it. Please send seal sacque to Lena Johns, and fur circular to Katie Good, my beaver sett to Dollie Good. Give Jane my blue suit, also please take one hundred dollars out of the rent of next quarter, October, and give her for a nest-egg—she is so good and loves Vicie. The \$1,000 Auntie left me, please give to Lee \$500, and sister \$500. My coral to Ella McKinney and a plain gold ring to Dan McK. Sewing machine to sister, and have her take some money, get nice books and give one to each one of my Sunday school class of 1885, which I left when going to New Brighton. Please have just my baptismal names on stones, daughter of E. J. and Felician Slataper. Doctor Dunn would give you the list of names, about eleven or twelve girls. My large arm-chair to Dr. Strom. Take good care of Vicie "somebody" as long as she lives. Saturday. Harriet.

This paper was, in November, 1888, presented by Mrs. E. J. Slataper and Mrs. Samuel Kerr, the mother and sister respectively of the deceased, to the register of wills of Allegheny County for probate as the will of Mrs. Knox. A caveat was filed by James A. Knox, husband of the deceased, to the probating of such will. After testimony taken and argument, the register admitted the paper to probate.

From this decision James A. Knox appealed to the orphans' court, which sustained the decision of the register and dismissed the appeal, and James A. Knox thereupon appealed to this court.

Eq. ¶46 and note; Harrison v. Harrison, 2 Gratt. 1; Wright v. Atkins, Turn. & R. 148; 2 Story, Eq. Jur. § 979 a; Joel v. Mills, 7 Jur. N. S. 899; Little v. Neil, 10 Week. Rep. 592; 1 Jarman, Wills, ed. 1861, 374.

To establish a trust by will the beneficiaries must be named; a desire expressed by the testator that certain property be placed in trust is insufficient. But if enough appears on the face of the will to enable the court to determine without any real doubt who was intended to be benefited, a valid trust will be established. Wood v. Camden Safe Deposit & Trust Co. 18 Cent. Rep. 273, 44 N. J. Eq. 460.

Where a testatrix devised one third of the residue of her estate to her daughter "her heirs, etc., to and for her and their only proper use and behoof forever," and a codicil contained the words "I desire that one half of the share of the property inherited from me by my daughter shall be placed in trust, the Camden Trust Company acting as trustee," apart from the effect of the Statute of Uses, the daughter took a trust estate in one half of the one third for life and a fee in the remainder. *Ibid.*

In such case the word "desire" was not intended to be used in a precatory sense but by way of direction or command. *Ibid.*

A gift to A. "hoping he will continue them in the family," was held too uncertain to create a trust. Harland v. Trigg, 1 Bro. Ch. 142.

So, too, a gift coupled with a request to "take care of B and his family," etc. Tolson v. Tolson, 10 Gill & L. 159; Harper v. Phelps, 21 Conn. 259.

Where a testator devised copholds to his wife, not doubting that she would dispose of the same to and amongst his children as she should please, this was held to be a trust for the children, as the wife should appoint. Massey v. Sherman, Amb. 520; Macey v. Shurmer, 1 Atk. 389; Wynne v. Hawkins, 6 L. R. A.

1 Bro. Ch. 179; Parsons v. Baker, 18 Ves. Jr. 476; Malone v. O'Connor, 2 Lloyd & G. 2 Plunk. 465.

The word "desire" has been held to raise a trust (Vandeyck v. Van Beuren, 1 Cal. 84; Erickson v. Willard, 1 N. H. 217; Burt v. Herron, 66 Pa. 400); so, too, "It is my will that" (Whiting v. Whiting, 4 Gray, 240); so, of the words "wish and desire." Braisher v. Marsh, 15 Ohio St. 108; Cook v. Ellington, 6 Jones, Eq. 371. But see, *contra*, Lines v. Darden, 5 Fla. 51; Brunson v. King, 2 Hill, Ch. 438.

Powers in trust inferred in will.

Powers in trust are sometimes inferred from the terms of a will when an intention to create the same is necessary in order to carry out the directions and purposes of the testator. See Walker v. Whiting, 28 Pick. 813; Fay v. Taft, 12 Cush. 449; Watson v. Mayrant, 1 Rich. Eq. 449; Withers v. Yeadon, 1 Rich. Eq. 324; Baker v. Red, 4 Dana, 158; Pitt v. Pelham, 1 Freem. 184, 1 Ch. Cas. 176; Tenant v. Brown, 1 Ch. Cas. 180; Blatch v. Wilder, 1 Atk. 420; Cook v. Fountain, 8 Swanst. 536; 2 Pom. Eq. Jur. 578.

If by the will and codicil taken together we are made reasonably certain as to who was intended, it is all the certainty which is required. Hutchinson v. Tindall, 8 N. J. Eq. 357; Brown v. Combs, 29 N. J. L. 36; Perry, Tr. 48 82, 83; Hill, Trustees, 61.

Absolute devise or bequest coupled with precatory words.

Where the gift is for the donee's absolute use, precatory words do not create a trust. In Meredith v. Henegge, 1 Sim. 542, 10 Price, 306, where the testator, after having given his real and personal estate in the fullest terms to his wife, declared that he had devised the whole of his real and personal estate to his wife, "unfettered and unlimited," the wife was

Messrs. W. K. Jennings and R. D. Wilson, for appellant:

The trunk of the system of wills now in force in Pennsylvania is found in the Act of April 8, 1833, 11 Purdon, p. 1709, which provides: "Every will shall be in writing, and, unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction, and in all cases shall be proved by the oaths or affirmations of two or more competent witnesses; otherwise such will shall be of no effect."

Under this Act the courts insist upon a close compliance with the express requirements of the new Act, and avoid the dangerous doctrine of equivalent forms of execution so broadly adopted in their former adjudications.

See *Stricker v. Groves*, 5 Whart. 886; *Dunlop v. Dunlop*, 10 Watts, 155; *Cavett's App.* 8 Watts & S. 24; *Grabill v. Barr*, 5 Pa. 444.

In *Hays v. Harden*, 6 Pa. 411, decided in 1847, Gibson, Ch. J., says, speaking of this Act: "The solemnity of the signature, therefore, and not the attestation of two witnesses, was the only thing superadded; the rest was left to stand where it stood before."

In *Asay v. Hoover*, 5 Pa. 21, it was held expressly, as had been before inferentially, that the Act of 1833 gives no authority for the execution of a will by a mark.

See also *Grabill v. Barr*, 5 Pa. 446; *Greenough v. Greenough*, 11 Pa. 497; *Shinkle v. Crock*, 17 Pa. 159; *Ingles v. Bruntington*, 4 Yeates, 346; *Dunlop v. Dunlop*, 10 Watts, 155.

absolutely entitled for her own benefit. 1 Jarman, Wills, 686.

Where a testator makes an absolute devise or bequest, mere precatory words of desire or recommendation annexed will not in general convert the devise or legatee into a trustee, unless, indeed, it appear affirmatively that they were intended to be imperative. *Burt v. Herron*, 66 Pa. 400.

Where the words of the gift point plainly to a full, absolute and unfettered enjoyment by the donee himself, mere precatory expressions annexed to the gift can hardly be pronounced imperative. 1 Jarman, Wills, 388; *Knight v. Boughton*, 11 Clark & F. 513; *Winch v. Brutton*, 14 Sim. 379; *Meredith v. Heneage*, 10 Price, 306.

Mere expressions of kindness and good will towards third parties, or an appeal to the donee's liberality on their behalf, is not enough to create a precatory trust for their benefit. *Re Bond*, L. R. 4 Ch. Div. 238; *Knight v. Boughton*, 11 Clark & F. 513; *Schouler*, Wills, 623.

The court will not "do violence to the general intent" in order to create a trust where the words used were "It is my wish;" so, too, "wish and will." *McKee v. Means*, 34 Ala. 349.

Authority to dispose of property at discretion.

Authority to dispose of property at discretion, there being no bequest over, is taken as evidence of the extent of the interest intended to be given, and is construed to be an absolute interest, and not a mere power to sell. *Kendall v. Kendall*, 36 N. J. Eq. 91.

The test question in precatory trusts is whether, by using these words milder than a command, the testator meant to control A or to submit a proposed benefit to his discretion or selection. *Re Pennock's Estate*, 20 Pa. 288; *Stead v. Mellor*, L. R. 5 Ch. Div. 725; *Schouler*, Wills, 621.

6 L. R. A.

The form of execution should indicate with reasonable certainty the person. No argument is necessary to establish the proposition that the word "Harriet" does not do this.

See *Long v. Zook*, 13 Pa. 402.

Messrs. John H. Hampton and Charles M. Thorp, for appellees:

This instrument is plainly testamentary, and, being properly executed, is the last will and testament of Harriet S. Knox. The form of a will is immaterial if the substance is testamentary.

Schouler, Wills, § 261; *Ross v. Quick*, 30 Pa. 225; *Turner v. Scott*, 51 Pa. 128; *Frederick's App.* 52 Pa. 338; *Patterson v. English*, 71 Pa. 458; *Frew v. Clarke*, 80 Pa. 178; *Fosselman v. Elder*, 98 Pa. 159; *Wilson v. Van Leer*, 103 Pa. 600.

This instrument is properly executed in accordance with the requirements of our statutes and its execution has been properly proved. Neither subscribing witnesses nor witnesses present at the execution of the paper are required.

Hight v. Wilson, 1 U. S. 1 Dall. 94 (1 L. ed. 51); *Carson's App.* 59 Pa. 498; *Fosselman v. Elder*, 98 Pa. 159.

To sign is not necessarily to write one's full name. The test as to whether a paper is signed or not is, Did the person subscribe the paper with the intention of signifying his assent to its provisions? This is the criterion which is applied to questions arising under the Statutes of Frauds and Perjuries, which require a writing signed by the parties and in the construction of which it has been held that a signing by initials is good.

Subsequent provisions of the will, expressed by way of "recommendation," "suggestion" and "desire," rather enlarge than restrain the power of disposition. *VanGorder v. Smith*, 99 Ind. 412.

When a bequest of personal property is made for life, with a full power of disposition, by will or otherwise, at the pleasure of the devisee, without limitation or restriction as to the time, mode or purposes of the execution of the power, the life estate is controlled by the limited power of disposition, and an absolute estate in the property is thereby created in the legatees. *Dodge v. Moore*, 100 Mass. 335; *Hale v. Marsh*, Id. 468; *Cummings v. Shaw*, 103 Mass. 159; *Ramsdell v. Ramsdell*, 21 Me. 238; *Diehl's App.* 36 Pa. 120; *Kinter v. Jenks*, 43 Pa. 445; *Dunlap v. Garlington*, 17 S. C. 567.

Where a testator gave all his real and personal estates to his "dear wife absolutely," with full power for her to "dispose of the same as she may think fit for the benefit of my family, having full confidence that she will do so," the wife took absolutely. *Re Hutchinson and Tenant*, L. R. 8 Ch. Div. 540; 1 Jarman, Wills, 688; *Irvine v. Sullivan*, L. R. 8 Eq. 673; *Godfrey v. Godfrey*, 2 N. R. 16; *Wood v. Cox*, 1 Keen, 817.

Where a testator devised and bequeathed all his real and personal property to his wife, her heirs, executors, administrators or assigns, to and for her sole use and benefit, in full confidence that she would in every respect appropriate and apply the same unto and for the benefit of all his children, the widow took a life estate with a power of appointment among the children. *Gully v. Cregoe*, 24 Beav. 185; *Shovelton v. Shovelton*, 32 Beav. 143; *Curnick v. Tucker*, L. R. 17 Eq. 320; *Le Marchant v. Le Marchant*, L. R. 18 Eq. 414.

No trust is created by the will in favor of the children. *Bamford v. Bamford*, 123 Mass. 280.

The widow took at least an estate for life, with a

1 Reed, Stat. Fr. § 386; *Sanborn v. Flagler*, 9 Allen, 474; *Palmer v. Stephens*, 1 Denio, 478; *Chichester v. Cobb*, 14 L. T. N. S. 433; Browne, Stat. Fr. § 362 and cases there cited; *Brown v. Butchers & D. Bank*, 6 Hill, 443; *Weston v. Myers*, 33 Ill. 432; *Selby v. Selby*, 8 Meriv. 2; *Main v. Ryder*, 84 Pa. 223. See also *Vernon v. Kirk*, 30 Pa. 218; *Carson's App.* 59 Pa. 493; *Baldwin's Estate*, 16 W. N. C. 800; *Re Jakob's Will*, 21 W. N. C. 510.

There are English decisions to the effect that a signing of a will by initials is good.

Re Goods of Savory, 15 Jur. 1042; *Addy v. Grix*, 8 Ves. Jr. 504; *Baker v. Denning*, 8 Ad. & El. 94; *Re Goods of Emerson*, 9 L. R. Ir. 443.

In *Jenkins v. Gaisford*, 8 Swabey & Tr. 93, the case was that of a signing by stamping the name, and it was held good. The testator signed an assumed name in *Re Goods of Redding*, 2 Robt. Eccl. 389, and it was held a good signature, the court saying it would pass as the mark of testator.

A case is reported, *Re Goods of Clarke*, 1 Swabey & Tr. 23, where a maiden name was interchanged with a married name and the signature was held to be within the statute.

See also *Hartwell v. McMaster*, 4 Redf. 393.

Mitchell, J., delivered the opinion of the court:

The writing in question is clearly testamentary. Although it does not on its face purport to be a will, and in form is not a command but a request, addressed to no special person by

name but plainly to those who should have the possession or control of her property, it has the essential element of being a disposition of property to take effect after death, and the precatory form is therefore immaterial. *Fosselman v. Elder*, 98 Pa. 159.

It being undisputed that the paper is in the handwriting of the decedent, and being testamentary in character, the only question left upon its validity as a will is the sufficiency of its execution by the signature "Harriet."

The paper is proved to have been written after the passage of the Act of June 8, 1887, (Pub. Laws, 333), and the fact that the decedent was a married woman is therefore unimportant. That Act repealed the requirement that a married woman's will should be executed in the presence of two witnesses neither of whom should be her husband, and put her, in respect to signature by herself, upon the same footing as men and unmarried women. No greater effect can be attributed to the Statute. It certainly was not intended to authorize a married woman to execute a will any more loosely than other persons. We are therefore remitted to the general question whether a signature by the first name only may be a valid signing of a will under the Act of 1833 and its supplements.

The condition of the law before the passage of the Wills Act of 1833 is well known. By the English Statute of Frauds all wills as to land were required to be in writing signed by the testator. Under this Act it was held that

power to convey the fee and to receive the proceeds. *Cummings v. Shaw*, *supra*; *Gibbins v. Shepard*, 125 Mass. 543.

Where the language of a testator shows a clear intent to devise the fee of his lands to his wife, words of recommendation or suggestion or advice as to the management or occupation thereof by the family, contained in other clauses, will not limit her estate. *Hoxsey v. Hoxsey*, 37 N. J. Eq. 21.

A mere recommendation not considered imperative.

No recommendatory terms of a will expressing a wish, will, desire, etc., are sufficient to create a trust unless there be certainty as to the parties to take and what they are to take. *Lines v. Darden*, 5 Fla. 51; *Gilbert v. Chapin*, 19 Conn. 342. See *Harrison v. Harrison*, 2 Gratt. 1.

The word "recommend" is susceptible of an interpretation consistent with the legal and equitable power of the person recommended to depart from the recommendation. *Johnston v. Rowlands*, 2 De G. & Sm. 354.

Recommendatory expressions in a will depend for their full force on the discretion of the donee of the power. *McCulloch v. McCulloch*, 11 Week. Rep. 504; *Graves v. Graves*, 13 Irish C. 152; *Godfrey v. Godfrey*, 11 Week. Rep. 554; *Soott v. Key*, 11 Jur. N. S. 819; *Hood v. Oglander*, 12 L. T. N. S. 623; *Wigram, Wills*, 215.

Whenever the objects of the supposed recommendatory trust are not certain or definite; whenever the property to which it is to attach is not certain or definite; whenever a clear discretion or choice to act or not to act is given; whenever the prior dispositions of the property import absolute and uncontrollable ownership,—in all such cases courts of equity will not create a trust from recommendatory words. *Story*, Eq. § 1070. See also *Wood v. Cox*, 2 Myl. & C. 684; *Wright v. Atkins*, Turn. & R. 143; *Stead v. Mellor*, L. R. 5 Ch. Div. 225; *Lambe v. Eames*, L. R. 10 Eq. 237; L. R. 6 Ch. App. 597; *Hess* 6 L. R. A.

v. Singler, 114 Mass. 56; *Re Pennock's Estate*, 20 Pa. 263; *Van Duyn v. Van Duyn*, 14 N. J. Eq. 307; 2 Pom. Eq. Jur. § 1014-1017, and notes; *Howard v. Carual*, 109 U. S. 731, 734 (27 L. ed. 1062).

Expressions of trust and confidence.

Under the clause "After payment of my just debts and funeral expenses, I give and devise to my wife one third of all my real estate to her sole use and behoof forever; the other two thirds I leave in her power, and bequeath to her for her support during her lifetime, and leaving it as an injunction on her to divide it on the children at her death, as she deems best, and as they deserve," the wife took an estate in fee in one third of the residue; as to the other two thirds she took at least an estate for life, with a power to convey the fee and to receive the proceeds. *Gibbins v. Shepard*, 125 Mass. 541.

Where the gift was "to J, her executors, administrators and assigns, to and for her and their own use and benefit, upon the fullest trust and confidence reposed in her that she shall dispose of the same to and for the joint benefit of herself and my children," no obligation is imposed which the court could enforce. *Webb v. Woods*, 2 Sim. N. S. 237. See also *White v. Briggs*, 15 Sim. 38; *Parnall v. Parnall*, L. R. 9 Ch. Div. 97; and the following cases bearing on the subject: *Winch v. Brutton*, 14 Sim. 379; *Ingram v. Fraley*, 29 Ga. 553; *Steele v. Levisay*, 11 Gratt. 454. See, however, *Re Pennock's Estate*, 20 Pa. 263; *Bardswell v. Bardswell*, 9 Sim. 819; *Williams v. Williams*, 1 Sim. N. S. 353, 354; *Huskisson v. Bridge*, 15 Jur. 733; *Fox v. Fox*, 27 Beav. 301; *Green v. Marsden*, 1 Drew. 643; *McCulloch v. McCulloch*, 11 Week. Rep. 504.

If the subsequent words, "enjoining the widow to divide the estate on her death on the children," makes a good devise over, such devise would take effect in case of a failure by the widow to convey during her life. *Smith v. Snow*, 123 Mass. 323.

the signature of the testator in any part of the instrument was sufficient. Redf. Wills, chap. 6, § 18, pl. 9, and cases there cited.

The same construction was given to the law in Pennsylvania, and under the Act of 1705, which required wills of land to be in writing and proved by two or more credible witnesses, etc. (1 Smith, Laws, 83), it was even held that a writing in the hand of another, not signed by the testator at all, might be a good will. *Rohrer v. Stehman*, 1 Watts, 463.

In this state of the law the Act of 1833 was passed. It was founded on the English Statute of Frauds (29 Charles II.), the phraseology of which it follows closely but with the important addition that the will shall be signed "at the end thereof." In making this change it is undoubtedly true, as suggested by Strong, J., in *Vernon v. Kirk*, 30 Pa. 222, that the Legislature "looked less to the mode of the signature, than to its place." Accordingly the Statute makes no definition of a signature, or of the word "signed." "It was only by judicial construction that (the Statute) was made to require the testator's signature by his name" (Strong, J., *Vernon v. Kirk*), and that judicial construction which held that a mark was not a valid signature (*Asay v. Hoover*, 5 Pa. 21; *Grabill v. Barr*, Id. 441, decided in 1846) was changed, it may be noted, by the Legislature as soon as their attention was directed to it. Act January 27, 1848, Pub. Laws, 16.

The purposes of the Act of 1833 were accuracy in the transmission of the testator's wishes, the authentication of the instrument transmitting them, the identification of the tes-

tator, and certainly as to his completed testamentary purpose. The first was attained by requiring writing instead of mere memory of witnesses, the second and third by the signature of the testator, and the last by placing the signature at the end of the instrument. The first two requirements were derived from the English Statute, the third was new (since followed by the Act of 1 Vict., chap. 26), and was the result of experience of the dangers of having mere memoranda or incomplete directions taken for the expression of final intention. *Baker's App.* 107 Pa. 881; *Vernon v. Kirk*, 30 Pa. 222.

These being the purposes of the Act, and the Legislature not having concerned itself with what should be deemed a signing, we must look *dehors* the Statute for a definition.

As already said, the Act is founded on the Statute of Frauds, 29 Charles II. Under that Act it has been held that the signing may be by a mark, or by initials only, or by a fictitious or assumed name, or by a name different from that by which the testator is designated in the body of the will. 1 Jarman, Wills, *78; Redf. Wills, chap. 6, § 18, and cases there cited.

In this State, as already seen, it was held, on a narrow construction of the Act of 1833, that a mark was not a signing; but on the other points, so far as they have arisen, our decisions have been in harmony with those of the English courts. Thus in *Long v. Zook*, 18 Pa. 400, the will of David Long was held to be validly executed by his mark although the mark was put to the name of Jacob Long. In *Vernon v. Kirk*, 30 Pa. 218, "Ezekiel Norman for Rachel

Will, sufficiency of signature.

There are American statutes which expressly authorize the signature by mark. *Smith v. Dolby*, 4 Harr. (Del.) 350; *Burford v. Burford*, 29 Pa. 221; *Schouler*, Wills, 305.

Under the statute of Oregon, the making by a testator of his mark to his will is a signing of the will. *Pool v. Buffum*, 3 Or. 428.

The making of his mark by the testator will satisfy the statute; and that, too, as various cases rule, notwithstanding he was able to write at the time. *Baker v. Denning*, 3 Ad. & El. 94; *Sprague v. Luther*, 8 R. L. 252; *Chase v. Kittredge*, 11 Allen, 49; *Higgins v. Carlton*, 28 Md. 115; *Cozzens' Will*, 61 Pa. 196.

The will has been upheld where the testator made a mark, with his hand guided or not guided by another. *Wilson v. Beddard*, 12 Sim. 28; *Baker v. Denning*, 3 Ad. & El. 94; *Jackson v. Van Dusen*, 5 Johns. 144; *Nickerson v. Buck*, 12 Cush. 332; *Upchurch v. Upchurch*, 16 B. Mon. 102.

Or where a testator wrote only his initials. *Re Goods of Savory*, 15 Jur. 1042.

Or where he affixed a seal stamped with his initials, and pronounced it his "hand and seal." *Re Goods of Emerson*, L. R. 9 Ir. 443.

Or where his full signature was effected by the aid of another person who guided his hand. *Vandruft v. Rhehart*, 29 Pa. 222; *Stevens v. Van Cleave*, 4 Wash. C. C. 232.

Where a testator was paralyzed and was raised in bed, and a pen was put into his hand, which was held by another whilst he made his mark, this was a valid execution of the will. *Cozzens' Will*, *supra*.

An imperfect or indistinct subscription of the testator's name to his will may be regarded as his mark. *Hartwell v. McMaster*, 4 Redf. 389.

So, where he stamped his name. *Jenkins v. Galsford*, 3 Swabey & Tr. 93.

6 L. R. A.

Where the testator signs under an assumed name, such a signature may satisfy the statute by passing as the testator's mark. *Re Goods of Redding*, 2 Rob. Ecol. 339; 1 Wms. Exrs. 76.

Name affixed by another.

A testator's name may, at his request, be affixed to a will by an attesting witness. The effect is the same as though written by the testator himself. *Herbert v. Berrier*, 81 Ind. 1.

The statute is satisfied where, the testator having requested another to sign the paper as his will for him, the latter complies under the strict precautions of the Code (*Vernon v. Kirk*, 30 Pa. 218; *Abraham v. Wilkins*, 17 Ark. 232); or, where by direction of a testator another person, under the same precautions, stamps the will, by way of signature, with an instrument on which the testator has had his usual signature engraved for convenience in stamping letters or other documents requiring his signature. *Jenkins v. Gaisford*, 3 Swabey & Tr. 93.

It is not necessary that a testator should have touched the paper of the will with his own hand or with the point of his pen, if the subscription of his name thereto be adopted by his acknowledgment and declaration. *Re Merchant's Will*, 1 Tuok. 151.

For under the Statute of Frauds, and various Codes in the United States, provision is made for the signing of the will, not only by the testator himself, but also by some other person in his presence and by his express direction. *Riley v. Riley*, 36 Ala. 496.

There are States, however, where this signing by another is placed by legislation under much narrower restraints. *Re McElwaine*, 18 N. J. Eq. 499; *Vines v. Clingfost*, 21 Ark. 304.

Doherty at her request" was held to be a valid signing under the Act. And in *Main v. Ryder*, 84 Pa. 217, it may be noted that a mark was held to be a good signature (subsequent to the Act of 1848), though put to a name which was not the testator's real, or at least his original, name, though it was one by which he had been known for some years in his own neighborhood. No question was raised against the will on this point.

The precise case of a signature by the first name only does not appear to have arisen either in England or in the United States; but the principles on which the decisions already referred to were based, especially those in regard to signing by initials only, are equally applicable to the present case, and additional force is given to them by the decisions as to what constitutes a binding signature to a contract under the same or analogous statutes. Browne (on the Statute of Frauds, § 362) states the rule thus: "In cases where the initials only of the party are signed, it is quite clear that with the aid of parol evidence, which is admitted to apply to them, the signature is to be held valid." And see *Palmer v. Stephens*, 1 Denio, 478; *Sandborn v. Flagler*, 9 Allen, 474; *Weston v. Myers*, 33 Ill. 432; *Salmon Falls Mfg. Co. v. Goddard*, 56 U. S. 14 How. 448 (14 L. ed. 493); *Oschester v. Cobb*, 14 L. T. N. S. 433.

Though, therefore, we find no precise precedent, yet the analogies are all favorable, rather than otherwise, to the sufficiency of a signing by first name only, if it meets the other requirements of the Act. These are matters depending on circumstances, which will be considered further on.

Looking beyond the decisions to the general use of language, what is understood by signing, and signature? Webster defines to sign as "to affix a signature to; to ratify by hand or seal; to subscribe in one's own handwriting;" and signature as "a sign, stamp or mark impressed; . . . especially the name of any person written with his own hand, employed to signify that the writing which precedes accords with his wishes or intentions; a sign manual."

All the definitions include a mark, and no dictionary limits a signature to a written name. There can be no doubt that historically, and down to very modern times, the ordinary signature was the mark of a cross, and there is perhaps as little question that in the general diffusion of education at the present day the ordinary use of the word implies the written name. But this implication is not even yet necessary and universal. The man who cannot write is now happily an exception in our Commonwealth, but he has not yet entirely disappeared, and in popular language he is still said to "sign," though he makes only his mark. Thus, in *Asay v. Hoover*, 5 Pa. 26, the witness says: "The name was written after the will was read to her, and after she had signed it; . . . she was reclining in bed when she signed it," although the signature the witness was testifying to was only a mark.

But even in the now usual acceptation of a written name, signature still does not imply the whole name. Custom controls the rule of names, and so it does the rule of signatures. The title by which a man calls himself and is

known in the community is his name, as in *Main v. Ryder*, *supra*, whether it be the one he inherited or had originally given him, or not. So the form which a man customarily uses to identify and bind himself in writing is his signature, whatever shape he may choose to give it. There is no requirement that it shall be legible, though legibility is one of the prime objects of writing. It is sufficient if it be such as he usually signs; and the signatures of neither Rufus Choate nor General Spinner could be rejected, though no man unaided could discover what the ragged marks made by either of those two eminent personages were intended to represent. Nor is there any fixed requirement how much of the full name shall be written. Custom varies with time and place, and habit with the whim of the individual. Sovereigns write only their first names; and the sovereign of Spain, more royally still, signs his decrees only "I, the King" (Yo el Rey). English peers now sign their titles only, though they be geographical names, like Devon, or Stafford, as broad as a county. The great Bacon wrote his name "Fr. Verulam," and the ordinary signature of the poet-philosopher of fishermen was, "Iz. Wa." In the fifty-six signatures to the most solemn instrument of modern times, the Declaration of Independence, we find every variety from "Th. Jefferson" to the unmistakably identified "Charles Carroll of Carrollton." In the present day it is not uncommon for business men to have a signature for checks and banking purposes somewhat different from that used in their ordinary business; and in familiar correspondence, signature by initials, or nickname, or diminutive, is probably the general practice.

What, therefore, shall constitute a sufficient signature must depend largely on the custom of the time and place, the habit of the individual, and the circumstances of each particular case. As already seen, the English and some American cases hold that a signature by initials only or otherwise informal and short of the full name may be a valid execution of a will or a contract, if the intent to execute is apparent. To this requirement our statute adds that the signature must be at the end, as evidence that the intent is present, actual and completed. On this point of the completed act, the use of the ordinary form of signature is persuasive evidence, and the absence of it may be of weight in the other scale. As well suggested by the learned judge below, if a will drawn with formality or in terms that indicate the aid of counsel or the intent to comply with all the forms of law, be signed with initials or first name only, doubt would certainly be raised as to the completed purpose of the testator to execute it; and if then it appeared that his habit was to sign his name in full the doubt might become certainty; while on the other hand if it were shown that he usually or even frequently signed business or other important papers in the same way, the doubt might be dissipated. As in all cases where the intent is the test, there can be no hard and fast legal rule as to form. The statute requires that the signature shall be at the end, and that requirement must be met without regard to intention; but what shall constitute a signature must be determined in each case by the circumstances.

Tested by these views, the will in the present case appears to have been well executed. Of the handwriting and of the identity of the testatrix there is no question, and her completed intent to execute the paper as the expression of her testamentary wishes is attested at the end of it by a signature, admitted to be made by her, and shown to be in the form which she habitually used. The writing has not the usual formalities of a will, but is in form a letter addressed to no one by name, but clearly intended for her mother or such of her family as should assume control of her property after her

death, and the form of the instrument might well account for the signature she was accustomed to use, were it not still more clearly explained by the unfortunate differences with her husband, and her repugnance to using his name, as shown by her avoidance of it in her correspondence, and her direction not to put it on her tombstone. On the evidence it is clear that the testatrix intended this as a complete execution of the instrument, and we find nothing in the law to defeat its validity for that purpose.

Judgment affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA
v.
FIRE CREEK COAL & COKE CO.,
Pff. in Err.

(.....W. Va.....)

***The fourth section of chapter 63, Acts 1887, which prohibits persons and corporations engaged in mining and manufacturing, and interested in selling merchandise and supplies, from selling any merchandise or supplies to their employes at a greater per cent of profit than they sell to others not employed by them, is unconstitutional and void, because it is class legislation, and an unjust interference with private contracts and business.**

(November 18, 1890.)

ERROR to the Circuit Court for Fayette County to review a judgment convicting defendant of a violation of the provisions of Acts 1887, chap. 63, prohibiting certain classes of employers from discriminating against their employes in the sale of merchandise. *Reversed.*

The case sufficiently appears in the opinion.

Mr. J. W. St. Clair for plaintiff in error.

Mr. Alfred Caldwell, Atty-Gen., for the State.

Snyder, P., delivered the opinion of the court:

Writ of error to a judgment of the Circuit Court of Fayette County, pronounced on September 29, 1887, upon an indictment against the Fire Creek Coal & Coke Company, a domestic corporation. There was a motion to quash, and a demurrer to the indictment,—each of which were overruled,—a trial by jury and conviction, and a fine of \$25 imposed upon the defendant.

The indictment is under the provisions of the fourth section of chapter 63, Acts of 1887, which provides, in substance, as follows: That it shall be unlawful for any person, firm, company, corporation or association engaged in mining or manufacturing, and who shall be interested in merchandising, to knowingly and willfully sell any merchandise or supplies whatsoever to any employe at a greater per cent of profit than merchandise and supplies of

the like character, quality and quantity are sold to other customers, buying for cash, and not employed by them. The violation of this section is made a misdemeanor, punishable by a fine not exceeding \$100 and not less than \$25.

In *State v. Goodwill*, 10 S. E. Rep. 285 (decided by us at the present term), this court held it is not competent for the Legislature, under the Constitution, to single out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power. And we also held, in that case, that the third section of the same Act, under which the indictment now under consideration is founded, is unconstitutional and void. In that case we referred to the constitutional provisions, both state and federal, and reviewed at some length the decisions of the courts in respect to the power of the Legislature to enact laws such as the one here in question. The provision of the Statute which we declared invalid in that case was an attempt to prohibit persons engaged in mining and manufacturing from issuing, for the payment of labor, any order or paper, except such an order as is specified in the Act. The chief ground upon which we held that section void was that it discriminated against a class of employers, and interfered with the right of contract between citizens in respect to matters purely private. Having held that section of the Act void, as an abridgement of the guaranteed rights and privileges of the citizens of this State, it seems to me that the fourth section of the same Act—the one now in question—must, for the reasons and upon the authorities and principles set forth in the opinion in the said case of *State v. Goodwill*, be also held unconstitutional and void.

There are many considerations for selling goods or supplies at less per cent of profit to one customer than to others. The goods may be of the "like character, kind, quality and quantity," and still there may be considerations, entirely proper, why the sale should not be at the same price in all cases,—such as the character and promptness of the customer; the risk of loss or time of payment; the aggregate amount of purchases by the same person of

*Head note by *SNYDER, P.*
6 L. R. A.

different kinds of goods or supplies. It may be more profitable to sell a large bill of different kinds of goods to a large consumer than to sell one of the same kind of articles to one who buys nothing else. The Statute is a Procrustean bed. It consigns all sizes and conditions to the same measure of treatment, regardless of their differences. It excludes all freedom in trade, and all considerations of mutual benefit, and even charity. If the employer sells goods to the family of some friend, in indigent circumstances, at less than cost, then, under this Statute, he must sell at the same price to all his employes. But it is unnecessary to illustrate the vices, the crudities and the injustice of the Statute. That it is an attempt to do for private citizens, under no physical or mental disabilities, what they can best do for themselves, is apparent. It selects miners and manufacturers as a class, and denies to them privileges which are not only proper and legitimate in themselves but to some extent necessary and unavoidable in the conduct of business, privileges which concern private affairs solely, and which are enjoyed by all other classes and citizens. It is an attempt on the part of the Legislature to do what, in this country, cannot be done; that is, to prevent persons who are *sui juris* from making their own contracts. The Act is an infringement alike of the right of the employer and the employé. More than this, it is an insulting attempt to put the laborer under legislative tutelage, which is not only degrading to his manhood, but subversive of his rights as a citizen of the United States. *Godcharles v. Wigeman*, 118 Pa. 481, 4 Cent. Rep. 887.

In condemning this Statute, we do not wish to give countenance to the idea that any employer, whether he is engaged in mining, manufacturing or any other business, has the right to discriminate against his employes, by selling to them goods or supplies, under similar circumstances, at a greater per cent of profit than he does to his other customers. Such a discrimination is not only unjust, but it is subversive of the first principles of trade; and no employé should buy from such employer. The remedy is in the hands of the employé. He is not compelled to buy from his employer; and the general law, without any special statute, will fully protect him in his refusal to do so. The ground on which this Act is condemned is that it is class legislation, and an unjust interference with the rights, privileges and property of both the employer and the employé, and places upon both the badge of slavery, by denying to the one the right of managing his own private business, and assuming that the other has so little capacity and manhood as to be unable to protect himself, or manage his own private affairs.

For these reasons, and upon the principles announced in the opinion of this court in *State v. Goodwill*, hereinbefore referred to, we hold the said fourth section of the Act aforesaid unconstitutional and void.

The judgment of the Circuit Court is reversed, the demurrer to the indictment sustained, and the defendant discharged.

English and Brannon, JJ., concurred; Green, J., absent.

MINNESOTA SUPREME COURT.

N. J. AIKEN, *Appl.*,

v.

Lesser FRANKLIN, *Resp.*

(....Minn....)

*At common law a covenant of seisin is not implied in a deed of real property by the use of the operative words "grant, bargain, sell, convey and warrant."

(November 27, 1896.)

*Head note by COLLINS, J.

NOTE.—Covenant of seisin.

The covenants of seisin and the right to convey are general covenants that the grantor is lawfully seised, and had a right to convey at the time of execution of the conveyance; where the grantor is not at the time possessed of the legal title, and is not in possession of the premises, the covenant is broken as soon as made. *Mitchell v. Warner*, 5 Conn. 497; *Griffin v. Fairbrother*, 10 Me. 91; *Raymond v. Raymond*, 10 Cush. 184; *Slater v. Rawson*, 1 Met. 450; *Bartholomew v. Candee*, 14 Pick. 170; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249; *Pearse v. Chouteau*, 18 Mo. 527; *Greenby v. Wilcocks*, 2 Johns. 1, 8 Am. Dec. 379; *Backus v. McCoy*, 3 Ohio, 218, 17 Am. Dec. 585; *Devore v. Sunderland*, 17 Ohio, 60, 49 Am. Rep. 442; *Garfield v. Williams*, 2 Vt. 327; *Dickinson v. Hoomes*, 8 Gratt. (Va.) 397; *Pollard v. Dwight*, 8 U. S. 4 Cranch, 421, 430 (2 L. ed. 666, 669); *Howell v. Richards*, 11 East, 643.

6 L. R. A.

APPEAL by plaintiff from a judgment of the District Court for Hennepin County dismissing the complaint in an action to recover damages for an alleged breach of a covenant contained in a deed of certain lands. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. S. M. Finch, for appellant:

While it is necessary under our statutes to express covenants, yet, no form being prescribed and no place in the deed indicated in which they shall be placed, any apt words in the conveyance will comply with the require-

In such case no eviction is necessary to give a right of action upon it. *Le Roy v. Beard*, 49 U. S. 8 How. 451 (12 L. ed. 1151); *Pollard v. Dwight*, 8 U. S. 4 Cranch, 421 (2 L. ed. 666); *Peters v. Bowman*, 98 U. S. 56 (25 L. ed. 91); *Foot v. Burnet*, 10 Ohio, 317, 36 Am. Dec. 90.

It is broken when the estate described is not the property of the grantor. *Morrison v. McArthur*, 43 Me. 567; *Basford v. Pearson*, 9 Allen, 389; *Bacon v. Lincoln*, 4 Cush. 210, 50 Am. Dec. 765; *Wheelock v. Thayer*, 16 Pick. 68.

Or when property has improvements and erections belonging to third persons. *Van Wagner v. Van Nostrand*, 19 Iowa, 427; *Mott v. Palmer*, 1 N. Y. 564; *Tift v. Horton*, 58 N. Y. 377; *West v. Stewart*, 7 Pa. 122; *Powers v. Dennison*, 80 Vt. 752.

If the grantor has actual possession at the time of the conveyance, the covenant is broken on eviction of the grantee by a permanent title, and an action

ments of the statute, and all the words of the deed must be held to have a meaning, and effect is given to the conveyance in accordance with the words used.

Greenl. Cruise, Real Prop. bk. 4, pp. 25, 26.

Any words will be sufficient which show the intent of the parties.

Id. p. 368.

No particular technical words are required to make a covenant.

Hallett v. Wylie, 8 Johns. 48; *Bull v. Follett*, 5 Cow. 170; *Jackson v. Stuart*, 20 Johns. 85.

Some words create a covenant. Thus the words "grant or demise," in a lease for years, create a covenant in law for quiet enjoyment.

Grannis v. Clark, 8 Cow. 86-41; *Barney v. Keith*, 4 Wend. 502.

The words "grant, bargain, sell, enfeoff and confirm" import a covenant in law.

Browning v. Wright, 2 Bos. & P. 21.

The words "grant, bargain, sell, convey and warrant," are apt words to express covenants. See Devlin, Deeds, § 882; *Wadlington v. Hill*, 10 Smedes & M. 560, 562.

The proposition in the deed, "sell and convey," loses all its force if any construction can be placed thereon except that grantor conveyed something, or if he did not his agreement and the covenant that he entered into were broken.

Jackson v. Green, 11 West. Rep. 850, 112 Ind. 341; *Witt v. St. Paul & N. P. R. Co.* 38 Minn. 122.

The burden of proof is upon the defendant in cases where breach of covenant of right to convey or of seisin is alleged. He must show his title, and it is not for the plaintiff to show a want of title in defendant by proving a negative.

Devlin, Deeds, § 882; Rawle, Cov. 84; *Abbott v. Allen*, 14 Johns. 253; *Swafford v. Whipple*, 3 G. Greene (Iowa) 261; *Schofield v. Iowa Homestead Co.* 32 Iowa, 321; *Beckmann v. Henn*, 17 Wis. 412; *Baker v. Corbett*, 28 Iowa, 317; *Mecklem v. Blake*, 16 Wis. 102.

The covenants of seisin and of right to convey are synonymous. A person who is seised has a right to convey.

Rickert v. Snyder, 9 Wend. 416; *Willard v. Twitchell*, 1 N. H. 177; *Sedgwick*, Damages, p. 175.

If defendant was not seised of the land he had no right to convey, and this covenant must necessarily be broken.

Mitchell v. Hazen, 4 Conn. 510, 511; *Starr v. Leavitt*, 2 Conn. 243; *Hinman v. Leavenworth*, 2 Conn. 244, note.

If grantor has no title to the whole or a part of the premises the covenants of seisin and of

power to convey are broken immediately on the execution of the deed.

Fowler v. Poling, 2 Barb. 300; *Cushman v. Blanchard*, 2 Me. 288.

Mr. R. B. Forrest for respondent.

Collins, J., delivered the opinion of the court:

In the complaint in this action, plaintiff, with some particularity as to details, alleged a breach of a covenant of seisin and right to convey contained, as he contends, in a deed of certain real property in the State of Mississippi, which deed was executed and delivered by defendant, as grantor, unto plaintiff, as grantee, a copy thereof being made a part of the complaint. We are not advised by the complaint as to where the conveyance was executed and delivered, nor as to the existence of any statute in the State of Mississippi regulating the form of a deed, or bearing upon the subject of covenants, express or implied, therein. Defendant by his answer admitted the execution and delivery of the instrument, alleged a right to convey all of the title and interest in the premises thereby conveyed, and put in issue some of the details before referred to. A reply having been interposed, the case was brought to trial, before the court, without a jury. Upon reading the pleadings, plaintiff's counsel purposely refused to offer any testimony, claiming that under the authorities the burden of proof was upon the defendant. The court thought otherwise, and dismissed the action. Its conclusion was right; but our affirmance is expressly put on the ground that there is no covenant of seisin in the deed. There is none by implication, and certainly none in express words. This question confronts us at the outset, but neither of the counsel have suggested whether we should construe the instrument, with respect to the existence of covenants, by the statute of the State in which plaintiff seeks his remedy, or by the laws of the State wherein is situated the subject matter of the contract,—the land conveyed,—and which, in the absence of proof to the contrary, we assume to be the common law. *Hoyt v. McNeil*, 13 Minn. 390 (Gil.) 862.

The operative words in the deed now being considered, wherein must be found the covenant of seisin, if found at all, are "grant, bargain, sell, convey and warrant," and from their use the appellant contends the covenant is implied. But, if his right to recover is to be determined by the law as it exists in this State, this position, if correct, is immaterial; for, by virtue of our statute, no covenants whatever

of covenant will lie. See *Martin v. Baker*, 5 Blackf. (Ind.) 232; *Coleman v. Lyman*, 42 Ind. 289; *Brandt v. Foster*, 5 Iowa, 294; *Schofield v. Iowa Homestead Co.* 32 Iowa, 317, 7 Am. Rep. 197; *Parker v. Brown*, 15 N. H. 176; *Partridge v. Hatch*, 18 N. H. 498; *Backus v. McCoy*, 3 Ohio, 218, 17 Am. Dec. 586; *Great Western Stock Co. v. Sasa*, 24 Ohio St. 542; *Richardson v. Dorr*, 5 Vt. 9; *Kingdon v. Nottle*, 1 Maule & S. 355.

Covenant runs with the land.

This covenant of seisin runs with the land, and inures to the subsequent grantee upon whom the loss falls. *Allen v. Kennedy*, 6 West. Rep. 845, 91 Mo. 324. See *Dickson v. Desire*, 23 Mo. 151; *Chambers v. Smith*, 23 Mo. 174; *Magwire v. Rigglin*, 44 Mo. 512; *Jones v. Whitsett*, 79 Mo. 188; *Lockwood v. Sturdevant*, 6 Conn. 373; *Raymond v. Raymond*, 10 6 L. R. A.

Cush. 134; *Smith v. Strong*, 14 Pick. 128; *Prescott v. Trueman*, 4 Mass. 627, 3 Am. Dec. 249; *Collier v. Gamble*, 10 Mo. 467; *Abbott v. Allen*, 14 Johns. 243; *Stanard v. Eldridge*, 16 Johns. 254; *Wilson v. Forbes*, 2 Dev. L. (N. C.) 80; *Kincaid v. Brittain*, 5 Sneed (Tenn.) 123; *Garfield v. Williams*, 2 Vt. 323.

The settled construction of this statutory covenant by the highest court of Missouri, as first declared in *Dickson v. Desire*, *supra*, was substantially affirmed in *Magwire v. Rigglin*, *supra*; *Jones v. Whitsett*, 79 Mo. 191, and *Allen v. Kennedy*, 6 West. Rep. 845, 91 Mo. 324.

A contrary construction had been originally announced by the same court in *Collier v. Gamble*, 10 Mo. 467; *Schnelle & Q. Lumber Co. v. Barlow*, 34 Fed. Rep. 354.

are implied in conveyances of real estate. Gen. Stat. 1878, § 6, chap. 40.

Nor do these words import a covenant of seisin at common law, so that, if we pass upon the question upon the presumption that the rule in Mississippi should govern, the result is equally as disastrous to the appellant.

In a leading case (*Frost v. Raymond*, 2 Cal. 188) will be found an opinion by Chancellor Kent, in which, after a thorough examination of the authorities, he declares that a covenant of seisin cannot be implied at common law from the use of the words "grant, bargain, sell, alien and confirm" in a deed of real property; expressly repudiating, as opposed to the entire stream of authorities, a statement to the contrary made by Lord Eldon in the case of *Browning v. Wright*, 2 Bos. & P. 21, cited by appellant.

The words construed by the illustrious chancellor, above quoted, are in part the same—and, as to the balance, of the same significance—as those used in this respondent's deed, and on which appellant relies. It being unnecessary for a decision, we do not express an opinion as to where the burden of proof may be in actions of this character, but call attention to the fact that the New York cases cited by appellant have been overruled in *Woolley v. Newcombe*, 87 N. Y. 605. See also Rawle, Covenants, 5th ed. § 64, note.

Nor have we considered other interesting questions suggested by the pleadings herein, but not discussed by counsel.

Judgment affirmed.

John MARTIN, *Resp't.*,
v.

Aaron PALMER and Joseph W. Wakefield,
et al., Intervenor, *App'ts.*

(....Minn....)

*1. Under Gen. Stat. 1878, chap. 32, § 63, "manual labor" in cutting, banking or driving logs or timber includes the use of all implements or instrumentalities actually used in and necessary to the performance of such labor by the lumberman.

2. Hence, where a man and his team are employed, at a gross price for both, to haul or bank logs, his lien on the logs extends to the use of the team.

3. The fact that the employer may afterwards put them to work separately, on different parts of the work, is immaterial.

*Head notes by MITCHELL, J.

NOTE.—Logging contracts, lien of laborer.

A lien on logs, under Maine Rev. Stat., chap. 61, § 38, enforceable within sixty days after they arrive at the mill, is not lost on any part of the logs cut by the same contractor at the same price and delivered at the same mill, because the different kinds are in separate piles and all of one kind has been delivered more than sixty days. *Phillips v. Vose*, 81 Me. 134.

The Michigan Act of 1861, giving a lien for labor performed in cutting and skidding logs by a harbor for a contractor, as against the owner of the logs, between whom and the laborer there is no

4. Where the whole of the services are performed under one contract of employment in getting out a single lot of logs, two different marks, however, being put on different portions of them, according to their grade or quality, the laborer may claim and enforce his lien for his entire services upon that part bearing one of these marks.

(December 12, 1880.)

APPEAL by intervenors from an order of the District Court for Hennepin County denying their motion for new trial in an action to enforce an alleged laborer's lien upon certain logs, in which judgment had been entered for plaintiff. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. A. B. Choate and A. T. Merrill for appellants.

Mr. John T. Byrnes for respondent.

Mitchell, J., delivered the opinion of the court:

Gen. Stat. 1878, chap. 32, § 63, provides that "any person who may do or perform any manual labor in cutting, banking, driving," etc., "any logs or timber in this State, shall have a lien thereon . . . for such services." The defendant employed plaintiff and his team, at a gross price per month for both, to work in a logging camp in getting out logs. As a matter of fact, during a great part of the employment the defendant worked them separately, the team being used in hauling the logs, while plaintiff was occupied in bringing in supplies with other teams or taking care of the stock in the logging-camp stable.

The principal question here presented is whether plaintiff's lien on the logs extends to the use of the team, the intervenors' contention being that "manual labor" applies only to the work of plaintiff's own hands. Such a construction is too narrow, and would in most cases render the Statute nugatory and defeat the remedy which the Legislature intended to give.

In almost every department of the work of logging, certain tools, appliances or instrumentalities are indispensably necessary to the performance of the labor. The timber cannot be cut without axes or hauled or "banked" without teams. Remedial statutes are to be liberally construed to advance the remedy. The Legislature could not have intended to exclude the use of those appliances or instrumentalities which are absolutely necessary to the performance of the various departments of labor enumerated in the Statute. We are therefore of opinion that "manual labor," as used in this

privy of contract, as also the provisions for its enforcement, are not unconstitutional. The Statute declares the lien; and, although there is no direct privy of contract between the laborer and the owner of the logs, yet the law enters into and forms a part of the contract between the owner and the contractor. *Reilly v. Stephenson*, 63 Mich. 509.

Under Wis. Laws 1885, chap. 408, §§ 1, 2, supplies actually used in paying for work of the men and teams in getting out logs and feeding the men and teams so employed create a lien on such logs although the supplies were first placed by the purchasers in their store for sale, before being so used. *Stacy v. Bryant*, 73 Wis. 14.

connection, includes the use and earnings of all implements, instrumentalities or agencies, such as axe, cant-hook, team or the like, which are actually used in and necessary to the performance of such labor by the lumberman or logger. *Hale v. Brown*, 59 N. H. 551. See also *Winslow v. Urquhart*, 39 Wis. 280, and *Hogan v. Cushing*, 49 Wis. 169.

And we fully agree with the learned trial judge that where, as in this case, "a man and his team are employed on the work at a gross price for both, the fact that the employer may have them work separately the whole or a part of the time can make no difference." This may often be necessary as a matter of convenience to the employer, as where teams are "doubled," and the superfluous drivers have to be set at some other department of the work.

There was a conflict in the evidence as to whether the logs on which plaintiff worked were all marked with the same mark (that on which the lien was claimed), or whether two different marks were used on different portions of the logs. The intervenors assign as error the fact that the court states in a memorandum attached to his findings that the evidence that part of the logs had a mark put on them different from that on which the lien is claimed was disregarded, because not pertinent to any issue under the pleadings. Assuming, without deciding, that a statement made by the trial

judge in such a memorandum, but not appearing as a ruling or otherwise in the "settled case," can be assigned as error, the evidence referred to was wholly immaterial. It is not pretended that plaintiff's labor was performed under two separate contracts of employment, or that two distinct lots of logs were worked upon by him. On the contrary, it appears that the labor was all performed under one contract, and in getting out one lot of logs; but the plaintiff swore that they all had the same mark put on them (that on which he claimed a lien), while defendant swore that two marks were used,—that "the good logs were marked 'P W,' and the poor ones 'R O.'" Had all the logs on which plaintiff labored, say 1,000,000 feet, been marked alike, there could be no doubt but that he could have enforced his lien for his whole labor against any portion of them, and that such labor would be deemed "wholly performed" on such logs, within the meaning of the Statute. And where the labor is, as in this case, performed under a single contract of employment upon a single lot of logs, different portions of which are, however, differently marked to distinguish the grade or quality, we do not see why a party may not claim and enforce his lien for the whole of his services exclusively upon that part of the logs bearing one of the two marks.

Order affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

JOHN W. LOVELL CO., *Appt.*,

v.

Henry O. HOUGHTON *et al.*, *Respds.*

(116 N. Y. 520.)

A publication charging that the books of another person infringed a copyright is privileged when made by a person claiming exclusive rights under the copyright, and an action to recover damages therefor will be dismissed, unless it is shown to have been made with express malice; and the fact that the copyright was improperly allowed, or that the copyrighted works were not the subject of a valid copyright, does not destroy the privilege.

(November 28, 1899.)

A PPEAL by plaintiff from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment of the Trial Term entered upon a verdict directed for defendants in an action to recover damages for the publication of an alleged libel. *Affirmed.*

Statement by **Parker, J.**:

Appeal from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment dismissing the complaint, entered upon a verdict for the defendants, found by direction of the court. The action was brought to recover damages for certain written and oral statements made by

NOTE.—Libel, privileged communications, damages in case of express malice.

A communication in good faith upon any subject in reference to which the party communicating has an interest or a duty, public or private, if made to a person having a corresponding interest or duty, public or private, is privileged. *Bradley v. Cramer*, 66 Wis. 297; *King v. [Patterson]*, 8 Cent. Rep. 363, 49 N. J. L. 417.

It is not necessary that the words used in a published article should be slanderous, to sustain an action for libel. *Prosser v. Callis*, 117 Ind. 105.

Words which would not be actionable *per se* in slander may be so in libel. *Herman v. Bradstreet Co.* 1 West. Rep. 458, 19 Mo. App. 227.

Communications or publications which upon proper occasions are qualifiedly privileged, are not privileged when made by persons actuated by malice. *Smith v. Smith* (Mich.), 3 L. R. A. 52; *Lowry v. Vedder*, 40 Minn. 475.

If a privileged communication be couched in 6 L. R. A.

language too violent for the occasion, it furnishes evidence of malice. *Kent v. Bongartz*, 1 New Eng. Rep. 137, 15 R. I. 72.

Where a communication is privileged no recovery can be had without proof of actual malice. Malice is not implied. *Briggs v. Garrett*, 2 Cent. Rep. 364, 111 Pa. 404.

In case of privileged communication, probable cause is a bar to a suit. If there is probable cause, it is of no consequence that the libel was malicious, *Ibid.*

Although the words spoken may be of a privileged character, yet, if the defendant was actuated by malice and his statements were false, he will be liable. *State v. Derry*, 4 West. Rep. 32, 20 Mo. App. 552.

Malice as an element.

To justify publication of defamatory matter, the occasion must be privileged, and must be used bona fide, without malice. *Chaffin v. Lynch*, 88 Va. 103.

the defendants concerning plaintiff's editions of two of the poet Longfellow's prose works, "Hyperion" and "Outre-Mer." The plaintiff claimed the statements to have been false; that they were maliciously made, and resulted in great damage to plaintiff's business. These books were published by the plaintiff in the year 1882. The early edition of "Hyperion" was published in 1839, and of "Outre-Mer," in 1835. It appears, therefore, that the limit of time for the terms of the copyrights had expired, such limit, together with the renewal permitted, being forty-two years. But in 1869 Mr. Longfellow obtained a copyright for a revised edition of such works; so the president of the plaintiff, being unable to purchase a copy of the early edition, sent his brother to the library of Harvard University, with instructions to carefully compare a copy of the later edition with a copy of the first edition, which was there preserved, and to make the former, by alterations, an exact copy of the latter. He did not succeed in making it an exact copy, for the book, when published, contained 183 variations,—variations made by Mr. Longfellow, and constituting a part of the ground of his claim for copyright. "Outre-Mer" also contained variations from the original editions, and which were in defendants' editions.

The defendants had been, with their predecessors, for a long time, the publishers of the works of Mr. Longfellow, under contract with him with respect to the same, and copyrights thereof, and were then publishing editions of "Hyperion" and "Outre-Mer," revised by Mr. Longfellow, for which a copyright had been obtained in the year 1869. Immediately after the publication of plaintiff's edition of "Hyperion," it was brought to the attention of the defendants. An examination at once disclosed that plaintiff's edition was not an exact copy of the first edition, but contained alterations and variations which could only be found in Mr. Longfellow's Revised Edition of 1869. Thereupon the defendants published a caution to the trade and public against buying the plaintiff's book, characterizing it as "a direct infringement of copyright, and a violation of the rights of Mr. Longfellow's heirs, and his publishers."

Other facts sufficiently appear in the opinion.

The court directed a verdict for the defendant.

Mr. Roger Foster, for appellant:

The publications complained of attacked the quality, not the title, of the plaintiff's books and were libelous *per se*.

Pollock, Torts, 261; *Thorley's Cattle Food Co. v. Massam*, L. R. 14 Ch. Div. 763. See also *Western Counties Manure Co. v. Lawes Chemical Manure Co.* L. R. 9 Exch. 218; *Ingram v. Lawson*, 6 Bing. N. C. 212; *Hart v. Wall*, L. R. 2 C. P. Div. 146; *Worthington v. Houghton*, 109 Mass. 481; *Steketes v. Kimm*, 48 Mich. 322; *Whittemore v. Weiss*, 83 Mich. 348; *Russell v. Webster*, 23 Week. Rep. 59; *Tabart v. Tipper*, 1 Camp. 350.

There was sufficient evidence of malice to entitle the plaintiff to go to the jury. Recklessness of statement constitutes legal malice even though the speaker of the privileged communication believed his charge to be true.

Samuels v. Evening Mail Assn. 9 Hun, 288, 75 N. Y. 604; *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 886; *Carpenter v. Bailey*, 58 N. H. 590; *Gassett v. Gilbert*, 6 Gray, 94; *Gott v. Pulsifer*, 122 Mass. 236; *Locke v. Bradstreet Co.* 22 Fed. Rep. 771; *Broughton v. Jackson*, 18 Q. B. 878; *Emack v. Kane*, 84 Fed. Rep. 46; *Collins v. Whitehead*, 84 Fed. Rep. 121; *Attins v. Perrin*, 8 Post. & F. 179; *Hart v. Wall*, L. R. 2 C. P. Div. 146; *Thorley's Cattle Food Co. v. Massam*, *supra*; *Saxby v. Easterbrook*, L. R. 3 C. P. Div. 839; *Grinnell v. Stewart*, 20 How. Pr. 478, 32 Barb. 544, 12 Abb. Pr. 220.

The defendants' bad faith clearly appears, since they could not have known until two days after the publication of their first libel that plaintiff's edition contained any of the new matter in their revised edition. They cannot claim that they then relied on what they afterwards discovered.

Cooley, Torts, 183; *Foshay v. Ferguson*, 2 Denio, 617; *Stewart v. Sonneborn*, 98 U. S. 187 (25 L. ed. 116); *Thomas v. Russell*, 9 Exch. 764.

Defendants must be presumed to have known the law, under which the plaintiff was not guilty of any breach of copyright.

Butler v. Livingston, 15 Ga. 565.

Very slight proof is sufficient to show malice in a charge of breach of copyright.

Hart v. Wall, L. R. 2 C. P. Div. 146.

It is some evidence of malice that plaintiff and defendant are rivals in trade, or that they competed together.

Good motives are essential to an exoneration or justification for publishing libelous matter which is true. *Jones v. Townsend*, 21 Fla. 431.

Malice, as an ingredient of libel or slander, signifies nothing more than a wrongful act done intentionally without just cause or excuse. *King v. Patterson*, 8 Cent. Rep. 363, 49 N. J. L. 417.

In a libel suit founded upon words actionable *per se*, it is proper to allow plaintiff to show malice by extrinsic evidence,—such as by letters written by defendant. *Miclenz v. Quasdorf*, 68 Iowa, 723.

An evil intent is a conclusive inference and presumption of law from the publication of libelous matter without excuse. *Richardson v. State*, 5 Cent. Rep. 707, 66 Md. 206.

But malice cannot be implied from the fact of the publication of a statement made in the discharge of a duty, and looking to the prevention of a wrong, even if it is false. *Missouri Pac. R. Co. v. Richmond (Tex.)* 4 L. R. A. 280, *note*.

It is a matter of law for the court to determine 6 L. R. A.

whether the occasion repels inference of malice, and to direct nonsuit or verdict for defendant. *Neeb v. Hope*, 2 Cent. Rep. 71, 111 Pa. 145.

The word "malicious," in defining the intent with which a slander is spoken, is not to be considered in the sense of spite or hatred against a person, but as meaning that the party is actuated by improper and indirect motives other than interest of the public. *Blumhardt v. Rohr*, 70 Md. 323; *Wynne v. Parsons*, 57 Conn. 73.

Unless slanderous words are uttered with actual malice, hatred or ill will, or with such clear want of ground as to warrant an inference of hatred or ill will, only compensatory damages should be allowed. *Broughton v. McGrew (Ind.)* 5 L. R. A. 408, 30 Fed. Rep. 672.

The existence of malice in publishing a libel makes a case for exemplary damages. *Cotulla v. Kerr*, 74 Tex. 89.

Malice as an element in libel and slander. See *Byam v. Collins*, 2 L. R. A. 129, *note*, 111 N. Y. 143.

Odger, Libel and Slander, 276; *Warman v. Hine*, 1 Jur. 820; *Smith v. Mathews*, 1 Mood. & Rob. 151.

Messrs. Joseph H. Choate, William V. Rowe and A. W. Evarts, for respondents:

The plaintiff failed to make out any malice on the part of the defendants, or any purpose on their part of injuring the plaintiff in causing the publications and making the statements complained of. It cannot, therefore, maintain this action, and the direction of a verdict for the defendants was proper and must be sustained.

Wren v. Weild, L. R. 4 Q. B. 780; *Hovey v. Rubber Typ Pencil Co.* 57 N. Y. 119; *Celluloid Mfg. Co. v. Goodyear Dental Vulcanite Co.* 13 Blatchf. 375; *Halsey v. Brotherhood*, L. R. 19 Ch. Div. 880, L. R. 15 Ch. Div. 514; *Odgers, Libel and Slander*, 188; *Hastings v. Giles Lithographic Co.* 51 Hun, 864.

The statements were fair statements made by the defendants in a matter where their interest was deeply concerned, to persons who, themselves, had an interest in such communications. They were therefore clearly privileged.

Klinck v. Colby, 46 N. Y. 427; *Hamilton v. Eno*, 81 N. Y. 116.

Parker, J., delivered the opinion [of the court:

The learned trial judge held that the publication complained of was a privileged communication; that the evidence adduced did not justify a finding by the jury that the publication was malicious; and directed a verdict in favor of the defendants. Whether the publication was a privileged communication had an important bearing upon the question of the sufficiency of plaintiff's proof to justify a submission to the jury. The publication was prima facie a libel. In such a case, proof of malice is not required, beyond evidence of the publication itself, because the law presumes malice. When, however, the publication is in fact a privileged communication, the rule is that upon the plaintiff rests the additional burden of proving the existence of express malice. *Klinck v. Colby*, 46 N. Y. 427.

The rule is the same, whether the action be regarded as one for slander of title or for libel simply. *Hovey v. Rubber Typ Pencil Co.* 57 N. Y. 125.

Whether the subject matter to which the alleged libel relates, and the interest in it of defendants, are such as to render the publication privileged, and therefore prima facie excusable, is a question for the court. *Klinck v. Colby*, supra.

When the facts upon which the defendants base their claim of privilege are challenged by the plaintiff, it then becomes the duty of the court to submit the question to the jury, under proper instructions, to determine the existence or nonexistence of the facts upon which the privilege is sought to be founded. But where, as in this case, the facts upon which the claim of a privileged communication is sought to be established are uncontradicted, upon the court rests the duty of determining, as a matter of law, whether the communication be privileged or not. Did the court rightfully determine that question?

Judge Folger said, in *Hamilton v. Eno*, that
 4 L. R. A.

"the occasion that makes a communication privileged is when one has an interest in the matter, or a duty in regard to it, or there is a propriety in utterance, and he makes a statement in good faith to another, who has a like interest or duty, or to whom a like propriety attaches to hear the utterance." 81 N. Y. 116.

Such an occasion is where a communication is fairly made by a person, in the discharge of some public or private duty, legal or moral, or in the conduct of his own affairs, in a matter where his interest is concerned. *White v. Nicholls*, 44 U. S. 8 How. 266 [11 L. ed. 591].

In *Klinck v. Colby*, supra, the defendants, having been defrauded of a large amount of goods, and having probable cause to believe that plaintiff was a party to the fraud, signed a paper in which they stated that they had been "robbed and swindled" by plaintiff and others, and agreed to bear equally the expense of prosecuting the offenders criminally. The court held, as a matter of law, that the exhibition of the paper to an agent of one of the parties defrauded, for the purpose of procuring the signature of the principal, was privileged.

In *Wren v. Weild*, L. R. 4 Q. B. 780, an action of the same general character as this, the plaintiff sought to establish his case by showing the invalidity of the patent, which, defendant asserted, justified the publication of which plaintiff complained. In that case, Blackburn, J., says: "But we think that as soon as it was shown in evidence that the defendant really had a patent right of his own, and was asserting it, the occasion privileged the communication, and the plaintiffs were bound to prove such malice as would support the action."

In *Hovey v. Rubber Typ Pencil Co.*, supra, the court says: "If the defendant, believing itself to have an exclusive patent, issued such a notice in good faith, as a warning to dealers, against an invasion of its rights, it in so doing would only have discharged a moral obligation, and satisfied the demands of fair dealing. In such a case, a mistake on its part as to the validity of its right would not have rendered it liable to an action."

If, in an action for slander of title, the defendant produce the deed under which he made the assertion of title, the communication is privileged, and the plaintiff must fail, unless he goes further, and proves that the defendant knew that the deed was worthless, and made the publication with such knowledge. So, if an author or book publisher obtain a copyright, and thereafter asserts that the same book, published by some other person, is unauthorized, such publication will be held to be a privileged communication, and its privileged character cannot be taken away by proof that it was not the subject of a copyright. The actual existence of a copyright under which the claim is made will afford protection to the claimant until the plaintiff shall have proven that the claimant had knowledge of its invalidity, and therefore acted in bad faith. In the case before us, the plaintiff proved that in the year 1882 it published cheap editions of "Hyperion" and "Outre-Mer;" that immediately thereafter the defendants published an advertisement in the *Evening Post and Publishers' Weekly*, charging that the plaintiff's books infringed a copyright which they claimed still existed in

later editions of such works. The result of such publication greatly diminished plaintiff's sales. On the part of the defendants, it appeared that they and their predecessors had been for a long time the publishers of the works of Mr. Longfellow, under contract with him with respect to the same, and the copyrights thereof; that at the time of the publication complained of they were publishing editions of "Hyperion" and "Outre-Mer," as revised by Mr. Longfellow, and for which a copyright had been obtained in the year 1889; that, before making the publication complained of, they caused an examination of the books issued by plaintiff to be made, and found them to contain words and expressions which were not in the original editions, but were in the revised editions,—words and expressions which, with others, formed the basis for Mr. Longfellow's claim for the copyright obtained. It is quite clear that such proof privileged the communication, and the learned court was right in so deciding. The plaintiff could not destroy the privilege by proof that the copyright was improperly allowed, or that the works, as revised, were not the subject of copyright. The fact that the copyright actually existed, and that Mr. Longfellow and his publishers claimed exclusive rights thereunder, and asserted them, privileged the occasion, and the plaintiff thereupon became burdened with the necessity of proving express malice.

This, we think, it failed to do. It did not attempt to prove that the defendants knew that the "revision," so called, was not the subject of a copyright, and that, therefore, their assertion of a right, as against the plaintiff, was made in bad faith, or that they had any other motive than that of protecting their supposed interest, and that of Mr. Longfellow. On the other hand, the defendants' positive testimony is to the effect that they believed they had a copyright; that they acted without malice, and their sole object was to protect their own rights, and those of Mr. Longfellow's family. It seems to be quite apparent from the testimony that not only did the defendants believe in the efficacy of the copyright to protect the alterations and changes contained in the revised editions, but that the plaintiff, at the time

of publication, entertained the same opinion.

"Hyperion" was originally published in 1839, "Outre-Mer," in 1835; so that in 1882 the terms of copyright had expired; the limit of the time, with renewal permitted, being forty-two years. Plaintiff determined to publish cheap editions of these works. It could not find a copy of the early edition of "Hyperion" in New York City. A copy of the later edition was thereupon obtained, and the plaintiff's president sent his brother to the library of Harvard University, where a copy of the edition of 1839 was preserved, with instructions to so alter the later edition as to make it an exact copy of the first. This he attempted, but, as it subsequently appeared, not very successfully, to do. Why did the plaintiff take so much trouble in order to procure an exact copy of the early edition? But one answer is suggested by the testimony before us, for the reason that the plaintiff, as well as the defendants, believed in the existence and validity of the copyright, in so far as the later alterations and revisions as made by Mr. Longfellow were concerned. Unfortunately, Mr. Lovell did not accomplish the task assigned him with thoroughness, and when plaintiff's edition was published it was found to contain 183 variations from the original edition. They had been made by Mr. Longfellow, and constituted a part of the ground of his claim for copyright. They were at once discovered by the defendants, who, because of their relations to the subject, were privileged to make the publication complained of. And the plaintiff is without redress, in the absence of proof of express malice on the part of the defendants in its publication. The case is barren of facts justifying or permitting an inference of express malice. Had it been submitted to the jury, with such a result, it would have been the duty of the court to have set the verdict aside, as against the weight of evidence. The rule is that under such conditions the court should refuse to submit a case to the jury. *Wilds v. Hudson River R. Co.* 24 N. Y. 433.

There are no exceptions to the admission or rejection of evidence which call for a reversal. *The judgment should be affirmed, with costs.* All concur.

NEW YORK COURT OF APPEALS.

Samuel B. WILLIAMS, Admr., etc., of
Wakeman Y. Andrews, Deceased, *Appt.*,

Lucy A. GULE, *Resp't.*

(.....N. Y.....)

1. A valid gift *causa mortis* exists where a person after having had two strokes of paralysis,

and about six weeks before his death, which resulted from a third stroke, has executed a bill of sale and delivered it, together with the subject matter thereof, to his attorney with directions to deliver the same to a certain person named, after the donor's death, although the instrument contains a clause empowering the donor to revoke the transfer at any time during his life.

2. A case should not be submitted to a

NOTE.—*Gift causa mortis.*

A donation *mortis causa* is that form of gift *inter vivos* which is expressly made conditional upon the death of the donor. *Perry's App. (Pa.) 7 Cent. Rep. 165.*

To constitute a valid gift *causa mortis*, it is essential that the donor should make it in contemplation of death, either in his last illness, or while he is in other imminent peril, and that his death should result therefrom. *6 L. R. A.*

suit from such illness or peril. *Dickeschied v. Exchange Bank, 23 W. Va. 340.*

Title to a gift *causa mortis* passes by delivery, defeasible only in donor's lifetime. *Emery v. Clough, 2 New Eng. Rep. 303, 63 N. H. 552.*

The validity of a gift *causa mortis* is to be determined by the law of the place where it is made, without reference to the donor's domicile. *Ibid.*

Where a person *in extremis* takes out a package

jury unless it presents the possibility of different inferences being drawn from the proofs; and if the facts are undisputed and the conclusion to be arrived at is as to their legal effect, a verdict is properly directed on the legal construction given by the judge.

(November 22, 1889.)

A PPEAL by plaintiff from a judgment of the General Term of the Supreme Court, Fifth Department, denying his motion for a new trial upon exceptions taken at the Monroe Circuit and ordered to be heard at General Term in the first instance, in an action to recover money collected upon a policy of insurance upon the life of plaintiff's intestate, in which a verdict had been directed for defendant, and ordering judgment to be entered upon the verdict. *Affirmed.*

The facts sufficiently appear in the opinion. **Mr. George F. Yeoman**, with **Mr. Herbert L. Ward**, for appellant:

There is no valid gift *causa mortis*. To such a gift three things are necessary: (1) it must be made with a view to donor's death; (2) the donor must die of that ailment or peril; (3) there must be a delivery.

Grymes v. Hone, 49 N. Y. 20.

Gifts *causa mortis* can be made only by a person by whom death is believed, on reasonable grounds, to be very near, and who makes the gift in view of, and because of, his approaching death.

1 Parsons, Cont. 286.

A vague and general impression that death may occur from those casualties which attend all human affairs, but which are still too remote and uncertain to be regarded as objects of present contemplation and apprehended danger, is not sufficient to sustain a gift *causa mortis*.

Irish v. Nutting, 47 Barb. 885.

There is no valid gift *inter vivos*. Delivery is essential to a valid gift.

of bonds from beneath his pillow, and hands them to another saying, in substance, "These bonds are for you," his intention is sufficiently manifested. *Vandor v. Roach*, 78 Cal. 614.

A gift may be shown by the surrounding circumstances to have been a gift *causa mortis*, and not a gift *inter vivos*. *Dickeschied v. Exchange Bank*, *supra*.

The burden of proving a gift of personal property by a decedent is much heavier on the claimant, when the alleged gift is a gift *causa mortis* than when the gift is one *inter vivos*. When the gift claimed is a gift *causa mortis*, it must be proven by strong and clear evidence. *Lewis v. Merritt*, 48 Hun, 161; *Dickeschied v. Exchange Bank*, *supra*.

What essential to constitute.

To constitute a good gift *causa mortis*, there must be complete delivery and retention of possession by donee. *Dunbar v. Dunbar*, 6 New Eng. Rep. 147, 80 Me. 152; *Henschel v. Maurer*, 69 Wis. 576.

A *donatio mortis causa* must be completely executed, precisely as required in the case of gifts *inter vivos*, subject to be devested by actual revocation by the donor, or by the donor's surviving the apprehended peril, or outliving the donee, or by the occurrence of a deficiency of assets to pay the debts of the deceased donor. *Basket v. Hassell*, 107 U. S. 602 (27 L. ed. 500).

To constitute a gift *causa mortis*, the subject of 6 L. R. A.

Jackson v. Twenty-Third Street R. Co. 88 N. Y. 520.

It is an elementary rule that such a gift cannot be made to take effect in possession *in futuro*. Such a transaction amounts only to a promise to make a gift, which is *nudum pactum*. There must be a delivery of possession, with a view to pass a present right of "property."

Young v. Young, 80 N. Y. 422; *Curry v. Powers*, 70 N. Y. 212; *Irish v. Nutting*, 47 Barb. 885; 2 Schouler, Pers. Prop. 118; *Bedell v. Carll*, 38 N. Y. 581.

The deed was not held in escrow.

Where the future delivery is merely to wait the lapse of time or the happening of some contingency, and not the performance of a condition, it will be deemed the grantor's deed, presently.

Hathaway v. Payne, 84 N. Y. 104. See *Stan-ton v. Miller*, 58 N. Y. 202; *James v. Vanderheyden*, 1 Paige, 885; *Taft v. Taft*, 59 Mich. 185.

Mr. Edward Webster, for respondent:

The evidence shows that all three of the conditions necessary to constitute a valid gift *causa mortis* existed and established this transfer as a gift *causa mortis*.

Grymes v. Hone, 49 N. Y. 17; *Champney v. Blanchard*, 89 N. Y. 111; *Curtiss v. Barrus*, 38 Hun, 167.

A delivery of the property to a third person, as a depositary for the donee, constitutes as good a gift *causa mortis* as though a delivery had been made directly to the donee.

Ruggles v. Lawson, 18 Johns. 285; *Hathaway v. Payne*, 84 N. Y. 93; *Crain v. Wright*, 36 Hun, 74; *Grymes v. Hone*, *supra*, and cases cited; *Wells v. Tucker*, 8 Binn. (Pa.) 866; *Michener v. Dale*, 23 Pa. 59; *Tooley v. Dibble*, 2 Hill, 641; *Clough v. Clough*, 117 Mass. 88.

The revocation clause expressed in the assignment did not affect the validity of the gift *causa mortis*. A gift *causa mortis* is not fully confirmed until the death of the donor, and one of its essential features is that it may be

the gift must be delivered either to the donee or to some person for his use and benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time to revoke the gift. *Daniel v. Smith*, 78 Cal. 548.

The donor's declaration that he has given the article in question will not perfect a gift which is incomplete for want of delivery. *Yancoy v. Field*, 18 Va. L. J. 158.

Before a gift *causa mortis* can take effect the donor must part, not only with the possession of, but also with all present control and dominion over, the subject of the gift. *Daniel v. Smith*, 78 Cal. 550; *Basket v. Hassell*, *supra*.

There must have been a delivery appropriate to the nature of the thing given. *Madaira's App.* (Pa.) 2 Cent. Rep. 812; *Lamson v. Monroe* (Me.) 2 New Eng. Rep. 458.

Where checks were delivered to a third person with directions to deliver them to the parties in whose favor they were drawn if the donor should die, but to return them to him if he should recover, it possessed none of the elements of a *donatio causa mortis*. *Daniel v. Smith*, 78 Cal. 551; *Walter v. Ford*, 74 Mo. 195.

Gifts *causa mortis*. See, generally, *Drew v. Haggerty*, 8 L. R. A. 230, note, 81 Me. 231; *Walsh's App.* 1 L. R. A. 585, note, 123 Pa. 177.

What necessary to completion of gift. *Beaver v. Beaver*, post. —

revoked by a repentance of the gift. In a gift *causa mortis* there is always a *locus penitentiae* to the donor until his death, which terminates the right and power of retraction.

2 Kent, Com. 445; *Bloomer v. Bloomer*, 2 Bradf. (N. Y.) 339; *Merchant v. Merchant*, Id. 445; *Wigle v. Wigle*, 6 Watts, 522; *Marshall v. Berry*, 18 Allen, 46; *Nicholus v. Adams*, 2 Whart. 22; *Bunn v. Markham*, 7 Taunt. 224.

Gray, J., delivered the opinion of the court:

This case presents a question whether a disposition of some personal property by the intestate, at a short time prior to his death, was valid, either as an executed gift *inter vivos*, or as a gift *causa mortis*.

The plaintiff, as administrator of the intestate donor, brought the action to recover back the subject of the gift from the defendant, on the ground that she had no valid title to it. Upon the facts, as developed on the trial, the judge presiding thereat ordered the jury to find a verdict for the defendant, and the general term have affirmed his action. The case made showed that about six weeks before his death occurred the intestate executed an instrument in the form of a bill of sale to his niece, Mrs. Guile, this respondent, of a policy of insurance on his life. In the instrument was a clause empowering him to revoke the transfer at any time during his life. This instrument and the policy the intestate delivered to one Webster, who acted as his attorney in drawing the instrument. After the death occurred Webster delivered the policy and assignment to Mrs. Guile, and she has collected its amount from the insurers.

At the time of the delivery of the policy, the intestate said to Webster that, if anything happened to him, he should give or hand it to her, Mrs. Guile. Webster, who, with his son, gave the only evidence in the case concerning the transaction, testified that the intestate "spoke about her being in his family and doing so much for him . . . The fact was that I was to give the policy and assignment to Mrs. Guile if something happened to Mr. Andrews . . . My understanding of the matter was that I was to deliver this, in case of death or incapacity, or something of that kind . . . They were placed in my hands to hand to her if anything happened to him; I was depository of the papers for Mrs. Guile and should give them to no one else."

The son corroborates the father's testimony as to his instructions upon the delivery of the policy. It appears that though the intestate looked well at the time of the transaction, he had already had two strokes of paralysis, and from the third stroke, about six weeks later, he lingered a few days in sickness until death came.

Now upon these facts opinions may differ as to what was the legal effect of the act of the decedent, as to whether there had been a valid transfer or gift to Mrs. Guile, as the general term have thought, or whether there was a gift in anticipation of the death of the donor from an impending peril to his life. But I do not think there was any room for opposite inferences as to the intention of the donor. The facts were undisputed and not conflicting,

and they evidenced an unmistakable and clear intent that Mrs. Guile should have the benefit of the policy, unless the gift was revoked during his life. In order that a case should be submitted to a determination by the jury, it must present the possibility of different inferences being drawn from the proofs. But where, on undisputed facts, the conclusion to be arrived at is as to the legal effect, there is nothing for the jury to pass upon, and a verdict is properly directed on the legal construction given by the trial judge. A test as to the propriety of refusing to submit a question to the jury is whether their verdict could be set aside as contrary to evidence. *Cagger v. Lansing*, 64 N. Y. 417, 427.

In this case, I think the intention of the deceased, in this transaction, to have been perfectly clear.

I do not agree with the opinion of the court at general term that there was a complete delivery to Mrs. Guile, and hence a valid executed gift; but I think there was a valid gift *causa mortis*. The elements which go to make up a valid executed gift were incomplete here. There was absent the essential feature of such a delivery as divested the donor of all possession and dominion over the subject of the gift. If the present right to the property is not parted with, so as to vest the title to it in the donee, there is no valid executed gift. *Young v. Young*, 80 N. Y. 430; *Jackson v. Twenty-third Street R. Co.* 88 N. Y. 520.

As Ruggles, J., said, in *Harris v. Clark*, 3 N. Y. 113: "The contract must have been executed. The thing given must have been put into the hands of the donee, or placed within his power by delivery of the means of obtaining it."

Here, not only was the instrument, purporting to assign to Mrs. Guile the property, made revocable by its terms, but the evidence of Webster, to whom the policy and instrument of transfer were given in custody, shows that that instrument was not to take effect *in presenti* at all. The donor retained control over the property; for he reserved the right to revoke the gift of it at any time during his life, and it was not, and it could not be, given by Webster to Mrs. Guile at any time during the intestate's life.

I think that the court below, in holding that there was an executed gift or sale, did not give due weight to the fact that the gift was not *in presenti*. No present possession or dominion did or could pass to the donee, and the absence of such a feature precludes us from deeming the gift to have been complete by delivery. But there was sufficient in the case as made to establish a gift *causa mortis*. Such a gift Judge Story described as amphibious, between a gift *inter vivos* and a legacy. Eq. Jur. § 606.

He says it differs from a gift *inter vivos* in several respects in which it resembles a legacy, and he mentions as one that "it is ambulatory, incomplete and revocable, during the donor's lifetime." And Leach, V. C., in *Gardner v. Parker*, 3 Madd. 184, said that wherever a gift is in prospect of death there is an implied condition that it is to be held only in the happening of that event. The distinction between such a gift and any other is that though de-

livery is an essential feature in each, in the former that peculiar character of revocability inheres during the donor's life.

Nottingham, *Lord Chancellor*, said, in *Edwards v. Jones*, 1 Myl. & C. 226: "A party making *donatio causa mortis* does not part with the whole interest, save only in a certain event, and it is of the essence of such a gift that it should not otherwise take place. . . . It leaves the whole title in the donor, unless the event occurs which is to divest him."

Judge Story said of such gifts (*Eq. Jur.* § 607), that the courts have "not considered the interest as completely vested by the gift, but that it is so vested in the donee that the donee has a right to call on a court of equity for its aid."

The title of the donee only becomes absolute at the donor's death, when by relation it is deemed to take effect from the time of the delivery. 1 Wms. Exrs. 552.

Until the donor's death, the condition is implied that he may always revoke it, and, in the case of an illness, if he lives, the thing shall be restored to him. It is not necessary that the donor should declare the condition. The presence, therefore, in this instrument of transfer here, of a clause giving power to revoke, indicates nothing more than an expression of what was implied in the law in a gift *causa mortis*. But this transaction possessed the additional distinctive feature, required to be present to constitute a gift *causa mortis*, of its having been made when the donor must be deemed to have had his death in view as the possible result of an existing disorder. It is not necessary that the donor should have been *in extremis*; only, that his death, when it occurred, should be from the disorder which afflicted him and menaced his life. *Grymes v. Hone*, 49 N. Y. 20.

The rule of law, in such cases of gifts made in prospect of death, demands, for their validity, that the proof shall show the existence of a bodily disorder, or of an illness which imperils the donor's life and which eventually

terminates it. But that he should be confined to his bed, or his room, or that he should die within a certain limited time, are not essential circumstances to support such a gift. It is a matter within the experience and common knowledge of all, and one requiring no evidence to show, that paralysis is the symptom of a disease which does terminate human life. Its strokes are known to cause to the victim a loss of bodily functions, or senses, and point to the existence of some grave ailment of the bodily system. It is quite a matter of common supposition, or belief, that the third stroke is followed by death.

I think that we are bound to presume that when death has occurred from disease, indicated by paralysis, a transaction such as we have here and which took place after the individual had been admonished by two paralytic strokes, was conducted with a view to death. It is unreasonable to say that the donor, in so acting, was not under the apprehension of a recurrence of the paralysis. We see him at the age of seventy years without wife or children, after having been twice stricken down with paralysis, delivering to his lawyer, Webster, a piece of property with the instruction that if anything happened to him he should deliver it to a niece who had lived with him. This presents a state of facts which, in my opinion, permits of but one legal conclusion. It was not a gift *inter vivos* which was sought and effected, but a gift *causa mortis*, which at common law served as a description of a revocable gift and in the civil law partook of the nature of a legacy. This very insertion by the intestate in the instrument of assignment of the power to revoke it emphasizes his otherwise evident intention of making a gift to his niece in the contingency of the more or less near approach of death. I see no error committed upon the trial which calls for a reversal at our hands, and I think the judgment appealed from, for the reasons stated, should be affirmed, with costs.

All concur.

INDIANA SUPREME COURT.

MANHATTAN CLOAK & SUIT CO., et al., Apts.,
v.

Henry C. DODGE et al.

(.....Ind.....)

1. The attorney of an assignee for the benefit of creditors has no right to borrow the trust funds, paying interest, and use them to buy claims against the debtor below

their face value, and then file such claims and have them allowed by the assignee, nor can he use his own funds for that purpose; in case he does so the assignee must account for the profits realized by the attorney if he had knowledge of his action.

2. The attorney of an assignee, who buys claims of creditors who have replevied goods sold to the debtor, and enters judgments in the replevin suits, declaring the goods to be of a certain value, and sells them at private

NOTE.—Persons acting in fiduciary relations cannot purchase trust property for their own benefit.

When a trustee, administrator, agent, attorney or person in any fiduciary relation, without the knowledge or consent of the beneficiary, purchases the trust property or unconsciously acquires title thereto, or when he uses the trust funds for his own benefit, equity impresses a constructive trust upon the profits and acquisitions so made for the benefit of the party beneficially entitled. *Scott v. Umbarger*, 41 Cal. 410; *Green v. Sargeant*, 23 Vt. 466; 6 L. R. A.

Ives v. Ashby, 97 Mass. 198; *Wortman v. Skinner*, 12 N. J. Eq. 358; *Obert v. Obert*, 2 N. J. Eq. 98; *Kruse v. Steffens*, 47 Ill. 112; *Audenreid's App.* 89 Pa. 114; *Fox v. Mackreth*, 2 Bro. Ch. 400; *Morret v. Pasko*, 2 Atk. 52, 54; *Powell v. Glover*, 3 P. Wms. 252; *Docker v. Somes*, 2 Myl. & K. 655; *Wedderburn v. Wedderburn*, 4 Myl. & Cr. 41; *Great Luxembourg R. Co. v. Magnay*, 25 Beav. 556; *Kimber v. Barber*, L. R. 3 Ch. 58; *Pooley v. Quilter*, 2 De G. & J. 827; *Fosbrooke v. Balguy*, 1 Myl. & K. 226; *Willett v. Blanford*, 1 Hare, 253; *Townend v. Townend*, 1 Giff.

sale for a less sum, is accountable to the estate of the insolvent for the actual value of the goods only, and not for the amount of the judgments.

3. It is the duty of an assignee who has collected a large part of the assets to have a dividend declared as soon as he can ascertain the probable amount of the claims; and where he neglects so to do, without excuse, he is liable for interest from the time when he could have secured an order declaring a dividend.

(May 14, 1886.)

APPEAL by exceptants from a judgment of the Circuit Court for Elkhart County, overruling their exceptions to the report of the assignee for benefit of creditors of Huffman & Swalley, and settling the account of such assignee. *Reversed.*

The case sufficiently appears in the opinion.

Mr. John M. Vanfleet, for appellants:

The appellee Dodge should not be allowed to hold the claims he bought with the trust funds for more than he paid therefor.

2 Perry, Tr. § 832; 1 Perry, Tr. § 188.

Such a trust will be enforced against all persons except bona fide purchasers, whether the purchase or loan was rightful or wrongful.

2 Pom. Eq. Jur. §§ 1051, 1052; 1 Story, Eq. § 822; Weeks, Attys. §§ 121, 258, 259, 277; *Brotherson v. Consalus*, 26 How. Pr. 218; *Coz v. John*, 32 Ohio St. 532, 538.

The appellee Dodge should not be allowed to hold the claim he bought with his own private means for more than he paid therefor.

See *Brackenridge v. Holland*, 2 Blackf. 877, 881; *Stropes v. Greens Co.*, 73 Ind. 42, 48; *Fort Wayne v. Roenthal*, 75 Ind. 156, 160; *Bulkley v. Wilford*, 2 Clark & F. 177; *Pooley v. Quilter*, 2 De G. & J. 327; *Hobday v. Peters*, 29 L. J. N. S. (Ch.) 780, 8 Week. Rep. 512, 28 Beav. 349; *Poillon v. Martin*, 1 Sandf. Ch. 569; *Ex parte James*, 8 Ves. Jr. 337, 346; 2 Sugd. Vend. 415, § 11, bottom p. 691, Am. notes by J. G. Perkins, 1873; *Re Marquand*, 57 How. Pr. 477.

The appellee Dodge should not be allowed to show that the replevied goods were worth less than the values he had them adjudicated at.

Wiseman v. Lynn, 39 Ind. 250, 259; Wells, Replevin, § 569; *Melick v. Voorhees*, 24 N. J. Eq. 805.

Mr. Dodge is liable as a trustee of his own wrong.

Hill, Trustees, Am. notes, *103; 1 Perry, Tr. § 245; *Wilson v. Moore*, 1 Myl. & K. 127; *Rackham v. Siddall*, 1 Macn. & G. 607; *Life Assn. of Scotland v. Siddall*, 3 DeG. F. & J. 58; *Le Fort v. Delafeld*, 3 Edw. Ch. 32; 2 Pom. Eq. Jur. §§ 1079, 1081; *Lawrence v. Bowle*, 2 Phill. Ch. 140; *Lord v. Wightwick*, 4 De G. M. & G. 803, 808.

Messrs. Johnson & Herr and Henry C. Dodge, *in propria persona*, for appellees.

201; *Fawcett v. Whitehouse*, 1 Russ. & M. 132, 149; *Bulkley v. Wilford*, 2 Clark & F. 102, 178; *Ernest v. Croysdill*, 2 De G. F. & J. 175; *Rolfe v. Gregory*, 4 De G. J. & S. 575; *Heath v. Crealock*, L. R. 18 Eq. 215; *Barnes v. Addy*, L. R. 9 Ch. 244; *Ex parte Cooke*, L. R. 4 Ch. Div. 123; *Nant-y-Glo & B. Iron Works Co. v. Grave*, L. R. 12 Ch. Div. 738; *Re Hallet's Estate*, L. R. 13 Ch. Div. 693.

An attorney can, in no case, without the client's consent, buy and hold otherwise than in trust any adverse title or interest touching the thing to which his employment relates. *Baker v. Hum-*
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Elliott, Ch. J., delivered the opinion of the court:

The assignee of insolvent debtors allowed claims against the estate of the insolvents, and made a report of his action. To this report the appellant, in the capacity of creditor, filed exceptions. Issues of fact were presented by the exceptions. Evidence was heard and a decision entered against the appellant.

The attorney of the assignee of the insolvent debtors borrowed from the assignee trust funds and paid him interest on the money borrowed. The assignee in his report fully accounted for the money loaned and interest received from the borrower. The money thus obtained by the attorney was by him used in buying claims against the insolvent debtors, and these claims were, after the purchase by the attorney, filed against the insolvents' estate, and were allowed by the assignee. The claims were brought by the attorney for a sum greatly below their face value. We are clear that the attorney had no right to reap any profit from the purchases made by him with the trust funds. It was the duty of the court to require the assignee to account for the profits realized by his attorney. The position occupied by the latter imposed upon him the obligation to devote his labor and his talents to the service of the creditors whom the assignee represented. He had no right, occupying the position he did, to engage in buying claims for his individual benefit, and, as the assignee knew of the conduct of his attorney, he violated his duty in allowing him to secure more than the actual cost of the claims. Whatever profit accrued from the use of the trust funds by the attorney belonged, in equity, to the persons entitled to the funds.

It would violate plain principles of justice to permit the attorney of the assignee of an insolvent debtor to use the trust funds for his own profit. Trust funds are to be used for the benefit of the beneficiaries under the trust, and not for the benefit of anybody else. It would be subversive of justice to permit an attorney of a trustee to use his position for his individual benefit, although he made no use of the trust funds; and we are satisfied that, even where an attorney purchases the claims of creditors with his own money, he could obtain, at most, no more than the sum he actually paid for them. The policy of the law is to prevent an attorney from sacrificing the interests of his client for his own gain; and to carry into effect this policy the courts will not allow an attorney to take advantage of his position to the possible injury of his client. *Downard v. Hadley*, 116 Ind. 181; *Re Marquand*, 57 How. Pr. 477; *Ex parte James*, 8 Ves. Jr. 337.

The assignee of an insolvent debtor owes a duty to all of the creditors. He certainly can-

phrey, 101 U. S. 503 (25 L. ed. 1068); *Smith v. Brotherline*, 62 Pa. 481; *Davis v. Smith*, 43 Vt. 266; *Wheeler v. Willard*, 44 Vt. 641; *Giddings v. Eastman*, 5 Paige, 561; *Moore v. Bracken*, 27 Ill. 23; *Harper v. Perry*, 23 Wis. 57; *Jett v. Hempstead*, 25 Ark. 462; *Case v. Carroll*, 35 N. Y. 885.

Persons acting in a fiduciary capacity cannot purchase the trust property. *Tyler v. Sanborn*, 4 L. R. A. 218, note, 123 Ill. 183.

So an agent cannot purchase the subject of the agency. *Ibid.*

not be allowed to buy claims from creditors and reap a profit. The reason for this rule operates against the assignee's attorney, for he, as the trusted, confidential adviser of the trustee, represents all of the beneficiaries. To him, the assignee, as the representative of all the creditors, must look for advice, and that advice must come from an unbiased mind. He has no right to deal with them, or any of them, for his own benefit; for the instant he becomes interested he ceases to occupy the position which it is his duty to his clients to maintain. To permit the attorney to buy claims, even with his own money, would open the way to fraud and wrong, and such ways it is the duty of the court to tightly and securely close. The law means to keep attorneys from assuming positions where they may be tempted to prefer their own interests to those of their clients. To deter them from assuming such positions, it sternly denies them the right to secure any profit from their transactions with their clients, and requires them to yield it to the trust it was their duty to serve with undivided zeal and interest. In cases of this character it is unnecessary to prove a corrupt design or fraudulent practices. The intention may be honest, and yet the act be wrongful in legal contemplation. The wrong emerges from the improper departure from duty, and is complete without an evil or fraudulent purpose.

The attorney bought claims with funds borrowed from the assignee, from Hood, Bonbright & Co., Bates, Reed & Cooley and Mills & Gibbs, after they had brought an action to replevy goods sold by them to the insolvent debtors. After he purchased the claims he caused judgment to be entered in favor of the several replevin plaintiffs, declaring that the goods were of the value stated in the respective affidavits; that he afterwards took the goods so adjudged to belong to the several plaintiffs and sold them at private sale on his own account, without having them appraised. The aggregate value fixed upon the goods in the replevin cases was \$3,299.78, and the amount realized from the sale was \$2,141.42. The counsel for the appellant contends that the value fixed by the judgment concludes the attorney, and that he must account to the estate for the value of the goods as fixed by the judgment. We cannot so hold. The attorney was not bound to account for anything more than the true value of the goods he bought with the trust funds. He was chargeable with that, but with no more. If he did do wrong, as is probably true, the ex-

tent of the injury worked by his wrong was the loss actually sustained, and that could not be greater than the true value of the goods he received. The object of the law is not to punish the attorney in such cases as this, but to secure to the client full compensatory damages.

The assignee collected from the sale of the property of the insolvent debtors the following sums of money, at the dates respectively mentioned: February 20, 1883, \$8,633.50; August 20, 1883, \$328.05; August 21, 1883, \$1,030; December 18, 1883, \$578; December 29, 1883, \$500. The money was not paid to the clerk by the assignee until the time of making his final report, February 28, 1884. He neglected to pay over the money on the advice of his attorney, to whom the greater part of the trust fund was loaned. The assignee should be charged with interest during the period he unreasonably withheld the money. It was his duty to have had a dividend declared as soon as the probable amount of the claims could be ascertained. As he received in bulk the greater part of the money of the estate at one time, he was bound to exercise diligence to secure a statement of the amount of the claims, present it to the court, and ask an order declaring a dividend. A trustee has no right to keep money from the beneficiaries when, by reasonable diligence, he can secure an order for their benefit. In this instance the assignee having received the greater part of the funds of the estate at one time, the court should have charged him with interest after the lapse of such time as would have enabled him, by the exercise of diligence, to have secured an order declaring a dividend. *Blahop, Insolv. 2d ed. 365.*

He had no right to withhold all the money until his final report was filed, for dividends may be declared when the amount can be ascertained, although without absolute accuracy, as the court may approximate the exact amount. Doubtless an assignee may show an excuse, where one exists, for failing to secure an order declaring a dividend, but no such excuse is here shown; on the contrary, it clearly appears that the delay was without any legal excuse whatever.

Judgment reversed, with instructions to grant a rehearing upon the exceptions, and to proceed in accordance with this opinion.

Mitchell, J., did not take part in the decision of this case.

Petition for rehearing overruled September 18, 1889.

ILLINOIS SUPREME COURT.

John D. HART, *Appt.*,

v.

Lucy A. BURCH.

(.....Ill.....)

1. An attempted release by a widow of her dower right, before assignment, is

ineffectual if made to one who is neither legal nor equitable owner of the estate to which the dower right has attached, and who does not stand in such relation thereto that the dower right upon execution of the release will unite with the fee.

2. A former tenant in common of land

NOTE.—Dower right. See *Everson v. McMullen*, 4 L. R. A. 118, note, 118 N.Y. 293; *Callahan v. Robinson*, 3 L. R. A. 497, note, 80 S. C. 249; *Youmans v. Wagener*, 3 L. R. A. 447, 80 S. C. 303.

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Subordinate to vendors' lien. *Seibert v. Todd*, (S. C.) 4 L. R. A. 606.

Widow, when estopped to claim. *Galbraith v. Lunsford*, 1 L. R. A. 324, note, 87 Tenn. 88.

which has been sold by order of court in proceedings for partition is not a warrantor in the chain of title within the rule which permits such warrantor to purchase in outstanding dower rights to relieve himself from liability upon his covenants of warranty.

3. A purchaser at partition sale has, before confirmation thereof, no such interest in the land as will enable him to take a release of an unassigned dower right therein.
4. A tenant in common cannot, as such, take a release from the widow of his deceased co-tenant of her right to unassigned dower in the lands of which her husband died seised as such co-tenant.
5. Dower may be assigned to the widow of a tenant in common upon her cross-bill filed for that purpose in a suit for partition to which she was not a party, where the original bill contained ample allegations upon which to base a decree, and the land has been in part sold and the proceeds brought into court, and she consents to the decree and sale and elects to take her dower interest in money; and the purchasers at the partition sale are not necessary parties.

(October 31, 1886.)

APPEAL by defendant, John D. Hart, from a decree of the Appellate Court, Third District, affirming a decree of the Circuit Court for Morgan County in favor of complainant in a cross-bill filed in a partition suit, for the purpose of procuring an assignment of dower to the widow of a deceased co-tenant. *Affirmed.*

John D. Hart and others filed a bill in chancery against Elizabeth Hart and others, seeking to assign dower to Elizabeth Hart, as the widow of David Hart, deceased, and for partition of the other real estate of which said Hart died seised among the other parties to the suit, as his heirs at law. Wesley B. Hart, one of the heirs of David, died after his father, leaving four children and a widow, who subsequently married Mr. Burch. Her rights as widow were set out on the face of the bill, but she was not made a party, and no notice of her dower interest was taken in the orders. Dower was allotted Mrs. Elizabeth Hart and the other lands were ordered sold.

Part of the lands were sold January 29, 1886, and the sale approved. Subsequently the remainder of the lands were sold to John D. Hart, and before the sale was approved Lucy A. Burch, on August 28, 1886, sold and quitclaimed by deed all her interest in all of the lands to John D. Hart.

Subsequently she filed, by leave of the court, a cross-bill to set aside this deed and asking to be endowed out of the proceeds of the sale, and the court granted the relief asked for, and set aside and annulled the deed, and Hart took this appeal.

Messrs. Morrison & Whitlock, for appellant:

Appellant was in equity bound to the purchasers at the partition sale, and he would have no right to assert this right of dower in the lands first sold. This was all that was required in order to enable Mrs. Burch to make a valid release of dower to him.

Chicago Dock Co. v. Kinzie, 49 Ill. 295.

Appellant was, at the date of the deed to him, the equitable owner of the land purchased 6 L. R. A.

by him at the partition sale, and sustained such relations to the title as enabled him to take, and Mrs. Burch to release to him, her dower right in lands purchased at such sale.

Bailey v. West, 41 Ill. 290; *Robbins v. Kinzie*, 45 Ill. 354; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289.

Mr. M. T. Layman for appellee.

Shope, Ch. J., delivered the opinion of the court:

The principal question arising upon this record is whether the quitclaim deed of August 26, 1886, from Lucy A. Burch, appellee, to appellant, operated to release her dower in the lands of which her husband died seised. It is not questioned that this deed was in every way sufficient for that purpose, if the grantee therein stood in such relation to the estate that a release thereof to him would unite the dower with the fee. Upon the death of her husband, Wesley B. Hart, appellee's right of dower in the undivided one-eleventh part of the land of which David B. Hart died seised, and of which her husband died seised as tenant in common with his brothers and sisters, became consummate, and the right of action accrued to her to have the same assigned.

The right of dower, when consummate, is, before assignment, a right resting in action only. It can exist only in the person upon whom it is cast by operation of law, and a deed or conveyance of it will pass no title, and can only be effective as a release and extinguishment of the right. Such right of dower is not the subject of transfer or sale, and cannot be released to one not in privity with the title under which the dowress claims. 1 Washb. Real Prop. 247, 252, 301; 1 Scribner, Dower, 478; *Summers v. Babb*, 18 Ill. 483; *Chicago Dock Co. v. Kinzie*, 49 Ill. 289; *Reiff v. Horst*, 55 Md. 42; *Kitzmiller v. Van Rensselaer*, 10 Ohio St. 63.

While it is not necessary that the releasee should hold the fee, yet he must be the legal or equitable owner of the title, or stand in such relation thereto that the dower right, upon execution of the release, will unite with the fee. An attempted conveyance to one not standing in such privity is ineffectual to release dower. Some months before the execution of the deed by the dowress, a considerable portion of the land had been sold at the master's sale under the decree in partition, to strangers, and the deeds confirmed. Afterwards, but still before the making of the deed by the dowress, the residue of the land was sold by the master in chancery, in further execution of the decree in partition, to appellant; but no report of the sale had been made or confirmation thereof had, nor a conveyance by the master made, until some months after the execution of the deed by the dowress to appellant.

Did appellant, by virtue of his purchase at the master's sale, acquire such interest in the land as would enable him to take a release of dower? It is clear he did not as to all that portion which had previously been sold to others. The title to so much had passed into others, with whom he had no connection. Whatever right he may have had in these lands had been extinguished by the sale, and deeds made in pursuance thereof.

Nor did he stand in the relation of warrantor

in the chain of title so as to bring him within the rule that a warrantor may purchase in the dower outstanding, and thus relieve himself from liability upon his covenants of warranty.

In respect of the portion purchased by appellant, it is contended that, although the sale was not complete until approved, he was, nevertheless, the equitable owner of the title, and might purchase in the dower of appellee. This, we think, is an erroneous view. It is true that the release may be made to the equitable owner of the land, for he could not assert it against the fee owner, but upon its release to him would become merged and extinguished. The difficulty here lies, not in ascertaining the rule of law, but in the relation appellant sustained to the title by virtue of his purchase. A sale by a master in chancery, or other person authorized to execute the decrees in chancery, is not, until confirmed by the court, a "sale," in the legal sense. Until confirmed, the bargain is incomplete, and confers no right in the land upon the purchaser. "Until then," says Mr. Rorer (Jud. Sales, 2d ed. § 106), "it is a sale only in a popular, and not in a judicial or legal, sense. The chancellor has a broad discretion in the approval or disapproval of such sale. 'The accepted bidder . . . acquires, by the mere acceptance of his bid, no independent right . . . to have his purchase completed,' but is merely a preferred proposer, until confirmation of the sale by the court, as agreed to by its 'ministerial agent.'" See *Young v. Keogh*, 11 Ill. 642; *Ayers v. Baumgarten*, 15 Ill. 444; *Bawlings v. Basley*, Id. 178; *Busey v. Hardin*, 2 B. Mon. 407; *Hay's Appeal*, 51 Pa. 58.

In the case last cited the court says: "Even the highest bidder, whose bid has been returned to the court as the best offered, has acquired no right which debars the heirs or their counsel from endeavoring to have his bid rejected and a resale ordered. . . . His bid, though the highest, was but an offer to purchase, subject to the approval or disapproval of the court, and in approving sales made in partition it is the duty of the court to regard primarily the interests of the heirs."

But if the authorities were not comparatively uniform in this respect, it would seem no doubt would remain upon reading the Statute of this State in respect thereto. Rev. Stat. §§ 29, 30, chap. 106.

It will be seen that the matter of the sale and purchase is left *in fieri*, until the court shall render its order of approval. Confirmation is final consent, and the court, being, in fact, the vendor, may consent or not in its discretion. Rorer, Jud. Sales, §§ 122-123.

The purchaser therefore acquires no interest in or right to the land, and being a mere offeror to purchase, stands in no such relation to the title that a purchase in of a dower interest therein would unite it with the fee. It follows that appellant, by virtue of his purchase at such master's sale, acquired no such interest in the land as would enable him to take a release of dower.

It is also urged that appellant was owner, as tenant in common with the other heirs at law of David Hart, deceased, of an undivided interest in all the land set off to Mrs. Elizabeth Hart, widow of said David, for her dower, as 6 L. R. A.

well as in all the land of which said David died seised. It is true that appellant owned the undivided one-eleventh of all of said land as tenant in common with his brothers and sisters, or the heirs of such as were deceased. The children and heirs at law of Wesley B. Hart, also, as representing their father's share, were seised of a like interest in common. It is said that appellant, as tenant in common in said lands, might purchase in the outstanding dower of the widow of said Wesley B. Hart, deceased. It may readily be conceded that one tenant in common may buy in an outstanding incumbrance or right of dower, affecting the common estate, and may compel contribution therefor from his co-tenants, and still this contention remain entirely groundless in this case. Each tenant in common was here seised of the undivided one-eleventh part of the estate, subject to the dower of the widow of their father, David Hart, which, as we have seen, was assigned in this proceeding, leaving the residue unincumbered thereby. Wesley B. Hart, one of the tenants in common, died, leaving children to whom his interests descended, incumbered by the dower of his widow. The dower right arose by operation of law upon the seisin of the husband, and accompanied and was dependent upon the estate of the husband in the land, and was an incumbrance upon the share or interest to which he had title, and none other. No claim or right of dower in the widow of Wesley B. attached to the share or portion of any of his co-tenants. The only unity required between tenants in common is that of possession. 1 Cruise, Dig. title 20, § 2.

One tenant in common may hold in fee simple, and another for life, one may hold by descent, another by purchase. Thus it is that tenancies in common descend to the heirs of each tenant, because they have several freeholds, and not an entirety of interest. Id. § 8.

And it has been held that a widow, having dower in the common estate, may release to one tenant in common for his share, without releasing her dower to another tenant in common who has a different share. *White v. White*, 16 N. J. L. 202.

Dower, under our Statute, is assignable by metes and bounds, when the land is susceptible of division without manifest prejudice to the parties in interest; but there is no provision, in terms, for the assignment in lands held in common, and in determining the mode of assignment, where partition between the tenants in common is not made, resort must be had to the rules of the common law.

At common law the widow was entitled to have assigned to her one third of the lands and tenements of which she was dowable, to be set out by metes and bounds where it was practicable. Such is the widow's common-law right. When the property did not admit of an assignment of dower in severalty, [either from the nature of the husband's interest in it or from the quality of the thing itself, the assignment by metes and bounds was necessarily dispensed with. "Thus, if the husband be seised in common, or in coparcenary, and die before partition, the widow cannot have her dower assigned by metes and bounds, but shall have the third part of the share of her husband to hold in common with the heir and the other

tenants." 7 Co. Litt. 32 b; 2 Scribner, Dower, 80; *Sutton v. Rolfe*, 3 Lev. 84.

In cases where the widow was entitled to dower of a part or portion held as tenant in common, the dower must be assigned in common; she, being entitled *pro tanto* of her husband's estate, cannot have it otherwise than her husband had it. 1 Cruise, Dig. title 6, chap. 3, § 10; title 20, § 25. That is, she, being by the statute endowable of the lands of which her husband died seised, is let into the estate as he possessed it at his decease, and not otherwise. So that, the dower of his mother having been assigned, the heirs of Wesley B. Hart held in common one eleventh of the residue, subject to the dower of appellee therein; and she would be entitled to one third of one eleventh for her life, in common, and the heirs at law of Wesley B. Hart to two thirds of one eleventh thereof during the continuance of her life estate. In case of partition, as we have seen, such dower interest would follow the portion assigned to the heirs of Wesley B. Hart. See also *French v. Lord*, 69 Me. 537.

It must be apparent that this dower right was not an incumbrance upon the estate held in common. Appellant had no interest in or right, legal or equitable, to the undivided portion of the land out of which appellee's dower arose, and upon which it was alone dependent. A conveyance to him would therefore no more

unite it with the fee vested in the heirs at law of Wesley B. Hart than would a conveyance to any stranger to the title.

It is also insisted that relief was improperly granted without the filing of an original bill by appellee, to which the purchasers at the first sale were made parties. The original bill filed by appellant by apt averment set out the dower interest of appellee, and prayed for its assignment, and its allegations were ample upon which to base the decree. The fund derived from the sale was in the control of the court for distribution; and although she had not been served, and the cause had proceeded to decree and sale without further notice of her dower right, yet appellee, while the court had jurisdiction, came into court, consented to the decree and sale, and elected to take her dower interest in money. The land had been reported not susceptible of division. There is no pretense that the land had not sold for its full value, and we can see no impropriety in the decree rendered. Nor were the purchasers at the first sale at all necessary parties. It would have been inequitable to have burdened them with the expense of independent litigation. By the decree rendered, their interests are in no way affected.

Finding no error in the record, the decree is affirmed.

GEORGIA SUPREME COURT.

MILLER & Co., Plffs in Err.,

MOORE, Sims & Co.

(...Ga....)

*1. In the sale of goods by words of description, which comprehend quality as well

*Head notes by BLACKLEY, Ch. J.

as variety, the descriptive words may be trusted by the purchaser as a warranty of both, and though inspection by him before acceptance will exclude from the warranty all patent defects, it will have no influence on those which are latent.

2. Defects not discovered by the inspection actually made, and not discoverable by such

NOTE.—Sale of goods, express warranty.

Where representations of the seller were material, the law will presume that the buyer relied upon them. *Hicks v. Stephens*, 8 West. Rep. 500, 121 Ill. 186; *Fishback v. Miller*, 15 Nev. 428; *Redgrave v. Hurd*, L. R. 20 Ch. Div. 1; *Nicol's Case*, 5 De G. & J. 387; *Benjamin, Sales*, 4th Am. ed. 465, note b.

Except as to patent defects the purchaser may rely on representations, and warranties as to quality, and is not bound to make any examination. *Brown v. Freeman*, 79 Ala. 406.

Where a sale is made wholly on the strength of vendor's representations, vendee having no separate knowledge of the facts, such representations amount to a warranty. *Ormsby v. Budd*, 72 Iowa, 80.

By an executory agreement for sale and delivery of an article of a particular quality, a warranty is established which will survive the acceptance. *Brigg v. Hilton*, 1 Cent. Rep. 312, 99 N. Y. 517.

The declarations of the seller as to the quality of the article sold constitute a warranty where they are relied on by the buyer as the basis of the contract, and the seller so understands it. *Drew v. Edmunds*, 6 New Eng. Rep. 355, 60 Vt. 401.

An affirmation at the time of sale is a warranty if it appear in evidence to have been so intended. *Pasley v. Freeman*, 3 T. R. 61; *Crosse v. Gardner*, Carth. 90; *Cross v. Garnet*, 3 Mod. 261; *Medina v. Stoughton*, 1 Ld. Raym. 593, 1 Salk. 210.

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An affirmation by the seller of the quality or condition of the thing sold, made as an assurance of facts and inducement to the purchaser, if so received and relied on by the purchaser, is an express warranty. *Shippen v. Bowen*, 123 U. S. 575 (30 L. ed. 1172); *Potomac Steamboat Co. v. Harlan & H. Co.* 3 Cent. Rep. 361, 66 Md. 48; *Osgood v. Lewis*, 3 Har. & G. 518; *Crenshaw v. Slye*, 32 Md. 144.

In the absence of an express warranty or actual fraud, every person who sells goods of a certain denomination or description undertakes, as a part of his contract, that the thing delivered corresponds to the description, and is, in fact, an article of the species, kind and quality thus expressed in the contract of sale. *Winsor v. Lombard*, 18 Pick. 60; *Miller, Cond. Sales*, 44; *Hogins v. Plympton*, 11 Pick. 99; *Beals v. Olmstead*, 24 Vt. 114; *Van Wyck v. Allen*, 69 N. Y. 61; *Catchings v. Hacke*, 15 Mo. App. 51; *Whitaker v. McCormick*, 6 Mo. App. 114.

While words of description may amount to a warranty of quality, yet they will not be so construed unless it appears they were so intended by the parties. *Maxwell v. Lee*, 34 Minn. 511.

Implied warranty.

To create an implied warranty there should be an affirmation of the fact by the seller to distinguish from a mere expression of opinion. *Englehardt v. Clanton*, 38 Ala. 336.

There can be none when the sale is made upon

as ought to have been made, are properly classed as latent. Hence corn, musty and "blue-eyed," packed in bulk beneath sound corn, is a latent defect in the whole lot as a carload, delivery and acceptance being made without breaking bulk or unloading the car.

3. A custom of trade in the City of Augusta, by which, contrary to the general law of the State, acceptance of corn in bulk and paying for it after inspection are considered as waiving or releasing all claim upon the seller to answer for any defects of quality, is not binding, except upon those who have recognized it in their own transactions, and thus adopted it for their own dealings.

4. The contract of sale embracing thirty carloads of corn in bulk, to be delivered on board by the carload at the point of destination, a defect of quality in some of the corn accepted and paid for will not justify the buyer in rejecting ten other carloads subsequently tendered according to the contract, neither of the parties electing or intending to rescind or abandon the contract in whole or in part.

5. In the present case, according to the weight of the evidence, the purchaser, some of the corn accepted and paid for having been defective, is entitled to recover for breach of warranty, and the seller is entitled to recover for breach of contract in rejecting cars which ought to have been accepted.

inspection, by the buyer. *Fogel v. Brubaker*, 122 Pa. 7.

But in every sale by sample there is an implied warranty that the goods are of the quality of the sample, and in every material respect correspond with it. *Brigham v. Retelsdorf*, 73 Iowa, 712.

Where the sale is of a definite chattel specifically described, the actual condition of which is capable of being ascertained by either party, there is no implied warranty. *Hood v. Bloch*, 29 W. Va. 244.

Upon a sale by sample there is no implied warranty of quality or equivalency in value with the sample. *Sidney School Furniture Co. v. Warsaw Twp. School Dist.* (Pa.) 5 Cent. Rep. 306.

The purchaser is, however, entitled to goods of like kind and grade (*Bach v. Levy*, 2 Cent. Rep. 490, 101 N. Y. 511); and in an action for their value they must be shown to correspond with the sample. *Hollender v. Koetter*, 2 West. Rep. 406, 20 Mo. App. 79. See *Goulds v. Brophy*, *post*, 392.

Rule of caveat emptor.

There is no implied warranty in a general sale that the quality shall be equal to the price paid. *Warren Glass Works Co. v. Keystone Coal Co.* 3 Cent. Rep. 854, 65 Md. 547; *Hart v. Wright*, 17 Wend. 209.

The rule of the common law is well established that if there is no express warranty, upon the sale of goods, of their quality, and no actual fraud, the maxim *caveat emptor* applies, and the goods are at the risk of the buyer. *Mixer v. Coburn*, 11 Met. 361.

Of such universal acceptance is the doctrine of *caveat emptor* that the courts of all the States where the common law prevails sanction it. *Barnard v. Kellogg*, 77 U. S. 10 Wall. 883 (19 L. ed. 987); *Hyatt v. Boyle*, 5 Gill & J. 120; *Gunther v. Atwell*, 19 Md. 171; *Rice v. Forsyth*, 41 Md. 404; *Rasin v. Con-Jey*, 58 Md. 65.

Terms of contract, payment and delivery.

Where the contract, though executory when made, yet contemplated a delivery from time to time, as wanted, in separate cargoes, each of which was to be paid for as indicated, it was clearly severable. *Scott v. Kittanning Coal Co.* 80 Pa. 231, 33 & L. R. A.

6. A part of the sum sued for being the expenses of resale, and the broker who made it being a witness for the plaintiff, it was proper to inquire of him, on cross-examination, not only as to the amount of his commissions, but whether they had been paid or not.

(November 12, 1890.)

ERROR to the Superior Court for Richmond County to review a judgment for plaintiffs in an action to recover damages for an alleged breach of a contract to purchase and accept certain corn. *Reversed.*

Miller & Co. bought of Moore, Sims & Co. "thirty cars of No. 2 white mixed corn."

The corn was shipped in carload lots from the west, examined in Atlanta by Moore, Sims & Co. and forwarded in the same cars to Miller & Co., in Augusta.

One lot was examined by Miller & Co. in the usual way in the cars, and, it appearing to be all right, they sent it to be stored in an elevator.

When it was being transferred to the elevator three carloads were found to be musty and blue-eyed.

Subsequently another lot of ten or twelve carloads arrived which Miller & Co. declined to accept, unless settlement should be made for

Am. Rep. 753; *Goodwin v. Merrill*, 13 Wis. 653; *Sawyer v. Chicago & N. W. R. Co.* 22 Wis. 408; *Gill v. Benjamin*, 64 Wis. 362, 54 Am. Rep. 621.

A statement descriptive of the subject matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty in the sense in which the term is used in insurance and maritime law; that is to say, a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract. *Behn v. Burness*, 3 Best & S. 751; *Bowes v. Shand*, L. R. 2 App. Cas. 455; *Lowber v. Bangs*, 69 U. S. 2 Wall. 738 (17 L. ed. 769); *Davison v. Von Lingen*, 118 U. S. 40 (28 L. ed. 885); *Gill v. Benjamin*, *supra*.

Defaults by one party in making particular payments or deliveries will not release the other party from his duty to make the other deliveries or payments stipulated in the contract, unless the conduct of the party in default be such as to evince an intention to abandon the contract or a design no longer to be bound by its terms. *Mersey Steel & Iron Co. v. Naylor*, L. R. 9 App. Cas. 434, L. R. 9 Q. B. Div. 648; *Pordage v. Cole*, 1 Saund. 220 b; *Blackburn v. Reilly*, 47 N. J. L. 808.

Where the manifest intention of the parties is to transfer the title, the sale may be complete, notwithstanding the property is yet to be measured, and the amount of the price yet to be ascertained. *Sewell v. Eaton*, 6 Wis. 480; *McConnell v. Hughes*, 29 Wis. 537; *Morrow v. Campbell*, 30 Wis. 90; *Fletcher v. Ingram*, 46 Wis. 191; *Gill v. Benjamin*, *supra*.

In *Morgan v. McKee*, 77 Pa. 223, and *Scott v. Kittanning Coal Co.*, *supra*, the buyer's right to rescind the whole contract upon the failure of the seller to deliver one installment was denied only because the right had been waived, in the one case by unreasonable delay in asserting it, and in the other by having accepted, paid for and used a previous installment of the goods. *Gill v. Benjamin*, *supra*.

Sale with warranty. See *Schupe v. Collender*, 1 L. R. A. 330, note, 56 Conn. 489.

Implied warranty that thing sold will give satisfaction. *Campbell Printing Press Co. v. Thorp* (Mich.) 1 L. R. A. 645, 36 Fed. Rep. 414.

General warranty. See *Joy v. Bitzer* (Iowa) 3 L. R. A. 184, note.

the three carloads of defective corn which had been accepted and paid for.

No settlement was arrived at, and Miller & Co. refused to accept the corn, and Moore, Sims & Co. brought this suit to recover damages for such refusal.

They recovered judgment in the court below, whereupon defendants took this writ.

Messrs. Foster & Lamar, for plaintiffs in error:

A sale by description is equivalent to an express warranty that the goods sold are of the kind described.

2 Benjamin, *Sales* (Corbin's Rev. ed.), p. 844, and *note 24*, citing many authorities; *Norington v. Wright*, 115 U. S. 188 (29 L. ed. 866); *Hogins v. Plympton*, 11 Pick. 97.

A breach of warranty, express or implied, does not annul the sale if executed, but gives the purchaser a right to damages.

Code, 2652.

Goods ordered are, after acceptance, presumed to be of the quality ordered, and the burden of proving them inferior is on the purchaser. That the purchasers made partial payments with knowledge that the goods were, in quality, inferior to those ordered, will not hinder them from pleading the defective quality as partial failure of consideration when afterwards sued for the balance of the price.

Atkins v. Cobb, 56 Ga. 86, 89, 90; 2 Benjamin, *Sales*, p. 856, *note 29* and authorities; *Clark v. Neufville*, 46 Ga. 261; *Fletcher v. Young*, 69 Ga. 592; *Watkins v. Paine*, 57 Ga. 50; *Beach v. Branch*, 57 Ga. 362; *Porter v. Wilder*, 62 Ga. 526; *Callaway v. Jones*, 19 Ga. 277; *Norington v. Wright*, 115 U. S. 188, 212 (29 L. ed. 866, 871); Code, 2652.

Miller & Co. "could recover if they inspected in the ordinary way of inspection, and without negligence failed to discover any defect, and there was, in fact, a latent defect at date of delivery."

Perdue v. Harwell, 80 Ga. 151; *Meickley v. Parsons*, 66 Iowa, 63, 55 Am. Rep. 261.

Moore, Sims & Co. having broken the contract, and delivered musty and blue-eyed corn, and refused to allow Miller & Co. for the damage so done, they were under no obligation to accept the other corn tendered.

King Philip Mills v. Slater, 12 R. I. 82, 84 Am. Rep. 603.

A statement descriptive of the subject matter is ordinarily to be regarded as a warranty or condition precedent, upon the failure or non-performance of which the party aggrieved may repudiate the whole contract.

Norington v. Wright, 115 U. S. 188 (29 L. ed. 866); *Pope v. Porter*, 3 Cent. Rep. 451, 102 N. Y. 866; 2 Benjamin, *Sales*, 787, and full *note*; *Branch v. Palmer*, 65 Ga. 210.

Messrs. J. S. & W. T. Davidson for defendants in error.

Bleckley, C. J., delivered the opinion of the court:|

1. The descriptive words by which the sale was made were, "No. 2 white mixed corn, bulk." These words comprehend quality as well as variety, and import a warranty on the part of the seller as to both. Corbin's *note 24* to 2 Benjamin, *Sales*, 844; *Gould v. Stein*, 149 Mass. 570; *Whitaker v. McCormick*, 6 Mo. 6 L. R. A.

App. 114; *Wolcott v. Mount*, 36 N. J. L. 268, 88 N. J. L. 496; *Bridge v. Wain*, 1 Starkie, Ev. 504.

Nor will inspection by the buyer before acceptance deprive him of the protection of the warranty as to latent defects. Miller, *Cond. Sales*, 87, 94; *Biddle, Warranty*, §§ 111, 141; *Meickley v. Parsons*, 66 Iowa, 63; *Jones v. George*, 61 Tex. 845; *Gould v. Stein, supra*.

Whether *Hight v. Bacon*, 126 Mass. 10, and *Barnard v. Kellogg*, 77 U. S. 10 Wall. 383 [19 L. ed. 987], are consistent with this rule, we need not inquire, since we are quite certain that the rule prevails in Georgia, however it may be in some other States. *Atkins v. Cobb*, 56 Ga. 86.

2. Three of the carloads of corn inspected, accepted and paid for were, as the evidence pretty clearly shows, "false packed." Upon the surface the corn was sound, and came up to the description, but beneath, beginning at a depth of some two feet, the corn was musty and "blue-eyed." The inspection actually made penetrated the mass a foot or more below the surface, and the defective corn was not discovered, and it does not appear that the inspection which ought to have been made was different from that which was in fact made. This being so, the musty and "blue-eyed" corn, packed beneath that which was sound, should be classed, with reference to the whole carload, as a latent defect. The difference between patent and latent is that one is open to observation by ordinary inspection, and the other is not.

3. It was not competent to vary the general law of the State, raising a warranty in favor of the purchasers, by showing a local usage in Augusta operating upon the corn trade, to the effect that the acceptance of corn in bulk, and paying for it after inspection, were considered as waiving or releasing all claim upon the seller to answer for any defects of quality. Doubtless the custom is binding upon those who have recognized it in their own transactions, and thus adopted it for their own dealings; but persons who have not done so are entitled to stand upon the general law. *Jones, Com. & Tr. Cont.* 122, 123; *Hatcher v. Comer*, 73 Ga. 418; *Thompson v. Ashton*, 14 Johns. 316; *Barnard v. Kellogg, supra*; *Yates v. Pym*, 6 Taunt. 446.

A vigorous and learned opinion to the contrary was delivered in *Snowden v. Warder*, 8 Rawle, 101, in which case *Chief Justice Gibson* dissented.

4. A defect of quality in the three carloads of corn did not, under the circumstances, entitle the purchasers to reject the ten carloads subsequently tendered, and found, upon inspection, to come up to the terms of the contract. The whole purchase embraced thirty carloads, to be delivered in Augusta by installments, and these ten were a part of the thirty. Neither before nor after the defect was discovered in the three carloads was there any intention on the part of the buyers or the sellers to abandon or rescind the contract. On the contrary, even after the ten carloads were rejected, both parties went forward in the performance of the contract, and its full performance on both sides seems to have been completed. The right to rescind was neither

claimed nor exercised as to any part of the contract. The subject will be found discussed with more or less breadth in the following authorities: Leake, Cont. 654, 655; 2 Benjamin, Sales, 787, *note* 26; *Norrington v. Wright*, 115 U. S. 188 [29 L. ed. 866], 21 Am. L. Reg. N. S. 398, *notes*; *Cohen v. Platt*, 69 N. Y. 348; *notes* to *Gill v. Benjamin*, 64 Wis. 362, 54 Am. Rep. 624; *Blackburn v. Reilly*, 47 N. J. L. 290; *Myer v. Wheeler*, 65 Iowa, 390; *Mersey Steel & Iron Co. v. Naylor*, L. R. 9 App. Cas. 434. And see *Georgia Refining Co. v. Augusta Oil Co.* 74 Ga. 497.

In the present case there was no fraud on the part of the sellers. The false packing was not their work, nor was it known to them. They had purchased the corn as they sold it, packed in the same cars.

5. With the law properly applied to the evidence in this case, as we understand it, the plaintiffs in error are entitled to recover for the breach of warranty their damages, properly measured, for the defect in quality of the damaged corn in the three cars which they accepted and paid for; and the defendants in error (the plaintiffs below) are entitled to re-

cover their damages, properly measured, for the refusal of the purchasers to accept the ten cars of corn which ought to have been accepted, but were rejected without good cause. Whichever party has the larger claim on this basis should prevail, when the case is tried again, unless the evidence should be materially different from that which is now in the record before us.

6. When the broker who sold the ten cars was under cross-examination, it was competent to ask him not only to disclose the amount of his commissions, but whether they had been paid or not. These commissions were sued for in the action which was on trial; and though they could be recovered, if there was a real liability to pay them incurred by the plaintiffs below, the payment or nonpayment might throw light upon whether that liability was absolute, or dependent upon a recovery in this case. If the witness, as broker, had an interest in the recovery, that would go to his credit. At all events, he was under cross-examination, and the right to sift is very broad. 1 Thomp. Trials, § 406 *et seq.*

The court erred in not granting a new trial.

IOWA SUPREME COURT.

C. L. GARRETSON, *Appl.*,
v.
FERRALL & Hawkins Bros. *et al.*

(.....Iowa,.....)

The assignee of the claim of a mortgagee to damages by reason of a seizure of the mortgaged goods under an execution against the mortgagor cannot maintain an action to recover such damages unless he also holds an assignment of an interest in the mortgage debt.

(*Beck and Rothrock, JJ., dissent.*)

(June 6, 1899.)

A PPEAL by plaintiff from a judgment of the District Court for Mohaska County in favor of defendants in an action to recover damages for the alleged unlawful seizure of goods under an execution. *Affirmed.*

O. S. Garretson held a chattel mortgage from W. C. Garretson, of Marion County, Iowa, on his stock of jewelry in his store at Knoxville, Iowa, duly executed and recorded.

Subsequently the defendants, Ferrall & Hawkins Bros., obtained a judgment against W. C. Garretson and levied the execution on this stock of jewelry, then in the hands of an auctioneer, under the care of C. L. Garretson as agent, for sale for the benefit of O. S. Garretson. Notice was given the sheriff of O. S. Garretson's claim, and thereupon the defendants, Ferrall & Hawkins Bros., gave the sheriff an indemnifying bond in the penal sum of \$800 for the benefit of O. S. Garretson, or other claimants, signed by the defendant, Geo. H. Baugh, as surety, and the sheriff went and sold the goods under the execution of Ferrall & Hawkins Bros., amounting in value to about \$900, and paid the proceeds of the sale over to Ferrall & Hawkins Bros.

The mortgagee, O. S. Garretson, assigned
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his claim under his mortgage for this trespass and conversion of the goods to C. L. Garretson, and he brought this suit for the recovery of damages.

As a defense defendants alleged, *inter alia*, that no part of the debt due O. S. Garretson was ever assigned to plaintiff, and hence that the assignment of the claim for damages raised out of the claim of trespass upon the mortgaged property was void.

To this defense plaintiff demurred on the ground that it was not valid because it was not necessary to the validity of an assignment of the claim for a conversion of the mortgaged property that the debt or mortgage should be assigned.

The demurrer was overruled and defendant excepted.

At the conclusion of plaintiff's evidence, defendants moved the court to instruct the jury to return a verdict in their favor upon the grounds: *first*, that there was no sufficient evidence as to said alleged bond and its conditions, and the breach thereof; *second*, that there was no sufficient evidence of the alleged notice to the sheriff; *third*, that there was no evidence of the assignment of any interest in said note and mortgage to the plaintiff; *fourth*, that the evidence showed that no interest in said note and mortgage was assigned to the plaintiff; *fifth*, that, on the facts as shown, the defendants were entitled to a verdict in their favor.

This motion was granted and a verdict was returned for defendants, whereupon plaintiff excepted and took this appeal.

Messrs. Whiting S. Clark and Carroll & Davis, for appellant:

A chattel mortgage is something more than a mere security and incident of the debt, and in this respect unlike a mortgage of real estate.

Jones, Chattel Mortgages, § 1.

The mortgagee holds the title and right of possession of the goods, and the right to recover for any trespass or conversion.

Talbot v. DeForest, 8 Greene (Iowa) 586; *Dean v. Burney*, 10 Iowa, 498; *Doane v. Garretson*, 24 Iowa, 351; *Hubbard v. Hartford F. Ins. Co.* 88 Iowa, 341; *Evans v. St. Paul Harvester Works*, 63 Iowa, 208; *Jones, Chattel Mortgages*, §§ 452, 426.

The wrongful conversion of the goods at once vested in the mortgagee a valid claim upon the wrong-doer for the full damages. The mortgagee had complete control of this claim, which could be sold and assigned.

Code 1873, § 2525; *Weire v. Davenport*, 11 Iowa, 49; *Gray v. McCallister*, 50 Iowa, 497; *Vimont v. Chicago & N. W. R. Co.* 69 Iowa, 296.

The election of the remedy for the recovery of damages is a waiver of the right to recover the goods by replevin.

Wars v. Percival, 61 Me. 399; *Bennett v. Hood*, 1 Allen, 47; *Smith v. Way*, 9 Allen, 472; *Norton v. Doherty*, 3 Gray, 372; *Buckland v. Johnson*, 15 C. B. (80 E. C. L.) *145; *Herman, Estoppel*, § 1051; *Phillips v. Myers*, 55 Iowa, 285; *Perkins v. Jones*, 62 Iowa, 345.

A party who brings an attachment suit against a debtor affirms the sale and cannot maintain an action to recover the goods.

O'Donald v. Constant, 82 Ind. 212.

The remedy for the recovery of damages proceeds on the assumption that, by the wrongful conversion, the defendants have become the owners of the goods, while replevin proceeds on the ground of the continuing right of property in the goods.

McGarock v. Chamberlain, 20 Ill. 220.

Messrs. Bolton & McCoy, for appellees:

The mortgage could not be separated from the debt.

Wood v. Sands, 4 Greene (Iowa) 214.

The right of a mortgagee is a mere chattel interest, inseparable from the debt it is intended to secure, and transferable by a mere assignment of the debt without deed or writing.

Crow v. Vance, 4 Iowa, 436.

The debt is the principal thing, and the right of the mortgagee is an incident attached to the debt, and ceasing when the debt is discharged.

Ewing v. Scott, 2 Iowa, 447; *Bremer County Bank v. Eastman*, 84 Iowa, 393; *Barthol v. Blakin*, 84 Iowa, 452; *Grapengether v. Fejervary*, 9 Iowa, 163.

The interest of the mortgagee in the mortgaged property is but a chattel interest and follows the debt, the principal thing for which it stands security.

Burton v. Hintrager, 18 Iowa, 348. See also, to the same effect, *Sims v. Hammond*, 88 Iowa, 368; *English v. Waples*, 18 Iowa, 58; *Bank of State of Indiana v. Anderson*, 14 Iowa, 544; *McClure v. Burris*, 16 Iowa, 591; *Pope v. Jacobus*, 10 Iowa, 262. See also *Carroll v. Reddington*, 7 Iowa, 386; *Wood v. Sands*, 4 Greene (Iowa) 214.

The assignment of the mortgage without the assignment of the note created no liability against the assignor whatever.

Wood v. Sands, *supra*.

An assignment of the mortgage without an assignment of the debt is a nullity.

Pothemus v. Trainer, 30 Cal. 685; *Jackson v. Bronson*, 19 Johns. 825; *Jackson v. Willard*, 4 6 L. R. A.

Johns. 41; *Lucas v. Harris*, 20 Ill. 165; *Webb v. Flanders*, 32 Me. 175; *Garroch v. Sherman*, 6 N. J. Eq. 219.

A conveyance of all the grantor's right in land in which he has the interest of a mortgagee binds nothing, without an assignment of the debt.

Dearborn v. Taylor, 18 N. H. 153; *Hobson v. Roles*, 20 N. H. 41; *Furbush v. Goodwin*, 25 N. H. 425.

Given, Ch. J., delivered the opinion of the court:

There is a controversy between counsel as to the correctness of the abstracts; but enough appeared without question to show that the controlling point of difference is whether the plaintiff could maintain this action without an assignment to him of an interest in the note and mortgage of W. C. to O. S. Garretson. Whether the plaintiff waived his exception to the ruling on the demurrer by going to trial is immaterial for the presentation of this question, as it is evident from the testimony that the court sustained the motion ordering a verdict for defendants upon the third and fourth grounds assigned for the motion. There was evidence as to the existence of the bond and its conditions, and of notice to the sheriff, upon which the court would unquestionably have submitted the case to the jury.

It has been so frequently held by this court as not to require citation that the mortgage is a mere incident to the debt; that the assignment of the debt carries the mortgage with it; and that the assignment of the mortgage without an assignment of the debt is a nullity.

Counsel for appellant are understood as resting their position upon the claim that, when O. S. Garretson sold the claim in suit to C. L. Garretson, the mortgage debt became thereby extinguished and paid to the value of the claim, whether O. S. Garretson obtained full value or not—that it is a mere matter of accounting between W. C. Garretson, mortgagor, and O. S. Garretson, mortgagee; and, if the claim sold is sufficient to pay the debt, there was no debt or mortgage to assign; and, if not fully paid thereby, the mortgagee is the one to hold the balance of the debt and mortgage. This position is not tenable. Had O. S. Garretson, the mortgagee, brought this suit, he would recover because he had the mortgage debt and its securities, and not because some other or different debt had accrued in his favor. The giving of the bond and taking the goods substituted the bond as the security instead of the goods, and the remedy for the mortgage debt and its security may be upon the bond. If, by assignment without the debt to C. L. Garretson, he would not have acquired any right of action as to the goods, he certainly acquires none upon the bond without the assignment of the debt. There was no error in the action of the court in overruling the demurrer, nor in ordering a verdict for the defendants.

Affirmed.

Beck, J., dissenting:

1. I cannot assent to the foregoing opinion, believing that it is based upon a misapprehension of the law applicable to the facts of the case, which, briefly stated, are these: Defendants executed an indemnifying bond to the

sheriff, to protect him against liability by reason of a levy of an execution he was required to make upon goods claimed by a mortgagee under a chattel mortgage. The execution was against the mortgagor and in favor of Ferrall & Hawkins Bros., who are defendants in this case. The mortgagee assigned his claim under the bond for damages to plaintiff, who prosecutes this suit on the bond.

2. What did the mortgagee assign to the plaintiff? His claim under the bond for damages. What was that claim? A chose in action arising on the bond by reason of the facts that the mortgagee held a special property, under the mortgage, in the goods, and the right to the possession thereof as the holder of such special property. He could maintain a suit for the deprivation of that property, and right of possession. His damages recoverable in such action would be the value of his interest in the goods. That interest, of course, would depend upon the existence of the debt secured by the mortgage.

3. The mortgagee's claim upon the bond as a chose in action was, under the laws of this State, assignable; and an action was sustainable thereon by the assignee. But, in order to assign his claim for damages, the mortgagee was not required to assign also the debt or mortgage, or both. These were only evidence of the right to recover damages,—the muniments, as it were, of his title thereto. They constitute no part of the damages,—the thing assigned by the mortgagee, and sought in this suit to be recovered by plaintiff.

4. When the mortgagee comes to enforce his debt and the mortgage it may be pleaded that the debt is paid to the extent of the recovery had by him on the bond, which was for the property mortgaged. The bond stands in the place of the property, and the mortgagee's rights are affected by recovery on the bond, just as they would have been had he taken the property and sold it under the mortgage.

5. The position of the foregoing opinion—to the effect that the assignment of the claim for damages cannot be supported unless it be shown that the debt and mortgage are also assigned to the assignee of the claim for damages—is shown to be plainly unsound by these considerations: If the value of the property levied upon is less

than the debt, the mortgagee, under the doctrine of the foregoing opinion, will lose his debt to the extent to which it exceeds the value of the property. The measure of recovery on the bond is the value of the property not exceeding the mortgage debt. Now, if the mortgagee must assign the debt if it be for \$1,000 in order to be enabled to assign the claim for damages, which may be for but \$100, an evident absurdity exists which, it will be readily seen, would work gross injustice. Indeed, it seems to me that the doctrine of the foregoing opinion is not only unsupported by legal principle, but that its recognition would lead to injustice whenever an attempt should be made to apply it to actual transactions.

6. In my judgment there are more than one general statement of legal doctrines as to the effect of the assignment of a mortgage without the assignment of the debt, and the remedy for the mortgage debt after the indemnifying bond was given, found in the majority opinion, which are not correct. But I am not called on to point out the errors, as, in my opinion, these doctrines do not support the conclusion reached by the majority of the court in this case. In my judgment, the effect of an assignment of a mortgage without the assignment of the debt, and the remedy to be pursued after the execution of the indemnifying bond, and other matters stated in the argument of the opinion, have nothing to do with the question in hand, which is this: Can a mortgagee, when the mortgaged goods have been taken by a sheriff on an execution against the mortgagor, assign his claim for damages against the makers of an indemnifying bond given to the sheriff, without making an assignment of the mortgage debt? The question involves the validity of the assignment, and the right to enforce it by the assignee, and nothing else. The effect of an assignment of a mortgage without the assignment of the debt, and remedies to be pursued by the mortgagee for the collection of his debt, have nothing to do with the case; and this consideration does not serve to guide to its correct determination. In my opinion the judgment of the district court ought to be reversed.

Rothrock, J., concurs in this dissent.

Petition for rehearing overruled October 22, 1889.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Edith M. BINNEY

v.

GLOBE NATIONAL BANK OF BOSTON *et al.*

(....Mass....)

1. A married woman who indorses blank promissory notes at her husband's request for him to fill up and use, which afterwards and in her absence he fills up and negotiates for value to a bank, is liable to the bank as indorser under Massachusetts Statutes which give her the unrestricted right to contract except with her husband.

2. An indorser cannot deny the validity of an original note, as against a bona fide

holder, although the indorsement was merely for accommodation.

3. It does not constitute a void gift of property to her husband as against bona fide holders, for a married woman to indorse her signature on blank notes for her husband's use.

4. A married woman is "a person" subject to compulsory insolvency proceedings under Massachusetts Pub. Stat., chap. 57, § 112, in case of failure to dissolve an attachment before return day, as she is competent to contract and give a bond to dissolve the attachment, although she could not do so when the original insolvent law was passed, and the Public Statutes re-enacting its provisions do not mention a married woman *eo nomine*.

5. To sustain a petition in insolvency

against a debtor for failure to dissolve an attachment, it is sufficient to show to the court that the attachment was founded upon a demand probable against the estate of an insolvent debtor; the declaration need not be inserted in the writ or filed before the return day.

6. An allegation that suits were duly entered in court and are still pending implies that the writs were served on the defendant.

(January 4, 1890.)

APPEAL from a decree of the Supreme Judicial Court, Suffolk County, dismissing a bill to review proceedings in a court of insolvency. *Bill dismissed.*

The facts appear in the opinion.

Mr. Joshua D. Ball, for plaintiff:

A husband or wife cannot transfer property one to the other, except as to certain gifts to the wife.

Pub. Stat. chap. 147, § 8; 1884, chap. 182.

Whether a pianoforte came within the exception was left to the jury.

Hamilton v. Lane, 138 Mass. 358.

There could be no valid gift of money or property by husband to wife before this exception.

Hawkins v. Providence & W. R. Co. 119 Mass. 599; *Porter v. Wakefield*, 5 New Eng. Rep. 491, 146 Mass. 27.

He could not give her a promissory note.

Gay v. Kingsley, 11 Allen, 845; *Toule v. Toule*, 114 Mass. 167; *Turner v. Nye*, 7 Allen, 176; *Jackson v. Parks*, 10 Cush. 550.

Gift of household furniture by husband to wife, void.

Edgerly v. Whalan, 106 Mass. 307.

Same as to tea-set.

Baxter v. Knowles, 12 Allen, 116.

Same as to money.

Thomson v. O'Sullivan, 6 Allen, 308, 304.

Same as to his money deposited in her name in savings bank.

Spelman v. Aldrich, 126 Mass. 113.

A married woman is not liable on a promissory note payable to her husband's order, and indorsed by him.

Roby v. Phelon, 118 Mass. 541. See also

Wilson v. Bryant, 184 Mass. 299, 300.

Note payable to wife or bearer.

Ingham v. White, 4 Allen, 412. See also *Knell v. Eggleston*, 1 New Eng. Rep. 455, 140 Mass. 202; *Woodward v. Spurr*, 2 New Eng. Rep. 233, 141 Mass. 283.

In England a married woman who was a separate trader by the custom of London, was liable to the Bankrupt Law.

Ex parte Carrington, 1 Atk. 206; *La Vie v. Philips*, 1 W. Bl. 570, 3 Burr. 1776.

A married woman carrying on business as a trader, whose husband had been sentenced to transportation, but confined in the hulks, was also liable to the Bankrupt Law.

Ex parte Franks, 7 Bing. 762.

Under 33 and 34 Vict., chap. 93, § 12, making the wife liable to be sued for, and any property belonging to her separate use liable to satisfy, her debts contracted before marriage, as if she had continued unmarried, she was not liable to be put into bankruptcy.

Ex parte Holland, L. R. 9 Ch. App. 307; *Ex parte Jones*, L. R. 12 Ch. Div. 484.

Now, by a special provision of the Married Women's Property Acts of 1882 she is liable to

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be put into bankruptcy in respect to her separate estate, if she carries on trade separately from her husband.

18 Law Rep. (Statutes), p. 455, chap. 75, § 1, cl. 5.

In Maryland, where they have had an insolvent law for many years similar in some respects to our Insolvent Law, and where a married woman has pretty full power to contract, and is liable as to her separate property, it has been held that she is not subject to the Insolvent Law; that it could not apply to a married woman when passed, as she had no power then to contract debts, and the various statutes since enlarging her powers, rights and liabilities did not have the effect to subject her to the Insolvent Law.

Relief Bldg. Assn. v. Schmidt, 55 Md. 97; 1 Md. Code 1860, art. 48, p. 344; 1878, art. 51, 67, §§ 19-23, pp. 481, 482, 717; Md. Acts 1880, chap. 258.

A married woman was not liable to have her property confiscated under the Absentee Act, by going with her husband out of the jurisdiction of Massachusetts, and into that of the enemy.

Martin v. Com. 1 Mass. 347, 391.

In some cases married women have been held subject to the provisions of the United States Bankrupt Law, and in some not.

Re Collins, 3 Biss. 415; *Re Kinkead*, 3 Biss. 405; *Re Ruddell*, 2 Low. 124; *Re Lyons*, 2 Sawy. 524; *Re O'Brien*, 1 Nat. Bankr. Reg. 176; *Re Howland*, 2 Nat. Bankr. Reg. 357; *Re Goodman*, 5 Biss. 401.

Messrs. Lauriston L. Scaife and Bancroft G. Davis, for Globe National Bank of Boston:

The liability of a person signing upon the back of such a note is that of an indorser.

2 Randolph, Com. Paper, § 834; *Bigelow v. Colton*, 13 Gray, 309. Also *Dubois v. Mason*, 127 Mass. 87.

The liability of parties so signing is fixed by the condition of the notes and by the positions of the signatures thereon at the time when the notes first took effect by delivery,—which in this case is when they were first delivered to the banks.

Clapp v. Rice, 13 Gray, 405; *Dubois v. Mason*, 127 Mass. 87; *Baldwin v. Dow*, 180 Mass. 416.

Though a note given by the wife to the husband, or by the husband to the wife, is void, yet if it is indorsed over by the payee (whether husband or wife), even for accommodation, as between such indorser and the indorsee, the note is valid and the indorser is liable to the indorsee thereon.

Kenworthy v. Sawyer, 125 Mass. 28.

The fact of coverture, therefore, does not affect Mrs. Binney's liabilities upon these notes. See *Bigelow v. Colton*, and *Kenworthy v. Sawyer*, *supra*; *Roby v. Phelon*, 118 Mass. 541, 542; *Knight v. Thayer*, 125 Mass. 25.

Nor does it matter, since the Statute of 1874, chap. 184, that the consideration furnished by the holder of the note went wholly to the husband.

See *Major v. Holmes*, 124 Mass. 108.

As between the signer and innocent third parties, the person to whom the instrument was intrusted must be deemed the agent of the signer in filling the blanks.

Angle v. Northwestern Mut. L. Ins. Co. 92 U. S. 330, 338 (23 L. ed. 556, 559); *Androscoggin Bank v. Kimball*, 10 Cush. 878; *Putnam v. Sullivan*, 4 Mass. 45; *Story*, Prom. Notes, 7th ed. § 10.

And the filling of the blanks need not be done immediately nor in the presence of the signer.

Temple v. Pullen, 8 Exch. 889; *Montague v. Perkins*, 22 L. J. N. S. C. P. 187; *Story*, Prom. Notes, 7th ed. § 10, note.

The person who fills them up may be the husband of the signer.

Frank v. Lilienfeld, 38 Gratt. 377.

And even if the plaintiff signed the forms under a misapprehension, she would still be liable to a bona fide indorsee.

Chapman v. Ross, 56 N. Y. 187. See also *Frank v. Lilienfeld*, *supra*.

The law clothes a married woman with power to manage her own affairs, and she ought to accept the responsibilities which attach to a free agency.

Mills v. Angela, 1 Colo. 385.

The argument that this was "a gift of her signature" by the wife to the husband, and so is a nullity and void, is not sound.

Major v. Holmes and *Kenuorthy v. Sawyer*, *supra*.

Within the limits of her power to enter into contracts, a married woman may act by an agent, and her husband may be the agent.

Mechem, Ag. § 63; *Harris*, Cont. Married Women, § 479; *Coolidge v. Smith*, 129 Mass. 554; *Arnold v. Spurr*, 180 Mass. 347; *Wheaton v. Trimble*, 5 New Eng. Rep. 881, 145 Mass. 345; *Raton v. Littlefield*, 6 New Eng. Rep. 841, 147 Mass. 122, 125.

Devens, J., delivered the opinion of the court:

The petition in the case at bar is addressed to the supervisory jurisdiction of this court of all cases arising under the Insolvent Law, which may, "except where special provision is otherwise made upon the bill, petition or other proper process of the party aggrieved, hear and determine the case as a court of equity." Pub. Stat. chap. 157, § 15.

While the language used is broad enough to include all questions of fact as well as of law, and while, in the exercise of this jurisdiction, the court is not limited to the evidence which was before the court of insolvency, but may hear and pass upon other evidence, the application of the party invoking the interference of this court does not bring before it the whole case, but only those points in which she alleged herself to have been aggrieved. *Lancaster v. Choate*, 5 Allen, 530.

The first complaint of the plaintiff is that the alleged notes, produced by the petitioning creditors, the Globe National Bank and the National Bank of the Republic, were not valid claims against her. At the trial before a single judge of this court, in order to prove the invalidity of the notes, she offered the testimony of George H. Binney, her husband, which was objected to by the defendants; and while the evidence was received in order that the case might be fully reported, should either party desire to appeal, the presiding judge did not find it necessary to pass upon the admissibility of this testimony as he was of opinion that if

admissible and fully considered, the bill should still be dismissed.

Without discussing the admissibility of this testimony, it showed that the plaintiff indorsed these so-called notes, held by the two banks, on printed blank forms of notes which contained nothing but the printed words, which appear by the exhibits produced; that she did so at the request of her husband who took them and, afterwards (not in her presence) filled up the blanks and negotiated them for value to the two banks, who discounted them and were bona fide holders thereof; that she received directly no consideration for them, although the proceeds were used to some extent for the support of herself and family, and that she never saw them after she gave them to her husband.

It further appeared, by the testimony of her husband, that she knew "that these notes were to be filled up and used" by him. Upon a state of facts similar to this, an indorsee who receives such a note for value, before maturity, or who discounts it for value after it has been filled up by one to whom it has been entrusted with authority thus to fill up and use it, may ordinarily hold the indorser responsible. Such an instrument entrusted to the custody of another for use would make, as between the indorser and an innocent third party, that other the agent of the indorser, nor can it be important whether the filling up is done in the presence of the indorser or subsequently, if then done by his authority. In either case it is his own act although done by the hand of another, and he is bound by it. *Androscoggin Bank v. Kimball*, 10 Cush. 878.

Nor is the liability of the plaintiff affected by the fact that she is the wife of the signer of the note, who filled the blanks therein and caused the same to be discounted, receiving the proceeds thereof. While a promissory note between husband and wife is void between the original parties, an indorser, when sued upon a contract between him and his indorsee, is not at liberty to deny the validity of the original note or the capacity of the maker for the purpose of defeating his or her own liability. The consideration moving from the party who takes the note with the signatures of the maker, and of the indorser, is sufficient to support the promise of the latter, and the fact that the indorsement is for the accommodation of the maker affords no defense to the indorser. *Kenuorthy v. Sawyer*, 125 Mass. 28, and cases cited.

The authority given to a married woman to make contracts as if she were sole, not only as to her separate property, but of every kind, with anyone except her husband (Pub. Stat. chap. 147, § 2), authorizes her to act, when she sees fit to do so, by an agent. The husband may be authorized to act for her as agent as well as any other person, and, within the authority thus given him, his acts would bind her as if she acted in person. *Coolidge v. Smith*, 129 Mass. 554; *Arnold v. Spurr*, 180 Mass. 347; *Wheaton v. Trimble*, 145 Mass. 345, 5 New Eng. Rep. 881; *Frank v. Lilienfeld*, 38 Gratt. 377.

The contention of the plaintiff, that these blanks were a gift to the husband, or that her signature was a gift to him, which was a nullity, cannot be maintained. So far as the blanks are to be treated as mere pieces of paper, it would seem that they were the property of the

husband, according to the evidence. It is in the power of the wife also, if she chooses, to give her signature for the benefit of her husband. It has been held under Stat. 1874, chap. 184, that a promissory note made by a married woman jointly with her husband, the only consideration being a debt due from him to the payee, would bind her. *Major v. Holmes*, 124 Mass. 108.

In *Roby v. Phelon*, 118 Mass. 541, it was held that the husband and wife being incompetent to contract with each other, a note made by her to him was, as between them, wholly void, and his indorsement of it to the plaintiffs could not make it binding upon her, although it might estop him to deny its validity in an action by the indorseees against him. In the case at bar, the wife is in the position of indorser, the note has been transferred to the holders with her consent for value, and she cannot deny its validity as against them. Even assuming, then (but without intending so to decide), that the evidence offered by the plaintiff was admissible, proof that the notes, when signed by the plaintiff, contained unfilled blanks, would not, under the other circumstances proved, invalidate them, in the hands of the Banks.

When the original Insolvent Law was passed, rendering a person whose goods or estate were attached, liable, in a certain class of cases, to be proceeded against in insolvency if no bond to dissolve the attachment was given, a married woman could not execute a bond or make a contract; and it may well be, that she was not liable to be proceeded against in insolvency if an attachment of her property was made and not dissolved. Stat. 1838, chap. 163, § 19.

It is urged by the petitioner that the provisions of the Public Statutes, so far as they are the same as pre-existing laws, are to be construed as a continuation thereof, and not as a new enactment; that no Act has ever been passed, in terms, making a married woman liable to be adjudged an insolvent debtor, and that the legislation giving her power to make contracts, except with her husband, as if sole, cannot be construed as subjecting her to the provisions and penalties of the Insolvent Law. But the provisions of the Insolvent Law are intended largely, perhaps primarily, for the benefit of insolvent debtors, although they are accompanied by provisions in some cases enforced by penalties which shall compel a complete surrender of property in order to its equal distribution among creditors. There is certainly no hardship in holding that when married women have attained all the privileges supposed to attend the right to make contracts freely, they should accept the responsibilities which should accompany these rights. The Statute (Pub. Stat. chap. 57, § 112), which provides that "if a person whose goods or estate are attached on mesne process, in such action founded upon such contract, has not, before the return day of such process, dissolved the attachment in the manner provided by law," such person may be proceeded against in insolvency, does not *eo nomine* mention a married woman. She is, however, included within the word "person," and it is not important, according to our rule for the construction of statutes, that the pronouns "he" and "himself,"

are used in connection with it in other parts of the section. Pub. Stat. chap. 8, § 8.

An examination of other statutes will show that this word includes, *prima facie*, married women as well as single. Thus, Pub. Stat., chap. 162, §§ 1, 2, relating to the arrest of debtors, when taken in connection with the third section, show that by the word "person," married women would have been deemed to have been included, but for their exception therefrom. Again the fact that married women may become insolvent debtors is clearly recognized in the same chapter. Provision is there made (§§ 6-16) for the enforcement of judgments against female debtors whether "married or unmarried," and the 11th section provides for the proceedings which shall be taken if such judgment debtor "becomes an insolvent debtor under the laws of this Commonwealth." The argument that she could not dissolve the attachment of her property by giving a bond, has now ceased to exist, as she is entirely free to make such a contract. By our law, a married woman is *sui juris* as to her own property, except as to dealings with her husband. Otherwise she is put on the same footing as if she were a *feme sole*; her common-law disabilities as to holding and dealing with her property are removed. *Pacific Nat. Bank v. Windram*, 138 Mass. 175; *Jackson v. Von Zedlitz*, 136 Mass. 342.

We cannot agree that she is not to be treated here as a person fully *sui juris*, because, as suggested by the petitioner, she may have property without the State, which she cannot by the laws of other States fully control as she may that which is within this Commonwealth. Nor do we deem it necessary now to discuss how far, if at all, a wife might be liable criminally to any penalties of the Insolvent Law, if committed in the presence, and under the presumed coercion, of the husband. Pub. Stat. chap. 167, § 119.

Being included within the general word of description used in the Insolvent Law, and there being now no reason arising from incapacity to contract or other cause why the law should not be applied to her, she is brought within its terms, subjected to its liabilities and entitled to its benefits. Having failed to dissolve an attachment of her property by neglecting, under the circumstances stated in the Statute, to give bond, she was liable to be proceeded against, under the Insolvent Law.

The declarations in the actions brought respectively by the Globe National Bank and the National Bank of the Republic, were not inserted in the writs upon which the attachments were made, nor were they filed in court until the return day. No demand was ever made on either bank for a copy of the declaration. It is the contention of the plaintiff that she could not be in default or liable to be proceeded against for not dissolving attachments, when there was nothing to show, until after the time to dissolve them had expired, that her property was attached in an action "founded upon a demand in its nature provable against the estate of an insolvent debtor."

In order that a valid attachment may be made, the writ need not contain a declaration nor any description of the cause of action in which it is intended to declare, other than the

name of the term thereof; and the declaration may be filed in the clerk's office on or before the day on which the writ is returnable, unless an arrest of the person is made. Pub. Stat. chap. 167, §§ 7, 8.

It was not necessary, therefore, to the validity of the attachment, that a declaration should be inserted in the writ, or filed before the return day. It was sufficient to show to the court, as it was shown, that the attachment was founded upon a demand in its nature provable against the estate of an insolvent debtor.

Pub. Stat., chap. 157, § 8, requires that where an attachment of property is made upon a writ, and the declaration is not inserted therein, "a copy shall be furnished to the defendant or his attorney within three days after he has demanded the same in writing of the plaintiff or his attorney." Of this provision the plaintiff did not seek to avail herself. We have no occasion to consider what would have been the effect had such a demand been made and refused.

The plaintiff further urges that the petition to the court of insolvency fails to aver that a service of the writs had been made upon her, and also that the petition of the Globe National Bank was not sufficiently verified by oath. It may be questioned whether defects like these, if they existed, are to be remedied by a petition like that in the case at bar, intended to secure substantial justice, through the supervisory jurisdiction of this court. It is, however, enough to say that the allegation that the suits were duly entered in court, and are still pending, implies that the writs were served on the petitioner. That such service was actually made, appears by the agreement of counsel. As to the jurat upon the petition of the Globe National Bank, it was in the form which has heretofore been held sufficient. *O'Neil v. Glover*, 5 Gray, 144; *American Carpet Lining Co. v. Chipman*, 146 Mass. 385, 6 New Eng. Rep. 47.

Bill dismissed.

Edward T. HYLAND *et al.*

v.

Edward HABICH *et al.*

(.....Mass.....)

The death of the mortgagor revokes the authority to sell goods to a third person on

the security of a mortgage given in part to secure indebtedness on the part of such third person expected to arise from future sales to him by the mortgagee.

(November 12, 1890.)

ON reservation from the Bristol County Superior Court in a suit to redeem certain property from the lien of a mortgage. *Decree for plaintiffs.*

The parties entered into the following agreed statement of facts:

The defendant is, and has been for many years, engaged in the business of manufacturing and selling ales. On the 27th day of July, 1880, one Bridget Hyland executed and delivered to him a mortgage of real estate, of which she was seised, to secure the defendant for the indebtedness her husband, Matthew Hyland, was then under to the defendant, and for the price of all goods which the defendant might in the future sell to Matthew Hyland.

The defendant continued to sell ales to Matthew Hyland on the credit of said mortgage until November 25, 1887, all of which, up to September 2, 1887, were duly paid for. On October 17, 1887, Bridget Hyland died, and the fact of her death was known to the defendant on that day. She left a will devising her real estate to Matthew Hyland for his life, with the remainder over to her children.

The amount of said sales from September 2, 1887, to October 17, 1887, was \$1,490. The amount of sales from October 17, 1887, to November 25, 1887, was \$1,040. The defendant, on July 28, 1888, duly demanded of all the parties plaintiff payment for such sales in the sum of \$2,530. Such sum was not paid, and the defendant began foreclosure proceedings, when the bill in equity was brought to redeem the said real estate from said mortgage.

If on these facts the defendant is entitled to recover under said mortgage for all said sales from September 2, 1887, to November 25, 1887, a decree may be made that the plaintiffs may redeem upon payment to the defendant of \$2,530, with interest from July 28, 1888, and costs. But if the defendant is entitled to recover under said mortgage only for sales made prior to the death of Bridget Hyland, October 17, 1887, then a decree may be made that the plaintiffs may redeem upon payment of \$1,490, with interest from July 28, 1888, and costs.

Mr. S. M. Thomas, for plaintiffs:

If a married woman mortgages or pledges

NOTE.—Contract of guaranty.

An agreement to guarantee the payment by another of goods to be sold in the future, not founded upon any present consideration passing to the guarantor, until acted upon creates no liability in the guarantor. The sale of the goods upon the credit of the guaranty is the only consideration for the conditional promise. Such a guaranty is revocable by the guarantor at any time before being acted upon, and the death of the guarantor operates its revocation, upon the ground that the promise by itself created no obligation, and might at any time be revoked before it is accepted. *Oxford v. Davies*, 12 C. B. N. S. 743.

Where the creditor knew there was no personal estate, it would be presumed that the advances were not made upon the guaranty; and upon the death of the guarantor it would be grossly inequitable. *L. R. A.*

able to allow the creditor to charge the real estate. Under the circumstances, and upon this ground, the death will be considered to operate as a revocation. *Harris v. Fawcett*, L. R. 8 Ch. App. 866, L. R. 15 Eq. 811.

So, the death of a person who has given a letter of credit authorizing another to draw on him for a certain amount for a limited period will operate as a revocation of all authority to draw on him after that event, so as to bind his estate. *Michigan State Bank v. Leavenworth's Estate*, 23 Vt. 200.

See, on the subject of guaranty, generally, *National Exchange Bank v. Gay*, 4 L. R. A. 343, 57 Conn. 254; and as to its continuance, limitations and notice of acceptance, *Ibid*.

As to liability on such contract, see *Best v. Johnson*, 3 L. R. A. 168, note, 78 Cal. 217.

Effect of death of guarantor. *Kernochan v. Murray*, 2 L. R. A. 183, note, 111 N. Y. 303.

her separate property for her husband's debts, such property occupies the position of a surety or a guarantor, and will be discharged by anything that will discharge a surety or guarantor who was personally liable.

Stamford, S. & B. Bkg. Co. v. Ball, 4 De G. F. & J. 313; *Brandt, Suretyship and Guar.* § 22; *Wallace v. Hudson*, 37 Tex. 456; *Spear v. Ward*, 20 Cal. 874; *Agnew v. Merritt*, 10 Minn. 312; *Wolf v. Banning*, 3 Minn. 202; *Hodgson v. Hodgson*, 2 Keen, 704; *Knight v. Whitehead*, 26 Miss. 245; *Smith v. Townsend*, 25 N. Y. 482; *Bank of Albion v. Burns*, 46 N. Y. 174.

The mortgage being in the nature of a guaranty for future advances, the death of the mortgagor terminated her power to act, and revoked any authority or license she might have given if it had not been executed or acted upon at the time of her death.

Jordan v. Dobbins, 122 Mass. 168; *Harris v. Fawcett*, L. R. 15 Eq. 311, L. R. 8 Ch. 866; *Westhead v. Sproson*, 8 Hurlst. & N. 723. See also *Spear v. Ward*, *supra*.

Messrs. Wm. H. Fox and A. M. Alger, for defendants:

There is no analogy between this case and the case of an ordinary guaranty for optional advances from time to time to be made to another person. A man may make a guaranty which will not be determined by his death.

Coulthart v. Clementson, L. R. 5 Q. B. Div. 42, 46; *Kernochan v. Murray*, 2 L. R. A. 183, 111 N. Y. 306.

The mortgage in the case at bar is a contract. As the authority conferred on the mortgagee to make future advances cannot be regarded as perpetual, there is an implied provision that it may be revoked by notice to the mortgagee to make no further advances on the credit of the mortgage. Revocation can be accomplished only by such notice.

Coulthart v. Clementson, *supra*; *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290, 314, 319; *Agawam Bank v. Strever*, 18 N. Y. 502, 518; *Jeu-devine v. Rose*, 36 Mich. 54.

The mere transfer of the mortgagor's title to another, by the mortgagor's death, or by her deed, is not to be taken as notice, by operation of law, that the authority is terminated.

8 Pom. Eq. Jur. p. 182, note 1.

Knowlton, J., delivered the opinion of the court:

The mortgage which, under the agreed statement of facts, the plaintiffs seek to redeem, was given to secure the payment: *first*, of an existing indebtedness due from Matthew Hyland; and, *secondly*, of such indebtedness as might

afterwards accrue from his sale or consignment of goods to said Hyland. The debt then existing was long ago paid, and we need to consider only that part of the mortgage which relates to the indebtedness thereafter to be contracted. The language of the condition in the mortgage impliedly gave the mortgagee a right to sell goods to said Hyland for an indefinite time upon the faith of this security. It was like an ordinary, continuing guaranty of payment for goods to be sold, except that, instead of a personal undertaking to pay as a guarantor, it was a transfer of the estate as security for the payment. The mortgagee had the same right to sell, trusting to the security, and there were the same limitations upon his right, as if the mortgagor had given merely a personal, continuing guaranty. He had an implied authority from the owner of the mortgaged estate, which was subject to revocation at any time, and which would be revoked by the death of the owner. The principles laid down in *Jordan v. Dobbins*, 122 Mass. 168, are decisive of this case. The defendants urge that a conveyance of property as security implies that the authority to sell is to continue after the death of the owner until the owners of the estate see fit to revoke the authority. But we see no good ground for this contention. If the security were by a mortgage of personal property, there would be no one, after the death of the mortgagor, who could revoke the authority until the appointment of an administrator. In the mean time the property might be charged to its full value; and, if the mortgage were of real estate, different heirs might disagree as to the action to be taken. We are of opinion that the right to sell upon the faith of the guaranty rests upon a continuing authority, and that, where a mortgage is given instead of a personal promise as security, the authority proceeds from the mortgagor, and is terminated by his death. Even in England, where it is held that such a guaranty is terminated, not by the death of the guarantor, but by notice of his death, the knowledge which the mortgagee in the present case had of the death of the mortgagor would be deemed constructive notice, sufficient to determine his right to sell on the faith of the security. *Harris v. Fawcett*, L. R. 15 Eq. 311, L. R. 8 Ch. App. 866; *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42, 47; *Lloyd's v. Harper*, L. R. 16 Ch. Div. 290-314, 319.

Under the agreement of the parties the plaintiffs are entitled to redeem upon the payment of \$1,490, with interest from July 23, 1888, and costs.

Decree accordingly.

WYOMING SUPREME COURT.

Charles V. TRUMBLE, *Pff. in Err.*,
v.
TERRITORY OF WYOMING.

(....Wyo. T.....)

1. On a trial for murder, where every circumstance attending the killing is proved, the jury should not be instructed to presume malice from the fact of intentional killing.
6 L. R. A.

ing with a deadly weapon. It is for the jury to decide from all the facts whether the killing was malicious, giving to the accused the presumption of innocence.

2. The accused is presumed to be innocent until his guilt is established, and the prosecutor must establish, beyond reasonable doubt, every element of guilt, or the accused must be acquitted; hence the burden of proof is never upon the accused.

3. When the indictment charges the murder of a person whose name is to the grand jury unknown, and the prosecutor offers to prove that it was impossible for the grand jury to learn the name of the deceased, and this testimony is excluded on the objection of the accused, he cannot allege error by reason of the absence of such proof; nor will his conviction be reversed because, at the trial, a witness testified to the name of the deceased, particularly where different witnesses gave him different names.

4. Where the record shows the presence of defendant at the commencement of the trial, and states, in the same entry, the calling of the jury, the trial, the argument, the charge of the judge, the exceptions of the accused by his counsel and the verdict, the record sufficiently shows the presence of the accused when the verdict was received, where it is not claimed that the defendant was not actually present in court.

(June 6, 1889.)

ERROR to the District Court, First District, held in and for the County of Laramie, to review a judgment against defendant in a prosecution for murder. *Reversed.*

Statement by Corn, J.:

This was an indictment for murder in the first degree, charging the plaintiff in error with the murder of a certain person, whose name was to the grand jury unknown. The evidence upon the trial tended to show that about the 7th of October, 1888, at the Town of Lusk, in the County of Laramie, the plaintiff in error was acting as deputy sheriff and marshal of the town. That he arrested the deceased upon suspicion that he, with others, had recently stolen a number of horses from parties in Johnson County. While the deceased was in his custody, Trumble claimed that the deceased told him that the parties having the horses in charge were camped about four miles from town. Trumble thereupon summoned a number of the citizens as a posse to assist him in arresting them and reclaiming the property. The deceased was put in a buggy to guide them to the spot, and Trumble rode on ahead to find the camp. Trumble returned, and, stating that the camp was not in the vicinity indicated by the deceased, procured a buggy whip, dragged the deceased from the buggy by the handcuffs which he had on, and struck him several blows with the whip to compel him to reveal where the camp was situated. The deceased appealed to the crowd for protection, and, upon their protest against such a proceeding, Trumble desisted from whipping him. The entire party returned to town, and the deceased was turned over to other parties, to be kept in custody, and was kept in custody of one person and another about the town, until the night of the 9th, when the deceased was in Whittaker's saloon, still in custody and handcuffed. Trumble inquired where the deceased was, and, being told, went into the saloon. He informed the deceased that he was going to release him, and took off the handcuffs. A conversation then occurred between Trumble and the deceased, which is stated with slight differences by various witnesses, all of them, however, substantially agreeing. Trumble told the deceased he was now a free man, and asked him if he was glad of it; and deceased said he was. Trumble asked de-

ceased if he would take a drink with him, and deceased said he would. Trumble asked him if he was a friend of his or an enemy. Deceased replied that he had treated him so that he could not be a friend to him. Some other conversation then occurred about a saddle belonging to deceased, in which others also took part. Trumble again asked deceased if he was a friend of his, and deceased said he was not. Trumble asked what he was going to do about it, and deceased replied that he did not know that he was going to do anything about it. Some other conversation then occurred, in which others took part. Trumble again repeated his question to deceased, whether he was a friend or an enemy, and deceased replied that he was not a friend. Trumble drew a revolver, and pointed it at the deceased, working the hammer back and forth, and again repeated his question, and the deceased said: "I will have to be a friend to you now." Trumble then told the deceased he was a coward, again raised his pistol, and asked if he was a friend. The deceased said: "Do you want the truth? Well, Charley, I don't like you," and Trumble immediately shot him, his death being almost instantaneous. Trumble testified that deceased had threatened him, and that he was afraid of him, and that immediately before the shooting deceased threw his hand back as if to draw a pistol. The jury returned a verdict of guilty of murder in the first degree. The defendant's counsel presented motions for a new trial, and in arrest of judgment, and for the discharge of the defendant.

Messrs. James J. Rowen and William Ware Peck for plaintiff in error.

Mr. Hugo Donselmann, Atty-Gen., for the Territory.

Corn, J., delivered the opinion of the court:

Numerous errors are assigned upon the record in this case, but it will only be necessary for us to specially notice a part of them. The court charged the jury, among other things, that "where the fact of killing purposed by the use of a deadly weapon is proved, malice is to be presumed, unless it appears from all the evidence in this case that the killing was without malice, or was justifiable or excusable." The charge of the court is a monograph discussing the whole law of the case, and was not given to the jury by separate instructions, each setting out the law as bearing upon a particular phase of the case, and the principle above announced runs through the entire charge. In another part of the charge the court says, in defining "manslaughter:" "The first part of this definition is meant to cover a case when the killing is unlawful and intentional, but where the circumstances are such as to defeat the presumption raised by law as to malice." And in another part of the charge: "If you find the killing to have been proved, and that defendant did the killing, if the prosecution has failed to prove deliberation and premeditation beyond a reasonable doubt, the law presumes such killing to be murder in the second degree, in the absence of any further evidence. The burden then falls upon the defendant to show either that such killing was justifiable or excusable, or that it was attended

by such facts as would limit such killing to the crime of manslaughter."

The principle here discussed is so essential in the law of homicide, so all-important as affecting the rights of a defendant upon trial for murder, that if it is erroneously stated, and the jury misdirected in regard to it, it cannot be doubted that the case should be retried by a jury properly instructed upon the question. That there is in the older decisions abundant precedent for such statement of the law there can be no question. That modern legal opinion has exploded the fallacy and cleared up the confusion which produced it, we think is equally clear. In a case where nothing else is shown but that the defendant intentionally killed the deceased by the use of a deadly weapon, it may perhaps be permissible to say that, such killing being proved, malice is presumed. But it is difficult to conceive of such a case. It would seem that in all cases the previous relations of the parties to the transaction would at least appear,—whether they were friends, or enemies, or mere strangers. This is especially true under our law, where the defendant is a competent witness on his own behalf. Even in a case so bare of facts as the one suggested, where nothing was in evidence but that the defendant killed the deceased, and that they were friends, or enemies, or mere strangers, it would seem to be palpably improper to instruct the jury to presume the only remaining element necessary to constitute defendant's guilt, upon proof of the killing alone, when the case was but half tried; but that the jury should be directed that it was their duty to decide from all the facts of the case, many or few, whether the killing was malicious, giving to the defendant the presumption of innocence. But, if such an instruction is permissible in certain cases, it is not applicable here. Here every circumstance attending the killing was known to the jury; every event leading up to the tragedy was fully detailed. Why should the jury be instructed to presume malice from one fact in the case alone, when the case was full of facts from which they might and ought to form their opinion upon that question?

The subsequent part of the charge—"The burden, then, falls upon the defendant to show either that such killing was justifiable or excusable,"—is in line with the idea first announced, and, if the first is the law, follows necessarily from it. But if the defendant is presumed to be innocent until his guilt is established, and if the prosecutor must prove every material allegation of the indictment—every element of guilt—beyond reasonable doubt, before he can ask for a conviction, how can the burden of proof upon any question ever fall upon the defendant? If the burden is ever upon him, it is the burden of proving what? His innocence of the crime charged, or his innocence of some element essential to constitute the crime charged. But unless the prosecutor established every such element beyond reasonable doubt the defendant must be acquitted. Such an exigency in the prisoner's defense can only arise, then, after the prosecution had proven the defendant's guilt beyond all reasonable doubt, and the proposition would be thus stated: "The prosecution having proven beyond reasonable doubt that the defendant is

guilty of murder in the killing of the deceased, the burden then falls upon the defendant to show that such killing was justifiable or excusable." The statement of the proposition is, of course, its refutation. The doctrine that the burden never falls upon the defendant does not arise *in favorem vite*, or out of any pity or sympathy for the prisoner, but it arises out of the nature of what the sovereign power voluntarily undertakes to do before it will ask a conviction for crime at the hands of a jury.

The indictment charges the defendant with murder of a certain person, whose name was to the grand jury unknown. It is insisted by counsel for plaintiff in error that the name of the deceased, as shown by the evidence, was Charley Miley, and that the grand jury knew, or might have known by proper inquiry, that such was his name. They insist that the defendant cannot, under this indictment, be convicted of any crime perpetrated upon Charles Miley, and move that the defendant be discharged. If the point were well taken, the effect would be that the defendant would stand acquitted of the murder of a person unknown, and this court, under the statute, would deem it its duty to direct that he be held to await action upon his case by the grand jury for the murder of Miley. One witness upon the trial testified that the name of the deceased was Charley Miley, that he learned his name at the coroner's inquest, and afterwards stated it to the grand jury. Other witnesses testify, however, that he was a stranger in the town, and that his name was not known. He is usually designated by the witnesses as "the prisoner," from the fact of his having been held in custody by Trumble about the time of the killing. One witness states that he understood his name to be Gilliland. A number of witnesses state that for the few days he was there he was usually called "Red Bill." Another states that he was known as "Gunny-Sack Bill." Finally the defendant himself upon the witness stand states that his name was Pete Gilmore. We think, under these circumstances, it could hardly be held that the name of the deceased was known to the grand jury, or that it was a misdescription to designate the deceased as a person whose name was to the grand jury unknown. But the prosecuting attorney, finding that a variance in this respect was insisted upon, at the close of the evidence upon the part of the Territory, placed upon the stand the former prosecuting attorney, during whose incumbency the indictment was found, and offered to prove by him that he was present in the grand jury room, and heard the testimony, and that it was impossible to obtain from the witnesses the name of the deceased. This testimony was objected to by defendant's counsel, and their objection sustained by the court, and they cannot now complain of its absence.

It is further urged by the counsel for plaintiff in error that the record does not show the presence of the defendant in court when the verdict was received. The presence of the defendant when the verdict is received and the jury discharged is required by law, and it has been held that, if these things are done during the enforced absence of the defendant in a capital case, the verdict is a nullity, and it operates as an acquittal. Upon this question

we are referred specially to the decision in *Nolan v. State*, 55 Ga. 531. Nothing more than what is above stated is there decided. In that case the defendant was actually absent from court, in jail, when the verdict of guilty was received and the jury discharged. It was done without his consent, and in the absence of his counsel. There are no such circumstances in the case at bar. It is not claimed that the defendant was not present in court, but it is urged that the record does not show his presence; that this is fatal, and the defendant ought to be discharged.

It is true that, the defendant's presence in court being required by law, the record ought to show it, either in terms or by necessary inference from a consideration of the whole record. 1 Bishop, Crim. Proc. § 1833.

The record entry of June 17, 1887, under the title of this cause, recites the coming into court of the defendant and his counsel; the coming in and calling of the jury, and the presence of all of them; the continuation of the trial by the introduction of evidence; the argument of counsel, and the charging of the jury

by the court; the retirement of the jury to consider of their verdict; the exception of defendant by his counsel to the charge of the court; and, finally, the return of the jury into court with their verdict, and the verdict itself. It is one entry, and the first recital in it is the presence of the defendant. There seems to be no reason why the court should indulge the violent presumption that the defendant had at some time during these proceedings been taken from the court-room, and not returned to it. The record shows the presence of the defendant as clearly as it could be made to appear without useless and frivolous repetitions of the one fact.

These are the only errors assigned which we deem it necessary to consider. We express no opinion upon the evidence. Dark as may be the record of the defendant's guilt, we deem it more important that the principles governing such cases should be correctly stated than that any particular individual should be brought to speedy punishment, however guilty he may be.

The judgment will be reversed, and the case remanded for a new trial.

INDIANA SUPREME COURT.

Jacob STONER, *Appt.*,

v.

James H. RICE, State Auditor.

(....Ind....)

1. The purchase from the government of lands bordering on non-navigable

NOTE.—Public lands, surveys, meander lines.

Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser. *St. Paul P. R. Co. v. Schurmeier*, 74 U. S. 7 Wall. 272 (19 L. & ed. 74).

Meander lines made by the government surveyors are not to be considered in determining the actual boundaries of lots sold by the government as bounded upon rivers or other navigable waters. *Fuller v. Dauphin*, 14 West. Rep. 361, 124 Ill. 542; *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600; *Steele v. Sanchez*, 72 Iowa, 65.

Where the lots were designated by their numbers as specified in the government survey and plat, and it appeared, from the field notes of such survey, that the lines of the lots extended to and from the pond, it was held that the lots, as patented, extended to the pond, although the then existing line of the pond, and the meandered line as run and marked, may have differed. *Boorman v. Sun-nuchs*, 42 Wis. 238.

A meandered line run by the United States surveyor between the Mississippi River and a fractional quarter section of land, merely for the purpose of ascertaining the quantity of land in the fraction, cannot be regarded as a boundary line, where no monuments are established, and where such line does not appear upon the plats in the United States land-office; but in such case the river will be considered as the boundary line. *Houck v. Yates*, 22 Ill. 179.

Although, as to public lands of the United States, 6 L. R. A.

inland lakes, divided therefrom in the survey by a meandering line, and designated as a fractional quarter or a lot, the number of acres of dry land being given, takes all the land within the full subdivision of which such lot forms a portion, including that part beyond the meandering line and covered by the water.

2. After the auditor of state has ap-

a meandered line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence *altunde*. *Lammers v. Nissen*, 4 Neb. 245.

Whether in a survey of United States lands the meander lines were considered as they generally are, as following the winding of streams, is a question of fact. *Bissell v. Fletcher*, 19 Neb. 725.

The locality of the shore line of a meandered river at the time of the government survey is purely a question of fact. *Menasha Wooden Ware Co. v. Lawson*, 70 Wis. 600.

Upon a question of boundary in the case of *Jackson v. Louw*, 12 Johns. 255, in ejectment, the court, in construing a provision in a deed in these words: "leading to the creek and thence up the same to the southwest corner of a lot," etc., says: "There can be no doubt but this lot must follow the creek upon one of its banks or through the middle. This description can never be satisfied by a straight line. The term 'up the same,' necessarily implies that it is to follow the creek according to its windings and turnings, and that must be the middle or center of it." *Brown v. Huger*, 62 U. S. 21 How. 320 (18 L. ed. 180).

An entry of government land, bounded by a meandered line, does not include land lying at the time between such meandered line and the bank of the river. *Lammers v. Nissen*, *supra*.

Where there is a boundary upon a fixed monument which has width,—as a way, stream or wall, even if the measurements were only to the side of it, the title to the land conveyed passes to the line of the middle of the monument. *Gould v. Eastern R. Co.* 2 New Eng. Rep. 585, 142 Mass. 86, 54 Alb. L. J. 118, citing *White v. Godfrey*, 97 Mass. 472; *Clark v. Parker*, 103 Mass. 554; *Motley v. Sargent*, 119

peared and been made a party to a suit originally commenced against other persons, and pleaded to the complaint, he cannot avoid the judgment on the ground that he represents the State, and that the State cannot be sued.

(November 8, 1890.)

APPEAL by plaintiff from a judgment of the Circuit Court for La Porte County overruling a demurrer to the answer in an action to enjoin the sale of certain lands alleged to belong to plaintiff. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. John H. Bradley and L. A. Cole*, for appellant:

Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of land in the fraction subject to sale, and which is to be paid for by the purchaser.

St. Paul & P. R. Co. v. Schurmeier, 74 U. S. 7 Wall. 273 (19 L. ed. 74); *Schurmeier v. St. Paul & P. R. Co.* 10 Minn. 82.

The government did not sell the land according to the meanderings of the lake.

See *Illinois & M. Canal Trustees v. Haven*, 10 Ill. 557; *Middleton v. Fritchard*, 4 Ill. 510.

If, however, the meander line was the boundary as shown by the patent, the lake or river

would be the boundary to which the grantee would take, for the reason that the meander line must follow the lake or stream as nearly as possible; and it is not the intention of the government to leave any land between the meander line and the actual water line.

Minto v. Delaney, 7 Or. 842.

The fact that the meander line was not run exactly on the water's edge would not vary the rule.

Starr v. Child, 20 Wend. 156. See also *Lucas v. Carley*, 24 Wend. 451; *Cold Spring Iron Works v. Tolland*, 9 Cush. 492; *Noble v. Cunningham*, 1 McMull. Eq. 289; *Ross v. Faust*, 54 Ind. 471; *Hills v. Homton*, 4 Sawy. 195; *Quicksilver Min. Co. v. Hicks*, 4 Sawy. 688; *Morsyth v. Smale*, 7 Biss. 201; *Kraut v. Crawford*, 18 Iowa, 549; *Messer v. Hershey*, 42 Iowa, 356; *June v. Purcell*, 36 Ohio St. 896; *Boorman v. Sunnucks*, 42 Wis. 238; *Shufeldt v. Spaulding*, 87 Wis. 662.

A grant of land bordering on a stream not navigable, unless restricted by a clear and unequivocal declaration to the contrary, carries title to the thread or center of the stream, and there is no difference in regard to lakes.

See *Indiana v. Milk*, 11 Fed. Rep. 389; *Champaign & St. L. R. Co. v. Valentine*, 19 Barb. 491; *Dutton v. Strong*, 66 U. S. 1 Black, 23 (17 L. ed. 29); *Cobb v. Davenport*, 32 N. J. L. 369; *Smith v. Rochester*, 92 N. Y. 468; *Ledyard v. Ten Eyck*, 36 Barb. 102; *Ridgway v. Ludlow*, 58

Mass. 231; *Walker v. Boynton*, 120 Mass. 349; *Peck v. Denniston*, 121 Mass. 17. See *Sleeper v. Laconia*, 60 N. H. 201; *Taylor v. Blake*, 5 New Eng. Rep. 61, 64 N. H. 392.

Government issuing patents for the lots mentioned under surveys, as shown by plats, is bound by the plats, and patentees take to the body of the river, although in fact there lay opposite the lots, and between the main land and the body of the river, a strip of land which might in fact be an island, and the title to such strip passes to the patentees. *St. Paul, S. & T. F. R. Co. v. First Div. St. Paul & P. R. Co.* 26 Minn. 31.

Land described in a deed as bounded on the bank of a river not navigable, or by lines running to a stake or tree standing on the bank, and thence up, down, on or by the river to another monument on the bank, extends to the thread of the stream. The doctrine is founded on the presumption that such was the intention and understanding of the parties. The mere fact that the distances and the quantity of land conveyed are greater under this construction than those named in the deed is not sufficient to overcome the presumption. *Rix v. Johnson*, 5 N. H. 520; *State v. Canterbury*, 28 N. H. 195, 216; *Woodman v. Spencer*, 54 N. H. 507, 511, 512; *Sleeper v. Laconia* and *Taylor v. Blake*, *supra*; *Newhall v. Ireson*, 8 Cush. 593, 598; *Gould v. Eastern R. Co.* 2 New Eng. Rep. 595, 142 Mass. 85, 89; *Berridge v. Ward*, 10 C. B. N. S. 400; *St. Clair Co. v. Lovings-ton*, 90 U. S. 23 Wall. 45, 64 (23 L. ed. 59, 62); *Kent v. Taylor*, 6 New Eng. Rep. 122, 64 N. H. 439.

Where the government meander line along the bank of a navigable slough along the Mississippi River was not made or given on the map, but simply preserved in the field notes, the grant was to the middle of the slough. *Fuller v. Dauphin*, 14 West. Rep. 361, 124 Ill. 542.

The water boundary, though run by course and distance, would be controlled by the actual course of the shore, and would pass the right to the property to low-water mark. *French v. Bankhead*, 11 Gratt. 135.

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Land adjoining a creek was described in a patent of the United States as bounded on the side of the creek by a line meandering from a point in its center, down the center a certain distance to a station on the bank, and thence a further distance to another station, and so on, from station to station on the bank, according to various courses and distances, to a point where the line left the creek. It was held that the creek constituted the boundary of the land, and that the courses between the stations only indicated the general direction of the stream, being points fixed by the surveyor to enable him to compute the amount lying between the creek and the other boundaries. *Quicksilver Min. Co. v. Hicks*, 4 Sawy. 688; *Hills v. Homton*, Id. 195.

Flats in front of the lots conveyed pass by the deeds, because they were in the harbor, although the quantity of land conveyed and the length of the lines would have been satisfied by applying them to the upland alone. *Mayhew v. Norton*, 17 Pick. 357; *Brown v. Huger*, 62 U. S. 21 How. 320 (16 L. ed. 130).

The most material and certain calls must control those that are less material and certain. A call for a natural object, as a river, a known stream, or a spring, or even a marked tree, shall control both course and distance. *Newsom v. Pryor*, 20 U. S. 7 Wheat. 10 (5 L. ed. 382).

Wherever natural or permanent objects are embraced in the calls, these have absolute control, and both course and distance must yield to their influence. *Morrow v. Whitney*, 95 U. S. 551 (24 L. ed. 456); *Brown v. Huger*, 62 U. S. 21 How. 306 (16 L. ed. 125).

A survey called for a tree on the bank of a river, and thence down the river by courses and distances to the place of beginning. It was held that there was no doubt of the intention of the surveyor to make the river a boundary, although the corners were fourteen perches from the river. *Grant v. White*, 63 Pa. 271.

Title to lands bounding on navigable waters. See *Fulmer v. Williams*, 1 L. R. A. 603, note, 123 Pa. 151.

Ind. 248; *Rice v. Ruddiman*, 10 Mich. 125; *Newhall v. Iveson*, 8 Cush. 595. See also *Moody v. Palmer*, 50 Cal. 81; *Newson v. Pryor*, 20 U. S. 7 Wheat. 7 (5 L. ed. 332); *Coa v. Freedley*, 33 Pa. 124; *Vance v. Forre*, 24 Cal. 436; *Mayo v. Masseaux*, 88 Cal. 442; *Serrano v. Rawson*, 47 Cal. 52; *Black v. Spragus*, 54 Cal. 266; *Thomas v. Patten*, 18 Me. 838; *Brown v. Clements*, 44 U. S. 3 How. 671 (11 L. ed. 787); *Bates v. Illinois Cent. R. Co.* 66 U. S. 1 Black, 207 (17 L. ed. 160); *Chapman v. Polack*, 70 Cal. 487; *Forsyth v. Smale*, 7 Biss. 201; *State v. Portsmouth Sav. Bank*, 4 West. Rep. 526, 106 Ind. 435.

If the patent to Cabbell passed the lake bed, neither the Act of Congress of 1850, nor the survey and plat pursuant thereto, nor the patent to the State in 1885, can in any manner affect the title of the appellant.

Lindsey v. Hawes, 67 U. S. 2 Black, 554 (17 L. ed. 265).

Mr. Louis T. Michener, Atty-Gen., for appellee.

Olds, J., delivered the opinion of the court:

The question in this case involves the title to the bed of a fresh-water lake situated in the N. $\frac{1}{4}$ of sec. 8 in T. 36 N. of R. 1 W. in La Porte County. This question arises on demurrer to the appellee's answer to the complaint. The lake is not navigable. The principal part of the lake is situated in the N. W. $\frac{1}{4}$ of said section, a small portion extending into the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section, and a small portion extending into the S. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section.

There are 39.72 acres of dry land situate in the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section, lying to the west and south of said lake and designated by the government survey as lot 4. There are 51.33 acres of dry land situate in the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section lying to the north and west of said lake, and designated by the government survey as lot 8; and there are 34.45 acres of dry land in the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section, lying east of said lake, designated by the government survey as lot 1.

The appellant owns these three lots, viz.: lots 1, 3 and 4, deriving his title by means of conveyances from the United States prior to 1884, and by virtue of such conveyances and ownership claims to own and have the title to the land beneath the water of the lake. On the contrary, it is contended by the appellee that by such conveyances the appellant only acquired title to the dry land; that the meandered line around the border of such lake constitutes the boundary line of appellant's land; and, acting upon this theory, the appellee, in the year 1884, procured a survey of the lake within the meandered line to be made by the general government and platted as lots 5 and 6, and such survey and plat was made by the commissioner of the General Land Office, who is *ex officio* surveyor-general of Indiana, and the same was adopted and approved by the Secretary of the Interior, and also procured a patent to be issued by the United States to the State of Indiana for the same on March 17, 1885.

The conclusion we have arrived at is that the owners of lands bordering on non-navigable inland lakes such as the one described in this case, when the subdivisions of the land are surveyed by running a meander line between

the dry land and the water to ascertain the number of acres of dry land, and designating such subdivision as a fractional quarter or a lot, giving the number of acres of dry land, takes the title to all the land contained within the subdivision; that is to say, he takes as a riparian owner, and his title includes and he owns the land beneath the lake far enough beyond the meandered line and water's edge to make out the full subdivision in which his land is so situated. As in this case, the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ is surveyed and designated as lot 1. The purchaser of lot 1 acquires title to all the land situate within the boundary line of the said N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of said section, as the same is platted by the government; and by the survey all the land situate in the N. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of said section was designated as lot 8, and the purchaser of lot 8 acquired title to all the land in said N. $\frac{1}{4}$ of said N. W. $\frac{1}{4}$ of said section, whether a part of it be covered with water and constitute a part of an inland lake, or part of it be swamp; and the same is true in regard to the S. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$, designated as lot 4. The survey included all the land; and when a portion of a subdivision was covered with water such portion was meandered to determine the amount of dry land, and the meandered line does not constitute a boundary line.

It is contended that the riparian owner bordering on a non-navigable lake, like a river, takes to the thread or center of the lake. This rule is impracticable when applied to lakes. Suppose the lake to be round, or nearly so, with riparian owners, as there would be, on the north, south, east and west of it, this rule could not be applied; while the rule we have laid down is practicable, and we think the proper rule to be applied in cases of this character. To hold that the meandered line constitutes the boundary would be against the great weight of authority. Indeed the authorities are almost unanimous against such a doctrine. The weight of recent authorities is to the effect that the owner of the bank owns to the center of the body of non-navigable water, at least, whether it be a lake or river, and that, as a lake generally dries up, the owners of the banks become the owners of the bed, each to the center thereof. But we are unable to find a case parallel with the one under consideration, or where the doctrine has been applied to a lake, like the one in question or many of the lakes within this State. Where the body of water is a running stream, being a narrow rivulet at its head, and growing larger and widening until it enters into another stream still larger, or where it is a long narrow body of water, there is no trouble of applying this doctrine; but when the body of water is surrounded by land and almost circular in form, covering a quarter or half section or more of land, with riparian owners on either side, we cannot say that the owners on the east and the west would take to the exclusion of those on the north and south, nor *vice versa*; nor would it do, as it seems to us, to apply a doctrine that would require the running of diagonal lines between the various owners, each reaching to the center of the lake. The true doctrine to apply in the disposition of such land as is covered by the body of such lakes, we think, is that the government in mak-

ing surveys included in such survey all the land within the district surveyed, and if there was a lake or large pond, which covered a part of a subdivision, it was meandered out, and the dry land in such subdivision designated as a fractional subdivision or lot; that in the purchase of such fractional subdivision or lot the purchaser took title to it as a riparian owner, with the right to the land, as the water receded, within the boundary lines of the subdivision conveyed to the purchaser. In other words, the purchaser acquired title to all the land within the subdivision, though it was described as a fractional subdivision or lot. The authorized survey divided all the land within the district into subdivisions, and if by reason of water upon a tract of the land, a portion of it was regarded at the time as worthless and unsalable, there was a meander line run to ascertain the amount of dry land, and such subdivision was designated as fractional subdivision or lot; and, although thus described, the sale passed title to the whole subdivision.

There are two decisions of this court supporting this doctrine. *Edwards v. Ogle*, 76 Ind. 302; and in the case of *State v. Portsmouth Sav. Bank*, 106 Ind. 435, 4 West. Rep. 528, the court says: "Without entering upon a review of the numerous cases upon the subject of riparian rights, we are very clear that the deeds or patents from the State to Dunn and Condit carried to them no more of the swamp and overflowed lands than were included in the several surveyed subdivisions bounded by the lake."

Upon the general question of riparian rights we cite *Boorman v. Sunnucks*, 42 Wis. 233; *Rice v. Ruddiman*, 10 Mich. 125; *Jones v. Johnston*, 59 U. S. 18 How. 156 [15 L. ed. 323]; *Banks v. Ogden*, 69 U. S. 2 Wall. 57 [17 L. ed. 818]; *St. Clair Co. v. Livingston*, 90 U. S. 23 Wall. 46 [23 L. ed. 59]; *Murry v. Sermon*, 1 Hawks, 56; *Municipality No. 2 v. Orleans Cotton-Press*, 18 La. 122; *Belding v. State*, 25 Ark. 315; *Ridgway v. Ludlow*, 58 Ind. 248; *Ross v. Faust*, 54 Ind. 471; *Pere Marquette Boom Co. v.*

Adams, 44 Mich. 404; *Richardson v. Prentiss*, 48 Mich. 92.

The further question is presented in the case that the State claims title to the land, and it cannot be sued either directly or by any action in relation thereto against the appellee, as auditor of state. The action was originally commenced against one Simeon Harness and William Everhart, sheriff of La Porte County, alleging ownership in the plaintiff, and that the auditor of state had executed a lease to Harness, and that the auditor of state had issued a warrant to the sheriff of said La Porte County, commanding said sheriff to dispossess said appellant, and to place said Harness in possession; and afterwards the auditor of state came into court and answered to the complaint, and the cause was dismissed as to the other parties. The auditor of state was suing to dispossess the appellant of the land, and he had a right to have his title settled and to continue in possession; and after he had commenced suit against the occupant the auditor of state appeared and was made a party to the suit and pleaded to the complaint, and he cannot now avoid a judgment on the ground that he represents the State, and the State claims title to the land, and cannot be sued either directly or indirectly. *State v. Washington*, 101 Ind. 69; *State v. Portsmouth Sav. Bank*, *supra*.

As the cause was commenced, it involved a litigation between two parties claiming a right to the land,—one claiming title by mesne conveyances from the United States, and the other by lease from the State. The title to the real estate in question having passed from the United States to the appellant by mesne conveyances prior to the issuing of the patent for the same to the State, the State took no title; and it follows therefrom that the court erred in overruling the demurrer to the defendant's answer.

Judgment reversed, at appellee's costs, with instructions to the court below to sustain the demurrer to the answer.

KENTUCKY COURT OF APPEALS.

George W. ANDERSON, Jr., *Appt.*,

J. F. JETT *et al.*

(....Ky.....)

1. An agreement between owners of rival steamboats to divide profits of the business in a certain proportion without creating any partnership or any other duty or obligation towards each other, and that, in case either party sells his boat for the purpose of going out of business, he shall not engage in it again for one year, is void on grounds of public policy as an attempt to prevent competition in business.
2. If the object of a contract is to prevent or impede free and fair competition in trade, and it may in fact have that tendency, it is void as being against public policy.

(December 12, 1899.)

NOTE.—See *Lealie v. Lorillard*, 1 L. R. A. 456, 110 N. Y. 519.
6 L. R. A.

APPEAL by plaintiff from a judgment of the Circuit Court for Carroll County sustaining a demurrer to the petition in an action brought to recover damages for an alleged breach of a contract not to engage in a certain trade. *Affirmed*.

The case sufficiently appears in the opinion.

Messrs. Masterson & Gaunt for appellant.

Messrs. J. A. Donaldson and Thomas J. McElrath, for appellees:

The contract sued on, the purpose of which was to secure a monopoly of the trade, is void as against public policy.

Stanton v. Allen, 5 Denio, 434, 49 Am. Dec. 238; *Hooker v. Vandewater*, 4 Denio, 349, 47 Am. Dec. 253; *Metzger v. Cleveland*, 3 Ind. Law Mag. 42, Greenwood, Pub. Pol. 653.

Bennett, J., delivered the opinion of the court:

The steamboats Blue Wing and Hornet were,

prior to the 15th day of September, 1885, rivals in the freight and passenger trade on the Kentucky River; rather, they were rivals as public carriers on said river. On the 15th day of September, 1885, the appellant, George W. Anderson, as the sole owner of the Blue Wing, and Silas F. Douthitt, on behalf of the appellees and himself, as the controlling and managing owner of the Hornet, entered into a written agreement by which it was agreed that, in order to prevent the rivalry that then existed between said boats in said carrying business, and the consequent reduction of freight and passenger charges below a fair compensation, the said boats should thereafter share in the net profits earned by each in the proportion of 63½ per cent to the steamboat Hornet, and 37½ per cent to the steamboat Blue Wing; that each boat should bear its own running and other expenses, and, in case the owner or owners of either boat should sell the same, such owner or owners should replace the same with another boat, just as good, to be run, and the net profits divided, as before; or, if the owner or owners of either boat should sell it, with a view of going out of the trade, notice thereof should be given to the owner or owners of the other boat, and the owner or owners so selling should not come into the trade again, either directly or indirectly, within one year thereafter; that the steamboat Hornet was sold by the said Douthitt, with the view of going out of the trade; that he gave proper notice of that fact; that the appellant, by reason of said sale and notice, purchased the steamboat Kerr, to take the place of the steamboat Hornet; that with the Kerr and Blue Wing the appellant was doing a thriving and profitable business, which was interrupted and destroyed by said Douthitt, contrary to the agreement, bringing the Hornet into the trade again, as a competitor for freight and passengers, which competition had the effect to destroy the appellant's profitable business, by which he was damaged, etc. The case is here on appeal from the circuit court sustaining a demurrer to the appellant's petition and amended petition.

It is to be observed that the respective owners of these boats entered into no partnership in business. The property rights and responsibilities of the owner or owners of each boat remained as before the arrangement was entered into. Neither assumed any duty or obligation in reference to the other that he was not under before the agreement was entered into, except that of pooling the net profits earned by each, and dividing them in certain proportions; but neither party was under any obligation to the other party to run his boat for as much as a single day. Neither party was under any obligation to the other to keep his boat well manned, or in good and clean condition. The only tie common to both was that of dividing the net profits of each boat. There was a strong stimulation to increase the net profits by means other than that of popular favor springing out of efficient steamboat facilities and close attention to the business of shipping for reasonable charges and courteous attention to passengers at reasonable fare. Also, under this agreement, there was no incentive for each boat to run the trade, if one boat could, perchance, do all the business, though only

"after a sort." It was to the interest of each for the other to lie up, thereby saving expenses and increasing the net profits; and another feature detrimental to the public interest consists in the fact that they were not only deprived of frequent means of shipment and passenger travel, but subjected to extortionate charges. Why so? Because there is no competition in the trade, nor likely to be any; for by this combination there lies another boat at the wharf, ready, according to the written obligation, to appear in the trade, and cut the prices of freights and passage below living prices, as long as such competition could hold out. It is the competition, or fear of competition, that makes these carriers efficient, attentive, polite and reasonable in charges. Remove competition, or the fear of it, and they become extortionate, inattentive, impolite and negligent.

The writing sued on by the appellant tends to inspire just such state of case. It is said that neither was bound to charge the same as the other. That is true; but either could extort with impunity, and the other would be an equal recipient of the fruit of the extortion. There would be no motive power—rivalry in trade—to circumvent the extortion. On the contrary, self-interest would prompt, not only the encouragement of the extortion, but an imitation of the nefarious example. It is true that their contract did not, in so many words, bind them to any given charges; but it made it to the interest of each, not only to charge, but to encourage and sustain the other in charges that would amount to confiscation. Why? The facts alleged in the petition doubtless stated as modestly as the draughtsman could show that the combination was exceedingly profitable, and entirely unfriendly to free and untrammelled competition. This combination was more than that of a combination not to take freight or passengers at less than certain prices. In such case, the combiners have to furnish adequate means of transportation, and efficient and polite officers, and confine themselves as nearly as possible to the sum agreed upon, in order to secure the trade, or a reasonable portion of it; but here, by reason of the agreement, there is no incentive to competition. Inefficient means of transportation, unskilled or inattentive officials, are no drawback to either boat. Its share of the profits come notwithstanding. The coal merchant whose only means of transportation is by the Kentucky River may not be able to compete with his rivals in business, if compelled to pay exorbitant freight charges; or, if such competition should not exist, the consumer of his coal would be taxed these charges. So with the merchants; and more pitiable than all the rest would be the condition of the agriculturist whose only means of transportation would be by said river. Rivalry is the life of trade. The thrift and welfare of the people depend upon it. Monopoly is opposed to it, all along the line. The accumulation of wealth out of the sweat of honest toilers by means of combinations is opposed to competing trade and enterprise. That public policy that encourages fair dealing, honest thrift and enterprise among all the citizens of the Commonwealth, and is opposed to monopolies and combinations, because unfriendly to such thrift and enterprise,

declares all combinations whose object is to destroy or impede free competition between the several lines of business engaged in utterly void. The combination or agreement, whether or not in the particular instance it has the desired effect, is void. The vice is in the combination or agreement. The practical evil effect of the combination only demonstrates its

character; but, if its object is to prevent or impede free and fair competition in trade, and may in fact have that tendency, it is void, as being against public policy. For the foregoing reasons the agreement is against public policy, and is therefore void.

The judgment is affirmed.

MINNESOTA SUPREME COURT.

James H. GOULDS *et al.*, *Respts.*,
v.

Thomas BROPHY, *Appt.*

(....Minn.....)

1. If an order be given to a manufacturer or dealer for a specific article of a known and recognized kind and description, and if the defined and described thing be actually supplied, there is no implied warranty that it will answer the purpose for which it is intended to be used.
2. The only implied warranty or condition of the contract is that it will conform to the description, and be of good workmanship and materials.

(November 22, 1890.)

APPEAL by defendant from an order of the District Court for Brown County denying his motion for a new trial in an action to recover the contract price for a well auger and appliances which had been sold and delivered to him, in which a verdict had been directed for plaintiffs. *Affirmed.*

The facts sufficiently appear in the opinion. *Mr. J. M. Thompson*, for appellant:

Plaintiffs' letters in effect said that the fifteen-inch auger, to do good work, need not necessarily be placed in the hands of experienced men, but could be used by men of ordinary ability, and need not be used in some particular kind of soil, but would do work in any ordinary soil of the country; that wherein plaintiffs say the larger augers proved unsatisfactory the one in question "would answer all purposes." This amounts to an express warranty, and the question should have been left to the jury.

McIntock v. Elmick, 87 Ky. 180; *Ward v. Bowen*, 81 Minn. 335; *Tuttle v. Brown*, 4 Gray, 457; *Benj. Sales*, 8d ed. § 613, notes K, M.

The auger was manufactured for the identical

*Head notes by MITCHELL, J.

NOTE.—Sale by manufacturer, implied warranty.

Where a manufacturer contracts to supply an article to be applied to a particular use, the buyer trusts to the manufacturer and relies on his judgment, and not upon his own; and there is an implied warranty that it shall be reasonably fit for the intended use. *Brown v. Edgington*, 2 Man. & Gr. 279; *Jones v. Bright*, 5 Bing. 533; *Randall v. Newson*, L. R. 2 Q. B. Div. 102; *Johnson v. Raylton*, L. R. 7 Q. B. Div. 428.

But where a known described and defined article is ordered, though for a particular purpose, if it be actually supplied, there is no warranty that it shall

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purpose for which it was sold, and by the defendant ordered for the precise use intended by plaintiffs, and for which it was made, and the law would imply a warranty of fitness.

Cogroove v. Bennett, 82 Minn. 371; *Harris v. Waite*, 51 Vt. 481, 81 Am. Rep. 694; *Curtis & Co. Mfg. Co. v. Williams*, 48 Ark. 325; *Shatto v. Abernethy*, 85 Minn. 538, 539; *Best v. Flint*, 2 New Eng. Rep. 604, 58 Vt. 543; 5 Wait, Act. and Def. 562, 565 and cases cited; 8 Wait, Act. and Def. 362, 459. See *Weber v. Demuth*, 24 N. Y. S. R. 236; *Snow v. Schomacker Mfg. Co.* 69 Ala. 111, 44 Am. Rep. 509; *Poland v. Miller*, 95 Ind. 387; *Bird v. Mayer*, 8 Wis. 362; 2 *Benj. Sales*, 8d ed. §§ 645, 656, 657, 661; *Getty v. Rountree*, 3 Pinn. 879; *French v. Vining*, 102 Mass. 132, 135; *Fogg v. Rodgers*, 84 Ky. 558; *Mason v. Chappell*, 15 Gratt. 572; *Parsons*, Cont. 6th ed. 566, note a; *Bea's v. Olmstead*, 24 Vt. 114; *Morehouse v. Comstock*, 43 Wis. 626; *Rodgers v. Niles*, 11 Ohio St. 48; *Byers v. Chapin*, 28 Ohio St. 300; *Leopold v. Van Kirk*, 27 Wis. 152; *Boothby v. Scales*, 27 Wis. 626; *Daves v. Peebles*, 6 Fed. Rep. 856; *Hoe v. Sanborn*, 21 N. Y. 552, 562; *Gerst v. Jones*, 32 Gratt. 524; *Park v. Morris Axe & Tool Co.* 4 Lans. 108; *Murray v. Smith*, 4 Daly, 277; *Hoult v. Baldwin*, 87 Cal. 610; *Phila. & R. Coal & Iron Co. v. Hoffman* (Pa.) 1 Cent. Rep. 927; *Best v. Flint*, 2 New Eng. Rep. 604, 58 Vt. 543; *Beers v. Williams*, 16 Ill. 69; *Archdale v. Moore*, 19 Ill. 535; *Van Wyck v. Allen*, 69 N. Y. 61.

Messrs. Lind & Hagberg and *George W. Somerville*, for respondent:

Where the contract is in writing, and there is no express warranty, no warranty will be implied.

Getty v. Rountree, 2 Chand. (Wis.) 28; *Moore v. McKinlay*, 5 Cal. 471; *Benj. Sales*, p. 577, art. 621.

In this case the property purchased is specifically defined; and in such case no warranty is implied though the vendor knew that the ven-

answer the particular purpose intended by the buyer. *Ollivant v. Bayley*, 5 Q. B. 238.

Where the article ordered was to be of a particular design or pattern, well defined and understood between the parties, and the article delivered conforms to the pattern or design, there is no warranty implied further than that it shall be of good workmanship and material. *Cunningham v. Hall*, 4 Allen, 274; *Mason v. Chappell*, 15 Gratt. 566; *Pridesaux v. Bunnett*, 1 Q. B. N. S. 612. See *Miller v. Moore*, ante, 374.

Conditional sale; implied warranty that thing sold will be satisfactory. See note to *Campbell Printing Press Co. v. Thorp* (Mich.) 1 L. R. A. 645, 22 Fed. Rep. 414.

des intended to use the property for a particular purpose.

Thompson v. Libby, 85 Minn. 448.

When there is a sale of a defined article specifically described, and capable of being ascertained by either party, there is no implied warranty.

Williams v. Ingram, 21 Tex. 800; *Hill v. North*, 34 Vt. 604.

Benjamin in his work on Sales (vol. 2, 4th Am. ed. pp. 864, 987) lays down the correct rule: That when a known, described, and defined article is ordered from a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer.

See *Cosgrove v. Bennett*, 32 Minn. 871; *Thompson v. Libby*, *supra*; *Ollivant v. Bayley*, 5 Q. B. 288; *Hoe v. Sanborn*, 21 N. Y. 552-563; *Chanter v. Hopkins*, 4 Mees. & W. 399; *Tilton Safe Co. v. Tidale*, 48 Vt. 88.

Mitchell, J., delivered the opinion of the court:

The plaintiffs were manufacturers of and dealers in an earth-boring auger and appurtenances, known as the "Challenge Auger Outfit," of which they had published and circulated descriptive catalogues, one of which they sent to defendant. This catalogue contained cuts or models of the outfit when put up and at work, and of the auger, and enumerated the various tools, etc., of which a full outfit consisted, which were stated to include "everything needed to bore a well, except wood-work for a derrick." It also gave the prices of different sized augers up to twenty inches, and stated that plaintiffs could make to order larger sizes, if desired, but that they did not advise this, since a smaller one would answer all purposes, and that when it is required to make a large hole it was better to use a reamer. The catalogue further stated: "These augers have been on the market too long, and are too well known to need any lengthy explanation or guaranty on our part. We would simply say that our auger is designed to work in soft material only, and for a low-priced auger outfit the Challenge is equal to any." From this catalogue defendant ordered a twenty-four inch auger, to which plaintiffs replied, saying that they would not recommend as large an auger as that, as they thought a fifteen-inch was amply large enough. To this defendant replied, ordering a twenty-inch auger outfit complete, with reamer to make a thirty-inch hole. In response to this, plaintiffs replied, saying that they had so little call for augers over fifteen-inch diameter that they did not carry them in stock; that the larger-sized augers, unless in the hands of a man of considerable experience and in a country to which they are particularly adapted, were generally very unsatisfactory; that they worked unnecessarily heavy and slow; and that an auger fifteen inches or less answered all purposes; that they could not fill the order for a twenty-inch auger for some time, and did not consider it advisable to make a reamer for a twenty auger for a thirty hole; that they could send defendant a fifteen-auger outfit complete, with reamer to make a twenty

hole, in a few days. To this defendant replied by telegram, ordering a fifteen auger, to make a twenty-inch hole, which order plaintiffs filled, and sent him the machine. The communications between the parties were all by letter or telegram. When sued for the purchase price, the defense was that the auger outfit was warranted to be suitable for, and would perform, the work, and would answer the purpose for which it was made, to wit, boring wells; that in fact it was not suitable for and would not perform such work or answer such purpose.

It is not claimed but that, so far as the plan and make of the outfit are concerned, defendant got just what he ordered; but the complaint is that it did not and would not reasonably answer the purpose for which it was designed. There is certainly no express warranty contained either in the catalogue or the correspondence between the parties, all that was anywhere said about the kind of material the auger was designed to work in, or the proper size, etc., being evidently merely precautionary or advisory. It is claimed, however, that there was, under the circumstances, an implied warranty that the article was reasonably fit for the use or purpose for which it was made and intended to be used, to wit, boring wells. As the contract was in writing, no warranty not expressed or implied by its terms can be added, either by implication of law or by parol proof. *Whitmore v. South Boston Iron Co.* 2 Allen, 52.

As to when there is and when there is not an implied warranty that an article ordered from a manufacturer or dealer shall be reasonably fit for the purpose for which it was made or designed to be used is a question upon which much has been said and written. As to the general rule applicable to the question, all the leading authorities are substantially agreed, although they state it somewhat differently and are not always agreed in the application of it to the particular facts of a given case.

As stated in 2 Benjamin on Sales, §§ 987, 988, the rule is: "Where a manufacturer or a dealer contracts to supply an article which he manufactures or produces, or in which he deals, to be applied to a particular purpose, so that the buyer necessarily trusts to the judgment or skill of the manufacturer or dealer, there is, in that case, an implied term of warranty that it shall be reasonably fit for the purpose to which it is to be applied. . . . But when a known, described and defined article is ordered of a manufacturer, although it is stated to be required by the purchaser for a particular purpose, still, if the known, defined and described thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer,"—in short, that there is no implied warranty, where the buyer gets what he bargains for, though it does not answer his purpose.

In Leake, on Contracts, 404, the same rule is stated thus: "If an order be given for the manufacture or supply of an article to satisfy a required purpose, that purpose, and not any specific article, being the essential matter of the contract, the seller is then bound, as a condition of the contract, to supply an article reasonably fit for the purpose, and is considered as warranting that it is so." "But if an order be given for a specific article of a recognized

kind or description, . . . and the article is supplied, there is no warranty that it will answer the purpose described or supposed, although intended and expected to do so."

In 1 Parsons on Contracts, 586, 587, the rule is stated thus: "If a thing be ordered of a manufacturer for a special purpose, and it be supplied and sold for that purpose, there is an implied warranty that it is fit for that purpose. This principle . . . must be limited to the cases where a thing is ordered for a special purpose, and not applied to those where a special thing is ordered, though this be intended for a special purpose."

Of the authors quoted, Leake is perhaps the most fortunate and clear in the statement of

the rule. This court has announced and applied the same rule in *Cogrove v. Bennett*, 33 Minn. 371,—a case not distinguishable in principle from the present one. Here the defendant simply ordered a specific article of a known, recognized and defined make or description, which was manufactured by the plaintiffs, and in the market. There was an implied warranty—or, more correctly speaking, condition of the contract—that it should conform to the description, and be of good material and workmanship, according to that description, but none that it would answer the purpose described or supposed. The rule of *caveat emptor* applies.

Order affirmed.

WISCONSIN SUPREME COURT.

STATE OF WISCONSIN, *ex rel.* John R. BALTZELL,

v.

Alva STEWART, Circuit Judge.

(74 Wis. 620.)

1. **An Act creating a board of drainage commissioners** with certain corporate powers for the purpose of promoting the public health and welfare, in the drainage and reclamation of a certain district, although a special Act, is not within the inhibition of Const., art. 4, § 31, subd. 7, against special or private laws giving corporate powers or franchises except to cities, as it falls within the police power.
2. **The Legislature may delegate to an officer or corporation** the right to determine the necessity of the exercise of the power of eminent domain.
3. **The fact that no appeal is allowed** from the decision of commissioners as to the necessity of drainage does not invalidate an Act providing for the drainage of lands in a certain district, and giving the commissioners power to carry out a plan therefor in case they shall be of opinion that the public health and welfare will be thereby promoted.
4. **Granting power to drainage commissioners to determine what land will be benefited** by the proposed drainage and shall be assessed therefor, where the locality is specified and the nature and extent of the proposed drainage are clearly indicated by the statute, is not an unlawful delegation of power.
5. **Giving an appeal from the decisions of drainage commissioners** in classifying lands for assessment, and fixing amounts of damages and benefits as well as on every other question except the necessity of drainage, provides due process of law.

(Cassoday, J., *dissent*s.)

(October 15, 1899.)

CERTIORARI to the Judge of the Ninth Judicial Circuit to review an order made by

NOTE.—Drainage. Construction of South Carolina Statutes, authorizing county commissioners to make contracts for the drainage of lands. See *Moore v. Barry*, 4 L. R. A. 294, note, 80 S. C. 680.

City drains and sewers in Oregon. See *Paulson v. Portland*, 1 L. R. A. 673, note, 18 Or. 460.

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him appointing drainage commissioners under the provisions of chap. 883, Laws of 1889. *Affirmed.*

Chapter 883 of the Laws of 1889 is entitled "An Act to Amend Chapter 443 of the Laws of 1885, Entitled 'An Act to Provide for Drainage and Reclamation of Certain Lands in Dane County.'"

Section 1 provides that when twenty-five or more owners of wet or overflowed lands, which in their opinion will be benefited by the system of drainage, and who shall be of the opinion that the public health or welfare will be promoted thereby, shall desire to institute proceedings for the drainage or reclamation of lands, they may apply to the court or judge thereof, by petition, for the institution of such proceedings, and the appointment of three commissioners to be known as "Drainage Commissioners of Drainage District Number 1 of Dane County;" and after giving four weeks' notice, "the court or presiding judge shall make an order appointing three disinterested and competent freeholders as commissioners, and then and there fix the time and place for their first meeting."

Section 3 provides for the report of an engineer, and then, after due notice, "after hearing the parties interested, who shall appear, the commissioners shall decide upon said petition, and if they shall be of the opinion that the public health or welfare will be thereby promoted, and shall decide favorably upon the intended work, they shall make an order therefor."

Section 4 provides for making an agreement as to damages for removal of dams, water powers, etc., and for an award of damages to every owner of lands taken not so agreed on within thirty days.

Section 5 provides for a basis of benefit for a levy of taxes such as may be necessary "for the lawful and proper purposes of the drainage district."

Sections 7 and 8 provide for an appeal from such classification to a special jury.

Section 11 provides for an appeal to a special jury on the question of damages and also for an appeal therefrom to the Circuit Court for Dane County, where it is to be tried as an action, subject to all rules pertaining to such.

Section 21 permits the commissioners to au-

thorize employes to go upon lands lying in the district for the purposes of the improvement, etc., and "may ever thereafter enter upon said lands as aforesaid for the purpose of maintaining or repairing such work."

Under this Act a petition was duly presented to respondent signed by the required number of freeholders of Dane County asking for the appointment of commissioners under the provisions of the Act, and such proceedings taken as culminated in the appointment of the commissioners; and this proceeding was thereupon taken for the purpose of reversing and setting aside such appointment.

The further facts appear in the opinion.

Messrs. S. U. Pinney and A. L. Sanborn, for relator:

This Act is one granting corporate powers and privileges, and as such is prohibited by the Amendment to the Constitution of Wisconsin of 1871, art. 4, § 31, subd. 7, which prohibits the Legislature from enacting any special or private law for granting corporate powers or privileges, except to cities.

Atkinson v. Marietta & C. R. Co. 15 Ohio St. 21; *State v. Cincinnati*, 20 Ohio St. 18; *Clegg v. School Dist. No. 56*, 8 Neb. 178; *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.* 103 U. S. 707 (26 L. ed. 601); *San Francisco v. Spring Valley Water Works*, 48 Cal. 493.

No particular form of words is necessary to create a corporation.

United States v. Babbit, 66 U. S. 1 Black, 61 (17 L. ed. 96), and cases cited; *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 221 (17 L. ed. 519); *Wood County v. Lackawanna Iron & Coal Co.* 93 U. S. 624 (23 L. ed. 991).

A corporation may be created by implication. *Ang. & A. Corp. § 76 et seq.*; *Rez v. Amery*, 1 T. R. 575; *Ex parte Newport Marsh Trustees*, 16 Sim. 349, 349; *Mahony v. State Bank*, 4 Ark. 620; *Dean v. Davis*, 51 Cal. 408.

The character of an association does not depend upon the name by which it is called. The question is, Has it the attributes of a corporation? If so, it is, in the nature of things, a corporation.

Thomas v. Dakin, 22 Wend. 9, 69, 81; *Liverpool & L. L. & F. Ins. Co. v. Oliver*, 77 U. S. 10 Wall. 566 (19 L. ed. 1029); *Oliver v. Liverpool & L. L. & F. Ins. Co.* 100 Mass. 531; *People v. Watertown Assessors*, 1 Hill, 620; *Ex parte Newport Marsh Trustees*, *supra*; *Conservators of River Tone v. Ash*, 10 Barn. & C. 349.

The grant of corporate powers by special acts, to all persons, whether natural or artificial, other than cities, is forbidden.

See *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *State v. Cincinnati*, 20 Ohio St. 18; *Clegg v. School Dist. No. 56*, 8 Neb. 178; *School Dist. No. 56 v. St. Joseph F. & M. Ins. Co.* and *San Francisco v. Spring Valley Water Works*, *supra*.

The mischiefs aimed at by this amendment could be evaded by creating quasi corporations or corporations *sub modo*, whether of a public or private character.

Ang. & A. Corp. 11th ed. §§ 23-25.

As to what are general and what are public, local or special laws, see—

State v. Laen, 9 Wis. 285, 295, 296; *Clark v. Janesville*, 10 Wis. 177, 181, 191-194; *Evans v. Phillippi*, 9 Cent. Rep. 691, 117 Pa. 237; 6 L. R. A.

McCarthy v. Com. 1 Cent. Rep. 111, 110 Pa. 246.

A local or special statute is limited in the objects to which it applies.

People v. Wright, 70 Ill. 399, 399.

A statute which relates to persons or things as a class is a general law, while a statute which relates to particular persons or things of a class is special.

Wheeler v. Philadelphia, 77 Pa. 350; *Scrantom v. Silkman*, 4 Cent. Rep. 317, 113 Pa. 191, 199; *Davis v. Clark*, 106 Pa. 377, 374; *Morrison v. Bocher*, 3 Cent. Rep. 117, 112 Pa. 328-330; *Scowden's App.* 96 Pa. 422, 425; *Com. v. Patton*, 88 Pa. 258.

The Act is unconstitutional in that it attempts to delegate to the commissioners the power to define and determine the boundaries of the drainage district. This power is essentially a legislative one and one which could not be delegated.

See *People v. Parks*, 58 Cal. 625; *Cooley*, Const. Lim. §§ 121, 122, and cases cited.

It is not competent for the Legislature to delegate the power of determining whether any exigency exists for the exercise of this extraordinary power, so as to exclude the jurisdiction of the courts to review and set aside their proceedings.

Donnelly v. Decker, 58 Wis. 469, 478; *Re Ryers*, 72 N. Y. 7, 8; *Reeves v. Wood Co. Treasurer*, 8 Ohio St. 338; *Sessions v. Crunkilton*, 20 Ohio St. 349.

The law will not allow the right of property or business to be invaded under the guise of a police regulation for the benefit of the public health or good order, when it is manifest that such is not the object or purpose of the enactment.

Chaddock v. Day (Mich.) 4 L. R. A. 809.

No action under this Act, which is shown to have any other object than to maintain the public health or welfare, can be sustained under our Constitution.

Re Jacobs, 98 N. Y. 98; *Lake View v. Ross Hill Cemetery Co.* 70 Ill. 191.

Without an opportunity to parties interested to have the benefit of due process of law the entire Act is unconstitutional and void.

As to what is due process of law, see—

Westervelt v. Gregg, 12 N. Y. 209; *Cooley*, Const. L. 355; *Davidson v. New Orleans*, 96 U. S. 97, 104, 105 (24 L. ed. 616, 620); *Hurtado v. California*, 110 U. S. 516, 535 (28 L. ed. 232, 238); *Citizens Sav. & Loan Assn. v. Topeka*, 87 U. S. 20 Wall. 662 (22 L. ed. 461); *Durkes v. Janesville*, 28 Wis. 464; *Hincks v. Milwaukee*, 46 Wis. 566.

Messrs. Luse & Wait filed a brief on behalf of the Stoughton Mill Company.

Mr. H. W. Chynoweth, with **Messrs. Rogers & Hall**, for respondent:

The clause of the Constitution in question is but a prohibition on the grant to private corporations,—those organized and carried on purely for the purpose of advancing private ends or for private gain.

Smith v. Sherry, 50 Wis. 210; *Cathcart v. Comstock*, 56 Wis. 590; *Chicago & N. W. R. Co. v. Langlade Co.* Id. 614; *Dowlan v. Sibley Co.* 36 Minn. 430.

In its general features the law in question is not unlike chapter 442, Laws of 1885, pro-

nounced a valid enactment by this court in *Bryant v. Robbins*, 70 Wis. 258.

This Act does not confer corporate powers or privileges in the sense intended in the Amendment to the Constitution. We can admit, for the purposes of this Act, that as to its corporate characteristics the creature is not unlike a town.

In *Norton v. Peck*, 3 Wis. 714, it is decided that a town is not a corporation, and towns are in that case denominated as quasi corporations or corporations *sub modo* only.

See also *Eaton v. Manitowoc Co.* 44 Wis. 493; *Cathcart v. Comstock*, 56 Wis. 590; *Pulaski Co. v. Reese*, 42 Ark. 54; *Beach v. Leahy*, 11 Kan. 23; *Soper v. Henry Co.* 26 Iowa, 264; *Morey v. Newfane*, 8 Barb. 645; *Sussex Co. v. Strader*, 18 N. J. L. 108; *Mower v. Leicester*, 9 Mass. 247; *Heddes v. Madison Co.* 6 Ill. 567; *State v. Pawnee Co.* 12 Kan. 426; *Pottawatomie County v. O'Sullivan*, 17 Kan. 58; *Norton Co. v. Shoemaker*, 27 Kan. 77; *Knowles v. Topeka Board of Education*, 83 Kan. 692; *Hamilton Co. v. Mighels*, 7 Ohio St. 109; *State v. Cincinnati*, 20 Ohio St. 18; *State v. Shearer*, 46 Ohio St. 275; *State v. Covington*, 29 Ohio St. 102; *Walker v. Cincinnati*, 21 Ohio St. 14; *Woods v. Colfax Co.* 10 Neb. 552; *Sherman Co. v. Simonds*, 109 U. S. 785 (27 L. ed. 1098); *State v. Wilson*, 12 Lea, 246; *Sauk Centre Board of Education v. Moore*, 17 Minn. 412; *Re Woolsey*, 95 N. Y. 185.

This Act directs and imposes the performance of a duty, the discharge of an obligation due to the State. It requires the abatement and destruction of a nuisance. No adjudication holds that any constitutional provision ever enacted restricts the Legislature or in the least limits or controls its power to make such a requirement or to impose such a duty on the people of any given locality within the territorial limits of the State.

People v. Draper, 15 N. Y. 532; *Baltimore v. State*, 15 Md. 876; *Burch v. Hardwicke*, 80 Gratt. 24; *State v. Hunter*, 88 Kan. 578; *Potter's Dwarrris*, Stat. § 452; *People v. Shepard*, 86 N. Y. 286; *Coe v. Schultz*, 47 Barb. 64; *Donnelly v. Decker*, 58 Wis. 461.

This Act is neither private nor special. It is both public and general.

Cathcart v. Comstock, 56 Wis. 590; *Phillips v. Albany*, 28 Wis. 840; *Zitake v. Goldberg*, 88 Wis. 238, and cases there cited; *State v. Baltimore Co.* 29 Md. 516; *Harrison v. Stickney*, 2 H. L. Cas. 108.

The Act is not void as an attempt to interfere with private property and private rights contrary to the law of the land and contrary to the Constitutions of the State of Wisconsin and of the United States.

Donnelly v. Decker, *supra*; *Wurts v. Hoagland*, 114 U. S. 606 (29 L. ed. 229); *Tide-Water Co. v. Coster*, 18 N. J. Eq. 518; *Hagar v. Reclamation Dist. No. 108*, 111 U. S. 701 (28 L. ed. 589); *Fries v. Brier*, 9 West. Rep. 260, 111 Ind. 65; *Macon v. Patty*, 57 Miss. 878, 84 Am. Rep. 451; *Mills v. Charletem*, 29 Wis. 401; *Cooley*, Taxn. chap. 20; *Chicago v. Larned*, 84 Ill. 203; *Harvard v. St. Clair & M. I. Drainage Co.* 51 Ill. 180; *Dean v. Davis*, 51 Cal. 406; *Hagar v. Yolo Co.* 47 Cal. 222; *Davis v. Gaines*, 48 Ark. 870.

It is perfectly competent for the Legislature
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to prescribe that these commissioners might levy the assessments as the Act in question provides.

Foster v. Wood Co. 9 Ohio St. 540.

Cole, Ch. J., delivered the opinion of the court:

This is a proceeding to reverse and set aside an order of the Circuit Judge of Dane County appointing three drainage commissioners, under chap. 883, Laws 1883. The validity of this Act is challenged on several grounds. In the first place it is insisted that the Act is void because in conflict with subdivision 7, § 81, art. 4, of the Constitution, which prohibits the Legislature from enacting any special or private law granting corporate powers or privileges except to cities. That chapter 883 is a special Act, as distinguished from a general law, it seems to me there can be no doubt.

In *State v. Lean*, 9 Wis. 279, and in some subsequent cases, the words "general law" received a very liberal interpretation,—one sufficiently broad to comprehend what some authorities denominate "Public Local Laws;" but unless all distinction between a general law and a special law is broken down, I can but think the law in question is a special Act. It is entitled "An Act to Amend . . . an Act to Provide for the Drainage and Reclamation of Certain Lands in Dane County," and in its terms applies mainly to lands in that county. I must therefore consider it a special Act, intended to accomplish or carry out a local system of drainage. That the Act grants certain corporate powers it seems to me equally plain. Whether those powers are the corporate powers and privileges the amendment of 1871 was intended to prohibit the Legislature from granting by a special Act is a question which will be considered in a moment; but now, without going into an analysis of the provisions of the Act, it is sufficient to remark that the law clearly grants certain corporate powers and privileges, within the meaning of many well-considered cases to which our attention was called on the argument.

The law declares that the commissioners shall be known as "drainage commissioners of drainage district Number 1 of Dane County." They are to take an oath, and give bonds for the faithful performance of their duties; cause accurate surveys to be made of the route of the proposed system of drainage. After hearing parties interested, the board decides whether, in their opinion, the public health or welfare will be promoted by the intended work; if so, they classify lands for the assessment of benefits and taxes to execute the same, assess such benefits and taxes, make contracts, incur obligations, sue and enforce the collection of delinquent assessments, and exercise other corporate powers. They exercise many powers of regular corporate bodies, and the Act seems to constitute the drainage commissioners a corporation to accomplish and carry out the work of the proposed system of drainage. But the counsel for the respondent insist and claim that, even if the Act does grant certain corporate powers, they are not of that nature and character which it was the intent of the amendment to prohibit the Legislature from granting by a special Act. It is said the drain-

age commissioners are organized as a quasi corporation for a governmental purpose, in order to execute the police power of the State in a particular district for the promotion of the public health and welfare. It is conceded that the police power of the State extends to the promotion of the health, comfort and good order of its citizens, and it cannot be successfully denied that drainage laws are enacted mainly to secure these ends. The declared purpose of the law in question is to promote the public health and welfare by executing a system of drainage. That is the main purpose and object of the law.

The question as to the validity of drainage laws was fully considered by this court in *Donnelly v. Decker*, 58 Wis. 461. There the town supervisors, under the General Statute, had constructed a ditch through the plaintiff's land, and were sued in an action of trespass. This court held that the law providing for the construction of ditches and drains to drain marsh, swamp and overflowed lands was valid, and that when, in the judgment of the supervisors, such ditches would conduce to the public health and welfare, they could be lawfully made.

Without further discussion it may be assumed that the law in question falls within the police power, and the commissioners exercise under it a police authority, intended to promote the public health and welfare. The question then is, Does the constitutional amendment of 1871 prohibit the Legislature from granting these powers for such a purpose by special Acts? While the question is not free from doubt, we are inclined to the opinion that the Legislature had the constitutional power to enact the law. It is certainly well-established doctrine that the State Constitution is simply a limitation of the power of the Legislature, and that in respect to the enactment of laws the Legislature has plenary power, except so far as it is restricted in its action by the precise terms of the Federal and State Constitutions. It might be difficult to draw an accurate line between the corporate powers and privileges which the Legislature is prohibited from granting by special laws and those which they may grant by such laws. No test has been suggested which is entirely satisfactory to our minds. It is said the restriction applies alone to granting powers to private corporations, and was not intended to limit the Legislature in conferring corporate powers upon quasi corporations which are political in their character, and are agencies for exercising the powers and duties of local government. This view might be adopted as sound were it not for the exception of cities in the clause. There would seem to be no object nor necessity for making the exception if the restriction had no application to a special law conferring corporate powers upon governmental subdivisions of the State; for cities are municipal corporations, organized to exercise powers of local government and police regulations.

We do not understand that subdivision 7, § 31, art. 4, has been construed by this court as being a prohibition only as to the grant of corporate powers and privileges to purely private corporations which are organized for private gain; and that it does not apply to quasi corporations which perform governmental

functions. The main object of this clause of the amendment may have been to prohibit the Legislature from granting corporate powers and privileges to private corporations, except by a general law; but we are not prepared to say that this was the only object of the clause. This provision was not before the court in *Smith v. Sherry*, 50 Wis. 218; *Catheart v. Comstock*, 56 Wis. 590, 610; and *Chicago & N. W. R. Co. v. Langlade Co.* 56 Wis. 614.

We shall not attempt to lay down any general rule which will furnish a test in all cases as to what corporations come within the amendment. It is a safer course to let each law be considered upon its own provisions and subject matter as it may come before the court. It is sufficient now to say that chapter 883, which organizes the board of drainage commissioners to carry out the prescribed system of drainage in Dane County, is not in conflict with the amendment of 1871. Under the authority conferred, the board exercises a police power for the promotion of the public health and welfare, and is not clothed with corporate powers or privileges forbidden by the amendment. This same question as to the grant of corporate powers by a special law was involved in *Bryant v. Robbins*, 70 Wis. 258. It is obvious that, if this law is obnoxious to the constitutional objection urged of granting corporate powers which the Legislature was prohibited from granting, the Law of 1886 was open to a like objection. Yet no such objection was taken to the law in that case, although it was argued by the same able and distinguished counsel who assails the Law of 1889 on that ground.

It may be, as the relator's counsel suggests, that the powers conferred upon the commissioners could have well been exercised by the county board of supervisors. The county board has, under the General Law, power to construct county drains where they will conduce to the public health and welfare (Rev. Stat. chap. 54); but the Legislature may have thought the drainage prescribed in the Law of 1889 would be more properly and effectually done under the direction of a board of commissioners, who would have charge of the work until completed. The county board consists of many members, and the *personnel* is constantly changing. The members are not generally chosen with reference to any peculiar fitness for such work, though they have ample authority under the Statute to inaugurate it. But whatever may have been the motive or reason which induced the Legislature to enact the law is an immaterial inquiry if the law is valid.

The law gives the commissioners, after hearing the parties in the matter who shall appear before them, power to decide whether the public health or welfare will be promoted by the intended work. A favorable decision by them of that question is conclusive. No appeal is granted for any further hearing on the question as to the necessity of the drainage. The law is vigorously assailed because it provides no appeal for the trial of that question. From the nature of the case it would seem that there should be somebody to determine the question of the necessity of the drainage for the public benefit. Is each person whose land is affected by the drainage entitled to a jury trial of the

issue? If so, one jury might find one way, another jury find another way; and a marsh which was the cause of sickness and death, and was really a nuisance, would never be drained. The Legislature might have declared the marshes in this case a nuisance, and taken steps for draining them. The question of necessity could not have been inquired into except where it was apparent that there was an attempt to evade the Constitution, and advance some scheme under the pretense of promoting the public health and welfare. In the case of a county drain the county board decides upon the necessity, and there is no appeal from the decision of the question.

The principle involved is analogous to taking property by right of eminent domain. Where a municipal corporation takes property for public use, the jury conclusively decides the question of necessity. The Legislature may determine the necessity of the exercise of the power, and the extent to which the exercise shall be carried; or it may delegate the exercise of that right to officers or corporations. "It is not indispensable that the Legislature shall determine that any given enterprise is necessary or proper before putting in operation the power of eminent domain. This power is primarily an absolute one, and theoretically exists in this absolute form in the ultimate source of authority in every organized society. In the constituted government of this State the right of exercising it has been confided to the Legislature, restricted by only two conditions: one that compensation shall be made to the owner of the property taken; the other that the use for which property may be taken shall be a public use. In other respects it is without limit. Whether the purpose to be subserved be necessary or wise is for the Legislature alone. That body also must decide when, or under what circumstances, the occasion for its exercise arises; but whether the Legislature will await the actual existence of the occasion before determining to employ its prerogative, or will declare in advance what conditions of things shall furnish the exigency for its agents to act, is a question purely for legislative discretion." This language of the court of New Jersey in *National Docks R. Co. v. Central R. Co.* 32 N. J. Eq. 755-763, is applicable to the point we are considering. This doctrine is in accord with the views of all the authorities upon the subject, and was sanctioned by this court in *Smeator v. Martin*, 57 Wis. 364; *Smith v. Gould*, 59 Wis. 631, and *Newcomb v. Smith*, 2 Pinn. 131. It is upon this principle of public benefit that not only the agents of the government, but also individuals and corporations, have been authorized to take or invade private property for the purpose of making highways, turnpike roads and canals; of erecting and constructing wharves and basins, and of draining swamps and marshes. Hubbell, J., in *Newcomb v. Smith*, *supra*.

No distinction is perceived in the case of taking land for a drain or other public purpose; for, while the public have often great interest in drainage on sanitary grounds, this fact furnishes more cogent reasons for the Legislature's delegating the power of determining whether the necessity exists under the circumstances.

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It is obvious the question could never be determined by successive jury trials.

Another objection to the law is that it attempts to delegate to the commissioners the power of creating and defining districts for drainage purposes, which it is said belongs solely to the Legislature. It is not apparent how the Legislature could accurately define the boundary of the lands which should be drained without more investigation than it has time to give such matters. As respondent's counsel say, "the Act does define the boundaries of the district;" but it is left to the commissioners to determine what lands shall be drained, and what lands shall be charged with assessments for doing the work. But the lands to be drained or reclaimed are in Dane County, and the nature and extent of the proposed drainage are clearly indicated.

In *Teegarden v. Racine*, 56 Wis. 545, and *Dickson v. Racine*, 61 Wis. 545, authority was given the common council to define the taxing districts for local taxation, and it was held that the common council possessed, *pro hac vice*, the legislative power, whose action was as conclusive in the matter as if taken by the Legislature itself. This is not like *People v. Parks*, 58 Cal. 625. There it is said: "The Legislature has not, in any of the provisions of the Act under consideration, designated any particular river, stream or locality within the State where drainage is necessary; nor has it located or established the boundaries of any drainage and assessment district within the limits of which taxes are to be levied, assessed and collected for the purpose of raising funds to defray the cost and expenses of the system of works designed by the Act." Page 641.

The Legislature could not well enter upon an inquiry of the lands which should be drained, but naturally referred that subject to the commissioners, who could investigate the facts. The commissioners could determine what lands would be benefited by the work, and assess the burdens in proportion to the benefits received. We see no objection to this feature of the law. See *Cooley*, Taxn. 2d ed. 149, and cases cited in the notes.

It is further insisted that the Act is void because it provides a method of drainage which affects property rights, without giving the owners of the land the benefit of due process of law. The Act gives an appeal from the decision of the commissioners in classifying the lands for assessment; from the amount of damages awarded for any land taken or injured; from the taxes and benefits apportioned—indeed, from the decision of all material questions which can arise, except from the decision as to the necessity of the drainage to promote the public health and welfare. We have stated some reasons for the conclusion that the Act is not void for that feature in it; but upon the other questions the aggrieved party has an appeal. Under the circumstances it cannot be truthfully said that a person has had his property taken from him or invaded, or burdens imposed upon it, without a hearing or due process of law. The plain and declared object of the Act is the promotion of the general health of the community and the public welfare, by the execution of the proposed system of drain-

age, and the improvement of wasteland which will result therefrom. These manifest advantages and benefits, both public and private, would seem to fully justify its enactment. The validity and wisdom of such legislation have been amply indicated by courts which have considered the subject, and no further remarks are called for upon the general question.

As we perceive no valid objection to chapter 383, the order of the Circuit Judge appointing the drainage commissioners is affirmed, and the cause is remanded for further proceedings according to law.

Cassoday, J., dissents.

MICHIGAN SUPREME COURT.

Cassie E. FILER

v.

Thomas W. FILER, *Appt.*

(....Mich....)

In a suit for divorce from bed and board, a plea of former adjudication, based on the dismissal of a former suit by the same plaintiff against the same defendant for an absolute divorce, will not oust the jurisdiction of the court to allow temporary alimony and solicitor's fees, before the plea has been passed upon, where the present bill admits the invalidity of the marriage set up in the first bill, and is based upon an alleged subsequent marriage.

(*Campbell, J., dissents.*)

(November 8, 1889.)

A PPEAL by defendant from an order of the Circuit Court for Wayne County directing that he be committed for contempt in refusing to comply with an order of the court requiring him to pay certain alimony and solicitor's fees in a suit brought against him for divorce. *Affirmed.*

The opinion sufficiently states the case.

Messrs. Alfred Russell and Edward A. Gott, for defendant, appellant:

The plea of "former adjudication" not having been replied to, but having been noticed for hearing, its truth being thereby admitted, was a complete answer to the application for alimony.

Edgar v. Buck, 8 West. Rep. 788, 65 Mich. 856.

The complainant's present bill is based upon an alleged marriage, which she claims took place in 1881, at Waterloo, N. Y., and the marriage of 1874, relied upon in her bill of 1885, is abandoned. The complainant is precluded from setting up the 1881 marriage by the decree of the former suit.

Barb. Ch. Pr. ed. 1843, pp. 126, 127; Gleason v. Knapp, 56 Mich. 293.

The court below was without jurisdiction, inasmuch as the complainant sets up a marriage, occurring outside of this State, and alleges acts of cruelty immediately following, thereby leaving the inference that such acts were committed outside this State.

NOTE.—A valid agreement for separation between husband and wife is not affected by a subsequent decree for divorce. *Galusha v. Galusha*, post, —, and note.

Effect of decree of divorce. See *Cumington v. Belchertown*, 4 L. R. A. 131, note, 149 Mass. 223.

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Milford, Eq. Pl. p. 85; Barb. Ch. Pr. 1848 ed. p. 86.

Mr. George H. Penniman for complainant, appellee.

Morse, J., delivered the opinion of the court:

On the 11th day of April, 1889, the complainant filed her bill in the Wayne Circuit Court in chancery, alleging marriage with the defendant at Port Hope, Ont., in the month of January, 1874; and that two children were born of said marriage, to wit, Claude, born June, 1875, and Adelbert, born March 5, 1879. She further alleges brutal and cruel treatment by the defendant. She also avers that shortly after the birth of her first child the defendant informed her that she was not his wife; that he had a legal wife living, to wit, one Mary A. Filer. That afterwards, on the 4th day of March, 1881, the said defendant procured a divorce from the said Mary A. Filer in the Circuit Court for the County of Oakland, in chancery. That in a few weeks thereafter the complainant and defendant proceeded to Waterloo, in the State of New York, and were there again married, before William H. Burton, a justice of the peace. That this marriage was followed by cohabitation as husband and wife. That said justice delivered a certificate of the marriage to said defendant, who afterwards tore up and destroyed the same.

Complainant also shows in her said bill that the defendant has for a number of years last past been living in open and notorious adultery with a woman named Beaubien; and that she is informed that this woman claims to be married to him. She further avers that the defendant has made false charges of improper conduct against her, and induced others to do so. That for the past three years he has not supported her or her said children. She avers that she has been a resident of this State "for more than one year immediately preceding the filing of this, her bill of complaint." She prays temporary alimony, solicitor's fees and expenses of suit, and that a decree of divorce from bed and board be granted her, with care and custody of the children, and such other relief and remedy as may be agreeable to equity in the premises. She also filed a petition for temporary alimony, etc. A copy of this petition, and notice of motion for an order upon said petition, to be heard April 22, 1889, was served on the defendant April 15, 1889. On the 20th of April, 1889, the defendant filed and served a plea in the cause. This plea set forth a former adjudication between the parties, in substance as follows: That on the 10th day of

August, 1885, the complainant filed a bill for divorce in the same court, and praying a decree from the bonds of matrimony, on the ground of extreme cruelty; that in said bill she alleged marriage with defendant at Port Hope, Ont., on the 22d day of January, 1874, and that the parties lived and cohabited as husband and wife from that time until August 10, 1885. She made no allegation of second marriage.

The defendant answered this first bill under oath, denying the marriage at Port Hope, and averring that at the time of such alleged marriage he had a lawful wife then living. He also denied cohabitation with complainant as her husband, as alleged in the bill, but admits that he had intercourse with complainant, who knew that he had a lawful living wife. That complainant refused to "go through any marriage ceremony with this defendant before any minister," and after the 4th day of March, 1881, refused to permit the defendant to have further intercourse with her, and has cohabited with other men, and is intemperate; and since said day this defendant has not had intercourse with her. "Any children borne by the complainant, if the fruit of intercourse with this defendant, were born out of wedlock." He also denied all charges of cruelty, or any misbehavior charged in the bill of complaint. The answer was not replied to; and thereafter the cause was heard on bill and answer, and the bill dismissed. The decree of dismissal was duly enrolled, was not appealed from, and now stands not reversed and of record in said court. This plea was on oath.

On the 29th day of April, 1889, an order was made, on the hearing of the petition for temporary alimony, that the defendant pay to said complainant, or her solicitor, \$10 per week from the date of the filing of the bill, as temporary alimony, and \$50 solicitor's fees. The defendant refused to comply with this order, and such proceedings were had thereafter that an order adjudging him guilty of contempt in so refusing was made May 14, 1889. From this order defendant appeals. The plea in the cause of former adjudication was not replied to, but was noticed for hearing by the solicitor for complainant. It is claimed by the solicitor for the defendant that the plea must be taken as true, and that, therefore, it was a complete bar to the application for alimony,—citing *Edgar v. Buck*, 65 Mich. 356, 8 West. Rep. 788.

But the present bill is filed for a divorce from bed and board, and not from the bonds of matrimony; and it is chiefly based upon an alleged legal marriage of a different and later date than the one alleged in the first bill, which is conceded by the complainant in her second bill to have been illegal because of the then existence of a lawful wife.

There is nothing in the plea or in the decree in the first case to indicate the grounds of dismissal of that bill; and it may have well been because of the illegality of the marriage averred therein. If so, the adjudication therein would not affect the right of complainant to file the present bill, the basis of which is another, later and legal marriage. The matter of the sufficiency of said plea as a bar to the present suit of complainant has not yet been determined by the lower court, and we do not feel called upon, in this appeal, to pass upon that question. The proceedings adjudging defendant in contempt seem to have been otherwise regular; and, until the court below has passed upon the plea, it certainly had jurisdiction of the matter of temporary alimony and solicitor's fees, while such plea was pending and undisposed of.

The further point is made that the court below had no jurisdiction because the bill only alleges a residence in this State of one year immediately preceding the filing of complainant's bill, while the Statute of 1887 (Pub. Acts 1887, p. 151) requires a residence of two years in a case where the cause for divorce occurred out of this State. It is argued, in support of this point, that the bill alleged a marriage out of the State, and then avers acts of cruelty immediately following such marriage, thereby leaving the inference that such acts occurred out of this State, as no dates are given or places named where or when said acts were committed. As the case stands in this court, we cannot consider this claim of defendant. The bill of complaint has not as yet been demurred to. The case now stands upon bill and plea. The court below had a right, upon a proper showing, to grant temporary alimony, and to enforce its orders granting the same. While the case is being disposed of, there can be no injustice in treating this complainant the same as other complainants in divorce cases. When the lower court determines that she had no standing in court, then she can have no claim to alimony; but, until this is decided, she is before the court, and entitled, if without means, to the usual aid afforded in such cases by a court of equity.

The order of the court below is affirmed, with costs of this appeal to complainant.

Sherwood, Ch. J., and Champlin and Long, JJ., concurred.

Campbell, J., dissenting:

I think no temporary alimony can be granted where the marriage is in dispute. I think, further, that the former divorce proceedings are a bar to the present claim of complainant.

ILLINOIS SUPREME COURT.

John V. FARWELL et al., Appts.,

Gerhard BECKER et al.

(.....Ill.....)

1. Where decrees are rendered against

NOTE.—Action for contribution, implied assumption. *Smith v. Ayrault* (Mich.) 1 L. R. A. 312, note. 6 L. R. A.

two defendants, separately, on a bill to compel contribution, and they are reversed in the appellate court, an appeal to the supreme court from the decree of reversal cannot be sustained as to one of the defendants against whom the judgment was for less than \$1,000.

2. Creditors who attach goods in good faith in the exercise of ordinary prudence and caution, with no intention of committing a tres-

pass or injuring anyone, but with the honest belief that transfers by the debtor were fraudulent, are not wrong-doers such as to be denied the right of contribution between each other for the damages thereby incurred, although the seizure turns out to have been unlawful.

3. One of several attaching creditors who has assisted in defending actions for trespass brought by a claimant of the goods, and whose debt has been fully paid from moneys arising out of a sale of the goods under the attachment, may be required to contribute to the payment of the damages recovered in the trespass suits against the other attaching creditors.

(June 15, 1899.)

APPEAL by plaintiffs from a judgment of the Appellate Court, First District, reversing a judgment of the Circuit Court for Cook County in their favor in an action to compel contribution by defendants as to the amount collected from plaintiffs as damages because of the attachment of certain property by plaintiffs and defendants. *Dismissed as to one appellee and reversed as to the other.*

The facts sufficiently appear in the opinion. *Messrs. Tenney, Bashford & Tenney*, for appellants:

Where several parties are jointly concerned in a transaction, and in carrying it out according to arrangement, and without any intent to injure others, are nevertheless made liable by some invasion of another's rights, if one should be compelled to make good the loss, he may compel contribution from his associates.

Cooley, Torts, p. 147; *Jacobs v. Pollard*, 10 Cush. 287; *Bailey v. Bussing*, 28 Conn. 455; *Stanton v. McMullen*, 7 Ill. App. 326; *Humphrys v. Pratt*, 5 Bligh, N. R. 154; *Betts v. Gibbins*, 2 Ad. & El. 57; *Toplis v. Grane*, 5 Bing. N. C. 636; *Goldborough v. Darst*, 9 Ill. App. 205; *Pizley v. Gould*, 13 Ill. App. 565; *Severin v. Eddy*, 52 Ill. 189; *Gower v. Emery*, 18 Me. 83; *Hove v. Buffalo, N. Y. & E. R. Co.* 37 N. Y. 297; *Castle v. Noyes*, 14 N. Y. 332; *Stone v. Hooker*, 9 Cow. 154; *Coventry v. Barton*, 17 Johns. 142; *Leggett v. DuBois*, 5 Paige, Ch. 114; *Horbach v. Elder*, 18 Pa. 33; *Moore v. Appleton*, 26 Ala. 633; *Dugdale v. Lovering*, 12 Moak, Eng. Rep. 816, and *note*, L. R. 10 C. P. 196; *Wooley v. Batts*, 2 Car. & P. 417; 1 Parsons, Cont. 37; *Ankeny v. Moffett*, 37 Minn. 109; 1 Hilliard, Torts, 188, *note a*; 1 Waterman, Trespass, §§ 29, 31.

The fact that a writ issued against one party was executed by seizing goods in the possession of another party, who claimed to be the owner, does not necessarily preclude contribution.

Nelson v. Cook, 19 Ill. 440; *Acheson v. Miller*, 2 Ohio St. 203; *Stanton v. McMullen*, 7 Ill. App. 326.

In any view of this case the defendants are liable for the share they have received of the proceeds of the goods seized and sold in the attachment proceedings.

Baier v. Wolf, 59 Ill. 470; *Kiewert v. Rindskopf*, 46 Wis. 481; *Wells v. McGeoch*, 71 Wis. 196; *Brooks v. Martin*, 69 U. S. 2 Wall. 70 (17 L. ed. 732); *Planters Bank of Tenn. v. Union Bank of Louisiana*, 83 U. S. 16 Wall. 488 (21 L. ed. 478); *Hunt v. Turner*, 9 Tex. 385, 60 Am. Dec. 167.

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Mr. Frederic Ullman, for appellee Shirk. *Messrs. Beck & Charlton and John Gibbons*, for appellee Becker:

There can be no contribution between wrong-doers.

Merryweather v. Niran, 8 T. R. 186; *Peck v. Ellis*, 2 Johns. Ch. 131. *Lingard v. Bromley*, 1 Ves. & B. 114, 117; *Thweatt v. Jones*, 1 Rand. 328; *Philips v. Biggs*, Hardr. 164; *Deering v. Earl of Winchelsea*, 2 Bos. & P. 270; *Norris v. Hill*, 1 Mich. 202; *Hunt v. Lane*, 9 Ind. 248; *Prescott v. Perkins*, 16 N. H. 805; *Fletcher v. Grover*, 11 N. H. 368; *Nickerson v. Wheeler*, 118 Mass. 295; *Jones v. Orchard*, 18 C. B. 614; *Bailey v. Bussing*, 28 Conn. 455; *Coventry v. Barton*, 17 Johns. 142; *Stone v. Hooker*, 9 Cow. 154; *Moore v. Appleton*, 26 Ala. 633; *Avery v. Halsey*, 14 Pick. 174; *Castle v. Noyes*, 14 N. Y. 329; *Arnold v. Clifford*, 2 Sumn. 238; *Horbach v. Elder*, 18 Pa. 33; *Rend v. Chicago West. Div. R. Co.* 8 Ill. App. 517; *Minnis v. Johnson*, 1 Duvall (Ky.) 171; *Acheson v. Miller*, 18 Ohio, 1; *Anderson v. Saylor*, 8 Head, 551; *Baird v. Midvale Steel Works*, 12 Phila. 255; *Herr v. Barber*, 2 Mackey, 545; *Jacobs v. Pollard*, 10 Cush. 287.

If the person seeking redress knew the act was illegal, or if the circumstances were such as to render ignorance of the illegality inexcusable, then he will be left by the law where his wrongful action has placed him.

Cooley, Torts, 147-150. See *Nichols v. Noutling*, 82 Ind. 488; *Wilkinson v. Loudonack*, 3 Maule & S. 117; *Moore v. Appleton*, *Avery v. Halsey* and *Castle v. Noyes*, *supra*; *Atkins v. Johnson*, 43 Vt. 78; *Rhea v. White*, 3 Head, 121; *Adamson v. Jarvis*, 4 Bing. 66; *Betts v. Gibbins*, 2 Ad. & El. 57; *Pearson v. Skelton*, 1 Mees. & W. 504; *Wooley v. Batts*, 2 Car. & P. 417; *Coventry v. Barton*, *supra*.

Craig, Ch. J., delivered the opinion of the court:

ON MOTION TO DISMISS APPEAL.

The appellee Elbert W. Shirk has entered a motion to dismiss the appeal, so far as he is concerned, on the ground that the amount involved is less than \$1,000 and the judgment of the appellate court is final. The bill in this case was brought against two defendants, Becker and Shirk. The facts set out in the bill, briefly stated, are that Farwell & Co., Becker, Shirk's firm (Sherer, Shirk & Co.) and Eisen & Co. were creditors of Ohlquist Bros., a firm doing business at Monticello and Center Point, Iowa. The firm became insolvent, and made transfers of their stock, which the creditors claimed were fraudulent, and thereupon brought attachment suits through the same attorneys. The goods were sold under the attachment proceedings, and enough was realized to pay the claims of Farwell, Becker and Shirk in full. Trespass suits were brought by the parties, who purchased the goods from Ohlquist Bros., against the sheriffs who made the levies, for the value of the goods, and, after considerable litigation in Iowa, judgments were recovered by the plaintiffs in both of the suits, which judgments were paid by Farwell & Co. They also paid certain costs and expenses of defending the suits, and brought this bill to compel

Becker and Shirk to contribute *pro rata* to the payment of the amount they had paid out. The circuit court entered a money decree requiring Becker to pay complainants \$5,047.75, and requiring Shirk to pay \$554.74. To reverse the decrees each defendant took separate appeals to the appellate court. The appellate court reversed both decrees, and remanded the cause, with directions to dismiss the bill (*Becker v. Farrell*, 25 Ill. App. 432), and to reverse that judgment complainants appeal to this court. We think it is plain that this court has no jurisdiction, so far as the defendant Shirk is concerned. Although two parties, Becker and Shirk, were made defendants to the bill, the action is against each defendant to enforce a separate and distinct liability. The item relied upon was separate as to each defendant, and so was the recovery. Shirk was in no manner connected with Becker as to the claim against him, nor was Becker in any manner liable as respects the claim against Shirk. Where the amount against each defendant is separate and distinct, as is the case here, the two amounts cannot be united so as to confer jurisdiction, but each must be treated as a separate suit, and, if the amount involved as to either one is not large enough to confer jurisdiction, the appeal must fail. See *Ballard Paving Co. v. Mulford*, 100 U. S. 147 [25 L. ed. 551].

The appeal as to appellee Shirk will be dismissed.

ON THE MERITS.

Several questions have been discussed by counsel in the argument, but there is but one question of any importance presented by the record, and that is whether complainants in the original bill, appellants here, have the right to require Gerhard Becker to contribute to the payment of the judgments rendered in the District Courts of Jones and Lyon Counties, Iowa, and costs which the complainants had paid in consequence of the levy on the goods as the property of Ohlquist Bros. It is insisted by appellee that in the attachment and sale of the goods in Iowa the complainants and Gerhard Becker, the defendant, were all wrong-doers, and that no right of contribution exists between wrong-doers. There are cases which hold that no right of contribution exists between wrong-doers. *Merryweather v. Nizan*, 8 T. R. 186, may be regarded as a leading case on the subject. *Nichols v. Nowling*, 82 Ind. 488; *Peck v. Ellis*, 2 Johns. Ch. 181; *Cumpton v. Lambert*, 18 Ohio, 81, and *Spalding v. Oakes*, 42 Vt. 343,—hold the same doctrine.

There are other cases where the same rule has been declared, but we do not think the weight of authority sustains the doctrine that no right of contribution exists between wrong-doers, as it is broadly stated in *Merryweather v. Nizan*. Indeed, the later English cases do not, in our opinion, sustain the doctrine as it is laid down in that case.

The question arose in *Adamson v. Jarvis*, 4 Bing. 66, and in passing upon the question, among other things, Best, Ch. J., said: "It was certainly decided in *Merryweather v. Nizan* that one wrong-doer could not sue another for contribution. Lord Kenyon, however, said 'that the decision would not affect cases of indemnity, where one man employed another to do

acts not unlawful in themselves, for the purpose of asserting a right.' This is the only decided case on the subject that is intelligible. . . . The case of *Philips v. Biggs*, Hardr. 164, was never decided; but the court of chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors. From the inclination of the court in the last case, and from the concluding part of Lord Kenyon's judgment in *Merryweather v. Nizan*, and from reason, justice and sound policy, the rule that wrong-doers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act."

What was said in the case cited was approved in a later case. *Helts v. Gibbins*, 2 Ad. & El. 57. See also *Wooley v. Batts*, 2 Car. & P. 417.

Story on Partnership, § 220, after stating what is regarded as the general rule that no right of contribution is allowed by the common law between joint wrong-doers, says: "But the rule is to be understood according to its true sense and meaning, which is, where the tort is a known, meditated wrong, and not where the party is acting under the supposition of the entire innocence and propriety of the act, and the tort is merely one of construction or inference of law." *Armstrong Co. v. Clarion Co.* 66 Pa. 218, sanctions the rule announced in Story, and, after reviewing the authorities on the question, holds that, where the tort is a known, meditated wrong, contribution cannot be had, but, where the party is acting under the supposition of the entire innocence and propriety of the act, contribution may be awarded.

In *Bailey v. Bussing*, 28 Conn. 455, a leading case on the subject, it was held: "The rule that there can be no contribution among wrong-doers has so many exceptions that it can hardly with propriety be called a general rule. It applies properly only to cases where there has been an intentional violation of law, or where the wrong-doer is to be presumed to have known that the act was unlawful."

In *Jacobs v. Pollard*, 10 Cush. 287, the Supreme Court of Massachusetts states the law as follows: "No one can be permitted to relieve himself from the consequences of having intentionally committed an unlawful act, by seeking an indemnity or contribution from those with whom or by whose authority such unlawful act was committed; but justice and sound policy, upon which this salutary rule is founded, alike require that it should not be extended to cases where parties have acted in good faith, without any unlawful design, or for the purpose of asserting a right in themselves or others, although they may have thereby infringed upon the legal rights of third persons. It is only when a person knows, or must be presumed to know, that his act was unlawful, that the law will refuse to aid him in seeking an indemnity or contribution. It is the unlawful intention to violate another's rights, or a willful ignorance and disregard of those rights, which deprives a party of legal remedy in such cases."

Acheson v. Miller, 2 Ohio St. 203, is a case in its facts quite similar to the present case. In the discussion on the right of contribution,

the Supreme Court of Ohio said: "The rule that no contribution lies between trespassers, we apprehend, is one not of universal application. We suppose it only applies to cases where the persons have engaged together in doing wantonly or knowingly a wrong. The case may happen that persons may join in performing an act which to them appears to be right and lawful, but which may turn out to be an injury to the rights of some third party who may have a right to an action of tort against them. In such case, if one of the parties who have done the act has been compelled to pay the amount of the damage, is it not reasonable that those who were engaged with him in doing the injury should pay their proportion?"

After reviewing the authorities, the court holds that the legal rule is that where parties think they are doing a legal and proper act contribution will be had, but where the parties are conscious of doing a wrong courts will not interfere. See also *Coventry v. Barton*, 17 Johns. 142.

Under the authorities, we think it is clear that if the attaching creditors, at the time they sued out their attachments and seized the goods, acted in good faith, exercising such prudence and caution as an ordinarily prudent person would exercise, with no intention of committing a trespass or injuring anyone, but with the honest belief that the transfers made by Ohlquist Bros. were fraudulent as to creditors, the right of contribution exists, although it ultimately turned out that the seizure of the goods was unlawful and unwarranted. The facts surrounding the transaction at the time the levy was made were such, in our opinion, as to lead any prudent person to believe that the goods were liable to be attached by creditors, as was done. Ohlquist Bros. were at the time of the pretended sale largely indebted to various parties. A day or two before the attachments issued they claimed to have sold the Monticello store to W. A. Tunberg, and the other stock to U. A. Tunberg and F. B. Ohlquist, another brother. No effort was made to adjust or pay their liabilities. They retained no other property liable to levy or sale. These and other kindred facts were brought to the attention of the attaching creditors before they proceeded to seize the goods. If the sales were fraudulent, although the possession of the goods was turned over to the purchaser, the creditors had the right to levy. Were not the facts surrounding the transaction such that a reasonably prudent person might well believe that an attempt had been made to defraud creditors? If so, it cannot be said that the attaching cred-

itors, in making the levy, intentionally violated the law, nor were they presumed to have known that the levy was unlawful. The fact that the goods when attached were in the possession of Tunberg is not a controlling fact. The surrounding circumstances indicated that the pretended sale was fraudulent, and if fraudulent, as it appeared to be, the creditors had a right to attach the goods, although in possession of a pretended purchaser, and a seizure under such circumstances cannot be regarded as tortious.

As to the equities of the case, they are with the complainants. The defendant as well as complainants sued out attachments which were levied on the goods; he assisted in defending the actions brought by the claimant of the goods; his debt was fully paid from money arising out of a sale of the goods under the attachment, and, as the complainants have been compelled to refund the value of the goods, equity and fair dealing unite in requiring the defendant to contribute his just proportion of the burden which has been cast upon the complainants on account of the seizure and sale of the goods.

We think the decree of the circuit court holding Becker liable to contribute was correct. One other fact remains to be noticed. It appears from the evidence that the complainants, when they paid the two judgments rendered against them for taking the goods, did not have the judgments receipted and canceled, but they were assigned to Parkhurst, who was an attorney of complainants. The decree treats the judgments as belonging to complainants, which is the fact; but, as they were assigned to Parkhurst, we think the decree should be modified, requiring complainants to procure an assignment of the judgments from Parkhurst, and file the same with the decree as a condition precedent to the issuing of an execution to collect the amount found due by the decree. In this respect the decree of the circuit court will be modified; in all other respects it will be affirmed.

The judgment of the Appellate Court as to defendant Becker will be reversed.

Magruder, J., dissenting:

I concur in the views expressed and the conclusion reached by the appellate court in the opinion delivered by *Mr. Justice Bailey*, then of that court, and reported as *Becker v. Furwell*, 25 Ill. App. 433.

Bailey, J., having heard this case in the appellate court, took no part in its decision here.

NEW YORK COURT OF APPEALS.

Minerva J. BEAVER, Exrx., etc., Respnt.,

v.

Charles C. BEAVER et al., Admr., etc., Appls.

(.....N. Y.....)

1. No trust can be implied from a mere

deposit in a savings bank by one person in the name of another.

2. A deposit of money in a savings bank in the name of the depositor's son, who does not appear ever to have known of it, does not show a gift to him, where the depositor re-

NOTE.—Gift defined.

A gift is a contract executed. The act of execution is the delivery of possession. Without delivery 6 L. R. A.

it is only a contract to give, not binding for want of consideration. *Re Campbell's Estate*, 7 Pa. 100; *Withers v. Weaver*, 10 Pa. 381; *Kidder v. Kidder*, 33

tained the pass-book for many years afterwards, dealing with the account as his own, and by the rules of the bank payments could be made to any person presenting the book, but to no one else.

(Danforth, J., dissents.)

(November 23, 1889.)

APPEAL by defendants from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Ulster Circuit in favor of plaintiff in an action to recover the amount of a certain bank deposit alleged to have belonged to plaintiff's testator, although made by and remaining within the control of defendants' intestate. *Reversed.*

Statement by Andrews, J.:

The action was commenced by the plaintiff, as executrix of Asiel G. Beaver, against the Ulster County Savings Institution, to recover certain deposits amounting to the sum of \$2,800 or thereabouts, standing to his credit on the books of the bank. The administrators of John O. Beaver claiming the money as part of his estate, they were substituted as defendants in place of the bank, the money having been brought into court. The question litigated was whether the money represented by the deposits and the accumulations had been vested in Asiel G. Beaver, as a gift from John O. Beaver. The account with the bank consisted of two deposits,—one July 5, 1866, of \$854.04, and one of October 5, 1866, of \$145.96,—making in the aggregate \$1,000, and the accumulations thereon. It is undisputed that the deposit \$854.04 was made in person by John O.

Beaver, and that the money deposited belonged to him. The only evidence to sustain the claim that it was given by him to Asiel G. Beaver is found in the relations between them and the circumstances attending the deposit.

Asiel G. Beaver was the son of John O. Beaver, and in 1836 was seventeen years of age, and resided with his father, as one of a family of thirteen children. John O. Beaver made the deposit of July 5, 1866, in the name of Asiel. The rules of the bank required that on making the first deposit the depositor should subscribe a declaration of his assent to the by-laws of the institution, and his promise to abide by them. John O. Beaver, at the date of the first deposit, signed in his own name a declaration presented to him by the treasurer of the bank, commencing with the words: "I, Asiel G. Beaver, of Esopus, Ulster County, hereby request the officers of the Ulster County Savings Institution to receive from me \$854, and open an account with me," etc. At the same time the savings bank entered on its books an account beginning, "Dr., Ulster County Savings Bank, in account with Asiel Beaver," and crediting said Asiel with the deposit of \$854. Under the name of Asiel Beaver were originally written the words, "Payable to John O. Beaver." The bank also at the same time issued and delivered to John O. Beaver a pass-book, with a similar entry as in the account on the books of the bank, containing also, as originally written, the words, "Payable to John O. Beaver." These words in the account and in the pass-book were in the handwriting of the treasurer of the bank, and were written at the same time and by the same hand as the other

Pa. 288; Trough's Estate, 75 Pa. 115; Zimmerman v. Streepier, Id. 147; Scott v. Lauman, 104 Pa. 595.

A gift *inter vivos* is an immediate, voluntary and gratuitous transfer of personal property by one to another. *Flanders v. Blandy*, 9 West. Rep. 418, 45 Ohio St. 108.

A donation *inter vivos*, as distinguished from a *donatio mortis causa*, does not require actual delivery; and it is sufficient to complete a gift *inter vivos* that the conduct of the parties should show that the ownership of the chattels has been changed. *Poullain v. Poullain*, 79 Ga. 11.

Intent alone not sufficient.

An intention to give is not a gift; and so long as the gift is left incomplete, a court of equity will not interfere and give it effect. *Flanders v. Blandy*, 9 West. Rep. 418, 45 Ohio St. 108; *Snowden v. Reid*, 8 Cent. Rep. 886, 67 Md. 130.

To constitute a valid gift, the transfer must be consummated, and not remain incomplete or rest in mere intention; and this is so whether the gift is by delivery only, or by the creation of a trust in a third person or in the donor; enough must be done to pass the title. *Gano v. Flek*, 1 West. Rep. 503, 43 Ohio St. 462; *Robinson v. Ring*, 72 Me. 140; *Hayden v. Hayden*, 3 New Eng. Rep. 82, 142 Mass. 448; *Dickeschied v. Exchange Bank*, 23 W. Va. 340.

A gift of a chattel to take effect in the future is without consideration and not enforceable. Delivery, either actual or constructive, must be shown to establish it. *Vogel v. Gast*, 2 West. Rep. 418, 20 Mo. App. 104.

The mere possession of the subject of the alleged gift, unaccompanied by proof of its delivery by the donor to the donee, is insufficient to establish it as a gift either *inter vivos* or *causa mortis*. *Dickeschied v. Exchange Bank*, 23 W. Va. 341.

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The gift of a savings-bank book from husband to wife, *causa mortis*, is not valid without delivery, although the book is already in her possession; and his saying to her, "You may have it," or, "You may keep it; it is yours," is not sufficient to pass the property. *Drew v. Hagerty*, 3 L. R. A. 230, 81 Me. 231.

Where there are circumstances attending an alleged gift, which reasonably excite suspicion as to whether there was a gift in fact, the proof must be such as to remove suspicion. *Lewis v. Merritt*, 43 Hun, 161.

Delivery essential to completed gift.

Delivery is essential to a gift, and, whether it be *inter vivos* or *causa mortis*, there must be an actual handing over, with the intent to transfer the right of property and possession. *Johnson v. Stevens*, 22 La. Ann. 144; *Hanson v. Millett*, 55 Me. 184; *Carleton v. Lovejoy*, 44 Me. 445; *Egerton v. Egerton*, 17 N. J. Eq. 419; *Dilts v. Stevenson*, 17 N. J. Eq. 407; *Buechian v. Hughart*, 23 Ind. 443; *Peeler v. Guilkey*, 27 Tex. 355; *Curry v. Curry*, 30 Ga. 257; *Carswell v. Ware*, 30 Ga. 287; *Ward v. Turner*, 1 Lead. Cas. in Eq. 4th Am. ed. 1234; *Basket v. Hassell*, 107 U. S. 602 (27 L. ed. 500).

There must be an actual delivery or some act which is in law equivalent thereto. *Peters v. Fort Madison Const. Co.*, 72 Iowa, 405; *Snowden v. Reid*, 8 Cent. Rep. 686, 67 Md. 130; *Flanders v. Blandy*, 9 West. Rep. 417, 45 Ohio St. 103.

It may in some cases be a symbolical delivery. *Vogel v. Gast*, 2 West. Rep. 418, 20 Mo. App. 104.

A donation *inter vivos*, duly accepted by the donee, need not be accompanied by any other delivery. *Rauxet v. Rauxet*, 38 La. Ann. 699.

The donor must part with the dominion and control of the subject matter and transfer it to the donee, where the thing is incapable of manual delivery. *Snowden v. Reid*, 8 Cent. Rep. 886, 67 Md.

part of the entries. But before the delivery of the pass-book the words "Payable to John O. Beaver" were erased therefrom, and the same erasure was made in the account on the bank books. How the interlineation came to be made in the first instance does not appear, nor does it appear at whose suggestion or under what circumstances the erasures were made. Subsequently, on October 5, 1866, another deposit of \$145.96 was made to the account, and credited on the pass-book.

There are no facts, except as above stated, tending to show a gift of the money deposited to Asiel. On the other hand, many circumstances were shown which are claimed to be inconsistent with a gift by the father to the son of the money deposited. The son married a few years after the deposit was made, and died in 1866, twenty years after the date of the deposits, being then of the age of thirty-seven years, leaving a wife, but no children, surviving. John O. Beaver, the father, died in 1838. The father retained possession of the pass-book at all times until his death. In April, 1867, he drew \$27.29 from the account, and signed a receipt therefor in the pass-book in his own name. No other sum was ever drawn from the account. From time to time John O. Beaver presented the pass-book to the bank to have the interest credited, and the bank officers had no dealings with any other person in respect to the account. There is no evidence that Asiel G. Beaver ever had the pass-book in his possession, or knew of the deposits.

In May, 1870, Asiel opened an individual account at the bank in his own name, which continued until March, 1886, when he drew out

\$1,818.56, in full of the account. It appears that John O. Beaver had eight or nine pass-books in the bank, representing deposits made in the names of other persons. He left at his death real estate of the value of \$12,000 to \$15,000, and more than \$20,000 in personal property. One of the rules of the bank provides that "drafts may be made personally, or by the order in writing of the depositor (if the institution have the signature of the party), or by letters of attorney, duly authenticated; but no person shall have the right to demand any part of his principal or interest without producing the original book, that such payment may be entered thereon;" and another declares that, "although the institution will endeavor to prevent fraud or impositions, yet all payments to persons presenting the pass-books issued by it shall be valid payments to discharge the institution." The rules were printed on the pass-books of the bank.

Mr. A. T. Clearwater, with Messrs. Lawton & Stebbins, for appellants:

The deposit made under the circumstances found or established as matters of fact in this case was not a gift of the subject matter thereof, within the requirements of law.

Re Crawford, 5 L. R. A. 71, 118 N. Y. 560.

The one constant quality that persists in all the various modes of delivery effectual for the transfer of the title is that it serves to divest the donor of every vestige of dominion or control over the property.

See *Curry v. Powers*, 70 N. Y. 212; *Young v. Young*, 80 N. Y. 422; *Jackson v. Twenty-*

190; *Schick v. Grote*, 5 Cent. Rep. 823, 43 N. J. Eq. 382.

The subject of the gift must be delivered either to the donee or to some person for his use and benefit, and the donor must part with all dominion over the property, and the title must vest in the donee, subject to the right of the donor at any time to revoke the gift. *Daniel v. Smith*, 75 Cal. 543.

Where the alleged donor said to his wife, "I give these bonds to you, and I show you how to cut the coupons so that you may know how to do it yourself, and use the money for your living," but did not deliver them to her, but put them in a place to which she had no access, and drew the proceeds himself, there was no gift. *Peters v. Fort Madison Const. Co.* 72 Iowa, 405.

Donations *inter vivos* are subject to an implied condition that if, at the death of the donor, the donation shall be in excess of the disposable portion as then ascertained, it will be revoked or resolved to the extent of such excess. *Tessier v. Roussel*, 41 La. Ann. —, 6 So. Rep. 543.

Where it is within the power of the giver to control or cancel the gift, a gift *inter vivos* is not established. *Waynesburg College's App.* 1 Cent. Rep. 823, 111 Pa. 130.

Deposit of fund in trust for another.

To constitute a gift, there must have been a transfer of the fund to the claimant, or at least a transfer of it to the depositor as trustee for the claimant. *Sweeney v. Boston F. C. Sav. Bank*, 116 Mass. 384; *Sherman v. New Bedford F. C. Sav. Bank*, 136 Mass. 561.

Where a certificate of deposit is delivered by a person during his illness, in anticipation of death, to another person for the use of a third, it is a valid gift *causa mortis*, and the title passes from the 6 L. R. A.

death of the donor, although the certificate, payable to the latter's order, has not been indorsed by him. *Conner v. Root*, 11 Colo. 133.

Deposits by a father, made in the presence of his daughter, of money in a bank in her name and for her use, followed by other deposits to her credit entered in a pass-book supplied by the bank and delivered by him to the daughter, constitute a completed present gift of the money deposited. *Re Crawford*, 5 L. R. A. 71, 118 N. Y. 560.

Where there is an express declaration of trust in the donor of a gift, the rule which requires cessation of control and dominion by the donor over the personal property which is given is not applicable. *Miller v. Clark*, 40 Fed. Rep. 15.

A gift of a deposit in a savings bank is effected where the depositor has new pass-books made out in the names of the donees, who are required to sign a signature book in the bank, although the donor retains possession of the books, with the express purpose of preventing the donees from drawing and spending the money during her life, and an entry is made on the books to the effect that the donor alone has power to draw. *Miller v. Clark*, 40 Fed. Rep. 15.

Where the entire fund on deposit is assigned by depositor to be paid upon his death to the assignee, the money to be drawn out only on production of the book, which is delivered by the assignor to the assignee, the ownership of the money becomes vested in the latter, subject to the happening of the future event, the assignor's death, when it may be withdrawn. *Schollmer v. Schoendelen* (Iowa), 43 N. W. Rep. 232.

An assignment written in a bank book, directing the payment to the order of the assignee of all the within deposit at the assignor's death, is not of itself sufficient to create a vested interest in the as-

Third Street R. Co. 88 N. Y. 520; *Grangias v. Arden*, 10 Johns. 298; *Trow v. Shannon*, 78 N. Y. 446; *Doty v. Willson*, 47 N. Y. 580.

If the gift did not take effect immediately on the deposit, but something more was to be done to complete the transfer of title, then the deposit alone did not amount to the delivery required by law.

Eastman v. Woronoco Sav. Bank, 136 Mass. 208.

The bank, under such a form of deposit, did not become the debtor prima facie, of the mere name upon its books until the person answering to that name manifested in some form his assent to his side of the contract.

See *Orr v. McGregor*, 43 Hun. 528.

The retention of the pass-book by the depositor reserved to him in fact and in law the dominion over the subject matter of the deposit, and therefore was incompatible with a complete delivery.

People v. Mechanics & T. Sav. Inst. 92 N. Y. 7; *Orr v. McGregor*, 43 Hun. 530; *Schoenwald v. Metropolitan Sav. Bank*, 57 N. Y. 418; *Appleby v. Erie County Sav. Bank*, 62 N. Y. 12.

The donor not having divested himself of the dominion over the subject matter of the gift, there was no delivery such as the law requires, and the gift was incomplete, no matter what the intent of the donor may have been.

Robinson v. Ring, 72 Me. 140, 39 Am. Rep. 303; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157; *Nutt v. Morse*, 2 New Eng. Rep. 243, 142 Mass. 1; *Pope v. Burlington Sav. Bank*, 56 Vt. 284, 48 Am. Rep. 781; *Walker v. Welch* (Mass.) 4 New Eng. Rep. 854; *Bennett v. Cook*, 28 S. C. 353. See *Brabrook v. Boston F. C. Sav. Bank*, 104 Mass. 228.

The foregoing rules are not relaxed where the donor and donee occupy the relation of father and son, living together, and the son a minor.

Grangias v. Arden, 10 Johns. 298; *Jones v. Lock*, 35 L. J. N. S. Ch. 117; *Geary v. Page*, 9 Bosw. 291; *Meigs v. Meigs*, 15 Hun. 453.

The deposit, made in the manner, and under the circumstances, found by the court, did not create a trust in the father for the benefit of the son.

Martin v. Funk, 75 N. Y. 142; *Orr v. McGregor*, 43 Hun. 538.

Mr. F. L. Westbrook, for respondent:

In the absence of any explanation or contradictory evidence, the legal title to choses in action must be deemed to be in the person in whose name they are taken or to whom they are payable.

Sandford v. Sandford, 45 N. Y. 793; *Central Bank v. Hammett*, 50 N. Y. 159; *Re Crawford*, 5 L. R. A. 71, 113 N. Y. 560.

A gift of money is valid and completed when the right to it is settled, or to get it under the control of the donee is shown; and in determining that question the acts of the donor are to be interpreted by his intention at the time.

Orr v. McGregor, 43 Hun. 531; *Fulton v. Fulton*, 48 Barb. 591; *Gray v. Barton*, 55 N. Y. 72; *Pritchard v. Hirt*, 39 Hun. 380.

A delivery to a third party for the donee is an actual delivery.

Grymes v. Hone, 49 N. Y. 22; *Taylor v. Kelly*, 5 Hun. 115; *Whiting v. Barrett*, 7 Lans. 108.

The acceptance by such third person is an acceptance by the donee; and so long as such third person holds the subject of the gift, the donee may at any time demand it.

Hunter v. Hunter, 19 Barb. 638.

The delivery to the bank and a credit to Asiel, on its books, of the money, was a delivery to him, and the gift thereby became and was perfected; and it is of no consequence who took and held the pass-book.

Howard v. Windham County Sav. Bank, 40

signee; there should be some evidence in addition to show that it was regarded by the assignor as a complete transaction; and the delivery of the book containing the assignment, together with a rule of the bank requiring the production of the book before drawing out money deposited, is sufficient evidence. *Schollmier v. Schoendelen* (Iowa) 43 N. W. Rep. 232.

A written statement, in a savings-bank book, of a gift to the depositor's wife of all the funds credited or to be credited in that book, does not constitute a valid gift, where the book continues to remain, as before, within the reach and under the control of the husband, in a bureau drawer in the dining room of their residence, and he continues to draw money and appropriate it to his own use. *Daugherty v. Moore* (Md.) 17 Wash. L. Rep. 508.

It is not sufficient to deposit money in the savings bank in the name of the beneficiary, to constitute a perfected gift. *Drew v. Hagerty*, 3 L. R. A. 230, note, 81 Me. 231.

The form of deposit and the condition annexed are parts of that contract, and in some respects modify it; but, as regards the claimant, they are nothing more than declarations of the depositor, competent only upon the question of his intention. *Brabrook v. Boston F. C. Sav. Bank*, 104 Mass. 228; *Sherman v. New Bedford F. C. Sav. Bank*, 138 Mass. 583.

A declaration of trust by the owner, or a deposit of the fund in his name as trustee, or a deposit in the name of another, will not of itself be sufficient 6 L. R. A.

to prove a gift or voluntary trust; there must be some further act or circumstance showing a perfected gift of the legal or equitable interest. *Clark v. Clark*, 108 Mass. 522; *Broderick v. Waltham Sav. Bank*, 109 Mass. 149; *Powers v. Provident Sav. Inst.* 124 Mass. 377; *Cummings v. Bramhall*, 120 Mass. 552; *Eastman v. Woronoco Sav. Bank*, 136 Mass. 208; *Gerrish v. New Bedford Sav. Inst.* 123 Mass. 159; *Sherman v. New Bedford F. C. Sav. Bank*, 138 Mass. 582.

It is not a complete donation *causa mortis* where a depositor during her last illness delivered her savings-bank book to a third person, saying that if she died the money was for her sister in Ireland. *Walsh's App.* 1 L. R. A. 536, 122 Pa. 177.

A deposited several sums of money in a savings bank, "in trust" for certain relatives. He gave the deposit books into the possession of one of these persons, and A drew the interest accruing on the several deposits. The night before he died A said to these persons: "When I am gone, you take these books and transfer the money to your own names and say nothing to nobody about it." It was held that there was not a perfected gift of the money to said persons; and that the administrator of A's estate was entitled to it. *Nutt v. Morse*, 2 New Eng. Rep. 243, 142 Mass. 1; *Sherman v. New Bedford F. C. Sav. Bank*, 138 Mass. 581.

Gift by deposit of money in a bank, what necessary to completion. *Re Crawford*, 5 L. R. A. 71, note, 113 N. Y. 560.

And see gifts *causa mortis*: *Williams v. Guile, ante*, 366; *Miller v. Neff, post*, —.

Vt. 599; *Smith v. Brooklyn Sav. Bank*, 1 Cent. Rep. 801, 101 N. Y. 58; *Barker v. Harbeck*, 17 N. Y. S. R. 878.

Whether Asiel knew or did not know of the transaction is of no consequence, whether it was a gift or a trust.

Martin v. Funk, 75 N. Y. 137; *Scott v. Harbeck*, 49 Hun, 293; *Orr v. McGregor*, 43 Hun, 532; *Holliday v. Lewis*, 14 Hun, 480; *Tucker v. Bradley*, 33 Vt. 325; *Hunter v. Hunter*, 19 Barb. 633; *Bedell v. Carll*, 33 N. Y. 584.

The gift was effectual although the depositor retained the book in his possession until his death.

Willis v. Smyth, 91 N. Y. 301; *Orr v. McGregor*, *supra*; *Blasdel v. Locke*, 52 N. H. 238; *Grymes v. Hone*, 49 N. Y. 17.

If the money was given so as to transfer the ownership of it to Asiel, nothing that John O. could or did say or do afterwards could in any way affect the rights or interest of Asiel, whether John O. had the book or not.

Fowler v. Bowery Sav. Bank, 4 L. R. A. 145, 113 N. Y. 453; *Mabie v. Bailey*, 95 N. Y. 206; *Boone v. Citizens Sav. Bank*, 21 Hun, 235; *Scott v. Harbeck*, 49 Hun, 294.

In any event or aspect of the transaction, John O. Beaver became and was a trustee of the money and the pass-book for the benefit of Asiel.

Martin v. Funk, 75 N. Y. 134; *Fowler v. Bowery Sav. Bank*, 4 L. R. A. 145, 113 N. Y. 453; *Fisher v. Fields*, 10 Johns. 498; *Perry, Tr.* § 89; *Barry v. Lambert*, 98 N. Y. 806; *Gilman v. McArdle*, 1 Cent. Rep. 67, 99 N. Y. 459; *Chapman v. Porter*, 69 N. Y. 279; *Smith v. Lee*, 2 Thomp. & C. 592; *Fulton v. Fulton*, 48 Barb. 592; *Mabie v. Bailey*, 95 N. Y. 206.

When the trust is thus created, it is effectual to transfer the beneficial interest, and operates as a gift perfected by delivery.

Gerriah v. New Bedford Sav. Inst. 128 Mass. 161; *Hurlbut v. Hurlbut*, 49 Hun, 192.

Andrews, J., delivered the opinion of the court:

It is found that the money with which John O. Beaver made the deposit of \$354.04, July 5, 1866, belonged to him. The inference that the deposit of \$145.96, made October 5, 1866, was also made by him, from his own means, does not admit of reasonable question. The pass-book was at all times in his possession. Concurrently with the last deposit the amount was entered therein. It is affirmatively shown that Asiel, who was then a minor, lived with his father, and had no money of his own, and the circumstances are quite satisfactory to show that he never at any time during his life knew of the bank account. The question in the case turns upon the legal effect of the deposit, made in connection with the attendant and subsequent circumstances. If they establish either a trust in favor of Asiel as to the \$354.04, deposited July 5, 1866, or a gift of the fund deposited, then, clearly, the subsequent deposit would, in the absence of explanation, be impressed with the same character, and be governed by the same rules. On the other hand, if the first deposit was not affected with any trust, and was not a gift, neither is the last one. Both were the property of John O. Beaver, or both the property of the son, either by a beneficial or

legal title. The trial court seems to have sustained the transaction as a gift, but at the same time refused to find that there was no trust.

There is no warrant, under the decisions of this court, to uphold the deposit of July 5, 1866, as a trust.

The case of *Martin v. Funk*, 75 N. Y. 134, established a trust in favor of the claimant in that case, in respect to a fund deposited by another in a savings bank to his own credit, in trust for the former, the latter taking from the bank at the time a pass-book in which the account was entered in the same way. The court applied the doctrine that the owner of a fund may, by an unequivocal declaration of trust, impress it with a trust character, and thereby convert his absolute legal title into a title as trustee for the person in whose favor the trust is declared. There was no declaration of trust in this case, in terms, when the deposit of July 5, 1866, was made, nor at any time afterwards, and none can be implied from a mere deposit by one person in the name of another. To constitute a trust there must be either an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created. It would introduce a dangerous instability of titles if anything less was required, or if a voluntary trust *inter vivos* could be established in the absence of express words, by circumstances capable of another construction, or consistent with a different intention. See *Young v. Young*, 80 N. Y. 438, and cases cited.

The plaintiff's title to the fund must depend, therefore, upon the question of gift. The elements necessary to constitute a valid gift are well understood, and are not the subject of dispute. There must be on the part of the donor an intent to give, and a delivery of the thing given, to or for the donee, in pursuance of such intent, and on the part of the donee acceptance. The subject of the gift may be chattels, choses in action, or any form of personal property, and what constitutes a delivery may depend on the nature and situation of the thing given. The delivery may be symbolical or actual, by actually transferring the manual custody of the chattel to the donee, or giving to him the symbol which represents possession. In case of bonds, notes or choses in action, the delivery of the instrument which represents the debt is a gift of the debt, if that is the intention; and so, also, where the debt is that of the donee, it may be given, as has been held, by the delivery of a receipt acknowledging payment. *Westarbo v. De Witt*, 36 N. Y. 840; *Gray v. Barton*, 55 N. Y. 72; 2 Schouler, Pers. Prop. § 66 *et seq.*

The acceptance also may be implied where the gift, otherwise complete, is beneficial to the donee. But delivery by the donor, either actual or constructive, operating to divest the donor of possession of and dominion over the thing, is a constant and essential factor in every transaction which takes effect as a complete gift. Anything short of this strips it of the quality of completeness which distinguishes an intention to give, which alone amounts to nothing, from the consummated act, which changes the title. The intention to give is often established by most satisfactory evidence, although the gift fails. Instruments may be ever so formally executed by the donor, purporting to trans-

fer title to the donee, or there may be the most explicit declaration of an intention to give, or of an actual present gift, yet, unless there is delivery, the intention is defeated. Several cases of this kind have been recently considered by this court, *Young v. Young, supra*; *Jackson v. Twenty-Third Street R. Co.* 88 N. Y. 520; *Re Crawford*, 118 N. Y. 560, 5 L. R. A. 71.

We are of opinion that there is lacking in this case two of the essential elements to constitute a gift by John O. Beaver to his son of the money deposited July 5, 1866, viz., an intent to give, and a delivery of the subject of the alleged gift. The only evidence relied upon to establish an intent on the part of the father to make a gift to his son is the transaction at the bank on the day the deposit was made, in connection with the relation between the parties. There is no proof of any oral statement made by the father on that occasion disclosing an intention to make a gift, and not a *scintilla* of evidence that afterwards, during the twenty years which elapsed before the son's death, the father made any declaration or in any way recognized that the money belonged to the son, or had been given to him. Evidence offered, on the part of the defendant, of declarations of John O. Beaver, made on the day of the deposit and afterwards, inconsistent with the theory of an intent to give the money to Asiel, was excluded, on the objection of the plaintiff. The acts of John O. Beaver after the account was opened tend strongly to negative the claim that the money was deposited with intent to give it to the son. The drawing out of the interest by John O. Beaver on one occasion; his retention of the pass-book for twenty-two years, and procuring it to be written up from time to time; the fact that the son, so far as appears, never was informed of the existence of the account,—are strong indications that John O. Beaver did not make the deposit in the son's name, with intent to make a present gift of the money. The father dealt with the account as his own, and, if the control he exercised over it during the minority of Asiel could be reasonably explained on the theory that he acted as the natural guardian of the son, no such explanation is possible as to the sixteen years of the life of the son after he reached his majority.

The trial court having found that there was a consummated gift, which, of course, includes a finding of an intent to give, this court is concluded from reviewing the finding, if there was any competent and sufficient evidence to support it. The form of the account is the essential fact upon which the plaintiff relies. It may be justly said that a deposit in a savings bank by one person, of his own money to the credit of another, is consistent with an intent on the part of the depositor to give the money to the other. But it does not, we think, of itself, without more, authorize an affirmative finding that the deposit was made with that intent, when the deposit was to a new account, unaccompanied by any declaration of intention, and the depositor received at the time a pass-book, the possession and presentation of which, by the rules of the bank, known to the depositor, is made the evidence of the right to draw the deposit.

We cannot close our eyes to the well-known practice of persons depositing in savings banks

money to the credit of real or fictitious persons, with no intention of divesting themselves of ownership. It is attributable to various reasons,—reasons connected with taxation, rules of the bank limiting the amount which any one individual may keep on deposit, the desire to obtain high rates of interest where there is a discrimination based on the amount of deposits, and the desire on the part of many persons to veil or conceal from others knowledge of their pecuniary condition. In most cases where a deposit of this character is made as a gift, there are contemporaneous facts or subsequent declarations by which the intention can be established, independently of the form of the deposit. We are inclined to think that to infer a gift from the form of the deposit alone would, in the great majority of cases, and especially where the deposit was of any considerable amount, impute an intention which never existed, and defeat the real purpose of the depositor. The relation of father and son does not in this case, we think, strengthen the plaintiff's case. It may be true that, as between parent and child, a presumption of a gift may be raised from circumstances where it would not be implied between strangers. *Ridgway v. English*, 22 N. J. L. 400.

But where a deposit is made in the name of another, without any intention on the part of the depositor to part with his title, he would be quite likely to select a member of his own family to represent the account, and in this case this is the natural explanation of the transaction.

The circumstances of the erasure in the declaration signed by John O. Beaver, and also in the account on the books of the bank, of the words, "Payable to John O. Beaver," throw no light upon the actual intention. If they were originally inserted at the suggestion of John O. Beaver, it would seem to imply that when he came to make the deposit he did not intend to part with the control of the money, and it is scarcely presumable that he changed his intention at the very time of making the deposit. If the words were inserted by the treasurer without authority, he may have erased them so as to leave no evidence of an intent to evade the law or the rules of the bank in respect to deposits, or he may have done it for some other unexplained reason.

Again, it is possible that John O. Beaver desired that the fund should be placed so that it could be drawn on presentation of the pass-book, without the necessity of a written order, and the erasure was made for this reason. In short, the reason for the insertion of the words, and the subsequent erasure, is matter of speculation merely, and does not aid in the interpretation of the main transaction. There was not only a failure to prove an intent on the part of John O. Beaver to make a gift, but the case is, we think, equally defective on the proof of delivery. The declaration and request drawn by the treasurer ran in the name of Asiel, as did the promise recited to abide by the rules of the bank. But it was signed by John O. Beaver in his own name, and not as agent for Asiel, and in law was his request and his promise. John O. Beaver took and retained possession of the pass-book on which the rules were printed. The rules prescribed

the undertaking of the bank, and the conditions to be observed by depositors in requiring payment. Under these rules, John O. Beaver had the exclusive dominion over the account, and the exclusive right to draw upon it so long as he retained the pass-book. It was his signature that the bank had, and not that of Asiel, and the rule authorizing drafts by the depositor only applies when the bank has his signature. But the rule also prescribed that "no person shall have the right to demand any part of his principal or interest without producing the original book, that such payments may be entered thereon," and also that "all payments to persons producing the pass-books shall be valid payments to discharge the institution." Under these rules, Asiel was never in a situation to control the account, while John O. Beaver had complete authority over the fund at all times. If John O. Beaver had delivered the pass-book to Asiel with intent to give him the deposit, there would have been a constructive delivery of the subject of the gift (*Re Crawford, supra*); but he never did this or any equivalent act.

We think, for the reasons stated, that the

plaintiff failed to establish a gift, or to justify a finding of a gift. The question of gifts, in connection with deposits in savings banks, has of late years been frequently considered by the courts in various States. The preponderance of authority seems to be in favor of the views we have expressed. See *Robinson v. Ring*, 72 Me. 140; *Burton v. Bridgeport Sav. Bank*, 52 Conn. 398; *Marcy v. Amazeen*, 61 N. H. 181; *Schick v. Grote*, 42 N. J. Eq. 352, 5 Cent. Rep. 826; *Scott v. Berkshire County Sav. Bank*, 140 Mass. 157; 8 Am. & Eng. Cyclop. Law, title *Gifts*, and *notes*.

The cases of *Howard v. Windham County Sav. Bank*, 40 Vt. 597; *Bladel v. Locke*, 52 N. H. 238; and *Gardner v. Morrill*, 82 Md. 78,—go the furthest towards sustaining transactions, similar to the one in question, as gifts, of any we have noticed; but they are distinguishable in material respects from this.

Our conclusion is that the cause of action in this case was not made out, and the judgment should therefore be reversed, and a new trial ordered.

All concur, except Danforth, J., dissenting, and Finch, J., not voting.

MISSOURI SUPREME COURT.

James N. WHITEHEAD, by Guardian,
etc., *Resp't.*,
v.

ST. LOUIS, IRON MOUNTAIN &
SOUTHERN R. CO., *App't.*

(....Mo.....)

1. The petition in an action to recover damages for personal injuries, inflicted upon plaintiff through defendant's negligence while he was a passenger in the caboose attached to defendant's freight train, need not contain an allegation that authority to carry passengers was given by the company to the conductor in charge of the train.
2. If one is riding on a freight train with the consent of the agents in charge thereof, the company owes him a duty although he is there against its rules.
3. It is within the authority of the conductor of a freight train, having entire charge thereof, notwithstanding he is forbidden to carry passengers thereon, to permit a person to ride on such train even without payment of fare; and the company will be liable for injuries resulting to such person from lack of ordinary care on the part of its employes.
4. When a car containing a sleeping passenger becomes detached from a train and is left standing at the foot of a long down grade, and the trainmen know that another train will soon come down that grade on the same track, and that it is liable to be broken in two and thus not under complete control, and there is frost on the track, the failure on the part of the trainmen either to warn the passenger or

to signal the coming train at a greater distance than a quarter of a mile from the standing car, there being ample time to do so, will furnish evidence of gross negligence.

5. One who is on a freight train with the knowledge and consent of the agents having charge of it cannot be said to be there wrongfully.

(June 10, 1889.)

APPEAL by defendant from a judgment of the Circuit Court for Washington County, in favor of plaintiff, in an action to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servants. *Affirmed*.

The facts are fully stated in the opinion.

Meers. T. J. Fortis and George H. Benton, for appellant:

The petition fails to state facts sufficient to constitute a cause of action.

Whitehead v. St. Louis, I. M. & S. R. Co. 22 Mo. App. 60; *Snyder v. Hannibal & St. J. R. Co.* 60 Mo. 413; *Eaton v. Delaware, L. & W. R. Co.* 57 N. Y. 383, 13 Am. L. Reg. N. S. 665, 672, *note of Redfield, J.*

The court erred in the instruction given to the jury.

Cleveland & C. R. Co. v. Bartram, 11 Ohio St. 457; *Evans v. Memphis & C. R. Co.* 56 Ala. 246; *Pittsburgh, C. & St. L. R. Co. v. Nuzum*, 50 Ind. 141; *Ohio & M. R. Co. v. Applewhite*, 53 Ind. 540; *Cheney v. Boston & M. R. Co.* 11 Met. 121; *Boston & L. R. Co. v. Proctor*, 1 Allen, 267; *Johnson v. Concord R. Corp.* 45 N. H. 213; *Flower v. Pennsylvania R. Co.* 69 Pa. 210.

NOTE.—A railroad company admitting passengers to a freight train incurs the same responsibility to transport them safely as if admitted to the passenger train. *New York, C. & St. L. R. Co. v. Doane*, 1 L. R. A. 158, *note*, 15 West. Rep. 465, 115 Ind. 435. 6 L. R. A.

Rights of passengers to protection from injury while under the direction and control of the conductor. *Wagner v. Missouri Pac. R. Co.* 3 L. R. A. 153, *note*, 97 Mo. 512.

Messrs. Dinning & Byrns, for respondent:

Even if the plaintiff was not a passenger, but wrongfully on the train, the defendant is liable for all injuries inflicted which could have been prevented by the exercise of ordinary care and diligence.

Brown v. Hannibal & St. J. R. Co. 50 Mo. 461; *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 475; *Doss v. Missouri, K. & T. R. Co.* 59 Mo. 27; *Hicks v. Pac. R. Co.* 64 Mo. 480, 65 Mo. 84; *Burham v. St. Louis, I. M. & S. R. Co.* 56 Mo. 338; *Meyers v. Chicago, R. I. & P. R. Co.* 59 Mo. 223; *Morrissey v. Wiggins Ferry Co.* 43 Mo. 380; *Baltimore & O. R. Co. v. Trainor*, 33 Md. 542; *Tibby v. Missouri P. R. Co.* 82 Mo. 292; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291 (23 L. ed. 898); *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 62; *Wilton v. Middlesex R. Co.* 107 Mass. 108; *St. Joseph & W. R. Co. v. Wheeler*, 85 Kan. 185; *Cooley, Torts*, p. 674; *Shearm. & Redf. Neg.* § 264; 1 *Rorer, Railroads*, p. 669; *Congar v. Chicago & N. W. R. Co.* 24 Wis. 157; *Winchester v. Baltimore & S. R. Co.* 4 Md. 236; *Osborn v. Indianapolis & St. J. R. Co.* 83 Ind. 294; *Bass v. Chicago & N. W. R. Co.* 42 Wis. 654; *Northern Central R. Co. v. Price*, 29 Md. 485; *Redf. Railways*, p. 510; *Whitman v. Pearson*, L. R. 3 C. P. 422; 2 *Thompson, Neg.* pp. 656, 889, 1188, 1186; 1 *Thompson, Neg.* p. 328; *Gyfford v. Woodgate*, 11 East, 297; *Calor v. Stokes*, 1 Maule & S. 600; *Dunkman v. Wabash, St. L. & P. R. Co.* 10 West. Rep. 896, 95 Mo. 282.

The boy was in the caboose with the consent and approval of the conductor in charge of the train, and the Company was therefore liable to him as a passenger.

McGee v. Missouri P. R. Co. 92 Mo. 218, 10 West. Rep. 282; *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239; *Lackawanna & B. R. Co. v. Chenewith*, 52 Pa. 382; *Wood, Railroads*, p. 1083; *Baltimore City Pass. R. Co. v. Kemp*, 61 Md. 83; *Siegrist v. Arnot*, 86 Mo. 200; *Jacobus v. St. Paul & C. R. Co.* 20 Minn. 125; *The Steamboat New World v. King*, 57 U. S. 16 How. 474 (14 L. ed. 1021); *Dunn v. Grand Trunk R. Co.* 68 Me. 187; *Creed v. Pennsylvania R. Co.* 86 Pa. 144; *St. Anthony Falls Water Power Co. v. Eastman*, 20 Minn. 277; *Wilton v. Middlesex R. Co.* 107 Mass. 108, and cases cited; *Ramsden v. Boston & A. R. Co.* 104 Mass. 117; *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468, 483 (14 L. ed. 502, 508).

If plaintiff was not a passenger the defendant is liable because of the dangerous position of plaintiff, and the defendant's knowledge thereof.

1 *Redf. Railways*, § 7, p. 538; *Chandler v. Broughton*, 1 *Crompt. & M.* 29; *McLaughlin v. Pryor*, 1 *Car. & M.* 354; *St. Joseph & W. R. Co. v. Wheeler*, 35 Kan. 185.

If persons for their own advantage employ servants to conduct works, they must be answerable for what is done by those servants.

Rea v. Medley, 6 *Car. & P.* 292.

Black, J., delivered the opinion of the court:

Plaintiff, by his guardian, brought this suit to recover damages for personal injuries, and recovered a judgment for \$5,000, from which defendant appealed. As objections are made to the petition itself, the sufficiency of the evidence to support the verdict, and to the giving

6 L. R. A.

and refusing to give instructions. It is necessary to deal somewhat in the details of the case. The petition states that plaintiff entered a caboose car attached to one of defendant's freight trains in which it carried passengers, and that the defendant's agents permitted plaintiff to enter the car as a passenger, and then undertook to carry him from De Soto to Belmont. The circumstances of the accident are then set out, coupled with various allegations of negligence on the part of defendant, which circumstances will appear from the following statement of facts as disclosed by the evidence: Frey was a brakeman on the train in question, and boarded with the plaintiff's mother at De Soto. The plaintiff, a lad fourteen years of age, desired to go over the road with Frey, and the plaintiff's mother gave her consent, provided the conductor would permit him to go. Frey and the boy got on the freight train at De Soto at about 7 o'clock in the afternoon, at which time the train left. It does not appear what was said to or by the conductor, but it does appear that the boy remained in the caboose without objection. The boy's presence in the caboose, and his purpose to make the trip without the payment of fare, were known to the conductor, and the only inference to be drawn is that he gave his consent to the project. At about 2 o'clock in the morning, and some fifty miles distant from De Soto, the train, which was composed of twenty-two loaded freight cars and the caboose, reached the top of a hill. As it passed over the hill the caboose and four cars became detached, leaving the conductor, two brakemen and the boy in the caboose. The engineer did not discover the loss of a part of his train until he began to ascend another grade. To avoid a passenger train he went on to a station five miles distant, and there got orders, and returned with the engine to get the lost cars. In the mean time the caboose and four cars came to rest at the bottom of the grade, some two miles from the place where the train parted. The boy was then asleep in the caboose to the knowledge of the conductor and two brakemen, but was not waked up by them. While the caboose was at rest, one brakeman went forward to signal the engine on its return. The other went about a quarter of a mile up the hill to flag another freight train, which was known to be in the rear. It appears this rear freight train had met with a like accident at the top of the hill, and the forward part of the train, composed of some sixteen or eighteen cars, had but one brakeman on it, so that the train was not under the control of the engineer. He says he saw the signal when going down and around a curve, and that he resorted to all means at his command to bring his train to a halt, but could not stop it, and it ran into the caboose. In the collision the boy's arm and leg were broken. The leg had to be amputated. The boy was still asleep. The evidence fails to show what the conductor was doing, save that he was present at the time of the accident.

Considering the grade, frost on the rails, and the short distance at which the signal was displayed, it is left in doubt whether the train would have been stopped in time to avoid a collision had the accident to it not occurred. The evidence shows that the defendant carried

passengers for hire on its local freight trains, but not on through freight trains. The train in question was a special through train. The rules of defendant forbade the carriage of passengers on this and like through trains. There is nothing in the outward appearance of the cars or caboose to indicate any difference between through and local freight trains, though the latter are designated on the time cards displayed at stations. On this evidence the court gave the following instruction: "If you find from the evidence that plaintiff was riding on the caboose attached to a freight train of the defendant corporation with the knowledge and consent of the agents and employes in charge of said train; and that these agents and employes knew of the peril to which said Whitehead was exposed; and that he did not know it, and by the exercise of ordinary care could not have known; that these agents and employes knew of his peril in time to have informed him of it, or in time to have removed him out of danger, and that they failed to do either, and that they were guilty of negligence in not informing him of his peril, or in not removing him out of danger, and by reason of such negligence on the part of said agents and employes said Whitehead received the injuries complained of,—then you will find the issues for him."

1. There can be no doubt but a railroad company, being a carrier of freight and of passengers, may use separate trains for freight and for passengers, and may exclude freight from one and passengers from the other. *Cleveland, C. etc. R. Co. v. Bartram*, 11 Ohio St. 459; *Dunn v. Grand Trunk R. Co.* 58 Me. 187.

If the company assumes to carry passengers for hire upon its freight trains, it must exercise the same degree of care as is required in the operation of its regular passenger trains, the difference only being that the passenger submits himself to the inconvenience and danger necessarily attending that mode of conveyance. *McGee v. Missouri & P. R. Co.* 92 Mo. 208, 10 West. Rep. 283; *Wagner v. Missouri & P. R. Co.* 97 Mo. 512, 8 L. R. A. 156.

This leads us to the specific objection made to the petition, which is that, as it shows the plaintiff was injured while in the caboose attached to a freight train, it should contain a direct allegation that authority was given by the company to the agent in charge of it to carry passengers; for without such permission from the company, it insisted the defendant owed no duty whatever to the plaintiff. There is no law which prohibits a railroad company from carrying or persons from riding in the caboose of a freight train. When one is permitted to take a caboose for the purpose of transportation by the consent of those agents in charge of the train, he is presumed to be there of right. It is not necessary that he should set out the rules of the company, and allege a compliance therewith. If there has been a known violation of the rules of the company by the plaintiff, that is a matter of defense, and must be asserted by the company. Here it is not only stated that defendant's freight trains have a caboose attached to each, and in which it permits passengers to ride, but it is further stated that, the plaintiff desiring to go to Belmont, "they, said agents and servants, permitted him to enter said caboose car as a passenger, who

then and there agreed and undertook to carry and convey him," etc. This petition states more than enough to show that plaintiff was rightfully on the train, and the objection made to it is without a particle of merit. Again, the proposition that the defendant owes no duty whatever to one riding upon a freight train, unless he is a passenger in the full sense of the term, does not meet with our approval. If one is riding on a freight train with the consent of the agents in charge thereof, the company owes him a duty, though he is there against the rules of the company. 1 Shearn, & Redf. Neg. 4th ed. § 489; 2 Wood, Railway Law, 1045.

Even to a trespasser, the defendant is liable for injuries inflicted for want of ordinary care, after the perilous position of the party is discovered. In no view of this case can it be said defendant owed no duty whatever to the plaintiff.

2. It is next insisted, and, indeed, the proposition lies at the foundation of all the objections made to the judgment in this case, that the conductor had no power to permit the boy to ride on the train, because the defendant's rules forbade the conductor to carry passengers on this particular train. From this the conclusion is sought to be made that the boy was wrongfully on the train, and entitled to no care from defendant. It is to be observed here that contributory negligence on the part of the boy is not asserted; nor is it contended that he knew of the rule prohibiting passengers from riding on this train. His mother knew that some of the freight trains did not carry passengers; but she is not suing, and that fact does not affect this suit. The rule of law asserted on all hands is that the master is civilly liable for the negligence or wrongful acts of his agent when done in the course of the agent's employment, even though the master may have prohibited the agent from doing the act of which complaint is made. *Garretzen v. Duendel*, 50 Mo. 107; *Cousins v. Hannibal & St. J. R. Co.* 66 Mo. 576; *Ramden v. Boston & A. R. Co.* 104 Mass. 120.

The question here is not as to the general rule itself, but whether the act of the conductor in allowing the boy to ride on the train is within the scope of the conductor's employment.

A case often cited is that of *Wilton v. Middlesex R. Co.* 107 Mass. 108. There the plaintiff, a girl nine years of age, was walking on a bridge with other girls. The driver of a horse-car beckoned to the girls to get on. They got upon the platform, and the girl was injured by the negligence of the driver. Speaking of the driver it is said: "If, in violation of his instructions, he permits persons to ride without pay, he is guilty of a breach of his duty as a servant. Such an act is not one outside of his duties, but is an act within the general scope of his agency, for which he is responsible to his master. In the case at bar the invitation to the plaintiff to ride was an act within the general scope of the driver's employment, and if she accepted it innocently she was not a trespasser. It is immaterial that the driver was acting contrary to his instructions." Other cases are to the same effect. *St. Joseph & W. R. Co. v. Wheeler*, 95 Kan. 185; *Dunn v. Grand Trunk R. Co. supra*; *Lake Shore & M. S. R. Co. v. Brown*, 123 Ill. 162, 11 West. Rep. 800.

In *Sherman v. Hannibal & St. J. R. Co.* 72 Mo. 64, a boy got on a freight train without paying or intending to pay any fare. His presence was not discovered by those in charge of the train until he had traveled some ten miles. This court then said: "The train being one on which passengers were allowed to be carried, although the plaintiff boarded the train without the permission or knowledge of the conductor, yet, as the conductor, after he became aware of his presence on the train, suffered him to remain, he was entitled to the same protection as if he had paid his fare."

Muehlhausen v. St. Louis R. Co. 91 Mo. 332, 6 West. Rep. 857, was a case where a boy was run over and killed by a street car. An instruction was given, and by this court approved, in which it was, in substance, said that, although the boy had not paid any fare, still, if he was on the car with the knowledge and permission of defendant's employé in charge of the car, then the deceased was a passenger, and entitled to the same care and protection as if he had paid his fare.

Now, in this case the conductor had entire charge of the train. In its management he acted for and represented the defendant. It was a part of his duties to see that persons did not ride upon it, either with or without the payment of fare. How, therefore, can it be said his act in allowing the boy to ride upon the train was beyond or outside the scope of his employment? It was an act directly within the line of his duty. He made breach of his duty towards his master, but that is a matter of no consequence here. To all outward appearance, as well as in point of fact, he was master of the train. The defendant, therefore, cannot escape liability in this case on the ground that the conductor had no authority to permit the boy to ride on the train. It also follows from what has been said, as well as from the authorities cited, that the defendant did owe a duty to the boy. It owed a duty to him even on the theory that he was not in the full sense of the term a passenger. The instruction given

goes no further than to require of defendant ordinary care, and of this defendant ought not to complain. The authorities cited go far to show that the case might have been submitted to the jury on the theory that the boy was entitled to all the care of a passenger; but, as instructions were not given on that theory, we need say no more upon this question.

3. As to the evidence there can be no doubt but it tends to show negligence on the part of the trainmen. They knew there was a freight train just behind them; that it would reach them on a long down grade; that the freight trains were liable to, and frequently did, break in two, and then not be under the complete control of the engineer; and that there was frost on the rails. The evidence tends to show that the rear train could have been heard for two miles, and there was ample time to have given a danger signal further from the standing caboose. Under the circumstances, to flag the train at a distance of only a quarter of a mile from the caboose, and without warning to the boy, who knew nothing of what was going on, furnishes evidence of even gross negligence.

4. The objection made to the instruction given is that it does not submit the question whether the boy was rightfully on the train. It requires a finding that he was on the train with the knowledge and consent of the agents in charge of it. If he was on the train with the knowledge and consent of the agents who had charge of it, he was not wrongfully there; much less was he a trespasser. Even had he known that he was on the train in violation of the defendant's rules, still, being there with the consent of the master of the train, the company owed him a duty,—at least ordinary care,—and for a breach of that duty it is liable in damages. The instructions asked by defendant, and refused, are so far at war with what has been said that it is useless to speak of them in detail.

The judgment is affirmed.

All concur.

Motion for rehearing denied November 1, 1889.

MICHIGAN SUPREME COURT.

NICHOLS, SHEPARD & CO., *Appt.*,

v.

George B. CRANDALL *et al.*

(.....Mich.)

Evidence of a parol agreement as to a warranty of the power of an engine to run a certain separator, made prior to the giving of an order for the outfit, which contained an express warranty that the engine was of good material, and if properly run was "capable of driving said separator to do good business in threshing," is incompetent.

(*Morse, J., dissents.*)

(November 8, 1889.)

ERROR to the Circuit Court for Cass County to review a judgment in favor of plaintiff, but for a less amount than was claimed, in an action upon certain promissory notes given as

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part of the purchase price of a threshing outfit *Reversed.*

The case is fully stated in the opinion.

Messrs. Howell & Carr for plaintiff, appellant.

Mr. Spafford Tryon, for defendants, appellees:

Any positive assertion concerning the article sold, made at the time to induce the purchaser to buy, by which he is induced to buy, amounts to warranty and should be enforced as such.

Daniels v. Aldrich, 42 Mich. 58; *Hawkins v. Pemberton*, 51 N. Y. 198; *Ilahn v. Doolittle*, 18 Wis. 196; *Smith v. Justice*, 18 Wis. 600; *Cosgrove v. Bennett*, 32 Minn. 371.

Whatever a seller represents at the time of the sale is a warranty.

Hawkins v. Pemberton, *supra*; *Wood v. Smith*, 4 Car. & P. 45; *Stone v. Denny*, 4 Met. 151.

The trial court properly held defendants were

entitled to show the parol undertaking or warranty of the capacity of the engine, and which induced them to make the purchase.

Phelps v. Whitaker, 87 Mich. 72; *Chapin v. Dobson*, 78 N. Y. 74; *Unger v. Jacobs*, 7 Hun, 221; *Schenectady Co. v. McQueen*, 15 Hun, 551-555; *Juilliard v. Chaffee*, 92 N. Y. 529; *Grier-son v. Mason*, 60 N. Y. 394; *Phillips v. Preston*, 46 U. S. 5 How. 278-291 (12 L. ed. 152); *Lamb v. Story*, 45 Mich. 488; *Trevi-lick v. Mumford*, 81 Mich. 467; *Kostenbader v. Peters*, 80 Pa. 438; *Slughart v. Moore*, 78 Pa. 469.

Not being a part of the contract executed, but a collateral agreement made by plaintiff as to what the engine could and would do, parol evidence was properly admitted to prove it.

Lanphire v. Slaughter, 61 How. Pr. 36, and authorities cited above.

The writing not being signed by the plaintiff is not the sole or conclusive evidence of the contract; and, so far as the plaintiff's undertaking goes, such writing has no greater force than the oral evidence of witnesses, and would not exclude such testimony.

Gage v. Jaqueth, 1 Lans. 207-218; *Unger v. Jacobs*, 7 Hun, 220.

Nor is a party liable upon a written contract, who has not signed it; and until the contract is signed it is not the best or sole evidence of the agreement between the parties.

Gage v. Jaqueth, *supra*; *Townsend v. Corning*, 23 Wend. 435; *Osborn v. Rawson*, 47 Mich. 206; *Sovereign v. Ortmann*, 47 Mich. 182; *Dillon v. Anderson*, 43 N. Y. 231.

Long, J., delivered the opinion of the court:

Defendants bought of Nichols, Shepard & Co., a corporation doing business at Battle Creek, a threshing outfit, in the fall of 1884. On the purchase, six notes were given by defendants, amounting to the sum of \$1,723. There remained unpaid on these notes at the time of the trial in the court below the sum of \$1,045.80, according to the terms of the notes. Defendants claimed a breach of warranty on the sale of the engine, and on the trial plaintiff had judgment for \$77. Plaintiff brings error.

Defendants gave a written order for the outfit, which contained the following warranty:

"This machine is ordered, purchased and sold subject to the following express warranty and agreement, to wit: That with good management the separator is capable of doing a good business in threshing and cleaning grain, etc. Also that said engine is well made, and of good material, and, if properly run and rightly managed, is capable of driving said separator to do good business in threshing; conditioned, that upon starting the machinery the undersigned purchaser shall intelligently follow the printed hints, rules and directions of the manufacturers; and if by so doing they are unable to make it operate well, written notice, stating wherein it fails to satisfy the warranty, is to be immediately given by the undersigned purchaser to Nichols, Shepard & Co. at Battle Creek, Michigan, and also to the dealer through whom purchased, and reasonable time allowed to get to it, and remedy the defect, if any, unless it is of such a nature that they can advise by letter. If they are not able to make it operate well, the purchasers rendering neces-

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sary and friendly assistance, and the fault is in the machinery, it is to be taken back, and the payments refunded, or the defective part remedied, and made the same as in their other machines, which do perform satisfactorily. But if the purchasers fail to make it perform, through improper management, or lack of proper appliance, or neglect to observe the printed or written directions, then the said purchasers are to pay all the necessary expenses incurred. Deficiencies in the general adaptation for threshing, separating and cleaning, which alone involve damage or the return of the machinery, are expressly agreed by the undersigned to be reported in writing, as above stated, within five days after starting it, and not after continued use or injury to the machinery; and use without such written notice is conclusive evidence of satisfaction and fulfillment of warranty. It is expressly understood and agreed that all warranty on this machinery terminates and expires, and all liability of Nichols, Shepard & Co. for breach of warranty, damage or otherwise, ceases, entirely, at the close of this year. Also if any part of said machinery, except the belting, fails during this year in consequence of any defect in material of said part, Nichols, Shepard & Co. are to furnish a duplicate of said part, free of charge, except freight, after the presentation of the defective piece, clearly showing a flaw in the material, at the factory or to a dealer through whom said material was bought, at any time within this year; but deficiencies in any piece do not condemn other parts."

Plaintiff's declaration was on the common counts in assumpsit. The defendants gave notice under their plea of general issue that they would show on the trial that on or about August 15, 1884, they were desirous of going to the Territory of Dakota to engage in the business of threshing wheat on an extensive scale, and were desirous of purchasing a threshing machine of large size, with a steam engine of sufficient ability and power to drive and to operate the same without straining, forcing or overworking any parts of the same; and the said plaintiff, well knowing that these defendants wanted to purchase a machine and engine with the design and with the purpose of using and operating the same in the Territory of Dakota, and well knowing that said machine and engine would be practically worthless in such business unless it possessed the ability and power to work easily and well in such work without forcing or overworking such machine and engine, or any parts thereof, offered to sell, and these defendants, on August 15, 1884, offered to purchase of said plaintiff, one of its vibrating separators and one of its self-guiding traction engines. Therefore the said plaintiff represented the same manufactured by the plaintiff was made of the best material, perfect and complete in all of its parts, and was fit and proper, and was capable of doing the work and business contemplated, without any strain or overwork in any part thereof, as aforesaid; and thereupon the plaintiff, in consideration that these defendants would buy of it, at plaintiff's request, one of said separators, called "Vibrator No. 4," and a self-guiding traction engine, No. 10, manufactured by plaintiff at Battle Creek, its place of business, for a certain price, to wit,

\$2,000, undertook and promised the defendants that the said machine and engine were made of the best materials, and that both were perfect in structure, and manufactured in all respects with perfect castings, and furnished perfect and complete in all its parts, from the choicest materials, with the best possible workmanship and finish, and was pre-eminent fitted and proper for extensive business, and that engine No. 10 was of ample power and ability to operate said separator, and would furnish more power than these defendants would need to use in the business of threshing. That said engine did not possess sufficient capacity to drive or operate said vibrator No. 4 steam separator, and by reason thereof the said engine could not and did not do the work it was calculated and designed to do, and which it was warranted to perform by plaintiff; and in consequence of such want of power and ability to do the work required these defendants were obliged to and did allow the said threshing machine and men in their employ to lie idle for a long space of time while said engine was being repaired, and also defendants lost the use of said threshing machine by reason of such want of power to drive said separator to its full capacity, and lost a large number of threshing jobs and the gains and profits resulting therefrom, and the defendants, as well as their men and teams in their employ and use, were idle for a long period of time, etc. Notice is also given of defects in the machinery of the engine and damages claimed therefor.

On the trial Thomas J. Crandall, one of the defendants, was called as a witness, and testified substantially that he met plaintiff's agent, John Root, in the summer of 1884, at Dowagiac, who spoke to him about buying an engine and separator, and induced the defendant to go to Battle Creek and look at the machines of the plaintiff. "Arriving at Battle Creek," the witness says: "I told Fred Shepard, one of the firm, that I wanted a large-sized separator, a 36-inch cylinder, and a 13 horse-power engine to drive it. He said he didn't know what in the world I wanted such a power as that for. I told him I was going to take it to Dakota, and I wanted power to drive it for all it was worth,—for all I could put through it. I told them that I was told it took more power there than it did here; that they fed from both sides; and he went on and guaranteed his 10-horse-power to give us all the power we needed, and power to spare in any emergency. He said they did not have a 13 horse-power."

Hereupon the written warranty in the order was produced, and plaintiff's counsel moved to strike out this testimony, as the warranty of the engine was in the writing.

Defendants' counsel then stated: "There seems to be in this paper a printed warranty, but it refers to the machine generally, and not to the capacity and power of the engine to operate the separator. The defendants claim on a special warranty that the engine in question possesses ample power to run the separator, and would run it as well as the 13-horse power engine, and would guarantee that it had sufficient power to operate successfully in Dakota."

The court overruled plaintiff's motion, and refused to strike out the testimony. The witness then testified substantially that they relied

upon the recommend and warranty of the plaintiff, and that he never saw the written warranty till the contract was made; that he had never run a 10-horse-power engine, and so informed Mr. Shepard; that they shipped the engine and separator to Dakota, and began threshing about August 20, 1884; that the engine lacked power, and they had to fire beyond what they should have done, using from 1,700 to 1,800 pounds of coal, when a half ton should have been sufficient, and that coal was worth \$7.50, and 75 cents to haul. They threshed about forty-six days in the fall of 1884, and averaged about 800 bushels of wheat per day. Defendants' counsel then asked the witness: "What sized engine was in use then in Dakota in operating separators?" Witness answered, under plaintiff's objection, that they used from 12 to 15 horse-power engines there. Witness then testified that in consequence of heavy firing the flues leaked, and they were compelled to send forty-two miles to Fargo to get a man to fix them; that they were delayed three days, and paid the man \$10, and after the engine was repaired it stood only three days, and then leaked so badly they were compelled to get it fixed again, and were idle two days; that on each of these occasions four men besides himself were idle; and that they were paying the men from \$2 to \$4 per day and board. After being fixed the second time it ran four or five days, then began to leak so badly they could not use it and quit in the middle of a job, and he came home. Witness was then asked by his counsel: "What amount of work had you engaged?" Under objection of plaintiff's counsel the witness was permitted to answer this question, and testified: "I had 1,200 acres engaged. About three fourths of it was wheat and the balance of it oats. The wheat would average about eighteen bushels per acre, and the oats fifty or sixty. The price of threshing was five cents for wheat and three cents for oats. The only reason I did not do these jobs was that the engine gave out. We could thresh from fifty to sixty acres per day. Our total money expenses was \$19.25 per day. We began threshing the second season on August 20. The total amount threshed in 1884 was 14,650 bushels of wheat and 4,932 bushels of oats, and it took nineteen or twenty days. I was there twenty-three days. The second year I averaged 700 to 800 bushels of wheat and 1,200 bushels of oats. The separator was capable of threshing 1,200 to 1,400 bushels of wheat, and 1,800 bushels of oats, if run with sufficient power."

The defendants then called Fred East, who testified that he had thirty years' experience in threshing, and that he was in Dakota in the fall of 1884, and was using a Minnesota Chief, 36-inch cylinder, and 12-horse-power engine, for sixty days. He saw defendant there. Witness was then asked by defendants' counsel: "What did you average per day with that machine?" Witness was permitted to answer, under objection of plaintiff's counsel, and said 1,300 bushels of wheat and from 2,000 to 2,500 bushels of oats, if all at one place. Witness saw the machine in question that fall, and fed the separator for a while, and stated that he considered the engine rather weak. He was then asked: "How did it correspond with the engine you were running as to power?" and answered,

under objection, that it was a weaker power; that it did not have the power to run the separator to its full capacity; that the engines used in Dakota were from 12 to 15 horse power. Witness was then asked by counsel for defendant: "What was the value of the engine in suit for the purpose of running and operating a 36-inch-cylinder separator like the one in suit in Dakota in the fall of 1884?" Witness, under objection, answered that in his judgment it was not worth anything. On his cross-examination the witness testified that all the engines he saw in Dakota were straw-burners except defendants'; that straw-burners cost less fuel; that the engine seemed to be all right, only it lacked power, and had to labor too hard; that the difference between the cost of a 10-horse-power engine and a 12 is about \$300.

Mr. Eaton was called as a witness by the defendants, and testified that he was agent for C. Aultman & Co., manufacturers of engines. He was then asked what sized engine would be required to furnish sufficient power to run and operate successfully a 36-inch-cylinder separator. Under objection the witness answered: "A 12-horse-power engine is preferable anywhere for that size separator."

Thomas J. Crandall was then recalled, and testified that the engine would have been worth, freight and all, about \$1,600, if it had sufficient power to run the separator as represented, but as it in fact was it was not worth over \$200 or \$300. Upon his cross-examination he was asked by counsel for plaintiff: "Was it not worth as much as any 10-horse-power engine?" This was objected to by counsel for defendants as incompetent, and the objection sustained, the court saying: "I think the question is what it was worth in the market for that purpose. If he buys one to thresh with, he is not obliged to run around to sell it to make wooden bowls with. If he bought it for the purpose of threshing out there with it, and it was recommended to run that particular separator, he is not bound to hunt up any other kind of business for the machine at all, or to sell it."

Question. "What was that engine worth in 1884,—not what it was worth to you, or worth for running that separator; but what was it in fact worth in the market?"

Under objection this testimony was ruled out by the court, the court saying: "I don't think that is a proper question unless you confine it to the purpose of threshing. I don't think he was bound to try and sell it for anything except threshing."

Mr. Hooden was called as a witness by the plaintiff, and testified that he was employed by plaintiff as collection correspondent; that he kept track of and knew where machines were located. Witness was then asked to state from the knowledge thus acquired how many 10-horse-power engines, 36-inch-cylinder separators, were being used in Dakota. Under objection the answer to this question was ruled out. Witness was then asked to state whether or not plaintiff was from the fall of 1884 to 1886 prepared to furnish a 12-horse-power engine, in all respects like the one in suit, except size. The answer to this question was also ruled out by the court.

Upon the close of the testimony the court
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stated to counsel, in presence of the jury, its views of the case upon the testimony, as follows: "The defendants had a warranty outside of the written contract, and that part of the contract which requires them to give notice has reference only to such matters as were warranted in the contract, and does not apply to this special warranty. That was made verbally, and was not a part of the contract at all, and therefore they were not bound to give notice at all. As far as the separator is concerned, all the warranty there was on that was that it was a good machine. They didn't warrant it for any particular place, or anything of the kind. I think the special warranty and the warranty in the written contract upon the separator is substantially the same, and if there were any defects in the notice of it, and not giving notice, they could not recover for any defects in the separator. They would be confined to the damages, if any, upon the engine, and, as to that, it was sold for a particular purpose, and warranted to do a particular thing. It was warranted to run, to its full capacity, this 36-inch-cylinder separator. Upon the warranty there is no dispute in the testimony. They have not denied at all that they made such a statement to the defendants. If it would not run that separator to its full capacity they had a right to damages. As to the difference there was in that engine, for the purpose of threshing in Dakota, the difference between what it would have been if it had been perfectly competent to run that separator to its full capacity, and what it was: taking all the circumstances together in this testimony in relation to the loss and the account of fields they lost, and the difference there was in threshing, it was of no account, so far as they show the value of the machine. Consequently the only question to be submitted to this jury is, What was the difference, if any, between this machine as it was in 1884 and as it was recommended in this verbal warranty? I think that is all there is of it."

By plaintiff's counsel. "I understand the ruling to be this: that the jury are to deduct from the amount due the plaintiff on the notes, the difference between the actual value of the machine as it was for the purpose for which it is claimed to have been sold, and its value in fact, or its value as it would have been if as represented."

By the Court. "Yes, sir. If it was worth nothing, as he swears to, then they cannot recover anything, and they will take it just in proportion. If it was worth \$500, they would deduct \$500. If it was worth all they paid for it they would recover the full amount."

There might not have been any error in these instructions if the warranty of the engine, as claimed on the trial, had been made a part of the writing. But the court was clearly in error in admitting any testimony of a parol agreement as to the engine. The general rule is that parol, contemporaneous agreements cannot be admitted to contradict or to vary the terms of a written instrument. This rule is based upon the reasonable presumption that where parties have reduced their engagements to writing, and they are plainly and intelligibly stated therein, it is conclusively presumed to embrace all that was intended, and

to be the best possible evidence of the intent and meaning of those who are bound by it. *Sutherland v. Crane*, Walk. Ch. (Mich.) 523; *Martin v. Hamlin*, 18 Mich. 354; *Vanderkarr v. Thompson*, 19 Mich. 82; *Seaman v. O'Hara*, 29 Mich. 66; *Blackwood v. Brown*, 34 Mich. 4; *Stackpole v. Arnold*, 11 Mass. 80; *McLellan v. Cumberland Bank*, 24 M. J. 566.

It is laid down in the books as the principal cause of this rule that when parties, after whatever conversation or preparation, at last reduce their agreement to writing, this may be looked upon as the final consummation of their negotiation and the exact expression of their purpose; and all of their earlier agreements, though apparently made while it all lay in conversation, which is not now incorporated into their written contract, may be considered as intentionally rejected. The parties write the contract when they are ready to do so, for the very purpose of excluding everything else and making this permanent and certain. 2 Greenl. Ev. 4th ed. 60.

This claimed parol agreement as to the warranty of the power of the engine to run a 86-inch-cylinder separator was made prior to the giving the order for the outfit, and which order contained the express warranty. This became the contract of sale and warranty of the outfit when accepted and acted upon by the plaintiffs, and it contains no warranty of power of the engine to drive such a separator. On the trial it was not claimed that there had occurred any breach of this written warranty, or at least any such breach as would entitle the defendants to damages, without notice to the plaintiff, and giving it an opportunity to repair. In fact the defendants made no complaint, but from time to time wrote the plaintiff that they would pay the notes, asking an extension of time in which to meet them.

The court was in error in permitting the defendants to go into this part of the case. It was error to allow such a parol warranty to be shown, or to permit testimony to be given showing damages thereunder. The whole defense to the notes was made to turn upon a

claim of damages under such parol warranty and breach, and defendants were allowed to recoup such damages on the trial to an amount almost equal to the sums remaining unpaid on the notes. It is not, therefore, necessary to discuss the question raised upon the instruction of the court as the measure of damages which defendants might recoup. They were not entitled to recoup damages at all under a breach of this claimed parol warranty. If defendants had any defense to the notes growing out of the contract of warranty it could only arise under the written contract, and upon such a claim it could only arise after they had given the notice provided in the contract, and after plaintiff had been given an opportunity to repair. Even upon the defendants' own theory the court was in error in permitting the defendants to show their loss upon jobs taken, and it would have had no tendency to show the value of the engine. Neither could the damages upon such theory be shown without permitting the plaintiff to prove the market value of this engine in Dakota. It would not do to say that it was bought for a specific purpose, and its only value, therefore, would be for the purposes for which it was purchased. This question, however, does not become important, as the court was in error in permitting parol testimony to be given of the warranty.

The judgment of the court below must be reversed, and a new trial ordered, upon which the parties must be confined to the written warranty and the breaches of that, if any have arisen after notice to repair. Plaintiff will recover costs.

Sherwood, Ch. J., Champlin and Campbell, JJ., concurred with Long, J.

Morse, J., dissenting:

I think that the order given for the machine in this case did not constitute such a contract as would exclude the evidence of the parol warranty relied upon by defendants. See *Phelps v. Whitaker*, 37 Mich. 72, and cases cited.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Louise J. ALLIN, *Appt.*,

v.

CONNECTICUT RIVER LUMBER CO.
et al.

(...Mass....)

1. An action for trespass upon lands in another State cannot be brought in Massachusetts by trustee process under Mass. Pub. Stat., chap. 183, §§ 1, 3, authorizing personal actions including trespass *quare clausum* to be brought by trustee process in the county of the trustee's residence or place of business. The Statute did not give a new jurisdiction or make local actions transitory, but related merely to process in cases which the parties were entitled to bring, and to the venue of actions brought by the process specially authorized.

2. Whether an answer is in abatement
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must depend upon the substance and not the form of it.

3. An answer which sets up matter showing that the court has no jurisdiction, although in form an answer in abatement, is not such within the rule that an appeal cannot be taken from a judgment on an answer or plea in abatement.

(January 2, 1890.)

A PPEAL from a judgment of the Superior Court, Suffolk County, rendered upon a plea in abatement, in an action for trespass upon lands in Vermont. *Action dismissed.*

Messrs. H. N. Allin and G. L. Mayberry, for plaintiff:

A State must determine for itself the extent of its jurisdiction and control over the person and property of those within its borders.

Blanchard v. Russell, 18 Mass. 1; *Richardson v. New York Cent. R. Co.* 98 Mass. 85; *Taft v. Ward*, 106 Mass. 518.

While it is doubtless true that the law of the State where the act is committed determines whether it is actionable at all or not, our own law must determine whether it is actionable here as well as there.

Leach v. Greene, 116 Mass. 534; *Pearsall v. Dwight*, 2 Mass. 84.

Trespass *quare clausum fregit* is not a local action in this State when brought by trustee process.

Way v. Dams, 11 Allen, 357; *Putnam v. Bond*, 102 Mass. 370.

Although it was a local action at common law, so were actions for rent, actions on judgments and actions against officers in matters touching their offices, all of which are now transitory in this State and elsewhere.

1 Chitty, Pl. 16th ed. p. 281; *University of Vt. v. Joslyn*, 21 Vt. 52; *Bissell v. Briggs*, 9 Mass. 462, 468; *Barringer v. King*, 5 Gray, 9; *Pearce v. Atwood*, 13 Mass. 324.

The action does not determine any questions of title and is purely a personal remedy for damages and on principle should be transitory.

Livingston v. Jefferson, 1 Brock. 203; *Genin v. Grier*, 10 Ohio, 209; *Hibbard v. Foster*, 24 Vt. 542.

And the courts of this country have always recognized and enforced every statutory breach of this useless technicality.

Way v. Dams, *supra*; *Pitman v. Flint*, 10 Pick. 304; *Sumner v. Kinney*, 15 Mass. 280; *Genin v. Grier*, *supra*.

Wherever statutes have tended to make this action transitory, they have been regarded as, to that extent, revoking the common law.

Pitman v. Flint and *Genin v. Grier*, *supra*; *June v. Conant*, 17 Vt. 656; *Payne v. Britton*, 6 Rand. 105.

On principle, a trespass is no more local as to the State than as to the county.

Rundle v. Delaware & R. Canal Co. 1 Wall. Jr. 275; *Watts v. Kinney*, 6 Ill. 82.

A statute that allows an action for trespass to be maintained in a county other than the county where the land lies destroys the local nature of any such action brought in accordance with the provisions of such statute.

Genin v. Grier, *Way v. Dams* and *Putnam v. Bond*, *supra*.

An attachment of property within this State will always give our courts jurisdiction of a transitory action.

Pub. Stat. chap. 164, § 1; *Richardson v. Smith*, 11 Allen, 134; *Morrison v. Underwood*, 5 Cush. 52; *Neech v. Abbott*, 6 Vt. 580.

There is no reason why the local nature of the action should gain any force by crossing a state line.

Bissell v. Briggs, *supra*.

The court should sustain if possible a jurisdiction without which plaintiffs would frequently be left without a remedy for wrongs committed on land outside of this State by persons residing here.

Mumlyn v. Fabrigas, Cowp. 161, 176.

Mears, Ide & Stafford and *J. H. Wardwell*, for defendants:

Trespass *quare clausum* is at common law local and not transitory, and must be brought

6 L. R. A.

in the jurisdiction where the land is situated. 1 Chitty, Pl. 263; 3 Bl. Com. 204.

The action of trespass *quare clausum* is of that class which is not merely local in distinction from transitory, but it is also local in a jurisdictional sense; i. e., no court has jurisdiction to try such a cause outside the sovereignty wherein the land lies.

Niles v. Howe, 57 Vt. 383; *McKenna v. Fisk*, 42 U. S. 1 How. 241 (11 L. ed. 117); *Rogers v. Woodbury*, 15 Pick. 153.

The action was transitory and the objection did not reach the subject of jurisdiction.

Clark v. Scudder, 6 Gray, 122; *Briggs v. Nantucket Bank*, 5 Mass. 94.

It has always been the policy of the courts of Massachusetts to decline, as far as possible, to take jurisdiction of causes more properly cognizable in another sovereignty and involving a construction and enforcement of the laws of another State or country.

Erickson v. Nesmith, 15 Gray, 221; *Halney v. McLean*, 13 Allen, 438; *Remington v. Samana Bay Co.* 1 New Eng. Rep. 707, 140 Mass. 404; *Jenkins v. Lester*, 131 Mass. 355; *Campbell v. Sheldon*, 13 Pick. 8; *Campbell v. Wallace*, 10 Gray, 163; *Chase v. Chase*, 2 Allen, 101; *Smith v. Mutual L. Ins. Co.* 14 Allen, 336; *Staigg v. Atkinson*, 4 New Eng. Rep. 851, 144 Mass. 561; *Gale v. Eustman*, 7 Met. 14; *Leahy v. Root*, 11 Pick. 339; *McRae v. Mattoon*, 10 Pick. 49.

W. Allen, J., delivered the opinion of the court:

It is not denied that trespass *quare clausum fregit* is a local action, and that at common law the courts of this Commonwealth have no jurisdiction of trespass upon land in another State or country. The objection is not that an action of which the court has jurisdiction is brought in the wrong county, but that the court has not jurisdiction of the cause of action. *Briggs v. Nantucket Bank*, 5 Mass. 94; *Rogers v. Woodbury*, 15 Pick. 153; *Clark v. Scudder*, 6 Gray, 122; *Lawrence v. Smith*, 5 Mass. 362; *Niles v. Howe*, 57 Vt. 383; *Watts v. Kinney*, 6 Ill. 82.

It is claimed that the courts of this Commonwealth are given jurisdiction of the subject matter of the suit by Pub. Stat., chap. 183, § 1, which provides that all personal actions, except certain named, may be commenced by trustee process, and section 3, which provides that trustee writs shall be returnable in the county in which the trustee lives or has his usual place of business. Trespass *quare clausum* is a personal action, and may be commenced by trustee process under the first section of this Statute. *Way v. Dams*, 11 Allen, 357; *Wilder v. Bailey*, 8 Mass. 280, 291.

It is also a local action and must be brought in the county where the land lies, unless when otherwise provided by statute. The effect of the third section is that when the action is commenced by trustee process it must be brought in the county of the trustee, and so far the Statute modifies the common law, by which it must be brought in the county in which the land lies. The contention of the plaintiff is that the Statute not only fixes the county in which the action shall be brought when it is commenced by trustee process, but gives the courts of this Commonwealth jurisdiction of an action which could not have been brought in any county.

It cannot be argued that the Statute gives jurisdiction over trespass to land in another State only in an action commenced by trustee process, and the plaintiff is forced to contend that it gives jurisdiction over the cause of action without regard to the form of the writ—in other words, that it changes the action of trespass *quare clausum*, when the land lies without the jurisdiction of our courts, from a local to a transitory action. But if this is the effect of the Statute, it is impossible to confine it to causes of action arising without the State. The Statute makes no distinction between trespass to lands without and within the State. It includes trespass *quare clausum* only as it is a personal action; and requiring the action when brought by trustee writ to be brought in the county of the trustee cannot make it a transitory action as to lands without, and not as to lands within, the State. There seems to be no reason for holding that the Statute renders an action for trespass to lands outside the State transitory, which does not apply to an action for trespass to lands within the State.

The plain and simple meaning of the Statute is that when a party is entitled to a personal action, he may commence it by trustee process, and that actions, whether local or transitory, commenced by trustee process, shall be brought in the county in which the trustee lives. A construction is asked for it which will authorize an action to which the party was not entitled, and the logical result of which would be to change into transitory actions all local actions which can be commenced by trustee process. The Statute has been in existence nearly one hundred years, and we have not been referred to any authority or dictum to sustain the position of the plaintiff. On the contrary, the action of trespass *quare clausum* has always been treated as a local action. Stat. 1794, chap. 65, authorized a person entitled to any personal action, except, etc., to sue by trustee writ, and contained the same provisions as to the county in which the action should be brought as the Public Statutes.

By Rev. Stat., chap. 10, §§ 1, 71, and Gen. Stat., chap. 142, §§ 1-75, all personal actions, with the specified exceptions, brought in the court of common pleas or the supreme court, might be commenced by trustee process; and

personal actions, with the same exceptions, within the jurisdiction of, and which might be brought by, the ordinary process before a justice of the peace, might be commenced by trustee process. The meaning of the Statutes was not changed when they were consolidated in the Public Statutes, in the words: "All personal actions . . . may be commenced by trustee process," and the jurisdiction of the higher courts, or of the justices of the peace, was not thereby extended to personal actions or causes of action, of which they had not jurisdiction before the Statute. The Statute only regarded the process in actions which parties were entitled to bring, and the venue of actions brought by the process specially authorized.

We think that the court has jurisdiction of this appeal, although it is from the judgment apparently upon an answer which is in form an answer in abatement. The Statute does not give a right of appeal from a judgment upon an answer or plea in abatement. *Young v. Providence & Stonington S. S. Co.*, not yet reported.

But whether the answer is in abatement, must depend upon the substance, and not upon the form, of it. If the answer sets up matter which is not in abatement, but in bar, in which it goes to show that the court has no jurisdiction of the subject matter, it is not an answer in abatement within the meaning of the Statute, whatever its form may be, and a defendant cannot give to the superior court final jurisdiction of such matter, by putting it into the form of an answer in abatement. The matter of the plea is apparent upon the record, and goes to the jurisdiction of the courts of this Commonwealth. If the objection is well founded, the proper way for the defendant to take advantage of it is by motion to dismiss, and upon suggestion of want of jurisdiction, the court will dismiss the action. *Rea v. Hayden*, 3 Mass. 24; *Lawrence v. Smith*, *Watts v. Kinney* and *Niles v. Howe*, *supra*; Gould, Pl. chap. 4, § 24; 1 Chitty, Pl. 9th Am. ed. 442.

We think that the answer was not an answer in abatement, but that, as it appeared that the court did not have jurisdiction of the action, the judgment should have been that the action be dismissed.

Action dismissed.

ILLINOIS SUPREME COURT.

ILLINOIS CENTRAL R. CO., *Plff. in Err.*,
v.

Belford SLATER, Admr., etc., of Arthur B. Slater, Deceased.

(...III....)

1. Plaintiff may prove the speed at which the train was running in an action to recover damages for injuries by a railroad train causing death to his intestate, as tending to shed light on the questions of due care on the part of the deceased, and of the bearing of other

alleged acts and omissions of the company's servants upon the injury.

2. In an action by a father as administrator to recover damages for personal injuries causing the death of his minor son, who was performing services for plaintiff at the time, defendant cannot show that plaintiff was wealthy and able to hire others to perform the services, and thus save his son from exposure to the dangers incident thereto, where there is no showing that deceased was incapable of taking care of himself.

NOTE.—*Liability for death caused by negligence.*

Usher v. West Jersey R. Co. 4 L. R. A. 261, note, 126 Pa. 206.
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Action given by statute. Cleveland Rolling Mill Co. v. Corrigan, 3 L. R. A. 385, note, 46 Ohio St. 28; Louisville N. A. & C. R. Co. v. Buck, 2 L. R. A. 520, note, 116 Ind. 506.

3. A railroad company is subject to the General Statutes of the State respecting the signals to be given by such companies at public highway crossings, notwithstanding other and different rules are provided by its charter in regard to the signals to be given by it at such places.
4. Positive and direct testimony is not absolutely required to prove the fact that the required signals were not given by a train approaching a highway crossing; it is sufficient if the jury believe from all the evidence in the case that such signals were not given.
5. Children are required to exercise only that degree of care and caution which persons of like age, capacity and experience might be reasonably expected to naturally or ordinarily use in the same situation, and under the like circumstances, provided that the parents or persons having the control of such children have not been guilty of want of ordinary care in allowing them to be placed in such circumstances.
6. A requested instruction in an action by a father as administrator to recover damages for an injury causing the death of his minor son, that the father is entitled to the services of such son until he is twenty-one years of age, and that no damages can be allowed for any loss of his services or earnings during the period of minority, is properly refused.

(May 16, 1893.)

ERROR to the Appellate Court, Second District, to review a judgment affirming a judgment of the Circuit Court for Ogle County in favor of plaintiff in an action to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. W. & W. D. Barge, for plaintiff in error:

If the child, though young, is capable of the care and discretion required of an adult, the rule applicable to adults is to be applied to him.

Pierce, Railroads, 2d ed. p. 886; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25, 33; *Reynolds v. N. Y. C. & H. R. Co.* 58 N. Y. 248; *Even v. Chicago & N. W. R. Co.* 88 Wis. 618; *Shearm. & Redf. Neg.* 8d ed. § 50; *McMahon v. New York*, 83 N. Y. 642.

It is clear from the evidence that deceased could have seen and heard the engine and cars in time to have avoided the collision that caused his death had he reasonably used his senses of sight and of hearing, as required by law; and failure to take these precautions prevents a recovery on the allegation of failure to give the statutory signals.

St. Louis, A. & T. H. R. Co. v. Manly, 58 Ill. 800; *Chicago, B. & Q. R. Co. v. Damercell*, 81 Ill. 450; *Ill. Cent. R. Co. v. Goddard*, 72 Ill. 568; *Chicago & N. W. R. Co. v. Hatch*, 79 Ill. 137; *Pennsylvania Co. v. Frana*, 112 Ill. 398; *Wabash, St. L. & P. R. Co. v. Neikirk*, 15 Ill. App. 172; *Chicago & R. I. R. Co. v. McKean*, 40 Ill. 218; *Chicago, R. I. & P. R. Co. v. Bell*, 70 Ill. 102; *Gorton v. Erie R. Co.* 45 N. Y. 660; *Havens v. Erie R. Co.* 41 N. Y. 296; *Wilcox v. Rome, W. & O. R. Co.* 89 N. Y. 858; *Belfontaine R. Co. v. Reed*, 83 Ind. 476; *Chicago, R. I. & P. R. Co. v. Houston*, 95 U. S. 697 (24 L. 6 L. R. A.

ed. 542); *Lake Shore & M. S. R. Co. v. Müller*, 25 Mich. 274, 290; *North Pa. R. Co. v. Heilman*, 49 Pa. 60, 64; *Pa. R. Co. v. Beale*, 78 Pa. 504; *Blaker v. N. J. Midland R. Co.* 80 N. J. Eq. 240; *Telfer v. Northern R. Co.* 80 N. J. L. 188; *Brown v. Milwaukee & St. P. R. Co.* 22 Minn. 165; *Haines v. Ill. Cent. R. Co.* 41 Iowa, 227; *Solen v. Virginia & T. R. Co.* 13 Nev. 106; *Flemming v. Western P. R. Co.* 49 Cal. 258; *Butterfield v. Western R. Co.* 10 Allen, 532; *Allyn v. Boston & A. R. Co.* 105 Mass. 77.

The boys' failure to stop the team and let the train pass before attempting to drive across the track is such contributory negligence as will prevent a recovery.

Indianapolis & St. L. R. Co. v. Evans, 88 Ill. 63, 64; *Lalor v. Chicago, B. & Q. R. Co.* 52 Ill. 401; *Ill. Cent. R. Co. v. Buckner*, 28 Ill. 299; *Telfer v. Northern R. Co.* 80 N. J. L. 188, 198, 199.

Defendant's engineer had the right to presume, and to rely and act upon the presumption, that the team would stop or remain standing, and not go upon the track until the train had passed the highway.

St. Louis, A. & T. H. R. Co. v. Manly, 58 Ill. 800; *Telfer v. Northern R. Co.* 80 N. J. L. 188, 199.

The admission of evidence as to the speed of the train was error.

Chicago, B. & Q. R. Co. v. Lee, 68 Ill. 576; *Chicago, B. & Q. R. Co. v. Harwood*, 80 Ill. 88; *Warner v. New York Cent. R. Co.* 44 N. Y. 465; *Cohen v. Bureka & P. R. Co.* 14 Nev. 376; *McKonkey v. Chicago, B. & Q. R. Co.* 40 Iowa, 205.

Proof of plaintiff's pecuniary condition should have been admitted.

Chicago & A. R. Co. v. Gregory, 58 Ill. 226; *Pittsburg, Ft. W. & C. R. Co. v. Bumstead*, 48 Ill. 221; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71.

The third instruction given for appellees is erroneous because it permitted the jury to find for the plaintiff without any evidence whatever to support the verdict.

Hansburg v. People, 120 Ill. 21, 6 West. Rep. 328; *Pa. Co. v. Marshall*, 119 Ill. 399, 7 West. Rep. 445; *Pope v. Lowitz*, 14 Ill. App. 96; *Ind. & St. L. R. Co. v. Miller*, 71 Ill. 463; *Chicago Pack. & P. Co. v. Tilton*, 87 Ill. 547.

And it is bad because it singled out the fact that no witness testified positively that no bell was rung the statutory distance, and told the jury that would not prevent the plaintiff recovering in this case.

Calef v. Thomas, 81 Ill. 478; *Crain v. Jacksonville Nat. Bank*, 114 Ill. 516, 1 West. Rep. 602; *Evans v. George*, 80 Ill. 51; *Cushman v. Cogswell*, 86 Ill. 62; *Swigar v. People*, 109 Ill. 272; *Graves v. Colwell*, 80 Ill. 612; *Horne v. Walton*, 117 Ill. 181, 3 West. Rep. 571; *Haines v. Inter-Ocean Pub. House* (Ill.) 20 Bradf. 207; *Pope v. Lowitz*, *supra*.

During his minority the services of Arthur B. Slater belonged to his father, and therefore could not go to his estate, nor pass to the administrator, nor be distributed among his next of kin, because not belonging to them, and, for these reasons, could not be allowed or recovered in this action.

Morris v. Chicago, M. & St. P. R. Co. 26 Fed. Rep. 22.

Section 13 of appellant's charter is not repealed by the Act of 1869. A subsequent law which is general does not abrogate a former one which is special.

Warner v. Crosby, 89 Ill. 820; *Corington v. East St. Louis*, 78 Ill. 548; *Ottawa v. La Salle Co.* 12 Ill. 839.

The expression of one mode of action in an enactment is generally held to be an exclusion of all other modes.

Geddis v. Richland Co. 92 Ill. 119.

Messrs. **James H. Cartwright** and **James W. Allaben**, for defendant in error: The degree of care required by law of these boys depended not only upon the situation but upon their age also.

Chicago v. Keeffe, 114 Ill. 223, 1 West. Rep. 850; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25; *Pennsylvania R. Co. v. Kelly*, 81 Pa. 872; *Reynolds v. New York Cent. & H. R. R. Co.* 2 Thomp. & C. 644; *Stour City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 657 (21 L. ed. 745); *Boland v. Missouri R. Co.* 86 Mo. 434.

After these boys, through the negligence of the Railroad Company in failing to ring a bell or blow a whistle at the required distance, had come into near proximity to the railroad track, they did everything that they could with their age, strength, capacity and experience to avoid being injured, and hence were not guilty of contributory negligence.

See *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 218; *Dimick v. Chicago & N. W. R. Co.* 80 Ill. 838; *Chicago, B. & Q. R. Co. v. McGaha*, 19 Ill. App. 342; *Chicago & E. I. R. Co. v. O'Connor*, 119 Ill. 586, 6 West. Rep. 773.

By reason of the appellant's own conduct and neglect these boys were justified in assuming that there was no danger in approaching the railroad track at the time they did.

Chicago & N. W. R. Co. v. Goedel, 119 Ill. 515, 7 West. Rep. 689; *North Chicago Rolling Mill Co. v. Johnson*, 114 Ill. 57.

Running a train across a highway at an excessive speed will render the Railroad Company liable for the injuries thereby occasioned.

Rockford, R. I. & St. L. R. Co. v. Hillmer, 72 Ill. 235; *Continental Imp. Co. v. Stead*, 95 U. S. 161 (24 L. ed. 403); *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313.

The provision for giving signals at highway crossings is a police regulation for the protection and safety of citizens, and no corporation is above the general laws enacted for the safety of the community.

Galena & C. U. R. Co. v. Loomis, 18 Ill. 548; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460.

The damage to the father on account of the loss of services of his minor child may be made the basis for the assessment of damages.

Chicago v. Heising, 88 Ill. 204; *Stafford v. Rubens*, 115 Ill. 196, 1 West. Rep. 640; *Chicago & A. R. Co. v. Shannon*, 43 Ill. 338.

Wilkin, J., delivered the opinion of the court:

This case originated in the Circuit Court of Ogle County, and is an action on the case by appellee against appellant for negligently causing the death of Arthur B. Slater, his son. The deceased was about nine years old. When killed he was in a farm wagon drawn by two

horses, with an elder brother, thirteen years of age. The two boys were in charge of the team; and in attempting to cross the track of appellant on the public highway, using due care, as is alleged in the declaration, the wagon was struck by a passing locomotive, and both boys were killed. The negligence charged in the declaration against the employees of appellant is the omission to give the statutory signals, keep a proper lookout, running at a dangerous rate of speed, and failing to use reasonable diligence to stop the train in time to avoid the injury. Appellee recovered a judgment in the circuit court for \$1,000, which was by the appellate court, on appeal, affirmed, and appellant again appeals. The case is submitted in this court on the part of appellant on the same brief and argument filed in the appellate court. That court, by its judgment of affirmance, having settled all controverted facts adversely to appellant, we need give no attention to the lengthy review of the evidence contained in the argument, unless it is found necessary to do so in passing upon questions of law submitted for our decision.

On the trial, appellee was permitted, over objection, to prove the speed at which the train was running at the time deceased was killed, and this appellant says was error. One of the acts of negligence charged in the declaration is that the train was running at a high and dangerous rate of speed at the time of the accident. Surely the plaintiff had a right to prove that averment if he could. But, independent of the allegation, it was proper to prove the rate of speed at which the train was running, as tending to show whether or not deceased, under all the circumstances, exercised due care, and whether other alleged acts or omissions on the part of appellant's servants caused the injury. In other words, any proof of facts and circumstances immediately attending the accident was competent and proper. *Chicago, B. & Q. R. Co. v. Lee*, 87 Ill. 454; *Indianapolis & St. L. R. Co. v. Stables*, 62 Ill. 313; *Rockford, R. I. & St. L. R. Co. v. Hillman*, 72 Ill. 235.

Appellant offered to prove that appellee was a man of wealth at and before the time of the accident, but on objection the court refused to allow it to do so. It seems that the purpose for which the evidence was offered was to show that the father was able to employ others to perform the service deceased was engaged in at the time of his death, and thereby have saved him from exposure to danger incident to that service; and it is insisted that such evidence was competent under the ruling of this court in *Chicago & A. R. Co. v. Gregory*, 58 Ill. 226, and other cases cited, where, in passing on the question of negligence of parents in the care of their children, it is said the same rule should not be applied to persons dependent for support on their labor and those whose resources enable a parent to give constant personal attention to the care of their children, or employ persons for that purpose. It is not pretended that deceased on account of tender years, or want of mental capacity, was incapable of taking care of himself; and therefore the ability of the father to watch over him or employ others to do so was wholly immaterial; and to say as a matter of law that because a parent may be able to raise his child in idle-

ness, therefore he must do so, lest the child be exposed to danger in the performance of labor, would be monstrous. We find no error in admitting or excluding evidence.

The first, second, third and fourth instructions given on behalf of appellee are criticised by counsel for appellant, and a reversal insisted upon because they were given. We will notice them briefly in the order named. The first and second define the duty of railroad companies in this State as to giving signals at public highway crossings, in the language of section 68, chap. 114, of our Revised Statutes, and instruct the jury that if by reason of a failure of appellee's servants to perform that duty deceased was killed, he being free from negligence, appellant would be liable. The principal objection urged to these is that, inasmuch as appellee's charter defines its duty as to the giving of such signals differently from the Statute, it was error in the court below to require of appellant's servants a compliance with the Statute. The question here sought to be raised is not an open one in this court. The right to impose these and other like duties upon railroad corporations by statute grows out of the police power which may be exercised by the Legislature at its discretion, as the public safety requires. *Galena & C. U. R. Co. v. Loomis*, 18 Ill. 548; *Ohio & M. R. Co. v. McClelland*, 25 Ill. 140; *Galena & C. U. R. Co. v. Appleby*, 28 Ill. 283. See also 2 Redf. Railways, 428.

It is of the first importance that these duties in the running and management of railroad trains should be regulated by general statutes, and that railroad employes be required to conform thereto, thus avoiding the confusion and increased danger to life and property which would result from the application of different rules to the many different railroads throughout the State. Objections are urged to the phraseology of these instructions, but we think they are unimportant.

The third instruction—that which is: "It is not necessary, in order to enable the plaintiff to recover, that any witness should swear positively that no bell was rung or whistle sounded upon the train in question, at the distance of at least eighty rods from the highway crossing. It is sufficient upon that question if the jury believe from all the evidence in the case that no bell was rung or whistle sounded at a distance of at least eighty rods from the crossing"—is not open to the criticism made upon it, in view of the evidence in the case. It simply informed the jury that the fact in question might be proved by other than positive and direct testimony.

The fourth is as follows: "The jury are instructed that the rule of law as to negligence in children is that they are required to exercise only that degree of care and caution which persons of like age, capacity and experience might be reasonably expected to naturally or ordinarily use in the same situation, and under the like circumstances, provided that the parents or persons having the control of such children have not been guilty of want of ordinary care in allowing them to be placed in such circumstances." The giving of this instruction is urged as error, and is said to be directly contrary to the law in this class of cases. We find, however, in *Weick v. Lander*, 75 Ill. 98, 6 L.R.A.

which was an action by a father, as administrator, for the wrongful killing of his son twelve years of age, it was said: "It is not to be expected that a boy twelve years old will use the same degree of caution and care as a person of mature years; nor does the law require it. It was proper for the jury, in passing upon the negligence of the deceased, to take into consideration his age and experience."

In *Chicago & A. R. Co. v. Becker*, 76 Ill. 25, —a similar action, the deceased son being only seven years of age,—it was again said. "The age, the capacity and discretion of the deceased to observe and avoid danger were questions of fact to be determined by the jury, and his responsibility was to be measured by the degree of capacity he was found to possess." See also same case, 84 Ill. 483.

So in *Chicago v. Keefe*, 1 West. Rep. 350, 114 Ill. 223,—the deceased being a lad between ten and 11 years of age,—an instruction given at the request of the plaintiff limited the degree of care required of the deceased to such as "from his age and intelligence under the circumstances in evidence was required." The phraseology was condemned, but it was held that, inasmuch as it was in effect the same as if it had been limited to "such care as might be expected of a person of his age and discretion," there was no substantial error in giving it; and it was further said: "The circumstances in evidence are always to be taken into consideration in such cases, and, if the intestate exercised such care as under the circumstances might be expected from one of his age and intelligence, it was sufficient."

These decisions are in harmony with those of other States on the same subject, and but recognize the rule laid down by approved text-writers on negligence. *Shear. & Redf. Neg. § 49; Wharton, Neg. 309 et seq.*

The instruction was proper; nor does it, as insisted, conflict with the twenty-fourth, given on behalf of appellant, to the effect that if said sons, or either of them, possessed the knowledge or the ability of adults, the law would exact the same degree of care and prudence of them as older persons. The first announces the general rule as to negligence in children; the latter, that such general rule would not apply to the deceased and his brother if the jury should believe from the evidence they possessed the capacity of adults. It is to be borne in mind that this is not, as counsel for appellant assumes in argument, a suit by a parent for injury to his child; nor is it a case in which the deceased is shown to have been an infant, incapable of negligence or exercising any degree of care,—in which case the contributory negligence, if any, is that of the parent, and not of the child. Hence the authorities cited in support of the position that this fourth instruction is inapplicable to the case are not in point.

Defendant asked, but the court refused, to instruct the jury that "the father is entitled to the earnings and services of his minor son until such son is twenty-one years of age, and the jury has no right to allow any damages in this case for any loss of services or earnings of Arthur B. Slater during the period of his minority." It is argued with earnestness that this instruction contained a correct rule of law applicable to cases of this kind in the admeasure-

ment of damages. To the contrary are the cases of *Chicago v. Schotten*, 75 Ill. 470; *Rockford, R. I. & St. L. R. Co. v. Delaney*, 82 Ill. 198; *Chicago v. Keefe*, *supra*.

It is suggested, but not seriously urged, that other instructions asked by appellant were improperly refused. Having examined them, and also those given, we are satisfied that no error was committed by the trial court to the prejudice of appellant in refusing instructions. Thirty-four were asked by appellant, many of

them quite voluminous; twenty-five were given. The issues in the case are few and simple. The trial court might with great propriety have refused many more than it did. Certainly appellant has no substantial ground for complaint that the jury was not fully and fairly instructed as to the law on its behalf.

The judgment of the Appellate Court is affirmed.

Petition for rehearing withdrawn October 1, 1889.

OHIO SUPREME COURT.

STATE OF OHIO, *ex rel.* Morton W. COPE,

v.

Joseph B. FORAKER, Governor, etc.

(47 Ohio St.....)

*An amendment to the Constitution, submitted by the Legislature under the provisions of section 1, article 18, of that instrument, requires, for its adoption, a majority of all the votes cast at the election for senators and representatives at which it is submitted to the electors of the State for their approval or rejection.

(January 21, 1890.)

PETITION for a writ of mandamus to compel respondent to make proclamation that a certain amendment had been adopted as a part of the Constitution of the State of Ohio. On demurrer to the petition. *Petition dismissed.* The case sufficiently appears in the opinion. *Messrs. Williams & Le Blond* for relator. *Mr. David K. Watson, Atty-Gen.*, for respondent:

It is not the vote cast for the biennial amendment that is to determine whether or not the amendment carried, but whether that vote was a majority of all the votes cast at that election for senators and representatives.

People v. Wiant, 48 Ill. 263; *McCrary, Elections*, § 174; *County Seat of Linn Co.* 15 Kan. 500; *State v. Bechel*, 22 Neb. 158; *State v. Winkelmeier*, 35 Mo. 103; *Bayard v. Klinge*, 16 Minn. 249; *State v. Swift*, 69 Ind. 505; *State v. Lancaster Co.* 6 Neb. 474; *State v. Babcock*, 17 Neb. 188; *People v. Brown*, 11 Ill. 478; *McDowell v. Rutherford R. Const. Co.* 96 N. C. 514; *Enyart v. Hanover Twp. Trustees*, 25 Ohio St. 618.

Minshall, *Ch. J.*, delivered the opinion of the court:

The object of this proceeding is to compel the governor of the State to make proclamation of the adoption of an amendment to the Constitution of the State, providing for biennial elections, submitted by the Legislature to the electors of the State for their adoption or rejection at the last election for senators and representatives. The number of votes cast for its adop-

tion was 257,663; the number of express votes cast for its rejection was 254,215; and the total number of electors voting at the election was 780,304. As will be seen, there were more votes cast for the adoption of the amendment than were cast for its rejection, but the number cast for its adoption was not a majority of all the votes cast at the election for senators and representatives—a majority of such votes would have been not less than 390,153.

The amendment having been submitted by the Legislature, the question of its adoption or rejection must be determined by the provisions of section 1, article 18, of the Constitution, which reads as follows:

"Either branch of the General Assembly may propose amendments to this Constitution, and, if the same shall be agreed to by three fifths of the members elected to each House, such proposed amendments shall be entered on the journals, with the yeas and nays, and shall be published in at least one newspaper in each county of the State, where a newspaper is published, for six months preceding the next election for senators and representatives, at which time the same shall be submitted to the electors for their approval or rejection; and if a majority of the electors, voting at such election, shall adopt such amendments, the same shall become a part of the Constitution. When more than one amendment shall be submitted at the same time, they shall be so submitted as to enable the electors to vote on each amendment separately."

By this section an amendment submitted by the Legislature must be published, as therein required, "for six months preceding the next election for senators and representatives, at which time the same shall be submitted to the electors, for their approval or rejection; and if a majority of the electors, voting at such election, shall adopt" such amendment it shall become a part of the Constitution.

The plain reading of this language would seem to indicate but one construction, and that is, that an amendment so submitted would require for its adoption a majority of all the electors voting at the election for senators and representatives, as being the election indicated by the language "such election." Such seems to have been the view taken of it in the convention that framed the instrument, and such has been the uniform construction placed on it by the people of the State down to the present time. 2 Debates Convention 1851, p. 427. See also 2 Debates Convention 1874, p. 2811.

While the debates of a convention can have

*Head note by the COURT.

NOTE.—As to the number of votes necessary to carry a constitutional amendment, see note to *Lawrence v. Ingersoll*, *ante*, p. 308.

6 L. R. A.

no controlling effect upon the construction of the provisions of a Constitution, they are not without importance where they tend to support a construction indicated by the language of the instrument.

But it is claimed that "the election for senators and representatives is simply given as fixing the time when the proposed amendment should be submitted to the people of the State for their approval or rejection, and that the act of approving or taking part in the approval or rejection of the proposed amendment, which the Constitution says shall be done at the time of the election for senators and representatives, is an election in itself, and is the election referred to by the phraseology "a majority of the electors voting at such election."

The framers of the Constitution well understood the use of language; and whatever views may be entertained of the policy of some of its provisions it must be admitted that the instrument is a model of purity, precision and clearness of expression. In the next two sections of the same article, provisions are made for the submission of amendments, framed by conventions called for the purpose. And as to the adoption of amendments so framed and submitted, it is expressly provided that "no amendment of this Constitution, agreed upon by any convention assembled in pursuance of this article, shall take effect until the same has been submitted to the electors of the State, and adopted by a majority of those voting thereon." Const. art. 16, § 3.

If, then, it was intended that a majority of those voting on an amendment submitted by the Legislature should be sufficient to adopt it, the question arises, why language equally clear and explicit was not adopted to express such intention in the one case as well as in the other; or why, instead of limiting the provision contained in section 3 to amendments "agreed upon by any convention," it was not extended so as to include an amendment submitted by any Legislature. It would have been natural, and it is probable, that if the framers had had the same intention in framing section 1 as in framing section 3, as to how the majority for the adoption of an amendment should be ascertained, they would have provided in that section, as in section 3, that it should be a majority "of those voting thereon" instead of a majority "of the electors voting at such election." Such a plain difference of language indicates a plain difference of intention.

But the difference in the language employed is no greater than is the difference in the two cases to which the minds of the framers were directed. No doubt but that stability in its provisions was, as should always be the case, a consideration that influenced the minds of the framers of the Constitution in providing for its amendment. Two distinct modes of originating and submitting amendments are provided for; in one it may be done by the Legislature, in the other by a convention. Amendments submitted through the agency of a convention are necessarily attended with more deliberation and discussion than are those submitted by the Legislature. Amendments may be submitted by the Legislature as often as once in every two years. Hence there is much reason for the provision, contained in

section 1, that requires for the adoption of an amendment submitted by the Legislature a majority of all the electors voting at the election at which it is submitted. If it were otherwise there would be little, if any, more stability to the Constitution than there is to the statutes of the State. It could, and probably would, be changed every two years.

The argument of the counsel for the relator has the merit of ingenuity. He dissolves a general election into as many distinct elections as there are offices to be filled and questions voted on at the time it is held. He then utilizes the adverbial phrase, "at which time," so as to make it designate, not the time of a general election, but the time of a number of distinct elections, among which will be, where such are submitted, elections for constitutional amendments; and thence infers that the language "voting at such election," used in section 1, means the election upon constitutional amendments.

Such acute criticism upon language would defeat the plain, manifest intention of any instrument, however carefully prepared. We are satisfied beyond a doubt that the construction claimed is not the meaning of the language used in section 1 of article 16 of the Constitution.

But one of the most obvious objections to this construction is, that it requires to be demonstrated by such a labored process of occult reasoning upon the meaning of words and phrases, so different from the apparent meaning, as to warrant the belief that it never occurred, either to the framers of the Constitution or to the people who adopted it. So that, upon settled rules of construction, it should be rejected, if it could be shown to be in accordance with the strict grammar of the language and meaning of the words employed.

But even this cannot be claimed for the construction of the relator. The grammar of the language is against it. "Such," as here used, is a pronominal adjective, and necessarily defines an "election" previously mentioned; and the only one found in the context is an "election for senators and representatives." The construction of the relator requires for its adoption the insertion of words descriptive of an election, neither found in the section, nor required to be supplied by any rule of grammar, in order to complete the fullness of expression.

Counsel for the respondent has collected a great many cases bearing upon the question, some of which directly, and most of them by analogy, support the construction for which he contends. But as that construction is, to our minds, so clearly in harmony with the language of the instrument, and that which long years of common consent has placed on it, it is hardly necessary to do more than cite a few of them. *State v. Swift*, 69 Ind. 505; *State v. Lancaster Co.* 6 Neb. 474; *State v. Babcock*, 17 Neb. 188; *People v. Brown*, 11 Ill. 478; *State v. Wiant*, 48 Ill. 263; *Enyart v. Dunover Township Trustees*, 25 Ohio St. 618; *McCrary, Elections*, § 174.

In the case of *Gillespie v. Palmer*, 20 Wis. 573, much relied on by counsel for the relator, the judgment of the court was placed, principally, upon the language applicable to the case, and which, as there construed, is substan-

tially different from the language contained in section 1 of article 16 of our Constitution. There the language being construed was "a majority of all the votes cast at such election." The court holding that "votes" is not synonymous with "voters," determined that a majority of all the votes cast on the subject was sufficient to adopt the amendment. But no such question can arise under our Constitution on the meaning of words, the language being "a majority of all the electors voting

at such election." While "electors" may not be the exact synonym of "voters," it is in no sense synonymous with "votes." So that, if the decision were a sound one, it would not be in point here, by reason of the difference in the language of the two provisions. But the case does not seem to be regarded with very great favor in the State where it was decided. See *Bound v. Wis. Cent. R. Co.* 45 Wis. 548.

Writ refused and petition dismissed.

GEORGIA SUPREME COURT.

Jim DRYSDALE, *Plff in Err.*,

v.

STATE OF GEORGIA.

(....Ga....)

*1. Where the verdict is correct if the testimony of the prosecutor was true, and where the jury must have believed it true in order to render the verdict, the result coincides with the substantial merits of the case.

2. A husband may attack for intimacy with his wife in his presence, raising a well-founded belief that the criminal act is just over or about to begin, and the adulterer, though in danger, has no right to defend himself by using a deadly weapon.

(November 26, 1880.)

ERROR to the Superior Court for Richmond County to review a judgment denying de-

*Head notes by BLECKLEY, Ch. J.

NOTE.—Self defense, right of.

The right of self defense is founded on the law of nature, and is not superseded by the laws of society. *Isaacs v. State*, 25 Tex. 174; *United States v. Outerbridge*, 5 Ruw. 620; *Long v. State*, 52 Miss. 23. See *Gray v. Combs*, 7 J. J. Marsh. 478; *United States v. Holmes*, 1 Wall. Jr. 1; *Desty*, Am. Cr. L. 85.

It is a right based on necessity (*People v. Pool*, 27 Cal. 572), which everyone brings into society, and retains in society, except so far as the laws of society have curtailed it. *Gray v. Combs*, 7 J. J. Marsh. 478; *Horr. & T. Cas. on Self Def.* 387.

An act done from necessity raises no presumption of a criminal intent, but the necessity must be actual, imminent and apparent, with no other probable or possible means of escape. It must be great, and must arise from imminent peril to life or limb. *Oliver v. State*, 17 Ala. 587. See 4 Bl. Com. 25; 1 Hale, P. C. 43, 52; 1 Wharton, Cr. L. 8th ed. § 65; 1 Bishop, Cr. L. 8th ed. § 346; *Dupree v. State*, 33 Ala. 880; *Kennedy v. Com.* 14 Bush. 841; *Farris v. Com.* 1d. 363; *Muy v. State*, 6 Tex. App. 191; *Blake v. State*, 8 Tex. App. 581; *State v. Shippey*, 10 Minn. 223; *People v. Sullivan*, 7 N. Y. 898; *Com. v. Drum*, 58 Pa. 9.

There must be at least a seeming necessity, an actual necessity, or a reasonable belief of such necessity, to ward off some impending harm. *Dupree v. State*, *supra*; *State v. Benham*, 23 Iowa, 154; *State v. Burke*, 30 Iowa, 331; *Oliver v. State*, *supra*; *Noles v. State*, 26 Ala. 81; *Heg. v. Bull*, 9 Car. & P. 23; *Dill v. State*, 25 Ala. 15.

Men, when threatened with danger, must determine the necessity of resorting to self defense, and they will not be held responsible for a mistake in the extent of the actual danger, nor be subject to the peril of making that guilty, if appearances

defendant's motion for a new trial after trial of an indictment for assault with intent to murder and a verdict against him for unlawful shooting. *Affirmed.*

The prosecutor and his wife had separated. The wife rented from defendant's father the wing of his house and lived there with her children. Defendant was a member of his father's family living in the main part of the building.

Upon the premises upon which the house was built, in the night, the transactions occurred which led to this prosecution.

The prosecutor claimed and testified to the effect that he had suspected defendant of having improper relations with prosecutor's wife; that upon the night in question he approached the house and saw defendant go to the wife's window and knock; that soon afterwards he saw defendant and the wife come together out of the hall of the house and that they were about to enter the wife's sleeping room, she being in her night clothes or underclothes; that

prove false, which would be innocent if they proved true. *Campbell v. People*, 16 Ill. 18; *Meridith v. Com.* 18 B. Mon. 49; *Shorter v. People*, 2 N. Y. 193; *Pond v. People*, 8 Mich. 150; *State v. Sloan*, 47 Mo. 604.

Necessity is a defense when the act charged was done to avoid irreparable evil, from which there was no other adequate means of escape, and the remedy was not disproportionate to the threatened evil; and the necessity must not have been created by the fault of him who pleads it, nor be occasioned by him, nor be the result of his own culpability, nor be rashly rushed into. *Farris v. Com.* 14 Bush. 862; *Rex v. Stratton*, 21 How. St. Tr. 1045; *State v. Starr*, 33 Mo. 270; *Haynes v. State*, 17 Ga. 465; *Roach v. People*, 77 Ill. 25; *The Argo*, 1 Gall. 150; *Reg. v. Dunnett*, 1 Car. & K. 425; *The Joseph*, 12 U. S. 8 Cranch, 451 (3 L. ed. 621); *The New York*, 16 U. S. 3 Wheat. 59 (4 L. ed. 333); *Shorter v. People*, 2 N. Y. 193; *Logue v. Com.* 38 Pa. 295; *State v. Smith*, 10 Nev. 108; *Valden v. Com.* 12 Gratt. 717; *State v. Underwood*, 57 Mo. 40; *State v. Linney*, 52 Mo. 40; *State v. Neeley*, 20 Iowa, 108; *State v. Stanley*, 33 Iowa, 526; *Com. v. Selfridge*, *Horr. & T. Cas. on Self Def.* 8; *Isaacs v. State*, 25 Tex. 174. See *State v. Benham*, *supra*.

A man is justified in acting for his defense according to the circumstances as they appear to him. *Patten v. People*, 18 Mich. 814; *State v. Neeley*, 20 Iowa, 108; *Hurd v. People*, 25 Mich. 406; *Pond v. People*, 8 Mich. 150; *May v. State*, 6 Tex. App. 191; *Blake v. State*, 8 Tex. App. 581; *Reg. v. Thurborn*, 1 Denison, 387.

Whether a man is justified in employing in the first instance such means of resistance as will produce death depends on the circumstances and the nature of the attack; and he may not always use a deadly weapon, and it is still further wrong if it is

prosecutor thereupon rose from the grass and drew in which he had been concealed and started towards the couple saying: "I've seen enough of this," when defendant turned on prosecutor and commenced firing; that after two or three shots had been fired prosecutor drew a knife.

Defendant claimed and testified to the effect that at his father's request he went out into the yard to separate some dogs which were fighting there; that, failing in his attempt, he went back into the house for a pistol and after obtaining it came again into the yard, when he was accosted by the prosecutor, who arose from the grass with the words: "I have got you now and mean to stop this business and get even with you for going to Beaufort with my wife;" that as he arose from the grass he drew a knife and advanced on defendant, who warned him off and shot twice to scare him, and turned and ran, then shot a third time, and, having reached a ditch where he was forced to stop, fired to kill in his own protection.

In this state of the evidence the court gave the charge which is set out in the opinion, and to which exception was taken.

Messrs. R. L. Pierce and W. T. Gary, for plaintiff in error:

The charge as to past cohabitation led the jury to conclude that prosecutor had a right to punish for past wrong. The law only allows the prevention of impending wrong, or staying of its progress, not assuming any right to punish.

Hill v. State, 64 Ga. 467-469; *Biggs v. State*, 29 Ga. 724.

Mr. Boykin Wright, Sol.-Gen., for the State:

If a husband catches an adulterer or seducer fresh from cohabitation with his wife, and still

in her presence, and forthwith proceeds to assault the adulterer or seducer, there is no law, natural, human or divine, that condemns it.

Biggs v. State, 29 Ga. 724.

Bleckley, Ch. J., delivered the opinion of the court.

1. If the evidence of the prosecutor was true, there can be no possible doubt of the correctness of the verdict; and that the jury believed it true is equally certain, from the fact that they rendered a verdict based upon it. This disposes of the case upon its actual merits. None of the errors of the court complained of could have misled the jury if the prosecutor was a truthful witness; and, with or without errors, the jury could not have reached a verdict of guilty had they doubted the truth of his testimony.

2. The charge of the court complained of in the sixth ground of the motion for a new trial must be read in the light of that testimony, this charge being: "If you believe the prosecutor caught the defendant and his wife under such circumstances as led him to believe that they had just been in the act of cohabitation, or were about to cohabit, with each other, then the prosecutor had the right to protect his marital rights; and if in pursuance of such an object he assaulted the defendant, and the defendant shot at him with the intention to kill him, then the defendant is guilty of assault with intent to murder."

There was no evidence, save that of the prosecutor, which tended to show that the defendant and the prosecutor's wife were caught under circumstances calculated to induce the belief that they had just been in the act of cohabitation or were about to cohabit. If such circumstances existed, they were undoubtedly

a concealed weapon. *Young v. State*, 11 Humph. 200; *Stewart v. State*, 1 Ohio St. 66.

But if a man seeks to bring on a difficulty and slays his adversary, he cannot avail himself of the plea of self defense. *Com. v. Selfridge*, Horr. & T. Cas. on Self Def. 1; *State v. Neeley*, 20 Iowa, 108; *State v. Benham*, *supra*; *Isaacs v. State*, 25 Tex. 174; *State v. Hill*, 4 Dev. & B. L. 491.

Force necessary to be used.

A party assaulted is justified in using such force as is necessary to repel an assailant, but no more; and if unnecessary force is used he becomes the assailant. *Gallagher v. State*, 8 Minn. 270; *People v. Williams*, 82 Cal. 230; *People v. Campbell*, 30 Cal. 312; *Rasberry v. State*, 1 Tex. App. 664; *Stewart v. State*, 1 Ohio St. 66; *People v. Anderson*, 44 Cal. 65.

The degree of force must not exceed the bounds of defense and prevention; and this depends on the circumstances of each case; and the condition of both parties may be considered. *Gallagher v. State*, *supra*; *State v. Quin*, 8 Brev. 515; *People v. Doe*, 1 Mich. 451; *Patten v. People*, 18 Mich. 314; *Cotton v. State*, 31 Minn. 504; *Jackson v. State*, Horr. & T. Cas. on Self Def. 478; *Oliver v. State*, 17 Ala. 557; *Com. v. Seibert*, cited in Horr. & T. Cas. on Self Def. 688.

A man is not required to do everything in his power to avoid the necessity of slaying his assailant. Where there is no escape, after retreating as far as possible, killing will be justifiable; so where retreat is impossible or perilous, or would increase the danger; or where further retreat is prevented by some impediment, or was as far as the fierceness of the assault permitted. But if the assaulted party is in fault, he is bound to retreat as far as he can 6 L. R. A.

safely do so; he is required to decline the combat in good faith. *Phillips v. Com.* 2 Duv. (Ky.) 828; *Bohannon v. Com.* 8 Bush, 481; *People v. Sullivan*, 7 N. Y. 386; *State v. Shippey*, 10 Minn. 223; *Logue v. Com.* 38 Pa. 255; *Meridith v. Com.* 18 B. Mon. 49; *Reg. v. Smith*, 8 Car. & P. 160; *Creek v. State*, 24 Ind. 151; *Tweedy v. State*, 5 Iowa, 433; *Com. v. Selfridge*, Horr. & T. Cas. on Self Def. 1; *Valden v. Com.* 13 Gratt. 717; *Erwin v. State*, 29 Ohio St. 186; *Davison v. People*, 90 Ill. 221; *State v. Inwood*, 4 Jones, L. (N. C.) 218; *State v. Hill*, 4 Dev. & B. L. 491; *State v. Chavis*, 30 N. C. 353.

He is not obliged to retreat or to go to the wall from an assailant armed with a deadly weapon; and if he is driven to the wall so that he must be killed or sustain great bodily harm, and therefore kills his assailant, it is excusable homicide. *State v. Inwood*, 4 Jones, L. 210; *Phillips v. Com.* *supra*; *Smalts v. Com.* 8 Bush, 32; *Young v. Com.* 6 Bush, 312; *Carico v. Com.* 7 Bush, 124. But see *Bohannon v. Com.* 8 Bush, 481; *Tweedy v. State*, *supra*; *Carroll v. State*, 23 Ala. 28; *Pond v. People*, 8 Mich. 150; 1 East, P. C. 271; *Desty*, Am. Cr. L. 87.

And if he use all the means in his power to escape, even killing in self defense is lawful. *Com. v. Selfridge*, *supra*; *People v. Doe*, 1 Mich. 151; *People v. Sullivan*, *State v. Shippey* and *Bohannon v. Com.* *supra*.

A party resisting a murderous assault where several lives are in danger, being in the best position to judge as to the requirements of the occasion, is the one to determine when the proper moment has arrived, in self defense, to slay his assailant in order to his justification in law. *Re Neumeier* (Cal.) 5 L. R. A. 73, note, 30 Fed. Rep. 533.

brought about either by the guilty acts of the defendant, or by acts on his part done without just cause or excuse, and which were adapted to produce the belief that he was engaged at that time either in terminating or in beginning criminal communication with the prosecutor's wife.

The charge of the court has no reference to any cohabitation except such as may have just taken place, or such as was about to take place, at the time of the hostile meeting; and we take the law of such a situation to be this: that a man surprised by the husband immediately after an actual, or immediately before an intended, adulterous connection, can lawfully defend himself against the husband's violence by flight only, or at least by means short of deadly. He cannot stand his ground and shoot or cut to repel the husband's attack upon him, though it may be a dangerous attack. Whatsoever the law would justify the husband in doing under such circumstances, it would not justify the adulterer in preventing by homicide or attempting homicide, perhaps not otherwise than by making his escape.

The charge we have quoted, treated as a general proposition, is inaccurate, because circumstances which would lead a husband to believe that a man has just been engaged in the guilty act, or is about to engage in it, would not deprive the man of the right of self defense on the spot, unless he himself was chargeable with giving rise to such circumstances by his own improper or unjustifiable conduct. This qualification should have been introduced into the charge, but its absence in this particular case was harmless, inasmuch as the evidence on which the jury must have based their verdict showed that it was the improper and unjustifiable conduct of the accused at the time and place of the collision which brought the circumstances of apparent criminality into existence. Moreover, the verdict was not for assault with intent to murder, but only for unlawful shooting.

The other grounds of the motion for a new trial need not be discussed, inasmuch as none of them are sufficient, under the evidence in the record, to warrant the grant of another trial.

As we have already said, the credibility of the prosecutor was the question on which the propriety of conviction depended, and on that question the sagacity of the jury can be fully trusted.

Judgment affirmed.

Charles H. PHINIZY, *Plff. in Err.*,

vs.
William H. MURRAY.

(....Ga....)

*After a contract for the sale of certain shares in the stock of a corporation, but before the time appointed for receiving payment and making delivery, a dividend was declared, as to which there was no express stipulation in the contract. *Held*, that though, according to authorities on the subject, the purchaser, if he

had accepted the stock and paid for it, would have been entitled to the dividend, yet he had no right to decline acceptance and making payment because the seller claimed the dividend as his own, and refused to give an order for its payment to him, the purchaser. The latter, having failed, without just cause, to comply with his contract, lost his hold both upon the stock and the dividend.

(November 22, 1886.)

ERROR to the Superior Court for McDuffie County to review a judgment in favor of defendant in an action to recover damages for breach of a contract to sell and deliver certain shares of corporate stock. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Bryan Cumming and J. B. Cumming*, for plaintiff in error:

Title to the stock passed when the contract was signed.

Benjamin, Sales, §§ 813-815, 818, 819; Code, §§ 1950, 2644; *Denmead v. Glass*, 30 Ga. 637; *Morawetz, Priv. Corp.* 175 *et seq.*

The right to dividends occurs as soon as the contract of sale is made.

Morawetz, Priv. Corp. 175, 178.

Messrs. Foster & Lamar and T. E. Watson, for defendant in error:

Defendant offered to do all that his contract required of him when he offered to deliver the certificates with proper power of attorney to transfer the same; and in refusing to receive the certificates, etc., as offered, the plaintiff forfeited all right thereto.

1 Am. & Eng. Corp. Cas. 117; 5 Id. 137; *Morawetz, Priv. Corp.* § 329; *Ang. & A. Corp.* § 564 and *note 3*; *Sargent v. Frank in Ins. Co.* 8 Pick. 90; *Ross v. Southwestern R. Co.* 53 Ga. 515 (4); *Central R. & Hkg. Co. v. Papot*, 59 Ga. 342; *Bright v. Lord*, 51 Ind. 272.

If entitled to the dividend and to the order for the same beyond the customary instrument of transfer, it was nevertheless the duty of Phinzy to have accepted the tender of the stock and proxies, and sued, if necessary, to recover the dividend.

1 *Sutherland, Damages*, p. 148 and authorities; *Miller v. Mariner's Church*, 7 Me. 51, 20 Am. Dec. 341; *Hamilton v. McPherson*, 28 N. Y. 72, 84 Am. Dec. 830 and *note*, 833.

Bleckley, Ch. J., delivered the opinion of the court:

The contract, as alleged in the declaration, was that on the 27th of November, 1886, the defendant agreed to sell to the plaintiff fifty shares of the capital stock of the Georgia Railroad & Banking Company, at the price of \$120 per share, and to deliver the same as soon as the defendant could come to the City of Augusta and make delivery of the certificate or certificates, and execute a power of attorney to transfer the same. The breach alleged is that on the 4th of December, 1886, the defendant refused to deliver the shares, though requested by the plaintiff to do so, notwithstanding the plaintiff offered, and was ready, to pay the price agreed on. The evidence showed that on the 1st of December a dividend of \$4 per share was declared by the corporation, and that on the 8d of December the defendant went to Augusta, and there offered to execute the required papers for transferring the shares ac-

*Head note by BLECKLEY, Ch. J.

cording to contract. But the plaintiff's broker refused to pay for the stock and consummate the transaction, unless the defendant would also execute an order for the dividend. The defendant refused to execute this order, claiming that the dividend belonged to him.

Let it be conceded that the contract to sell was completed by what transpired previously to the time that the dividend was declared, and let it also be conceded that, as an incident thereto, the plaintiff was entitled to the dividend, as would appear to be the case from the authorities cited below; still, the broker, as representing the plaintiff, had no right to make the settlement of the claim to the dividend a condition of receiving the stock and paying for it. The defendant had not collected the dividend, as was done by the seller in *Currie v. White*, 45 N. Y. 822; and, if a right to it passed to the plaintiff as an incident of his purchase of the stock, the plaintiff could have collected it from the corporation without an order from the defendant, either in his own name or by using the defendant's name, as holder of the formal legal title, for his (the plaintiff's) use. By giving timely notice to the corporation, any right, legal or equitable, which he had in the dividend might have been protected. *Conant v. Seneca County Bank*, 1 Ohio St. 298.

The broker, as representing the plaintiff, had no right to exact the execution of a document, not contemplated by either of the parties at the time the contract was entered into, as a condition of payment for the stock, inasmuch as transfer and payment were to be concurrent

acts. He could very well claim, as he did, that the dividend belonged to the plaintiff; but he could not make the settlement of a dispute on that question a condition of completing the transaction the completion of which was necessary to perfect the incidental right which he claimed. The defendant was no party to the declaration of the dividend, and the act of the corporation in declaring it cast upon him no duty to execute a paper in carrying out or completing the contract of sale which he had made with the plaintiff, through the broker, that he had not expressly or impliedly undertaken to execute when the contract was entered into. By endeavoring to introduce this new term into the contract, and by standing upon it as a condition of his own performance, he lost any right, not only to the dividend, but to the stock, which he would otherwise have had. He virtually rescinded the contract by electing not to comply with it. The verdict was right in its effect, whatever errors may have been committed upon the trial. The following authorities tend to show that had the plaintiff complied on his part with the terms of the contract, and assuming that the contract had no infirmity by reason of the double agency of the broker, his right to the dividend would have resulted as a legal incident. *Blark v. Homersham*, L. R. 4 Exch. Div. 24; *Harris v. Stevens*, 7 N. H. 454; *Morawetz, Priv. Corp.* §§ 174-178; 2 Add. Cont. § 661; *Cook, Stocks and Stockholders*, § 543.

Judgment affirmed.

WEST VIRGINIA SUPREME COURT OF APPEALS.

Anthony REGER

v.

Lemuel O'NEAL, *Appt.*

(....W. Va....)

1. Where usurious interest has been paid upon a debt, and the debt, or any part of it, is unpaid, a court of equity, in stating the account between the parties, will credit upon the principal of what is unpaid whatever usurious interest has been paid, as of the date of its payment.
 2. A note for the payment of a sum of money given bona fide for purchase money for land, and not as a cover for a loan or forbearance of money, though it call for interest on that sum in excess of the rate allowed by law for the loan or forbearance of money, is not usurious. What is thus called "interest" is as much a part of the purchase price of the land as the principal sum, and the rate of interest so called for will be enforced.
 3. Where questions purely of fact are referred to a commissioner, his finding will be given great weight, though not as conclusive as the verdict of a jury, and should be sustained, unless plainly not warranted by any reasonable view of the evidence. This rule operates with peculiar force in an appellate court, when the findings of a commissioner have been approved by the court below.
 4. Where the decree sought to be reversed is based on depositions which are
- 6 L. R. A.

conflicting, and of such doubtful and unsatisfactory character that different judges might reasonably disagree as to the facts proved thereby, or the proper conclusions to be deduced therefrom, the appellate court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the appellate court might have pronounced a different decree if it had acted on the cause in the first instance.

(November 9, 1889.)

APPPEAL by defendant from a decree of the Circuit Court for Barbour County rendered in a suit to enforce a lien for unpaid purchase money upon certain real estate, confirming the report of a commissioner disallowing a claim made by defendant for credit of an alleged payment. *Corrected and affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Dayton & Dayton for appellant.
Mr. Samuel V. Woods for appellee.

Brannon, J., delivered the opinion of the court:

Anthony Reger brought a chancery suit in the Circuit Court of Barbour County against Lemuel O'Neal and others to enforce a lien reserved upon a tract of land in that county for the payment of several notes executed by O'Neal to Reger, admitting that all said notes had been paid except one for \$1,000, which he alleged

to be wholly unpaid. The defendant, O'Neal, demurred to the bill, and his demurrer was overruled. He filed an answer, alleging that one of said notes for \$2,000 carried interest at 7 per cent from date; and that he had paid that interest, which he branded as usurious; and that on other notes after their maturity he had paid interest at the rate of 8 per cent per annum until the 1st of October, 1877; and that after that date, under an agreement with Reger, he had paid but 6 per cent; and that he had paid all such interest annually; and that, if given credit for the usury paid, not only the other notes, but also that in suit, would be fully paid, and \$58.75 in excess; and he demanded that such usury be applied to discharge that note, and, by way of affirmative relief, asked that the said excess of payment be decreed to him on the final hearing. Afterwards O'Neal filed a further answer, alleging that a gross mistake existed in the cause, in the fact that at the house of Joseph Baker he had paid Reger \$535 on the note for \$2,000 and took his receipt therefor, which he had lost, and paid other moneys on that note, in all \$1,535, up to the 27th of September, 1878; and that on the 27th of February, 1878, he and Reger entered into an agreement in which it was erroneously assumed that the sum of \$1,000 was still due upon said note for \$2,000, when in truth there only remained then due thereon \$465; and that, notwithstanding there was only that sum due on that note, he paid 8 per cent on said \$1,000 until October 1, 1877, and thereafter 6 per cent, until payment of that note, in 1878 or 1879, and thus paid usurious interest on this \$585 which he did not owe; that for eight or ten years he had paid all interest, legal and usurious, promptly each year; and he prays that this further answer be treated as a cross-bill, and for affirmative relief.

The plaintiff filed a reply in writing to both these answers, denying that O'Neal had paid the money as claimed in his answers, and denying that he had by usury overpaid \$58.75, and denying that there had been any mistake or miscalculation, and alleging that O'Neal had received credit for every dollar he had ever paid, whether at the residence of Joseph Baker or elsewhere; that the \$2,000 note bore 7 per cent as part of the purchase price for land as shown by the deed. This reply further alleged that on the 27th of February, 1878, by an agreement with O'Neal, he bound himself to extend the time of payment of said several notes, and that in consideration of such extension and \$35 paid O'Neal he had agreed to waive and release all claim for usury paid. The cause was referred to a commissioner, to audit the account between the parties, to report what usury, if any, had been paid, and what was due on the purchase-money note filed with the bill. Numerous depositions were taken by the commissioner. The commissioner's report rejected the alleged credit of \$535, but did not decide as to the usury claimed by O'Neal, but submitted that matter to the court upon a report presenting it in five aspects, viz.: (1) on the basis that O'Neal was entitled to credit for usury to the 1st of October, 1877; (2) on the basis that he was entitled to credit for usury to the 1st of October, 1878; (3) on the basis that he was not entitled to credit for usury paid on

the \$2,000 note till its maturity, and was entitled to the usury after maturity until the 1st of October, 1877; (4) on the same basis as third, except that it stopped usury the 1st of October, 1878; (5) on the basis that there was no usury to be allowed, as it was released by the agreement, the 27th of February, 1878. The plaintiff excepted to the report because he was charged with usury. The defendant excepted because the report did not allow him credit for the usury at the dates when paid, and because it ignored the \$585 payment, and because of the aspects disallowing the usury. The court adopted the first aspect of the report, finding a balance due from O'Neal, after crediting him with usury paid, of \$164.13, and decreed that sum against O'Neal, and subjected the land to sale for it, thus disallowing credit for the \$535. Thereupon O'Neal obtained this appeal.

As to the demurrer to the bill, no ground for it has been assigned, either in this or the circuit court, and no ground is now seen for sustaining it. An important question in the cause is, Should this court reverse the decree below for not allowing O'Neal credit for \$535, which he claims to have paid on the note for \$2,000 at Baker's residence? The evidence bearing upon this question is conflicting and uncertain, and it would serve no purpose to detail it at large. The receipt which, it is alleged, was given for it has been lost, though O'Neal presents other receipts and papers, and does not explain definitely how this was lost. Both O'Neal and Reger say that money was paid Reger at Baker's; but O'Neal says that it was on the \$2,000 note, while Reger says it was paid on stock. It may be true that such payment was made and applicable on that note, and it may be also true that O'Neal received credit for it in the many payments and transactions as to this debt from time to time during eight or ten years. Their business was transacted in an irregular way, neither being competent to draw papers or make entries or calculations, having to call on others to do this work. Reger states positively that O'Neal received credit for every dollar he ever paid, while O'Neal, after stating that he paid \$530 or \$535, on being asked if he had not received credit for it, replied: "I cannot say whether I have or not. I have no recollection of the note being present at the time." When asked if he meant to say that he had never received credit for the money paid at Baker's, he answered: "I don't believe I did. I don't know, because I can't remember."

It is not certain when this payment was made. In his answer, O'Neal says it was "soon after the payment" of \$585, the receipt for which was dated the 1st of October, 1872, and in his deposition he says he paid it about the time the \$2,000 note fell due (1st of October, 1873), or a day or two before the date of said receipt. After this payment, on the 28th day of February, 1878, Reger and O'Neal executed a writing under seal whereby Reger agreed to let O'Neal have the use of the money O'Neal owed him (Reger); "four land notes to be paid as follows: The first note, of \$2,000, subject to a credit of \$1,000, to be paid on or before the 1st day of October, 1878," and proceeding and fixing later dates for payment of three other notes.

Thus, this agreement recognized that at its date it was subject to a credit of \$1,000, whereas, if it was subject to a credit of \$535, this would be untrue, for at that date it had, besides several indorsements of interest paid to the 1st of October, 1877, indorsements of \$635, \$381 and \$4, making up the \$1,000 credit. It seems strange that O'Neal should have signed an agreement recognizing the note as subject to a credit of only \$1,000, instead of \$1,535. But here stands this written instrument, containing this admission, inconsistent with the idea that he was entitled to this large credit.

In a fourth deposition of O'Neal, he states that he claimed that three receipts should be credited on the \$2,000 when he signed this article; but, being told by Reger that if he did not sign it he would sue him, he signed it. Three receipts might include this one for the \$535, or for interest for 1874, which is not credited on the bond. O'Neal does not specifically state that he claimed that the receipt for this \$535 was not credited. Now, this written agreement had been referred to and made an exhibit in the answer of O'Neal, filed the 2d of March, 1887; yet, though he gave three depositions after its filing, he never, until this fourth deposition, in September, 1887, alleged any compulsion in the execution of this instrument. He thus knew of this payment, and, if he refers to it in his fourth deposition, claimed it to have been made in February, 1878, and yet in his first answer he never mentions it, or hints at its being a credit to him, claiming only that the usury which he had paid, and an undisputed payment of \$630 on the note of \$1,000 sued on, would overpay it; and several months later files a further answer, claiming the omission of this \$535 credit as a glaring mistake. It strikes one as somewhat difficult to explain, that, with full knowledge of the facts, he failed to claim a credit for this \$535. It seems strange, too, that in 1879 O'Neal paid off this \$2,000 note by the payment of \$1,000 balance of its principal and \$60 interest, without mentioning on this credit which, he says, was specifically paid on that note.

There is a statement in the record containing items of interest debited to O'Neal on one basis and items debited on another basis, and from one of the footings is a credit subtracted, in the language, "Amount paid, \$520;" and it is claimed that this statement thus admits this \$535. It appears that Reger himself made no calculations, and was not able to do so, but procured others to do the writing and calculating. He says he knows nothing of this statement; but a witness says, when he went, at O'Neal's instance, to inspect the papers in Mr. Reger's hands, this paper was among them, and delivered to him by Reger. But this sum of \$520 is different from \$535. When it was paid, whether at one time, or at different times and set down as a lump sum, does not appear. It is unconvincing and inconclusive.

In addition to the facts which have been adverted to, there is considerable oral evidence on both sides bearing on this matter, more or less conflicting, inconclusive and uncertain. Upon it all the commissioner found against this credit of \$535, and the circuit court approved his finding. We must in this cause apply the rule laid down by this court on several occa-

sions. "The question is purely one of fact, and in such cases this court will not reverse, unless the finding is plainly erroneous," is the language of *Judge Snyder* in delivering the opinion in *Fisher v. McNulty*, 30 W. Va. 194.

In *Smith v. Yoke*, 27 W. Va. 643, *Judge Snyder*, in delivering the opinion, says: "This court has frequently decided that when questions of fact are referred to a commissioner the findings of the commissioner will be sustained, unless it plainly appears that they are not warranted by any reasonable view of the testimony. And this rule operates with peculiar force in an appellate court, where the findings of the commissioner have been approved and sustained by the chancellor. *Hundy v. Scott*, 26 W. Va. 710; *Boyd v. Gunnison*, 14 W. Va. 1; *Graham v. Graham*, 21 W. Va. 698.

"Where the decree sought to be reversed is based upon depositions which are so conflicting and of such a doubtful and unsatisfactory character that different minds and different judges might reasonably disagree as to the facts proved by them, or the proper conclusion to be deduced therefrom, the appellate court will decline to reverse the finding or decree of the chancellor, although the testimony may be such that the appellate court might have pronounced a different decree if it had acted upon the cause in the first instance." *Smith v. Yoke*, 27 W. Va. 639; *Prichard v. Eatus*, 81 W. Va. 187; *Doonan v. Glynn*, 28 W. Va. 715.

Thus, there is no error in disallowing said credit of \$535.

As to the usury: Usury was undoubtedly paid each year to Reger from maturity of the several notes, except one, to October 1, 1877.

It was well settled that as long as the debt is unpaid the debtor can, if he see proper, have it applied as a payment of the debt. *Norrell v. Hatrick*, 21 W. Va. 523; *Spengler v. Snapp*, 5 Leigh, 478; *Pax v. Talinferro*, 1 Munf. 248; *Turner v. Turner*, 90 Va. 379; *Tyler*, Usury, 448.

As said by *Sherwood, J.*, in *Campbell v. Sloan*, 62 Pa. 481: "These payments, as payments of interest, were avoided by the statute, and became payments on account of the principal." And in *Murrell v. Meyer*, 85 Ill. 40, it is held that the usury received is considered as so much extorted by means of the debt, and is to be applied in part payment of the same. See *Munsell v. McKelhenry*, 23 Ind. 4; *Lockwood v. Mitchell*, 7 Ohio St. 387; note to *Zeigler v. Scott*, 10 Ga. 389, 54 Am. Dec. 402; *Througill v. Timberlake*, 2 Head, 395; *Smith v. Young*, 11 Bush (Ky.), 893; *Crutcher v. Trabue*, 5 Dana, 80; *Ellis v. Brannin*, 1 Duv. 48; *Booker v. Gregory*, 7 B. Mon. 439; *Wood v. Gray*, 5 B. Mon. 93.

But these principles do not apply to debts due national banks, for reasons appearing in *National Exchange Bank v. Boylen*, 28 W. Va. 554. And the circuit court did allow O'Neal the usury paid, as against the note in suit. But the appellant complains that interest has been given on the usury annually paid, not from the times when paid, but only from the 1st of October, 1877. I think, with O'Neal's counsel, that the payments should be applied when paid, and operate to stop interest on the principal from that date. *Booker v. Gregory*, *supra*.

Under the process adopted by the commis-

sioner, he should have credited O'Neal with interest on usury paid from the time when paid. Correcting this error, by my calculation, O'Neal is aggrieved \$49.65. But in his statement, which is the basis of the decree, the commissioner charged Reger \$20.05 for 1 per cent usury on the \$2,000 note from its date to maturity and with \$100 for 2 per cent usury after its maturity to the 1st of October, 1877, but should have charged only \$50, as 1 per cent usury. This \$2,000 note was, with the percentage of interest it called for, purchase money for the land.

Usury is interest exceeding the lawful rate for the loan or forbearance of money, and does not exist where such interest is essentially and honestly a part of the consideration in the purchase of land, even though it may be called for in the form of a percentage on a principal sum, and be called "interest" and be in excess of the lawful rate; the interest, in such case of an honest purchase, where it is not a mere cover for what is in fact a loan, being as much a part of the purchase price as that part appearing of the principal. *Toussy v. Robinson*, 1 Met. (Ky.) 663; *Grane v. Adams*, 23 Gratt. 225; *Kraker v. Shields*, 20 Gratt. 898; 5 Rob. Pr. 467.

In the King's Bench, in *Beets v. Bidgood*, 7 Barn. & C. 453, Lord Tenterden said the only difficulty arose from calling it "interest;" but the court, looking at the substance, and regarding the interest as a part of the purchase consideration, held it not usurious.

In the New York Court of Appeals, in *Cutler v. Wright*, 22 N. Y. 472, this case of *Beets v. Bidgood* was said to be unquestionable law; and the Supreme Court of the United States has recognized it in *Hansbrough v. Peck*, 72 U. S. 5 Wall. 507 [18 L. ed. 523]. In said New York

case the syllabus is: "It seems that the mere fact that on a contract for the sale of land a higher than the legal rate of interest is reserved upon the deferred payments does not render the transaction usurious."

Therefore, it was error to charge Reger with said sums of \$20.05 and \$50, with interest from the 1st of October, 1877. This error against him, by my calculation, amounts to \$78.45, and subtracting the \$49.65 in favor of O'Neal, there remains a balance in favor of Reger of \$28.80, which being added to \$164.13, the amount decreed to Reger, makes \$192.93 as the proper sum due him at the date of the decree. Therefore the said decree is corrected so as to require the payment by O'Neal to Reger of \$192.93, with interest from the 2d day of January, 1888, instead of \$164.13; and, being so corrected, the said decree is affirmed with costs and damages to appellee.

Reger's counsel insists that the consideration for which he agreed by the article of the 27th of February, 1878, to extend indulgence to his debtor, and paid him \$85, was that O'Neal should waive all claim to usury. This may be so, but his evidence is contradicted by O'Neal's, and the writing is silent as to any such waiver or release of usury, and the commissioner and court, as I think properly, found against such release. The writing is the repository of the transaction, and we cannot make it speak, or operate as a release, on mere oral evidence as to a contemporaneous understanding, even if it would bar O'Neal from claiming usury if it contained such waiver, on which we indicate no opinion.

Decree corrected and affirmed.

Snyder, P., and English, J., concurred; Green, J., absent.

COLORADO SUPREME COURT.

Kemp G. COOPER *et al.*, *Plffs. in Err.*,
v.

PEOPLE of Colorado, *ex rel.* John J.
WYATT.

(....Colo.....)

- *1. The Statute providing that "the judgments and orders of the court or judge made in the cases of contempt shall be final and conclusive" has reference only to the extent of the review in such cases, and not to the mode of review, whether by writ of error or otherwise.
2. Contempt proceedings may be brought to the supreme court upon writ of error from the final judgment, but the review upon such writ extends only to an inquiry into the jurisdiction of the court entering the judgment.
3. When an affidavit is presented as a basis of a proceeding for contempt, the court must, in the first instance, examine the same, and, if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but if the facts are sufficient, the court may take jurisdiction,

and its subsequent orders will not be reviewed for mere errors.

4. The district courts of this State have the inherent power to summarily convict and punish, as for a contempt of court, those responsible for articles published in reference to a cause pending, when such articles are calculated to interfere with the due administration of justice in such cause. Neither the statutes nor the Constitution present any barrier to the exercise of such powers. The right of trial by jury does not extend to cases of contempt. The power to punish summarily in such cases is essential to the very existence of a court. The contrary rule would place it in the power of a vicious person to so conduct himself as to prevent any kind of a trial.
5. While liberty of speech and of the press is guaranteed by our Constitution, by a subsequent clause of the same sentence in which this is declared, the responsibility for its abuse is fixed.
6. With us the judiciary is elective, and every citizen may fully and freely discuss the fitness or unfitness of all candidates for the positions to which they aspire, criticise freely all decisions rendered, and by legitimate argument establish their soundness or

*Head notes by HAYT, J.
6 L. R. A.

unsoundness, comment on the fidelity or infidelity with which judicial officers discharge their duties; but the right to attempt, by wanton defamation, to prejudice the rights of litigants in a pending cause, degrade the tribunal, and impede, embarrass or corrupt that due administration of justice which is so essential to good government, cannot be sanctioned.

7. By statute the district courts of this State and the judges thereof are expressly given general jurisdiction to issue the writ of habeas corpus, and the jurisdiction to issue the writ in a particular case will be presumed in the absence of a showing to the contrary.

Per Elliott, J.

A district court or district judge has no authority by habeas corpus to release a prisoner under commitment by a criminal court for contempt against its authority in a matter wherein the criminal court has jurisdiction; and in general one court should not judge the jurisdiction of another tribunal of co-ordinate authority and dignity. The principles of comity should prevail.

On Petition for Rehearing.

- *1. During the pendency of a cause the court must be permitted to proceed therein without molestation, in accordance with the constitutional principles and approved legal rules and precedents. The privilege of directly interfering, in such cases, with the administration of justice by indiscriminate newspaper charges of perjury, bribery, corruption and the like, against the parties concerned, or against those conducting the trial, is not a constitutional right. Such interference may be summarily punished as a contempt.**
- 2. When the integrity of a litigant, witness, juror, judge or other court officer is suspected in a cause pending, the legal remedy by means of judicial investigation should be invoked.**
- 3. But the press may, without liability to punishment for contempt, in the interest of the public good, challenge the conduct of judges and other court officers; also of parties, jurors and witnesses, in connection with causes that have been wholly determined. It may also fairly and reasonably review and comment upon court proceedings from day to day as they take place.**
- 4. If substantial doubt exists concerning the jurisdiction of the court, pending the solution of this doubt, in good faith, and in a proper manner, the orders and proceedings of the court or judge are entitled to the same consideration as when the objection to jurisdiction is not raised.**

(November 1, 1889.)

ERROR to the District Court for Arapahoe County to review a judgment sentencing respondents Cooper and Stapleton to pay a fine for a contempt of court. *Affirmed.*

Statement by Hayt, J.:

Plaintiffs in error, together with one N. P. Hill, were, by the court below, ordered to appear and show cause why they should not be punished as for contempt of court, on account of the publication in the Denver Republican, a daily newspaper published at, and having a large

circulation in, the City of Denver, where the court was being held, certain articles, together with a large cartoon, all having reference to a cause pending in said court.

The matter was heard upon the following affidavit and answer:

"State of Colorado, County of Arapahoe—ss.:
In the district court.

The People of the State of Colorado, on the
Relation of John J. Wyatt,

vs.

Nathaniel P. Hill, Kemp G. Cooper and William Stapleton.

"John J. Wyatt, being duly sworn, on his oath deposes and says that he is the petitioner in a certain proceeding for a writ of habeas corpus now pending in this court; that under a certain warrant of commitment, issued out of the Criminal Court of Arapahoe County, this affiant was, on the 11th of July, A. D. 1889, arrested and taken to the county jail of said county; that as soon as practicable after said arrest this affiant had prepared, and himself duly verified, a petition for a writ of habeas corpus, and by his counsel applied to George W. Allen, one of the judges of the court, to hear and act upon the same; that said judge then and there stated to the counsel of this affiant that he was so much engaged in important trials then pending in his division of said court that he could not, with reasonable attention to said trials, give the time and attention to affiant's said application which its importance demanded, and suggested that affiant's counsel apply to one of the other judges of said court; that thereupon the counsel applied to Hon. O. Liddell, another of the judges of the said court, to hear said petition; that said last-named judge stated to said counsel that he was already worn by protracted hearings, and had a crowded docket of hearings requiring immediate attention, and requested the said counsel to apply to another of the judges of said court whose docket was not at that time so crowded; that thereupon said counsel of this affiant presented said petition to Hon. T. B. Stuart, a judge of said court, and requested that upon said verified petition his honor, Judge Stuart, would order the issuance of a writ of habeas corpus, and admit this affiant to bail until a hearing could be had as to the legality of his imprisonment; that an order to that effect was indorsed upon said petition by his honor, and a writ issued in accordance therewith, and a bond executed by this affiant in accordance with the terms of said order; that said cause was, on said 11th day of July, 1889, docketed in this court as cause No. 11,230, where it now remains, and is still undetermined; that this affiant appeared in person and by his counsel at court before his honor Judge Stuart, at the opening of court on Friday, the 12th day of July inst., pursuant to the order aforesaid, there to abide any order which the court might make in the premises, and at the request of the district attorney then and there present the hearing of said cause and further action therein was postponed, and by agreement set down for hearing on Monday, the 15th day of July instant. And your affiant on oath states that on the morning of Saturday, July 13 inst., the Denver Repub-

*Head notes by HELM, Ch. J.
C. L. R. A.

lian, a newspaper published in the City of Denver, contained the following articles pertaining to said cause and the action of this court and judge thereof in said matters, to wit:

"STUART WAS THE TOOL.

"The District-Court Judge Released Johnny Wyatt on Bail—Stretching Power of a Court—A Fanciful Affidavit Finds a Willing Judge Who Steps Outside of a Precedent and Legal Warrant and Nullifies the Power to Punish for Contempt of Court—The Proceedings Continued in Judge Stuart's Court until Monday, but Some New Moves May Be Made To-Day.

"Johnny Wyatt swore to a gauzy fiction. Judge Stuart did a thing unprecedented in legal annals. He released the prisoner on bail on a habeas corpus proceeding, and nullified a court's power to punish contempt. It was not Judge Stone who granted the application for J. J. Wyatt's release from jail on bail. Wyatt led the Republican to believe Thursday night that it was Judge Stone. He was released from jail on the order of Judge Thomas B. Stuart, who allowed bail to be accepted. To secure his release Wyatt made oath that he was detained without due warrant or process of law, when he knew it was false. To bring about a hearing in a habeas corpus proceeding the court orders the body of the prisoner to be brought before him, and the writ is returnable at once. If the court is not prepared at that time to hear argument in the case he sets the time, and remands the prisoner. That was the way Johnny got out of jail on Thursday night. Through a continuance of Judge Stuart's unwarranted proceeding, Wyatt is at liberty still, and will be, if Stuart can have his way, until Monday. Judge Stuart postponed a hearing in the matter yesterday until Monday, and he knows he will have nothing more to do in the case. The same procedure could have been taken yesterday by the counsel of Wyatt, and the supreme court could have been appealed to just as quickly; but it needed the unwarranted interference of a district-court judge who would step outside of a legal precedent to keep precious Johnny out of jail for two or three days. [Here follows the publication of an alleged interview with Judge Stone.]

"HOW JOHNNY GOT OUT.

"Judge Stuart was sought at his residence at 9 o'clock Thursday night by Wyatt's attorneys, who had a petition already prepared for a writ of habeas corpus. The petition was made out in Wolcott & Vaile's law office several days ago, but Messrs. Riddell and Ensley had to secure a copy of the warrant for commitment before they could present it to a judge. It is a voluminous petition, and reviews the whole proceedings in substance. It is sworn to and signed by Wyatt. Upon oath he claimed that he was "unlawfully and illegally deprived of his liberty." In the matter of application for the writ of habeas corpus, Wyatt made affidavit to the court (Judge Stuart) that he was unlawfully imprisoned, detained, confined and restrained of his liberty by Sheriff Weber; that he had been and was advised by counsel, H. Riddell and George W. Ensley, that his im-

prisonment, detention and confinement was illegal."

"THEIR MODEST REQUEST.

"After setting forth the allegations, Wyatt's attorneys asked for a writ of habeas corpus, directed to the sheriff, commanding him to have the body of Wyatt before the court (Stuart) to do and receive what should then be considered proper by the court concerning him, together with the time and cause of his detention, and that he be restored to his liberty. Judge Stuart read the petition, and shortly after ten o'clock Thursday night issued the following writ, which gave Wyatt his liberty on bail until the case could be heard: "To the Clerk and Sheriff: Let writ of habeas corpus issue upon the foregoing petition, returnable on Friday, July 12, 1889, at 10 o'clock A. M., at the court-house in Denver. In the mean time the prisoner may be admitted to bail upon giving bonds in the penal sum of \$1,000, conditioned that the prisoner, John J. Wyatt, shall appear at the hour above mentioned, and abide the order of the court, said bond to be approved by the sheriff."

"IN STUART'S COURT.

"When the above order was secured Thursday night Wyatt was released by the acting sheriff until 10 o'clock yesterday morning, when the writ was returnable. Wyatt and his legal advisers, Messrs. Riddell and Ensley, appeared before Judge Stuart for a hearing of the habeas corpus proceedings. The case is growing to such gigantic dimensions that J. F. Vaile, the junior member of the law firm of Wolcott & Vaile, for which concerns Mr. Ensley is hired to do the dirty work, has also gone into the case. He was present at the time. The prosecution was not aware of the case coming up when it did, and was not prepared to argue it. Assistant District Attorney Abbott told Judge Stuart that he wanted to be heard in the matter, and would have to postpone it. The court replied that there would be no snap judgment in the case. Then the hearing was postponed until 10 o'clock Monday morning. In the mean time Judge Stuart permitted Wyatt to be out on bail. The bond is in the sum of \$1,000, and George H. Graham and William Vaile are on it as sureties. Among lawyers and authorities Judge Stuart is receiving severe criticism for allowing Wyatt to be out on bail, for a habeas corpus is a proceeding requiring the sheriff to take his prisoner from jail before the court that issues it, and then show cause to the jury why he (the sheriff) deprives such prisoner of his liberty. This was not the rule in the Wyatt case, for he was not taken from jail, as he had already been liberated by a bond."

"WITHOUT AUTHORITY—BACK TO JAIL, JOHNNY."

[Under the above head-lines alleged interviews with various persons are published, all denunciatory of the action of Judge Stuart in the premises.]

"A JUDICIAL OUTRAGE.

"Judge Thomas B. Stuart of the district court dug his official grave both wide and deep

when he issued a writ of habeas corpus on Thursday night for the liberation of Deputy Secretary of State Wyatt from the jail of Arapahoe County. He had no more legal authority to do this than he would have had to issue a writ of habeas corpus for the liberation of the Cronin murderers from the jail of Cook County, Illinois. But he was not satisfied with issuing a writ; he went further, and directed that a bail-bond in the penal sum of \$1,000 should be taken, subject to the approval of the sheriff of Arapahoe County. As we showed yesterday morning, a writ of habeas corpus cannot be properly obtained in a contempt case in Colorado. Section 860 of the Code of Civil Procedure reads as follows: "The judgment and orders of the court or judge, made in cases of contempt, shall be final and conclusive. The punishment shall be by fine or imprisonment, but no fine shall exceed the sum of \$5,000." If Judge Stuart did not know of the existence of this statutory provision, and it is only charitable to presume that he did not, he was not properly informed regarding his powers and duties, and he should not have acted in ignorance. If he did know of its existence, he showed very conclusively that he is wholly unfit for a place on the bench. . . . Aside from the purely legal aspect of this case, Judge Stuart has left himself open to the severest condemnation for his course. Why should he have acted in the night on a case that might well have waited till morning? Mr. Wyatt was not suffering very seriously in jail. He was favored with the "parlor ward" in the jail through the partiality of the gang-ruled sheriff's office, and there could have been no injustice in letting him pay the penalty he had justly incurred by his outrageous refusal to let the grand jury see how much of the State's furniture had been stolen from the assembly building. No wonder the people lose faith in the administration of justice when courts and judges can be found ready to stretch their authority until it cracks in efforts to shield culprits from deserved punishment. No wonder the natural sense of justice of men often prompts them to take the law into their own hands for the punishment of criminals, when observation convinces them that the courts cannot be depended upon to insure the administration of justice. Judge Stuart knew, as every citizen of the State knew, that Mr. Wyatt was properly sent to jail by Judge Stone for a most flagrant case of contempt of court, and it was his business to know that the Civil Code absolutely forbade his interference in the case, even if his own sense of judicial propriety was not sufficient to keep him from meddling. Nor can he hope to escape the suspicion that the supposed political pull of the gang of which Johnny Wyatt is such a prominent member had some weight in procuring this writ. Senator Wolcott, George Graham and all the other members of the gang are and have been working like beavers to prevent the infliction of any punishment upon the defendant for his offense, while the people are equally unanimous in their desire to see justice done. Whether wittingly or unwittingly, Judge Stuart appears to have arrayed himself with the gang and against the people in this matter. Judge Stone has a duty to perform. He can-

not afford to let this matter rest, and he should take summary action to the fullest extent of his jurisdiction to send Mr. Wyatt back to jail this morning. District Attorney Stevens declared last evening that he should move, as soon as the criminal court convenes to-day, for the return of the culprit to prison, and we shall see if he has the courage to do his whole duty in spite of the gang. When Johnny Wyatt was liberated from jail at a late hour on Thursday night, he gave the press to understand that Judge Stone had let him out. This was not the case. Judge Stone knew nothing about the jail delivery effected by Judge Stuart till he read of it in the papers yesterday morning, and he is justly incensed at Judge Stuart's unwarranted and unlawful action. There can be no punishment for contempt of court if judges of equal jurisdiction assume to reverse each other's action in such cases. Now let Judge Stone show that his court cannot be trifled with in this outrageous way. Contempt of court is a serious offense, and judges should be careful not to provoke it.

"Affiant further states that thereafter, and on Sunday, the 14th day of July, 1889, the said The Denver Republican contained certain other articles and comments relating to said court, the same being as follows, to wit:

"WAS WYATT IN JAIL?

"Belief that the Stubborn Deputy Was Never Locked Up—Excellent Authority for the Statement that Judge Stuart Laboriously Freed a Free Man—His Honor Appoints a Committee to Ascertain Whether his Action was Foolish or Not—Judge Stone Urged to Resent the Indignity Heaped Upon Him."

[Then follows a lengthy article, severely censuring Judge Stuart's action in the Wyatt case, which is omitted.]

"NOTHING DONE YESTERDAY.

"Judge Stone and the District Attorney Leave Johnny Alone.

"Johnny Wyatt was not sent to jail yesterday, as anticipated. The district attorney did not issue a warrant for commitment as he said he would. Wyatt now laughs at law with impunity. Friday night the district attorney stated that Judge Stuart had exceeded his jurisdiction by permitting any prisoner held for contempt out on bail. As the court acted without authority, Wyatt claimed the prosecution had no legal right to be anywhere except in the county bastille. With this view, which is supported by the bar generally, the district attorney decided that he would issue another warrant of commitment for Wyatt yesterday morning. He didn't do it when the morning came around."

"JUDGE STUART NOT HAPPY.

"When Judge Stuart perused the Republican yesterday morning he was evidently much put out, for the first thing he did at the convocation of court was to issue an order appointing Joel F. Vaile and Lafe Pence, two attorneys, as a committee to examine into the matters relative to the charges made against him.

... If the Republican was guilty of contempt yesterday morning, it is still more in contempt this morning, for we not only do not take back a word we have already said in this matter, but repeat it all with emphasis. Judge Stuart committed a gross outrage when he let Wyatt out on bail, and he had neither authority nor excuse of a creditable kind for interfering in this case at all. His associates, Judge Allen and Judge Lindell, refused positively to issue the writ, and the attorneys of Wyatt did not deem it advisable to go near Judge Decker at all. This question is pretty well understood by the people, and we wish Judge Stuart joy of all the good he may get out of his appointment of a commission to investigate either himself or the Republican.'

"And affiant says that by the following statement in said last-named article contained, to wit: 'His associates, Judge Allen and Judge Liddell, refused positively to issue the writ,' it was falsely implied that said judges had considered the question whether the writ should or should not be issued, and had thereupon refused it, when in fact the petition of affiant had never been submitted to or considered by either of said judges. That upon said morning of July 14th said newspaper also contained a certain cartoon or illustration, intended and understood to apply to said cause and to this affiant, and to one of the judges of this court, the same being as follows, to wit: [At this point is inserted a large cartoon taken from The Denver Republican of July 14, 1889, in which, under the head-lines, "The Tug of War—The People against the Gang," a rope-pulling contest is pictured, with Wyatt as the object of contention. Citizens are represented upon the one side as tugging at a rope around Wyatt's body, for the purpose of pulling him into jail, while upon the other, Judge Stuart and others are represented as pulling him in the opposite direction.] And this affiant, on information and belief, alleges that one Nathaniel P. Hill, as the president and the owner of the majority of the capital stock of the Republican Publishing Company, and one Kemp G. Cooper, as the manager of said newspaper, and one William Stapleton, as the editor thereof, are each and all responsible for the publication of said several articles, and have permitted, authorized, inserted and caused the publication thereof, and that said newspapers containing said several articles were, under the procurement and cognizance of the said Nathaniel P. Hill, Kemp G. Cooper and William Stapleton, extensively and generally circulated in the City of Denver, and throughout the State of Colorado, on the dates of their publication as above set forth. That said articles and cartoons so published reflect upon the integrity and good faith of this court, and were designed, intended and calculated to hold up to public opprobrium one of the judges thereof. That the effect of the said publications was and is to prejudice the public with respect to the merits of a cause now pending for a hearing in this court, and yet undetermined, and that the same tend to corrupt the administration of justice. That said publications accuse the affiant of swearing falsely in regard to said cause, and are calculated to prevent a fair trial and determination of the same. And affiant says that

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he is advised by counsel that in the permitting, authorizing and making of said publication as hereinbefore set out, the said Nathaniel P. Hill, Kemp G. Cooper and William Stapleton have been guilty of gross contempt of this court. And upon the facts here presented affiant asks that an order be made by this court requiring said Nathaniel P. Hill, Kemp G. Cooper and William Stapleton to appear in this court at a time in said order to be stated, and show cause, if any they can, why they should not be punished for contempt." (Here follows an order upon respondents to show cause why they should not be punished as for a contempt for said publications.)

"ANSWER OF RESPONDENTS.

"State of Colorado, County of Arapahoe—ss.:

In the District Court in and for said County of Arapahoe.

The People of the State of Colorado, *ex rel.*

John J. Wyatt, Plaintiffs,

v.

Nathaniel P. Hill, Kemp G. Cooper and William Stapleton, Defendants.

"The said respondents, Nathaniel P. Hill, Kemp G. Cooper and William Stapleton, come and represent to this court that having, by an order of this court heretofore, and on the 15th day of July, A. D. 1889, been required to appear before the Honorable T. B. Stuart, one of the judges of said court, on Wednesday, the 17th day of July, A. D. 1889, at the hour of 10 o'clock A. M., and then and there to show cause, if any they have, why they and each of them shall not be punished for contempt of said court, a copy of which order is hereunto annexed, these respondents say: That from the said order and an affidavit therewith served, purporting to have been subscribed by John J. Wyatt and placed on file of this court, it appears that the alleged contempt consists in the publication of certain articles in the Denver Republican on the 13th and 14th days of July, last aforesaid, and the said respondents protest against the said rule and order above mentioned, and the jurisdiction of this court to commit or proceed upon said affidavit for contempt of court against any of the said respondents for any matters stated in the said affidavit, and respectfully pray that they may be discharged therefrom, and in support thereof allege the following grounds: *First.* That the acts therein complained of are not, nor is either of them, a contempt of said district court. *Second.* That the said district court cannot legally punish for contempt a publication made in a newspaper, and not done in the immediate presence of the court. *Third.* That any such publications out of court, in relation to the court, or of any of its officers, or of any cause pending therein, cannot be legally construed into a contempt of court in law, and the publisher cannot legally be punished therefor. *Fourth.* That these respondents admit that The Denver Republican is published by a corporation legally authorized to do business under the laws of the State of Colorado. *Fifth.* These respondents aver that the said Nathaniel P. Hill is not the president of said corporation, and that the said Nathaniel P. Hill neither incited, authorized nor caused the publication of said articles, nor any of them,

and aver that the first knowledge that the said Nathaniel P. Hill had of said articles, or any of them, was in the reading of the same in said papers after the same had been published. Deny that the said articles, or the said cartoon, or any or either of them, reflect upon the integrity and good faith of said court; and aver that they were not devised, intended or calculated to hold up to public opprobrium one or any of the judges of said court. Deny that the effect of said publications or any of them was or is prejudicial to the merits of any cause then pending before said court, or to prejudice the public in regard thereto, or that the same, or any of them, were intended to obstruct the administration of justice. *Sixth.* These respondents aver that they have not, nor has any of them, been guilty of disorderly, contemptuous or insolent behavior in the presence of said court or in chambers, or towards any referee or arbitrator, tending to interrupt the course of a trial, reference or arbitration or other proceeding. They aver that they have not been guilty of disobedience to any lawful writ, order, rule or process issued by said court, or any judge thereof, in chambers or otherwise; that they have not been guilty of disobedience of any subpoena, or in any manner refused to obey any order of the court, or of any judge thereof; that said respondents nor either of them have rescued any person or property in the custody of any officer, by virtue of any process of said court, or of the judge thereof, nor have they or either of them been guilty of a breach of the peace, or of boisterous conduct, or of violent disturbance in the presence of the court, or in its immediate vicinity, tending to interrupt the course of a trial or judicial proceedings, and that they have not been guilty of any conduct calculated to retard the due administration of justice. *Seventh.* And these respondents further answering say that a fair construction of said articles, or any of them, will not warrant an inference of any imputation or charge against the good faith and integrity of said court, or of any of the judges thereof, and that they nor either of them were so designed. *Eighth.* And said respondents further say and insist that they had, and still have, the right as editors, managers and publishers of said paper, to examine, criticize, comment upon or condemn publicly in said newspaper the proceedings of any and every department of the government of this State, and that they are not responsible for the truth in such publications, nor for the motives with which they were or are made, by summary process for contempt; and that under the Constitution of the State of Colorado, which guarantees to the citizen freedom of speech, and the right to write and publish whatever he will on any subject, these respondents, not being moved by any of the matters charged in said affidavit, as the same are therein stated and set forth, but with the purpose of advancing, if possible, the due administration of the laws in the matters in controversy, published the said articles as they lawfully might. And these respondents further say that no disrespect was intended by said articles to said court, or any judge thereof, and that a fair construction thereof will not warrant an inference to that effect, but that the same were written and published with the

just, proper and legal motives aforesaid, and concerning an act of a judge already performed."

The matter was thereafter heard by the court upon the foregoing affidavit and answer. This hearing resulted in the discharge of the defendant Hill; but the defendants Cooper and Stapleton, plaintiffs in error, were adjudged guilty of contempt of court, and sentenced to pay a fine of \$300 each therefor. To review the judgment of the district court plaintiffs in error bring the proceeding before this court by writ of error.

Mr. L. B. France, for plaintiffs in error:

The Statute under which relator proceeded (Laws 1887, p. 188 *et seq.*) is penal and nothing may be taken by intentment. It is incumbent upon the party complaining to show a case in point of jurisdiction within the law.

Batchelder v. Moore, 42 Cal. 418; *Re Buckley*, 69 Cal. 1; *Sedgwick, Stat. and Const. Law*, p. 299; *Roe v. San Francisco City & Co.* 60 Cal. 93.

Statutes such as ours, which seem broad enough to cover any possible emergency, have been treated by courts of eminent learning as limitations upon the common-law powers of courts in questions of contempt.

Stuart v. People, 4 Ill. 405, 406; *People v. Wilson*, 64 Ill. 203; *Storey v. People*, 79 Ill. 50; *Galland v. Galland*, 44 Cal. 478; *Dunham v. State*, 6 Iowa, 245; *Ex parte Hickey*, 4 Smedes & M. 751.

Even libelous articles published concerning a judge do not constitute a contempt for which the arbitrary power of the court may be invoked and summary punishment imposed.

People v. Few, 2 Johns. 290; *Dunham v. State* and *Ex parte Hickey*, *supra*.

The district-court judge erred in directing a habeas corpus upon the application of the relator.

This court even could not examine the proceeding of the criminal court upon habeas corpus.

Ex parte Reed, 100 U. S. 23 (25 L. ed. 539); *Ex parte Watkins*, 28 U. S. 3 Pet. 193-203 (7 L. ed. 650, 653).

The judgment of a court of competent jurisdiction upon a matter within that jurisdiction cannot be collaterally impeached. Nevertheless, this is what the judge of the district court undertook when he ordered the issuance of the writ.

Phillips v. Welch, 12 Nev. 164; *Ex parte Kearney*, 20 U. S. 7 Wheat. 38 (5 L. ed. 391); *Ex parte Maulsby*, 13 Md. 625, appendix.

The articles complained of could not have hindered the due administration of justice of which the relator complains because the district court could have pursued but one course if it had gone into an examination upon the return of the writ, to wit, to remand Wyatt to jail.

People v. Cassels, 5 Hill, 167; *Ex parte Kearney*, 20 U. S. 7 Wheat. 42, 43 (5 L. ed. 392); *Re Cohen*, 5 Cal. 494; *Ex parte Perkins*, 18 Cal. 60; *Ex parte McCullough*, 35 Cal. 97; *Ex parte Smith*, 53 Cal. 204; *Ex parte Cohn*, 55 Cal. 193; *Clark v. People*, 1 Ill. 266; *People v. Pirfenbrink*, 96 Ill. 68; *Robb v. McDonald*, 29 Iowa,

330; *State v. Fagin*, 28 La. Ann. 887; *Re Wood*, 30 La. Ann. 672; *Ex parte Mauleby*, 18 Md. 625, appendix; *Re Bissell*, 40 Mich. 63; *Ex parte Adams*, 25 Miss. 888; *Shattuck v. State*, 51 Miss. 50; *Phillips v. Welch*, *supra*; *State v. Towle*, 42 N. H. 540; *Penn v. Messenger*, 1 Yeates, 2; *Williamson's Case*, 26 Pa. 9; *State v. Galloway*, 5 Coldw. 326; *Vilas v. Burton*, 27 Vt. 56; *Keese v. Denver*, 10 Colo. 112; *Com. v. Garrigues*, 28 Pa. 9; *McConnell v. State*, 46 Ind. 298; Code, Laws 1887, § 443, p. 219; *Boyer v. Sweet*, 4 Ill. 120.

Messrs. Wolcott & Vaile, H. Riddle and Samuel W. Jones, Atty-Gen., for defendant in error:

The action of *Judge Stuart* was in all respects correct. It was his duty to issue the writ upon application made therefor.

Gen. Stat. p. 533.

It was within his discretion to admit the petitioner to bail.

Hurd, Habeas Corpus, 824 and citations; *Bronker's Case*, Style, 16; *Rez v. Bethel*, 5 Mod. 22; *State v. White*, T. U. P. Charl. 128.

The publications constituted a gross contempt of court deserving severe punishment: (1) because of their reflections upon the court and the judge thereof in reference to a suit then pending and not yet determined; (2) because of their charging perjury upon the petitioner Wyatt, whose rights were to be determined in the action then pending, and which had not yet been decided.

Hughes v. People, 5 Colo. 436, 445, 451, *et seq.*; *State v. Frew*, 24 W. Va. 416; *People v. Wilson*, 64 Ill. 195, 208; *Territory v. Murray*, 7 Mont. 251; *State v. Morrill*, 16 Ark. 384, 402, 407, 410, 411; *Re Sturoc*, 48 N. H. 428, 432; *Respublica v. Oswald*, 1 U. S. 1 Dall. 819, 325, 326 (1 L. ed. 155, 158, 159); *Bayard v. Passmore*, 3 Yeates, 438; *Com. v. Dandridge*, 2 Va. Cas. 408, 429; 2 Bishop, Cr. L. § 259; *Case of Rakes and Mrs. Read*, 2 Atk. 472; *Felkin v. Herbert*, 10 Jur. N. S. 62; *Rez v. Almon*, Wilmot's Notes, 243, 245, 247, 255, 256, 265; *Onalou's and Whalley's Case*, L. R. 9 Q. B. 219; *Reg. v. Skipworth*, 12 Cox, Cr. Cas. 871.

Hayt, J., delivered the opinion of the court:

The sentence being for contempt, our right to review the action of the court below is challenged in consequence of the following provision of the Statute: "The judgment and orders of the court or judge made in cases of contempt shall be final and conclusive." Section 860, Civil Code 1883.

While we cannot place such a construction upon the language of the Act as would render the Statute meaningless, it would, on the contrary, be absurd to suppose that every order made by a court or judge in cases of contempt would be beyond review and binding, whether the court had jurisdiction or whether it had not.

A brief review of the law as it was prior to the adoption of this provision will aid us in determining its meaning. "We shall never know," said Lord Coke, "the true reason of the interpretation of the statutes, if we know not what the law was before the making of them."

At common law judgments of the superior courts of record in matters of contempt were

final, and not revisable in any other court upon appeal or writ of error, but upon a habeas corpus the defendant was entitled to be discharged, if in commitment under a sentence absolutely void for the want of jurisdiction in the court rendering the same.

In this country, in the absence of statute, it has been decided that no appeal or writ of error would lie to a judgment for contempt; but it has been held that the remedy by prohibition might be resorted to in case the court was about to exceed its jurisdiction, and also that a judgment in contempt, rendered without jurisdiction, might be set aside upon certiorari; or, if the defendant was in custody upon such judgment, he might be discharged upon habeas corpus. And by statute in some States the additional remedies by appeal and error have been given. The tendency of the American courts has, however, been to limit the investigation, even upon appeal, to errors of law only, and generally to the jurisdiction of the court. Rap. Contempt, § 149.

Thus it will be seen that contempt orders and judgments are not ordinarily revisable for mere error, but may be set aside for want of jurisdiction of the court over the subject matter, over the defendant, or to render the particular judgment or order complained of. Rap. Contempt, § 141 *et seq.*; *Ex parte Reed*, 100 U. S. 13-23 [25 L. ed. 538, 539]; Hayne, New Trials, §§ 98-198; 2 Bishop, Cr. L. § 268; *Vilas v. Burton*, 27 Vt. 56; *People v. Kelly*, 24 N. Y. 74; *Ex parte Adams*, 25 Miss. 888; *Phillips v. Welch*, 12 Nev. 158; *State v. Galloway*, 5 Coldw. (Tenn.) 337.

Bishop, in the section cited *supra*, says: "It is not within the plan of this volume to discuss questions of practice; yet it may be observed that the very nature of a contempt compels the court against which it is committed to proceed against it, and, if the court has jurisdiction, precludes any other superior tribunal from taking cognizance of it, whether directly or on appeal or otherwise. Under peculiar provisions of law, however, in some of the States, and the pressure of modern opinions, the superior courts do in a measure, not fully, correct errors of the inferior ones in this matter."

In *Vilas v. Burton*, *supra*, it is said: "The English courts have always held that proceedings for contempt in one court, where the court has jurisdiction of the subject matter and of the parties, are not revisable in any other court. . . . And no cases are brought to light where such proceedings in the superior court have ordinarily been held revisable, unless where the proceedings were so irregular as to be against law, and to give the court no proper jurisdiction."

Upon an application to discharge a party committed for contempt upon habeas corpus, the Supreme Court of New York in *People v. Kelly*, *supra*, said: "The question whether the alleged offender really committed the act charged will be conclusively determined by the order or judgment of the court; and so with equivocal acts, which may be culpable or innocent, according to the circumstances; but where the act is necessarily innocent or justifiable, it would be preposterous to hold it a cause of imprisonment."

In *Phillips v. Welch*, *supra*, it was held that

the review must be limited to the question of jurisdiction, and that no error of law or fact not jurisdictional in character could be considered; and this is in harmony with the current of decisions in California. In a few cases appeals from contempt judgments have been allowed in that State, but even upon appeal the inquiry has been confined to the question of the jurisdiction of the court entering the judgment. While decisions may be found sanctioning the extension of the review beyond the question of jurisdiction, such decisions have usually been based upon statutory provisions authorizing the extension, and our conclusion, from the authorities, is that the code provision quoted has no reference to the mode of review, whether by writ of error or otherwise; but that it must be construed as a limitation upon the authority of this court in contempt proceedings to extend its inquiry beyond the question of the jurisdiction of the court below. Hayne, New Trials, *supra*; *Ex parte Perkins*, 18 Cal. 60; *People v. O'Neil*, 47 Cal. 109; *Roe v. San Francisco City & County Superior Court*, 60 Cal. 98.

When an affidavit is presented as the basis of a proceeding for contempt, the court must, in the first instance, examine the same, and if the facts presented do not show that a contempt has been committed, the court will be without jurisdiction to proceed; but if the facts are sufficient the court may take jurisdiction, and its subsequent orders will not be reviewed for mere error. We are not to be understood, however, as saying that a court, after once acquiring jurisdiction, might not so far depart from the forms prescribed by law in the subsequent proceedings as to exceed its jurisdiction, and thus vitiate its judgment. The practice of bringing up for the consideration of this court contempt proceedings by writ of error from the final judgment has been followed for many years, and we are not now disposed to consider favorably objections thereto. In some instances the facts necessary for the information of the court, to enable it to determine the question of jurisdiction in reference to a particular cause, do not appear upon the record proper, and in such cases the writ of error is peculiarly appropriate. Aside from this, there is no authority given this court by statute to require bond pending a determination of cases upon certiorari, while, to enable the defendant to sue out a writ of habeas corpus, he must be actually in custody at the time. The remedy by writ of error, however, as we have it, has been found ample to meet all cases, as it furnishes a remedy when either of the other writs might have been resorted to. These are additional reasons in favor of this mode of review, as in this State no appeal will lie from judgments in contempt cases. But the review upon the writ cannot be extended further than an inquiry into the jurisdiction of the lower court. *People v. Lake County Dist. Court*, 6 Colo. 534; *Teller v. People*, 7 Colo. 451; *People v. O'Neil*, 47 Cal. 109; *Romeyn v. Caplin*, 17 Mich. 455.

Was the district court justified, under the law, in holding the acts set forth in the affidavit, upon which the contempt proceedings were founded in the present instance, sufficient to constitute a contempt of court? Contempts are of two kinds: direct, *i. e.*, such as are commit-

ted in the immediate view and presence of the court or judge at chambers; consequential, or, as they are now usually termed, constructive, contempts, *i. e.*, such as are committed outside of the view and presence of the court or judge at chambers. The acts here complained of belong to the latter class, if to either. They consist of the publication in a newspaper, of general circulation in the place where the court was being held, of such articles in reference to a cause pending as were calculated to interfere with the due administration of justice, as it is said. It is admitted that by the common law such acts were held to constitute a contempt of court; but respondents challenge the authority of the court, under our Constitution and statutes, to punish, as for a contempt, any publication not made in the presence of the court, whatever be the language used. In support of this position the following cases are cited: *Stuart v. People*, 4 Ill. 405, 406; *People v. Wilson*, 64 Ill. 208; *Galland v. Galland*, 44 Cal. 478; *Dunham v. State*, 6 Iowa, 245; *Ex parte Hickey*, 4 Smedes & M. 751; *Storey v. People*, 79 Ill. 50.

The first four of these cases are cited for the purpose only of showing that statutes such as ours must be treated as a limitation upon the common-law powers of the court in matters of contempt, and while the opinions are from courts of eminent authority and learning, the doctrine announced is not only contrary to the weight of authority, but the question is *stare decisis* with us.

In the case of *Hughes v. People*, 5 Colo. 445, it was expressly decided that the Statute of this State was not a limitation upon the power of the courts to punish for contempts. This is in accordance with a long line of adjudicated cases, and we see no reason to change the conclusion then reached. The decision in the *Hughes Case* is commented upon and followed in the recent case of *State v. Frew*, 34 W. Va. 416, where the authorities are collated and reviewed.

While the Legislature in this State may increase or diminish the number of judicial districts, the district court itself is created, and its jurisdiction fixed, by the Constitution. By the express letter of that instrument it is given "original jurisdiction of all causes both at law and in equity." Const. art. 6, § 11.

The authority of the legislative department of the government to take away the inherent power of such a court to punish for contempts was doubted in *Ex parte Robinson*, 86 U. S. 19 Wall. 505 [22 L. ed. 205], and expressly denied in the following cases: *State v. Morrill*, 16 Ark. 408; *State v. Frew*, *supra*.

The power of the Legislature over the subject is not, however, here in question, as we can find nothing in the statutes which can be considered an attempt to take away such authority from the district courts of this State.

The other two cases cited by counsel for respondents, viz.: *Ex parte Hickey* and *Storey v. People*, deny the authority of the courts to punish, as for a contempt, the writers or publishers of newspapers responsible for articles appearing in the columns of such papers, on account of the constitutional provision in their respective States guaranteeing the freedom of speech and of the press. Hence, it is argued

in this case that the judgment of the court below is contrary to both the spirit and letter of section 10, article 2, of our State Constitution, "that no law shall be passed impairing the freedom of speech; that every person shall be free to speak, write or publish whatever he will on any subject, being responsible for all the abuse of that liberty; and that in all suits and prosecutions for libel the truth thereof may be given in evidence, and the jury, under the direction of the court, shall determine the law and the fact."

In the case of *Ex parte Hickey, supra*, the alleged contempt consisted in the publication of a certain newspaper article severely censuring the judge of that court for admitting a defendant charged with murder to bail. It was in reference to an act fully performed, although the trial of the defendant upon the indictment had not yet been called. The publisher, having been sentenced as for a contempt of court, and committed to jail, obtained a writ of habeas corpus from one of the judges of the supreme court. The judge, in discharging the petitioner from custody, used this language: "Our Constitution has declared that 'every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.' Article 1, § 6. The reflections of the petitioner upon the circuit judge of Warren County, as set forth in the petition complained of, when judged by the practice and assumptions of the English and some of the American courts, constitute an undoubted contempt of an aggravated character, but when passed through the crucible of our State Constitution, instead of a contempt of court, they become a mere libel on the functionary, and subject only to the punishment prescribed by law for the latter offense." This was the opinion of a single judge.

Afterwards, however, in another case in the same State, the supreme court upon appeal held: "The right of punishing contempts by summary conviction is a necessary attribute of judicial power, inherent in all courts of justice from the very nature of their organization, and essential to their existence and protection, and to the due administration of justice. It is a trust given to the courts, not for themselves, but for the people, whose laws they enforce, and whose authority they exercise; and each court has the power for itself finally to adjudicate and punish contempts without interference from any other. The right to punish for contempts extends not only to acts which directly and openly insult or resist the powers of the court or the persons of the judges, but to indirect and constructive contempts, which obstruct the process and degrade the authority of the court." *Watson v. Williams*, 86 Miss. 831.

In the case of *Storey v. People, supra*, the language complained of was in reference to acts of the grand jury fully completed, as was expressly declared in the opinion of the court: "We do not understand the articles as having a tendency directly to impede, embarrass or obstruct the grand jury in the discharge of any of its duties remaining to be discharged after the publications were made. No allusion is made to any matter upon which the members were thereafter to act, and there could therefore, of necessity, be no attempt to interfere

with the exercise of their free and unbiased judgments as to such matters." The court, however, said, in speaking of a constitutional provision similar to the one we have in this State: "This language, plain and explicit as it is, cannot be held to have no application to courts, or those by whom they are conducted. The judiciary is elective, and the jurors, although appointed, are, in general, appointed by a board whose members are elected by popular vote. There is therefore the same responsibility, in theory, in the judicial department that exists in the legislative and executive departments to the people, for the diligent and faithful discharge of all duties enjoined on it; and the same necessity exists for public information with regard to the conduct and character of those intrusted to discharge those duties, in order that the elective franchise shall be intelligibly exercised, as obtains in regard to the other departments of the government. When it is conceded that the guaranty of this clause of the Constitution extends to words spoken or published in regard to judicial conduct and character, it would seem necessarily to follow that the defendant has the right to make a defense which can only be properly tried by a jury, and which the judge of a court, especially if he is himself the subject of the publication, is unfitted to try."

Prior to and at the time of the adoption of these constitutional provisions, courts had at common law the undoubted authority to punish summarily, without a trial by jury, both constructive and direct contempt. And it is difficult to see how the provisions in reference to jury trials in suits and prosecutions for libel can be so construed as to either extend this right to contempt proceedings, or to support the argument that, as jury trials are not allowed in matters of contempt, therefore the Constitution takes away the power to punish as for a contempt for matters spoken, written or published beyond the immediate view or presence of the court, although presenting no barrier to summary punishment for direct contempts. No court has ever yet held that the right of trial by jury extends to contempt proceedings, and to so decide would defeat the very object of the power. So to hold would place it in the power of a vicious person so to conduct himself as to prevent any kind of a trial. As we have seen, the power to punish summarily for contempts is essential to the very existence of the courts (Cooley, Const. Lim. p. 390, note 5); and if the framers of our Constitution desired either to take away such power, or to abridge its exercise, we have no doubt that such intention would have been expressed in language that could not have been misunderstood. Similar constitutional provisions in reference to freedom of speech and of the press exist in almost every State of the Union, and we know of no other State where the court of last resort has arrived at a result similar to that reached by the Supreme Court of Illinois in the case of *Storey v. People, supra*. On the other hand, in several of the States a different conclusion has been reached, and the authority of the courts to punish summarily, as for a contempt, parties publishing articles in reference to causes pending, when such publications tend to corrupt or embarrass

the administration of justice, has been expressly upheld, notwithstanding the existence of such constitutional provisions. *State v. Morrill, supra; Myers v. State*, 21 Ohio L. J. 404; *State v. Frew, supra; Re Sturco*, 48 N. H. 428; 2 Bishop, Cr. L. § 259.

In *State v. Morrill, supra*, the court said: "The counsel for the defense supposed that the power of the courts to punish, as for contempt, the publication of libels upon their proceedings, was cut off by the seventh section of the Bill of Rights, which is in these words: 'That printing-presses shall be free to every person, and no law shall ever be made to restrain the rights thereof. The free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty.' The last clause of the section, 'being responsible for the abuse of that liberty,' is an answer to the argument of the learned counsel. It is a well-known fact that the bench and the bar have been, in this and all other countries where the law has existed as a distinct profession, the ablest and most zealous advocates of liberal institutions, the freedom of conscience, and the liberty of the press; and none have guarded more watchfully the encroachments of power on the one hand, or deprecated more earnestly tendencies to lawless anarchy and licentiousness on the other. The freedom of the press, therefore, has nothing to fear from the bench in this State. No attempt has ever been made, and we may venture to say never will be, to interfere with its legitimate province on the part of the judiciary by the exercise of the power to punish contempts. The object of the clause in the Bill of Rights above quoted is known to every well-informed man. Although the press is now almost as free in England as it is in this country, yet the time was, in bygone ages, when the ministers of the Crown possessed the power to lay their hand upon it and hush its voice when deemed necessary to subserve political purposes. A similar clause has been inserted in all the American Constitutions to guard the press against the trammels of political power, and secure to the whole people a full and free discussion of public affairs."

The latest decision that we have been able to find upon the subject is from the Supreme Court of the State of Ohio in the case of *Myers v. State, supra* (1889). The facts in the case were in some respects similar to those in the case at bar. The plaintiff in error, Myers, a newspaper correspondent, having been indicted by the grand jury, wrote and caused to be published in a Cincinnati daily paper, having a general circulation in the place where the court was being held, and while the case was still pending, an article charging that the grand jury finding the indictment was called by the presiding judge "for a special partisan purpose," and "never honestly drawn from the box;" that the grand jury was packed by the presiding judge, co-operating with the clerk, and that the writer had been by this method indicted "by rascally and infamous methods;" and the court said: "The article was a libel upon the presiding judge, but that alone did not form the basis of the information. The

intention of the publication was to insult and intimidate the judge, degrade the court, destroy its power and influence, and thus to bring it into contempt; to inflame the prejudices of the people against it; to lead them to believe that the trial then being conducted was a farce and an outrage, which had its foundation in fraud and wrong on the part of the judge and other officers of the court, and, if communicated to the jury, to prejudice their minds and thus prevent a fair and impartial trial. Besides, the tendency was, when read by the judge, to produce irritation, and, to a greater or less extent, render him less capable of exercising a clear and impartial judgment. It therefore tended directly to obstruct the administration of justice in reference to the case on trial, and its publication was a contempt of court. The fact that, before its publication, a professional opinion was given that the publication would not be a contempt, does not change the essential character of the defamatory article, nor relieve the respondent of responsibility for its origin and dissemination."

In *State v. Frew, supra* (1884), the defendants were punished as for a contempt of court for the publication of a libel upon the court and judges, the publication having been made in the city where the supreme court was sitting, and in reference to a cause then pending and undetermined in said court. The court, after a careful review and analysis of the authorities, said: "In every aspect of the case the publication is clearly a contempt of this court. Can such a publication be palliated or excused? Far be it from us to take away the liberty of the press, or in the slightest degree to interfere with its rights. The good of society and of government demands that the largest liberty should be accorded the press, which is a power and an engine of great good; but the press itself will not for a moment tolerate such licentiousness as is exhibited in said editorial. The press is interested in the purity of the courts, and, if it had no respect for the judges on the bench, it should respect the court; for when the judges now on the bench shall be remembered only in the decisions they have rendered the court will still remain. It never dies. It is the people's court, and the press, as the champion of the people's rights, is interested in preserving the respect due to the court."

At the time these decisions were rendered both Ohio and West Virginia had constitutional provisions similar to the provision of the Colorado Constitution quoted, and in the Ohio case it does not appear that the provision was ever considered by court or counsel as forming any barrier to the punishment as for a contempt, while in the West Virginia case it was expressly determined that the conviction and punishment were in accordance with the Constitution of that State.

Judge Cooley, in speaking of these constitutional provisions, says: "We understand liberty of speech and of the press to imply not only liberty to publish, but complete immunity from legal censure and punishment for the publication, so long as it is not harmful in its character, when tested by such standards as the law affords. For these standards we must look to the common-law rules which were en-

forced when the constitutional guaranties were established, and in reference to which they have been adopted." Cooley, Const. Lim. 422.

Turning to Blackstone as an authority as to what acts constituted constructive contempt at common law, we find among those enumerated the following: "By speaking or writing contemptuously of the court or judges, acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect which, when once courts of justice are deprived of their authority (so necessary for the good order of the kingdom), is entirely lost among the people." 4 Bl. Com. 285.

We quote this paragraph from Blackstone only for the purpose of showing the extent to which the summary punishment for contempt may be extended without infringing upon the constitutional guaranties of freedom of speech and of the press as defined by *Judge Cooley*; but it must not for this reason be understood that we claim the power of the courts to punish as for contempts is now as indefinitely broad as stated by Blackstone. However, upon principle and authority, we must hold that at common law superior courts of record have the inherent power summarily to convict and punish as for a contempt of court those responsible for articles published in reference to a cause pending, when such articles are calculated to interfere with the due administration of justice; and that neither the Statute of this State nor the constitutional provisions quoted present any barrier to the exercise of such powers by the district courts of the State, but that such power is inherent in those courts.

In the articles set forth in the affidavit in the case upon which the contempt proceedings are based, it is charged that the petitioner, "Johnny Wyatt, swore to a gauzy fiction." The judge of the court in issuing the writ of habeas corpus is referred to as "the tool," and charged with stepping outside of legal precedent "to keep precious Johnny out of jail for two or three days;" and in various subdivisions of the same article such phrases as "Back to jail, Johnny," "A judicial outrage," etc., are made conspicuous, and the judge is threatened with political punishment for a preliminary judicial act taken by him in the cause, in this language: "*Judge Thomas B. Stuart* of the district court dug his official grave both wide and deep when he issued a writ of habeas corpus on Thursday night for the liberation of Deputy Secretary of State Wyatt from the jail of Arapahoe County." And it is also said: "Nor can he hope to escape the suspicion that the supposed political pull of the gang, of which Deputy Wyatt is such a prominent member, had some weight in procuring this writ." And a demand is made upon *Judge Stone* of the criminal court to "take summary action to the fullest extent of his jurisdiction to send Mr. Wyatt back to jail." In the issue of July 14 the following appears: "If the Republican was guilty of contempt yesterday morning, it is still more in contempt this morning, for we not only do not take back a word we have already said in this matter, but repeat it all with emphasis. *Judge Stuart* committed

a gross outrage when he let Wyatt out on bail, and he had neither authority nor excuse of a creditable kind for interfering in the case at all." It is further charged that *Judge Stuart's* associates, "*Judge Allen* and *Judge Liddell*, refused positively to issue the writ," the falsity of which charge is set forth in Wyatt's petition, and no issue taken thereon by respondents in their answer. And not less objectionable than these articles is the cartoon entitled "The Tug of War—the People against the Gang." There can be no doubt that the tendency of the articles and cartoon exhibited in this affidavit, responsibility for which plaintiffs in error admit by their answer, was to prejudice the public as to the merits of a cause then pending and undisposed of; to degrade the court and judge before whom the same was pending; and to impede, embarrass and defeat the administration of justice in reference thereto. In these articles the petitioner, Wyatt, is charged with perjury; grave reflections are cast upon the court and upon the judge thereof, and the whole tendency of the language employed was to inflame the popular mind against both the petitioner and the judge, for the evident purpose of coercing the latter into sending the former "back to jail."

Parties have a constitutional right to have their causes tried fairly in court, by an impartial tribunal, uninfluenced by newspaper dictation or popular clamor. What would become of this right if the press may use language in reference to a pending cause calculated to intimidate or unduly influence and control judicial action? Days, and sometimes weeks, are spent in the endeavor to secure an impartial jury for the trial of a case; and, when selected, it is incumbent upon the court to exercise the utmost care in excluding evidence of matters foreign to the issues involved, so that the minds of the jurors may not perchance be unduly biased or prejudiced in reference either to the litigants or to the matters upon trial. But if an editor, a litigant, or those in sympathy with him, should be permitted, through the medium of the press, by promises or threats, invective, sarcasm or denunciation, to influence the result of a trial, all the care taken in the selection of the jury, as well as the precaution used to confine their attention at the trial solely to the issues involved, will have been expended in vain.

We would not for a moment sanction any contraction of the freedom of the press. Universal experience has shown that such freedom is necessary to the perpetuation of our system of government in its integrity; but this freedom does not license unrestrained scandal. By a subsequent clause of the same sentence of our State Constitution in which the liberty is guaranteed, the responsibility for its abuse is fixed. With us the judiciary is elective, and every citizen may fully and freely discuss the fitness or unfitness of all candidates for the positions to which they aspire; criticise freely all decisions rendered, and by legitimate argument establish their soundness or unsoundness; comment on the fidelity or infidelity with which judicial officers discharge their duties,—but the right to attempt, by wanton defamation, to prejudice the rights of litigants in a pending cause, degrade the tribunal, and impede, embarrass or corrupt that due administration of

justice which is so essential to good government, cannot be sanctioned. 2 Bishop, Cr. L. 7th ed. § 259.

It was said in argument by counsel for respondents "that by the common law every judge was regarded as the direct representative of the sovereign, and upon this fiction the power to punish for contempt was based." With us the people have been substituted for the crown. The courts are created by the people, and are dependent upon the popular will for a continuation of the powers granted. They are the people's courts, and contemptuous conduct towards the judges in the discharge of their official duties, tending to defeat the due administration of justice, is more than an offense against the person of the judge,—it is an offense against the people's court, the dignity of which the judge should protect, however willing he may be to forego the private injury.

It has been urged in argument that Judge Stuart had no jurisdiction in the habeas corpus proceedings to release Wyatt from arrest under the warrant of commitment from the criminal court. We deem it sufficient for the present to say that, the proceedings in the habeas corpus case not having been made a part of this record, we have no means of determining, except by legal presumption, the question of such jurisdiction. The record before us does not disclose for what offense Wyatt had been imprisoned by the criminal court; hence we express no opinion upon the action of Judge Stuart in the premises. By statute, the district courts of this State, and the judges thereof, are expressly given general jurisdiction in habeas corpus cases, *i. e.*, the power to issue the writ is given generally; and if there were facts set forth in the petition upon which Judge Stuart issued the writ, affirmatively showing that he had no jurisdiction in the particular case, and respondents desired to take advantage of this, they should have incorporated such petition in this record. This has not been done.

In the absence of such showing, the jurisdiction of the district judge to issue the writ in the particular case must be presumed. Gen. Stat. § 1609: *People v. Lake Co. Dist. Court, supra; Atchison, T. & S. F. Co. v. Nicholls*, 8 Colo. 188.

The judgment is accordingly affirmed.

Elliott, J., concurring:

I concur in the opinion of the court upon the main question involved in this case, and in the conclusion. Counsel for respondents has chosen to rest the defense in this proceeding mainly upon the ground that the publishers of newspapers have a constitutional right to assail the integrity, and impugn the motives, of a judge in relation to his judicial action, even in cases pending and undisposed of, without being amenable to contempt proceedings therefor. That such a doctrine is opposed to sound reason as well as the great weight of authority is clearly shown in the opinion of *Mr. Justice Hayt*, filed herein.

The idea may be conveyed by the opinion of the court, though not necessarily so intended, that a district court or a district judge has authority by habeas corpus to release prisoners under commitment for contempt by another court or judge of concurrent jurisdiction. I

am unwilling that such a rule of practice should be sanctioned in our jurisprudence, even by inference, as such a rule, if followed, would lead to judicial anarchy.

It was assumed in the argument of this case without question, and by fair implication the record may be said to show, that the relator was under commitment by the criminal court for contempt against its authority in a matter wherein the criminal court had jurisdiction. This was repeatedly asserted in the publications complained of, which assertions were incorporated in the record as a part of the affidavit of the relator, and are not controverted in any way; moreover, the record in this case nowhere discloses that the criminal court had acted without jurisdiction in the matter of relator's commitment; and hence its jurisdiction in the premises must be presumed. Under such circumstances, I am of the opinion that no district court or judge could lawfully discharge the relator from such commitment. Whether he could have been relieved by a higher tribunal need not now be considered. This court has always, as in this case, manifested extreme delicacy in interfering with the judgments of other courts in contempt cases. It makes use of the writ of error therefore under careful restrictions.

In *Church on Habeas Corpus* (p. 305), it is said: "One court of general jurisdiction should not review the proceedings of another on the writ of habeas corpus. The principles of comity should prevail." In *Rap., Contempts*, § 155, it is said: "The writ of habeas corpus is a collateral remedy, and, under the well established rule that a judgment of a court of competent jurisdiction, upon a matter within that jurisdiction, cannot be collaterally impeached, it results that, no question of jurisdiction being raised or involved, a conviction or commitment for contempt cannot be reviewed by means of this writ; for it is well settled that an order of committal for contempt is in the nature of a judgment, and the person committed thereunder is committed in execution. If, therefore, the court have jurisdiction of the person of the defendant, and of the subject matter out of which the alleged contempt arises, he can no more get relief on habeas corpus than he could if his committal had been in execution of a judgment founded upon a verdict in an ordinary prosecution for crime. If the court had jurisdiction, the rule making every superior court of record or legislative body the exclusive judge of contempts against its own authority and dignity closes the door to a review by this writ except in cases where excess of jurisdiction is clearly apparent."

Hurd on Habeas Corpus (412) says: "The right of punishing for contempts by summary conviction is inherent in all courts of justice, and essential to their protection and existence. A commitment under such conviction is a commitment in execution, and the judgment of conviction is not subject to review in any other court unless specially authorized by statute. It cannot be attacked under the writ of habeas corpus except for such gross defects as render the proceeding void."

Again, the same authority, speaking of summary conviction, applicable, though not limited, to contempt cases, on pages 404 and 405,

says: "Where a person is committed in execution under such a conviction, he cannot claim, under the Act 81 Car. II., nor under the Acts of several of the States, as we have seen, to be discharged under a writ of habeas corpus. Courts, however, possessing a common-law jurisdiction over the writ, or judges or other officers upon whom jurisdiction is conferred without such limit, may, in the exercise of such common-law or unrestricted jurisdiction discharge the prisoner from such commitment if it be fatally and incurably defective. But as we have also seen, courts are reluctant to interfere then under the writ of habeas corpus without having the conviction before them; and they never do for mere error or irregularity, unless they have the record before them in such form as to enable them to act expressly and conclusively upon such error or irregularity. Hence the importance of the writ of certiorari, and hence, also, the necessity of applying for relief from imprisonment in such cases to a court which, by its constitution and relation, possesses a corrective or revisory jurisdiction over the conviction, so that if it be erroneous it may be reversed, and then the prisoner be discharged."

Again, Rap. Contempts, § 155, still speaking of the review of contempt cases by habeas corpus, says: "It therefore becomes clear that the question of relief, or no relief, in these cases, by means of the writ of habeas corpus, depends upon the power of the court issuing the writ to inquire into and judge of the extent and limits of the jurisdiction of another court. Upon this subject, the adjudged cases, apparently so harmonious in their statement of the general rule, are, upon a closer examination, perplexing and inconclusive. In cases where the court issuing the writ is clothed by law with appellate or superintending jurisdiction over the tribunal which committed the petitioner, there seems to be comparatively little difficulty in reconciling the adjudications."

From an examination of the adjudged cases, I am satisfied that the simpler, safer and better rule in reference to the review of contempt proceedings is, as stated by the last-named author, "That one court should not judge the jurisdiction of another tribunal of co-ordinate authority and dignity." *Ex parte Watkins*, 28 U. S. 3 Pet. 193 [7 L. ed. 650]; *Ex parte Kearney*, 20 U. S. 7 Wheat. 88 [5 L. ed. 391]; *Ex parte Reed*, 100 U. S. 13 [25 L. ed. 538]; *Davison's Case*, 13 Abb. Pr. 129; *Clark v. People*, 1 Ill. 266; *Ex parte Thatcher*, 7 Ill. 167; *State v. Towle*, 42 N. H. 540; *Robb v. McDonald*, 29 Iowa, 830; *Re Bissell*, 40 Mich. 63; *Shattuck v. State*, 51 Miss. 50; *Phillips v. Welch*, 12 Nev. 158; *State v. Galoway*, 5 Coldw. (Tenn.) 326; *Ex parte Farnham*, 8 Colo. 545.

It is true our Statute in general terms confers jurisdiction in habeas corpus cases upon district courts and district judges. Nevertheless, there must, in the nature of things, be some limitation to the exercise of such power, else the unseemly spectacle might be presented of one district court releasing prisoners committed by another district court, or even by the supreme court itself. The criminal courts have jurisdiction in many cases concurrent with the district courts; and in all matters pertaining to

the exercise of their lawful jurisdiction they should be upheld accordingly.

Respondents had an undoubted right to question the jurisdiction of the district court in the premises, and to criticize the issuance of the writ of habeas corpus in temperate and respectful language, as much as they pleased; but they had no right, at least while the proceedings were pending, to subject the judge to ridicule, or to make insinuations against his good faith in connection therewith; for whether he had jurisdiction or not, he must, in any event, pass upon the question of such jurisdiction,—a matter of some difficulty, as we have seen,—and in so doing he should have been permitted to act uninfluenced by fear of injury to his reputation or other unworthy motive. *Williamson's Case*, 26 Pa. 9.

The decision in the case of *People v. Lake Co. Dist. Court*, 6 Colo. 534, is not in conflict with the views here expressed, but rather in support of them, when the whole opinion is considered.

Subsequently a petition for rehearing was filed and after consideration *Helm, Ch. J.*, on December 12, 1889, delivered the opinion of the court:

We have invited briefs in support of the present application; but counsel has elected to submit it upon the briefs filed and oral argument made at the final hearing of the cause. An extended and careful consideration of the suggestions embodied in the petition, and a re-examination of the subjects discussed in the opinion prepared by *Mr. Justice Hayt*, require a denial of the rehearing. The conclusion reached in that opinion, upon the principal question considered, is in harmony with the views expressed by the ablest jurists and law writers of the country. It could not be changed or modified without endangering, not only the best interests of the public in general, but also the highest welfare of the press itself. We recognize in this case, as we have heretofore done, the inestimable value of a fearless and independent press; but we would be grossly neglectful of our official duty were we, while carefully guarding the independence of the press, to forget that independence of the judiciary which is absolutely essential to constitutional government and liberty.

The opinion mentioned, in dealing with the question referred to, simply decides that, during the pendency of specific judicial proceedings, the court must be permitted to administer justice without molestation, in accordance with constitutional principles and approved legal rules and precedents. It determines nothing more; and it would be in the highest degree unworthy if it insisted upon less. The view is so simple, so equitable, so fundamentally important, that, when fairly understood, we do not believe its announcement will encounter a dissenting voice. Surely no man will claim that the litigant or the accused is not entitled to a fair and impartial judicial hearing. If he cannot rely with confidence upon the assurance that the court has power to secure him such a trial, then is one of the great departments of government a disastrous failure.

Relator was accused in the habeas corpus proceeding of perjury; and the integrity and

fairness of the judge were challenged in the most contemptuous and hurtful manner. If the right to make these accusations in a pending case exists, it cannot be limited to the parties litigant or court, nor to the particular forms of assault adopted in this instance. Other officers of the court and jurors and witnesses may be in like manner accused. But if a great metropolitan newspaper, which is daily read by thousands in the community where a trial is progressing, can, with impunity, charge the litigant or his witnesses with perjury, the jurors with bribe-taking, and the court and its officers with corruption in the specific case, the supposed fairness and impartiality of the proceeding may be effectually destroyed, and the attempted administration of justice become a mockery. Such charges, when written, as they usually are, with the most positive assumptions of their truthfulness, accompanied by flaming headlines, and often illustrated by clever cartoons, attract general attention, and produce profound and wide-spread impressions. The litigant, if he be the object of the assault, is placed at a great disadvantage, and his rights are seriously prejudiced. The juror or witness, if the challenge pertain to his conduct, is incensed or intimidated, and his independence and usefulness are correspondingly impaired. The judge, if the shaft be leveled at him, is annoyed and exasperated, and thus, consciously or unconsciously, his judgment is affected, his judicial action is dishonored, and the tribunal over which he presides is degraded before the public. The inevitable result of these things is to embarrass, if not to defeat, the proper administration of justice. When the integrity of a litigant, witness, juror, judge or other court officer is suspected in a given case, the law itself provides means for immediate investigation. Courts, with extremely few exceptions, are always prompt to examine into charges brought to their notice impugning the conduct of parties in any way connected with pending litigation; and one having such charges to make may rely with confidence upon the fact that a deaf ear will not be turned to his petition, and that, if sustained, the guilty parties will receive adequate punishment. If the court itself be accused, and a corrupt trial judge refuses appropriate relief by change of venue or otherwise, redress may always be had in a court of review. Such judicial investigations have great advantages for the discovery of truth. They are not so likely to reach erroneous conclusions, and inflict irremediable wrong, as are *ex parte* trials through the press.

It will be observed, however, that we are now insisting upon the foregoing judicial investigation only in cases actually pending. The right of the press, without fear of punishment for contempt, in the interest of the public good, to challenge the conduct of parties, jurors and witnesses, and to arraign the judge himself at the bar of public opinion, in connection with causes that have been fully determined, is not denied by the decision filed in this case. Would greater liberty in this direction be advantageous to the public welfare? Does any progressive journalist, upon sober reflection, candidly believe that greater license would even be beneficial to the press itself? The privilege of directly interfering, in a given

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case, with the administration of justice by indiscriminate newspaper charges of perjury, bribery, corruption and the like, against the parties concerned, or against those who are conducting the trial, cannot be defended on the ground that it is a constitutional right, covered by the provision relating to freedom of speech and liberty of the press. Such a privilege was never contemplated by the framers of that instrument. It would be a dangerous license, subversive of one of the highest constitutional rights of the citizen,—the right to that protection in court of his person and property which is always expected, and which the law should always extend. Of what value to him is the right of trial by jury under the supervision of a court, if the result is predetermined and controlled by inimical extrinsic influence, against which he has no chance to contend? Moreover, every exercise of such a privilege assaults, and to a certain extent undermines, the constitutional functions and public usefulness of the judiciary itself.

Let our position not be misunderstood. We recognize no limitation upon the privilege of newspapers to fairly and reasonably review and comment upon court proceedings from day to day as they take place. We do not shield judges or parties, jurors or witnesses, from hostile criticism by the press. We are not here concerned about private wrongs and grievances. Each and all of the individuals attacked may, so far as the present discussion is concerned, if unjustly accused, be left to actions for damages, or to complaints and indictments for criminal libel. We are dealing exclusively with the public welfare. Every citizen has a profound personal interest in the enforcement of the fundamental right to have justice administered by the courts, under the protection and forms of law, free from outside coercion or interference. It is doubtful if anything else can be mentioned of greater importance than this right to society and the State; and it is not too much to say that the responsibility of the journalist for its enforcement is, because of the vantage ground he occupies, second only to that of the judge.

For the reasons stated in the opinion of *Mr. Justice Hayt*, we have assumed that the district judge had jurisdiction to issue the writ of habeas corpus. Whether his jurisdiction in the premises would be maintained, were all the matters connected therewith before us, is a question upon which a majority of the court have declined to pass. It is left undetermined until such time as its proper presentation imposes the duty of a decision. But were we to concede that the jurisdiction of the district judge in the premises was doubtful, the position of respondents would not be materially different; for, if substantial doubt on this subject exists, pending the solution of this doubt, in good faith, and in a proper manner, the orders and proceedings of the court or judge are entitled to the same consideration as when no such objection is made. As we have said in another case, days of patient and careful investigation are sometimes necessarily consumed before the want of jurisdiction becomes apparent; and an admission that during this investigation witnesses may decline to testify, interlocutory orders may be disobeyed, and the proceedings

may be treated with public contumely, would operate to deprive the court of power to determine the very point of jurisdiction itself.

Further extension of the present discussion is unnecessary. It is manifest from what has already been said that we do not regard the principal question involved as one of private controversy merely, affecting only the parties here directly concerned. It may truthfully be said that the privileges of the press, and the rights of the judiciary and the people of the entire State, are, in a measure, involved.

The rehearing is denied.

PEOPLE of Colorado, *ex rel.* Elias R.
BARTON, *Appt.*,
v.
Wolfe LONDONER,

(.....Colo.....)

1. **Statutory proceedings for election contests are not exclusive** of *quo warranto* proceedings, unless the legislative intent to that effect is clearly expressed.
2. **The right to make amendments to existing special charters** of municipal corporations, even though local legislation, was reserved by Const., art. 14, § 14.
3. **Inquiry by *quo warranto* into usurpations of office is not abolished** by Const., art. 7, § 12, directing specific legislation for the trial of election contests; but such proceedings cannot be made a remedy for a contestant, and his claim to the office adjudicated therein. As to election contests purely, the statutory remedy directed by the Constitution is exclusive.
4. **The declaration in Const., art. 7, § 8, that ballots may be examined** in election contests, does not prohibit their examination in *quo warranto* proceedings.
5. **An opposing candidate may be the relator in *quo warranto* proceedings** under Code Civ. Proc., chap. 28, if he is otherwise qualified, on the district attorney's refusal to act; but his own claim to the office cannot be adjudicated in that proceeding.

(October 25, 1889.)

A PPEAL by relator from a judgment of the District Court for Arapahoe County sustaining a demurrer to the complaint in a proceeding in the nature of a *quo warranto* to try the title of respondent to the office of mayor of the City of Denver. *Reversed.*

Statement by Helm, Ch. J.:

At an election for mayor of the City of Denver, held in April last, relator, Barton, and respondent, Londoner, were opposing candidates. The returns on their face gave a majority of 877 for respondent. Upon a canvass by the proper board, respondent was declared elected. A certificate issued to him accordingly; and he duly qualified, and has since discharged the duties of the office. Relator claimed that upwards of 1,500 of the votes cast for respondent were illegal and fraudulent; and that therefore he (relator) was elected and rightfully entitled to the office. He took the proper oath, and demanded admission thereto, but was refused.
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Thereupon he instituted this proceeding in the district court. The jurisdiction of the court was challenged by demurrer. The demurrer was sustained, and judgment rendered dismissing the proceeding. From this judgment the present appeal was taken. The material constitutional provisions referred to in the opinion, but not quoted, are the following:

Const., art. 14: "Sec. 13. The General Assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers, and be subject to the same restrictions.

"Sec. 14. The General Assembly shall also make provision by general law whereby any city, town or village incorporated by any special or local law may elect to become subject to and be governed by the general law relating to such corporations."

Art. 7: "Sec. 8. All elections by the people shall be by ballot. Every ballot voted shall be numbered in the order in which it shall be received, and the number be recorded by the election officers on the list of voters, opposite the name of the voter who presents the ballot. The election officers shall be sworn or affirmed not to inquire or disclose how any elector shall have voted. In all cases of contested elections the ballots cast may be counted, compared with the list of voters, and examined, under such safeguards and regulations as may be prescribed by law."

Messrs. Pence & Pence, for appellant:

The inquiry by *quo warranto*, or by information in the nature of *quo warranto*, is the well-recognized and established method of determining the right to public office. It is the sufficient and adequate remedy for such acts of fraud at the polls as those set out in the plaintiff's complaint, and has been held to be the proper remedy in many of the States of the Union.

See *People v. Olds*, 3 Cal. 167; *People v. Scannell*, 7 Cal. 432; *Mages v. Calaveras Co.* 10 Cal. 876; *People v. Woodbury*, 14 Cal. 44; *Flynn v. Abbott*, 16 Cal. 884; *People v. Jones*, 20 Cal. 50; *People v. Holden*, 28 Cal. 124; *People v. Banvard*, 27 Cal. 471; *People v. Stratton*, 28 Cal. 832; *Stone v. Elkins*, 24 Cal. 125; *People v. Sassovich*, 29 Cal. 480; *Satterlee v. San Francisco*, 23 Cal. 320; *Hull v. Superior Court*, 63 Cal. 174.

In *New York*:

People v. Van Slyck, 4 Cow. 297; *People v. Ferguson*, 8 Cow. 102; *People v. Vail*, 20 Wend. 12; *Ex parte Heath*, 3 Hill, 42; *People v. Cook*, 14 Barb. 259, 8 N. Y. 67; *People v. Pease*, 30 Barb. 588, 27 N. Y. 45; *People v. Thacher*, 55 N. Y. 525; *People v. Hall*, 80 N. Y. 117.

In *Alabama*:

Reid v. Moulton, 51 Ala. 255; *Moulton v. Reid*, 54 Ala. 327.

Statutes providing methods for contesting elections, or city charters conferring the power to judge of the elections of officers, do not oust the courts of their jurisdiction to entertain an inquiry by the people by *quo warranto* or under provisions like those of chap. 27 of the Civil Code of Colorado.

See *People v. Holden*, 28 Cal. 124; *Satterlee v.*

San Francisco, 23 Cal. 820; *Ex parte Heath*, 3 Hill 42; *People v. Hall*, 80 N. Y. 117.

Such is the rule in *Indiana*:

State v. Adams, 65 Ind. 397; *State v. Gallagher*, 81 Ind. 558; *State v. Long*, 91 Ind. 851; *State v. Shay*, 101 Ind. 86; *Vogel v. State*, 5 West. Rep. 546, 107 Ind. 878.

In *Kansas*:

Bartlett v. State, 13 Kan. 99; *Lewis v. Marshall Co.* 16 Kan. 108; *State v. Stevens*, 28 Kan. 456; *Tarbox v. Sughrue*, 86 Kan. 225.

In *Missouri*:

State v. Fitzgerald, 44 Mo. 425.

In *Nebraska*:

Kane v. People, 4 Neb. 509.

In *New Mexico*:

Bull v. Southwick, 2 N. M. 321.

In *Oregon*:

State v. McKinnon, 8 Or. 498.

In *Wisconsin*:

State v. Kempf, 99 Wis. 470.

The proceedings by information in the nature of *quo warranto* or for "usurpation" under code provision have been recognized in the following, among other, cases:

Territory v. Hauzhurst, 8 Dak. 205; *Hardin v. Colquitt*, 63 Ga. 588; *Linegar v. Rittenhouse*, 94 Ill. 208; *Dillon, Mun. Corp.* § 141; *Reynolds v. State*, 61 Ind. 408-415; *Griebel v. State*, 10 West. Rep. 787, 111 Ind. 869; *Jones v. State*, 11 West. Rep. 243, 112 Ind. 198; *Lewis v. Marshall Co.* 16 Kan. 102.

In Michigan from the earliest reports to the latest the proceeding in the nature of *quo warranto* has been recognized and countenanced as the proper proceeding to try the title to a public office, notwithstanding that in that State there have been constantly upon the statute books provisions for contesting the elections before other tribunals.

See *People v. Tisdale*, 1 Doug. (Mich.) 59; *People v. Higgins*, 8 Mich. 233; *People v. Van Cleeve*, 1 Mich. 862; *People v. Cicott*, 16 Mich. 284; *Detroit v. Board Public Works*, 23 Mich. 546; *Harbaugh v. People*, 33 Mich. 241; *Cooley v. Askley*, 43 Mich. 458; *Farrington v. Turner*, 53 Mich. 27; *Atty-Gen. v. McIvor*, 68 Mich. 516. See also *Newsom v. Cocks*, 44 Miss. 352; *Osgood v. Jones*, 60 N. H. 543; *Atty-Gen. v. Delaware & B. R. Co.* 38 N. J. L. 282; *Territory v. Ashenfelter* (N. M.) 12 Pac. Rep. 879; *State v. Hardie*, 1 Ired. L. 42; *Saunders v. Gatling*, 81 N. C. 298; *State v. Owens*, 68 Tex. 261; *Atty-Gen. v. Ely*, 4 Wis. 420; *Atty-Gen. v. Barstow*, 4 Wis. 567; *Atty-Gen. v. Foote*, 11 Wis. 14; *State v. Messmore*, 14 Wis. 115, 168; *State v. Hilmantel*, 21 Wis. 566; *State v. Olin*, 28 Wis. 309; *State v. Stumpff*, Id. 690; *State v. Palmer*, 24 Wis. 63; *State v. Purdy*, 36 Wis. 213; *State v. Baker*, 38 Wis. 71; *State v. Jenkins*, 46 Wis. 616; *State v. Dahl*, 65 Wis. 510.

The effect and force of the code provisions in Colorado have been considered by our supreme court.

People v. Keeling, 4 Colo. 129; *Central & G. Road Co. v. People*, 5 Colo. 39; *Darrow v. People*, 8 Colo. 417.

The validity of the title to an office created by law is a judicial question—one which is not only the duty of the courts to decide, but one which it is the exclusive province of the judiciary department to determine.

State v. Towns, 8 Ga. 367; *Webre v. Wilton*, 6 L. R. A.

29 La. Ann. 625; *State v. Justices of Middlesex*, 1 N. J. L. 244; *State v. Marston*, 6 Kan. 537.

Mr. Lucius P. Marsh, with *Messrs. Wolcott & Vaile* and *George W. Easley*, for appellee:

Where the statute provides the remedy to test the right to exercise a franchise or office, it is exclusive of all other remedies.

Atchison, T. & S. F. R. Co. v. People, 5 Colo. 62.

Where a statutory remedy is given with a statutory right, the common-law remedies are withheld.

Com. v. Leech, 44 Pa. 382.

When a statute creates a right, or confers the means of acquiring it, and prescribes the remedy for its enforcement, the statutory remedy is exclusive and must be pursued.

Moulton v. Reid, 54 Ala. 327, 328; *Sedgw. Stat. and Const. Law*, 76, 341; *Com. v. Garrigues*, 28 Pa. 9; *Dudley v. Mayhew*, 3 N. Y. 9; *State v. Marlow*, 15 Ohio St. 114.

Where a new right, or the means of acquiring it, is conferred by a Constitution or a statute, and an adequate remedy for its infringement is given by the same authority which created the right, the parties injured are confined to the redress thus given.

Baxter v. Brooks, 29 Ark. 185, 186; *Vestry of St. Pancras v. Batterbury*, 2 C. B. N. S. 477, 89 Eng. C. L. 486, note; *Almy v. Harris*, 5 Johns. 175; *Lang v. Scott*, 1 Blackf. (Ind.) 405; *Bassett v. Carleton*, 82 Me. 553; *Peabody v. Boston School Committee*, 115 Mass. 383.

Quo warranto cannot be maintained because a specific remedy has been provided for the contest.

Ingerson v. Berry, 14 Ohio St. 326.

Article 7, § 12, of the Constitution, works a complete change in the matter of contested elections being tried in proceedings under *quo warranto*.

See *State v. Marlow*, 15 Ohio St. 114; *State v. Francis*, 8 West. Rep. 295, 8 Mo. 562.

The political power of the State may organize municipal bodies and provide the mode of reviewing the returns of all elections to ascertain whether they are in accordance with the expressed will of the people; and until the courts are empowered to act by the Constitution or legislative enactment, they must refrain from interfering.

Dickey v. Reed, 78 Ill. 261; *Brown v. Denver*, 7 Colo. 305; *Darrow v. People*, 8 Colo. 417.

The charter of the City of Denver remains in force, on the recognized principle that a later statute or constitutional provision, which is general and affirmative, does not abrogate a former, which is special and particular, unless negative words are used, or the two Acts are irreconcilably inconsistent.

State v. Macon Co. Ct. 41 Mo. 459, and authorities cited.

Helm, Ch. J., delivered the opinion of the court:

1. It is asserted by respondent that the district court had no jurisdiction to entertain the present proceeding, and that court itself so declared when dismissing the petition. The assertion and judgment are based upon the following Statute, and certain constitutional provisions hereinafter considered: "If the election

of a mayor . . . shall be contested, the contest shall be heard and determined by the board of supervisors, under rules which said board shall establish for such hearing." Denver City Charter, art. 4, § 9.

The mayor of Denver is not a member of the city council. He does not preside over either branch of that body, nor does he participate in their proceedings. His relation to the council is in this respect somewhat analogous to that existing between the governor and State Legislature. Therefore, no argument can be based upon the fact that each of the boards constituting the council is, by another section of the same Act, made the sole judge of the qualifications, election and returns of its own members. Does the language employed in the Statute above quoted operate to deprive the courts of jurisdiction in the premises by *quo warranto*?

Quo warranto is one of the most ancient and important writs known to the common law,—the modern proceeding by information, which has almost entirely superseded the ancient writ, being itself nearly 200 years old. This jurisdiction is expressly given to the supreme court by our Constitution. It is also, beyond doubt, included in the powers conferred by that instrument upon the district court, where, however, its exercise may be as regulated by statute. It receives express legislative recognition,—its ancient use and efficacy being by Statute united with its modern, enlarged scope. And, while a few cases hold the contrary, the great weight of authority, as well as the better reason, supports the proposition that, unless the legislative intent to take away the jurisdiction is expressed so clearly as to be practically beyond a reasonable doubt, it will be regarded as undisturbed. Such intent does not thus appear in the Statute before us. The board of supervisors is not made the "sole" or "exclusive" tribunal to try the contest for mayor, nor are any words employed expressly eliminating the judicial jurisdiction in question. Provisions substantially similar to the one before us have been held to create a cumulative remedy merely, and not to inhibit proceedings by *quo warranto*. 1 Dillon, Mun. Corp. § 202, and cases; McCrary, Elections, § 295, and cases. See also *Darrow v. People*, 8 Colo. 417; *State v. Camden*, 47 N. J. L. 64; *State v. Kempf*, 69 Wis. 470; *People v. Hall*, 80 N. Y. 117; *Hardin v. Colquitt*, 63 Ga. 588; *State v. Shay*, 101 Ind. 86; *State v. Adams*, 65 Ind. 398; *Com. v. Allen*, 70 Pa. 465.

The fact that the jurisdiction of state legislative bodies, in election contests affecting their own members, has universally been held exclusive, does not render such jurisdiction, when lodged in a municipal corporation, also exclusive. The reasoning in those cases which rely upon the supposed analogy between the Legislature and council has been shown fallacious. We shall not state the considerations whereby this fallacy appears, but content ourselves by citing a few of the cases in which it is demonstrated. *Com. v. Allen*, *People v. Hall*, *State v. Kempf* and *State v. Camden*, *supra*.

So far as this branch of the discussion is concerned, which is confined to the language of the provision cited, we must hold the statutory remedy under consideration concurrent with

the prescribed code proceeding by information in the nature of *quo warranto*.

2. But a more difficult question presented in this case is predicated upon section 12, article 7, of the Constitution, which reads: "The General Assembly shall, by general law, designate the courts and judges by whom the several classes of election contests not herein provided for shall be tried, and regulate the manner of trial, and all matters incident thereto."

We are told that this constitutional provision, when supplemented by appropriate legislation, so operates as to make the proceedings for election contests thus provided exclusive, and inhibit all other methods of trying title to office.

(a) A preliminary consideration is suggested by relator in argument. He earnestly contends that the charter provision relating to the election of mayor is void under this constitutional mandate, on the ground that it is a special and not a general Statute; and therefore, since no valid legislative action has been taken in obedience to the constitutional command, that the remedy by information remains unaffected. This specific question was passed upon in *Darrow v. People*, 8 Colo. 417, but we shall again notice it briefly. Prior to the adoption of the Constitution, Denver was incorporated under a special charter. No action has ever been taken, in pursuance of section 14, article 14, of that instrument, abandoning the charter, and reincorporating under the general laws authorized by section 18 of the same article. On the contrary, the special charter has been tenaciously preserved, and from time to time amended to meet the requirements of a growing and prosperous city. The right to make amendments thereto, even though palpably local legislation, has been considered and upheld by this court. *Brown v. Denver*, 7 Colo. 305; *Carpenter v. People*, 8 Colo. 116; *Darrow v. People*, *supra*.

Among the specific provisions of the charter existing at the adoption of the Constitution was the following: "Whenever an election of mayor shall be contested, the city council shall determine the same, as may be prescribed by ordinance." Sess. Laws 1874, p. 260, § 6.

This clause in the city charter was not repealed by the Constitution. That instrument simply commanded future legislation, and was purely prospective in its operation. Therefore the Statute in question was, in any event, saved by section 1 of the schedule. *People v. Grand Co.* 6 Colo. 202.

But, if this were not so, since the constitutional provision is general and affirmative, referring to election contests generally, no negative words being employed, while the Statute was a special and particular provision, relating to a particular and purely local election contest, a doubt might fairly arise as to whether the two clauses were so irreconcilably inconsistent as to justify the application of the doctrine relating to implied repeals.

By sections 13, 14, art. 14, of the Constitution, already referred to, the whole subject of towns and cities is, with twofold limitations, relegated to the Legislature. In connection with such municipal corporations, that body is, by these provisions, left to exercise almost plenary power. It determines the mode of organization, and provides for all matters pertaining

to government, including the number and kind of officers, their election or appointment, and duties. It may or may not, at its option, create the office of mayor. In some important particulars, all municipal offices are wholly unlike offices created by or expressly recognized in the Constitution. Thus these corporations are given a peculiar constitutional status. This fact has been recognized in various ways; for instance, the constitutional declaration that the judicial power of the State shall be lodged in certain specified courts is held not violated by giving the city council exclusive power to adjudicate contested elections of their own members. 1 Dillon, Mun. Corp. § 200.

Moreover, said section 14 has been construed as an express constitutional recognition of the right to amend as well as to retain existing special charters. See cases in 7 and 8 Colorado, above cited.

Thus, towns and cities like Denver, while retaining their special charters, appear to be a class of municipal corporations *sui generis*, so far as constitutional objection generally on the ground of local and special legislation is concerned. And, construing section 12, article 7, of the Constitution *in pari materia* with sections 13 and 14, article 14, we are of the opinion that the Statute under consideration may stand. The original provision remained in force when the Constitution was adopted, and the amendment was authorized by that instrument. Hence the requirement of said section 12 in relation to general laws does not control. We must therefore treat the charter provision as valid, and proceed to consider the present objection accordingly.

(b) Because the Constitution, in section 12, article 7, directs specific legislation for the trial of "election contests," it does not necessarily follow that the People, in their sovereign capacity, are thereby precluded from inquiring by information in the nature of *quo warranto* into usurpations of office. The framers of that instrument were, in this provision, dealing with the subject of election contests as such. They did not intend to revoke the jurisdiction by *quo warranto* so carefully given by them elsewhere to this and other courts (Const. art. 6, §§ 8, 11), — a jurisdiction which, though recognized at the common law, had also long been, and then was, specially lodged in the territorial courts by existing statute. "Election contests" and *quo warranto* proceedings differ materially in the primary and principal objects for which they are brought, as well as in their procedure. "Election contests," purely, are usually instituted within a prescribed period after the election, by or on behalf of the unsuccessful candidate, for the purpose of establishing his right to the particular office in controversy. And, though our statutes permit any elector, upon giving security for costs, to challenge in this way the right to occupy certain county offices, yet neither in this, nor in any other, contesting provision of which we are aware, is authority given any public officer or private individual to institute a proceeding, in the name of the State, having for its distinctive purpose the protection of the public. *Quo warranto* proceedings, on the contrary, deal mainly with the right of the incumbent to the office, independent of the question who shall fill it. They are brought in

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the name and on behalf of the people, to determine whether the incumbent has unlawfully usurped or intruded into, or is unlawfully holding, the office. They are not, primarily, in the interest of any individual, but are intended to protect the public generally against the unlawful usurpation of offices and franchises. It is true that, in the absence of a contesting statute, the common-law remedy by information is invoked by contesting claimants, though the relief obtained is inadequate, because the proceeding stops with the ouster, the contestant not being seated. 2 Dillon, Mun. Corp. §§ 842-844.

Such practice would be more readily adopted, under like circumstances, in this State, since the proceeding by information, made statutory, has been so enlarged as to permit the adjudication of the claimant's right to possession as well as the incumbent's title. Code, chap. 28.

But the public and prerogative function of this proceeding is still, under our Information Statute, its most important characteristic, and the trial of a contestant's claim is secondary and subordinate. It by no means follows that, because one person unlawfully intrudes into or holds an office, another is entitled thereto. The incumbent may have a majority of all the votes cast, but, nevertheless, be a wrong-doer. He may have been primarily ineligible, or have become subsequently disqualified. If, in such case, he be ousted from the office, his opponent is not installed. A vacancy exists, and a new election follows. *Darrow v. People, supra*.

The proceeding by the People, through which the intruder is turned out and the vacancy created, is not an "election contest" within the meaning of this constitutional phrase; nor is a similar investigation by the People for frauds that, perchance, were not discovered till the time for the ordinary statutory election contest had passed, such a proceeding. The incumbency, in all such cases, is a public wrong; and for this reason the People demand the removal. The office, like a franchise, in an important sense belongs to the People; and they simply assert their right to have it filled according to law, regardless of the private interest of any contestant or claimant.

Missouri has a constitutional provision like the one before us. The Supreme Court of that State declares that the election contests referred to have "no relation to *quo warranto* proceedings;" and, further: "A *quo warranto* proceeding in the circuit court is not an election contest, in the same sense in which those terms are used in the third and ninth sections of the Constitution. That proceeding only determines that the person holding the office is or is not a usurper. But, ousting him, if the court finds against him, it adjudges the right to the office to no one." *State v. Francis*, 88 Mo. 557, 8 West. Rep. 295.

It follows from the foregoing that, in our judgment, statutes passed by the Legislature, in obedience to the constitutional mandate on the subject of contested elections, do not prevent inquiry by *quo warranto* by the People into usurpations and unlawful holdings of office.

We are aware that this conclusion is not in harmony with the view taken in Ohio and Missouri, under constitutional provisions substan-

tially similar. *State v. Marlow*, 15 Ohio St. 114; *State v. Francis*, *supra*. But, with all due respect to those able courts, we believe it rests upon sounder principles of law, as well as wiser considerations of public policy. Surely, doubts, if they existed, should be resolved in favor of this jurisdiction by the courts. It is a matter of the greatest public importance whether ineligible or disqualified persons, or persons who by election frauds have secured an apparent majority of the votes, shall be permitted to usurp and hold public offices. Except on legislation, constitutional or statutory, so clear as to be irresistible, the voice of the people in this matter should not be silenced. The cases mentioned have not passed unchallenged.

In *Kane v. People*, 4 Neb. 509, the court, *per Lake, Ch. J.*, speaking with reference to the opinion in *State v. Marlow*, *supra*, says: "Indeed, even if our Constitution were the same as that of Ohio in this respect, still we should hesitate long before adopting the conclusion that a contest under the Statute was the exclusive mode of determining, in all cases, between conflicting claimants for an office. We should, as at present advised, be strongly inclined to hold that the remedy by *quo warranto* still remained as a concurrent remedy, to be resorted to at the option of the State, or of one claiming an office, against an incumbent wrongfully holding the same."

It will be observed that we do not go so far as the view thus foreshadowed in the foregoing case.

The opinion in *People v. Hall*, *supra*, adverted to *State v. Marlow* as taking a view contrary to the one announced. The disagreement is disposed of by saying that the case mentioned was put upon a peculiar requirement of the Ohio Constitution; but the line of reasoning adopted, and the language employed, are such as to convince us that, had the Ohio provision existed in New York, the Ohio doctrine would not have been followed.

3. The declaration in section 8, article 7, of the Constitution, that the ballots may be examined in contested elections, does not limit this examination to such proceedings. The right mentioned has always been freely exercised in *quo warranto*, which is the common-law method of inquiring into election frauds. And the purpose of this provision was to give, in the election contests authorized by section 12 of the same article, already considered, the privilege of inspecting and comparing ballots, not to withdraw it from the proceeding in which theretofore it had been universally exercised. The leading object of said section 8 was to preserve the purity of the ballot by insuring its secrecy; but, lest the language indicating this intent should be carried too far, and become the means of perpetrating fraud, the privilege in question was carefully extended to election contests, in which, perhaps, it might otherwise have been challenged.

4. Chapter 28, Code Civ. Proc., is a substitute for the original common-law *quo warranto* remedy. It prescribes an enlarged proceeding, substantially by information in the nature of *quo warranto*, and furnishes the exclusive method, so far as district courts are concerned, for investigating usurpations of office. The

district attorney having refused to act in the present case, relator was expressly authorized by this Statute to institute the proceeding. Being a "freeholder, resident and elector" within the City of Denver, relator's capacity to proceed in the name of the People cannot be challenged on the ground of insufficiency of interest. The fact that he was the opposing candidate, and claims to have received a majority of the votes legally cast, does not work his disqualification. It may be that he is more interested in vindicating his alleged private rights than he is in redressing the supposed public wrong. But this fact, if it be a fact, does not justify our refusal to investigate in this case the alleged usurpation, and render such judgment as the law permits, and the public welfare requires. A certain degree of interest on the part of relators in *quo warranto* proceedings is generally deemed requisite; and the officious intermeddling by parties having absolutely no interest, either as taxpayers or voters, is disfavored. But, since the Constitution commands the Legislature to designate the courts and judges by whom the several classes of election contests shall be tried likewise to regulate the manner of trial, we are of opinion that the forum and procedure prescribed in obedience to this command are exclusive as to the kind of contests referred to, though the Statute would otherwise be held cumulative. To this extent, the constitutional mandate requires a departure from the rule laid down by the authorities mentioned in the first part of this opinion. No such constitutional provision existed when those opinions were written. Therefore, in so far as relator seeks to give the present proceeding the character of an election contest purely, he must fail. By refusing to avail himself of the method provided in pursuance of the constitutional fiat, for trying his right to the office, he has waived his personal claims in connection therewith. The provisions of our Information Statute, permitting the court, as a secondary matter, in proper cases, to adjudicate a contestant's claim to the office, do not aid him; for this is not a case in which such relief would be proper. Relator is in no better attitude than if he had made his contest before the board of supervisors, and been there defeated. But the People, as we have seen, had no power to invoke that proceeding, nor could they have been made parties or privies thereto. And this is an additional reason why the estoppel which applies to relator, so far as his private interest is concerned, should not affect them. *People v. Hall*, *supra*; *State v. Hardie*, 1 Ired. L. 42.

Had the Legislature entirely failed to obey the constitutional command, our conclusion might, in this particular, have been different. We might under such circumstances, have held relator entitled to the private relief mentioned in the Information Statute. But it is not for us to here anticipate and enumerate the instances when election contests purely may be made a part of the proceedings by information; and we forbear further discussion.

The foregoing views harmonize in the main with those expressed by the two opinions in *Darrow v. People*, *supra*. It will be observed by reference to those opinions that the specific objection under section 12, article 7, of the

Constitution, last above noticed, was not then considered. In so far, however, as the language there employed would seem to recognize the right of a contesting claimant to ignore the constitutional, statutory election-contest remedy, and have his personal claims to office adjudicated in the proceeding by information, it is qualified in accordance with the conclusion above stated. Entertaining the views already announced in regard to the validity of the char-

ter provision in relation to contests for mayor, a consideration of the Statute lodging in the county court jurisdiction to try contests for "town" officers is unnecessary. For, whatever meaning we should assign to the word "town," the provision would have no application to Denver.

The demurrer should have been overruled, and the judgment is accordingly reversed.

INDIANA SUPREME COURT.

William MOELLERING, *Appt.*,

v.

Edwin EVANS.

(.....Ind.....)

1. Everyone must so enjoy his property as not to injure the property of another.
2. The measure of damages for removing the lateral support to land whereby it sinks and falls away is not the cost of restoring it, but the diminution of the value of the lot by reason of the act.
3. The natural right of lateral support to land does not extend to buildings placed thereon, and an adjacent proprietor is not liable for the giving way of the earth on account of his excavations if he has exercised reasonable care, and the earth would not have given away except for the added weight of the buildings.
4. It is proper to limit the re-cross-examination of a witness who has been examined and fully cross-examined and subsequently

recalled and re-examined in chief, to the matters testified to by the witness upon such re-examination.

(November 26, 1899.)

APPEAL by defendant from a judgment of the Circuit Court for Allen County in favor of plaintiff in an action to recover damages for the sinking and falling away of plaintiff's land because of the alleged removal by defendant of lateral support. *Reversed.*

The case is fully stated in the opinion.

Mr. T. E. Ellison for appellant.

Messrs. Bell & Morris for appellee.

Olds, J., delivered the opinion of the court:

This is an action by the appellee against the appellant for damages caused to certain lots owned by the appellee by reason of the excavation of the lands adjacent thereto by the appellant, permitting appellee's lots to cave, and causing the destruction of his fences and barn upon the lots, and greatly depreciating the value

NOTE.—*Right to use and improve one's own property.*

Every man is entitled to the ordinary and natural use and enjoyment of his property; he may cut down the forest trees, clear and cultivate his land, although in so doing he may dry up the source of his neighbor's springs, or remove the natural barrier against wind and storm. *Pa. Coal Co. v. Sanderson*, 4 Cent. Rep. 480, 113 Pa. 126.

It is a maxim of the common law that the owner of the soil has absolute dominion over the same indefinitely, above and below the surface; and that whatever damages to others he may occasion by his rightful command over his own soil is *damnum absque injuria*. *Rawstron v. Taylor*, 11 Exch. 309; *Gannon v. Hargadon*, 10 Allen, 106; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19. To the same effect are *Franklin v. Flak*, 18 Allen, 211; *Greely v. Maine Cent. R. Co.* 53 Me. 200; *Bowlsby v. Speer*, 31 N. J. L. 351; *Pettigrew v. Evansville*, 25 Wis. 223, 8 Am. Rep. 50; *Hoyt v. Hudson*, 27 Wis. 456, 9 Am. Rep. 473; *O'Connor v. Fond du Lac, A. & P. R. Co.* 58 Wis. 528, 38 Am. Rep. 753; *Taylor v. Pickas*, 64 Ind. 167, 31 Am. Rep. 114; *Cairo & V. R. Co. v. Stevens*, 78 Ind. 578, 38 Am. Rep. 139; *Gibbs v. Williams*, 25 Kan. 214, 37 Am. Rep. 241; *Barkley v. Wilcox*, 86 N. Y. 140, 40 Am. Rep. 512; *Aoton v. Blundell*, 12 Mees. & W. 324; *Phelps v. Nowlen*, 72 N. Y. 32, 28 Am. Rep. 93; *Butler v. Peck*, 16 Ohio St. 325.

Where the maxim *sic utere tuo ut alienum non laedas* is applied to land, it is subject to a certain modification, it being necessary for the plaintiff to show, not only that he has sustained damage, but that the defendant has caused it by going beyond what is necessary in order to enable him to have the

natural use of his own land. *West Cumberland I. & S. Co. v. Kenyon*, L. R. 11 Ch. Div. 782; *Pa. Coal Co. v. Sanderson*, 4 Cent. Rep. 481, 113 Pa. 126.

A land owner may change the grade of its surface, and if, in the absence of grant, prescription or mutual stipulation, mere surface water or the natural drainage is displaced, obstructed or caused to accumulate upon adjoining land, or upon a street or highway, no right of action arises. *Rawstron v. Taylor*, 11 Exch. 309; *Gannon v. Hargadon*, 10 Allen, 106; *Luther v. Winnisimmet Co.* 9 Cush. 171; *Morrill v. Hurley*, 120 Mass. 99; *Parks v. Newburyport*, 10 Gray, 23; *Flagg v. Worcester*, 13 Gray, 601; *Dickinson v. Worcester*, 7 Allen, 19; *Bangor v. Lansil*, 51 Me. 521; *Goodale v. Tuttle*, 29 N. Y. 459.

The general common-law rule is that "the right of an owner of land to occupy and improve it in such manner and for such purposes as he may see fit, either by changing the surface or the erection of buildings or other structures thereon, is not restricted or modified by the fact that his own land is situated with reference to that of adjoining owners, that an alteration in the mode of its improvement or occupation in any portion of it will cause water, which may accumulate thereon by rains and snows falling on its surface or flowing on to it over the surface of adjacent lots, either to stand in unusual quantities on other adjacent lands or pass into and over the same, in greater quantities or in other directions than they were accustomed to flow." *Gannon v. Hargadon*, 10 Allen, 106, 109; *Gould, Waters*, 467.

By the civil law, the lower of two adjacent estates owes a servitude to the upper to receive all the natural drainage; and the lower owner cannot reject, nor can the upper withhold, the supply, al-

of the lots. Issue was joined on the complaint by general denial, and a trial had, resulting in a verdict and judgment in favor of appellee against the appellant for \$300. There was a motion for new trial by the appellant overruled, and exceptions, and the ruling is assigned as error.

The first error presented and discussed is sustaining an objection to a question propounded to appellee while testifying as a witness in his own behalf. The appellee was recalled as a witness, and was asked on examination in chief, and testified, as to date he had sold one of the lots, that he sold it in October, 1886, and that the principal part of the earth which had caved or slipped off from the lot had slipped off before he sold the lot; that a large quantity of the dirt right under the stable dropped off or fell off. During the course of the cross-examination the counsel for appellant put the following question to the witness: "Don't you know that could be filled in there for twenty-five cents a yard?" There was an objection to the question, and the objection sustained, and exception taken at the time.

There was no error in this ruling. The witness was recalled to fix the date of the sale of the lot and to testify as to whether the injury to the lot had occurred before or after the sale. The witness had not testified on such examination as to the amount of earth which had slid off prior to the sale, nor as to the amount of the damage done. The witness had been upon the witness stand, and been examined in chief, and fully cross-examined; and was recalled to testify to those particular facts, and it was proper to limit the cross-examination to the particular matter testified to by the witness

when recalled, and the question propounded did not relate to and was not germane to the matter of which the witness spoke in his examination in chief.

The next question discussed is the giving and refusal of instructions by the court. The court gave the following instructions:

"1. There is incident to land, in its natural condition, a right to support from the adjoining land; and if land not subject to artificial pressure sinks or falls away, in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measurement of damages in such case is not the cost of restoring the land to its former condition or situation, or of building a wall to support it, but it is the diminution in value of the plaintiff's land by reason of the acts of the party removing the support.

"2. If you find from the evidence that the defendant in this case removed land adjoining plaintiff's in the manner charged in the complaint, then the measure of damages would be the diminution in value of plaintiff's land.

"3. If you find from the evidence that the defendant in this case removed land adjoining plaintiff's, as charged in the complaint, and as a result of such removal the fences and buildings on plaintiff's lands were destroyed or injured, in estimating the damages you may consider such injury to the fences and buildings on plaintiff's premises, if any."

Instructions 1 and 2 given by the court properly stated the law as to the measure of damages to the lots.

It is an old and true maxim that everyone must so enjoy his property as not to injure the property of another, and this was interpreted

though either, for the sake of improving his land, according to the ordinary modes of good husbandry, may somewhat interfere with the natural flow of the water. *Martin v. Jett*, 12 La. 501; *Lattimore v. Davis*, 14 La. 161; *Hays v. Hays*, 19 La. 351; *Adams v. Harrison*, 4 La. Ann. 165; *Delahoussaye v. Judice*, 13 La. Ann. 587; *Hooper v. Wilkinson*, 15 La. Ann. 497; *Barrow v. Laundry*, Id. 681; *Minor v. Wright*, 16 La. Ann. 151; *Gillis v. Nelson*, Id. 275; *Bowman v. New Orleans*, 27 La. Ann. 502; *Kauffman v. Griesemer*, 26 Pa. 415, note; *Miller v. Laubach*, 47 Pa. 147; *Hays v. Hinkleman*, 68 Pa. 324; *Bentz v. Armstrong*, 8 Watts & S. 40; *Butler v. Peck*, 16 Ohio St. 34; *Tootile v. Clifton*, 22 Ohio St. 247; *Gillham v. Madison Co. R. Co.* 49 Ill. 484; *Gormley v. Sanford*, 52 Ill. 159; *Hicks v. Silliman*, 93 Ill. 256; *Overton v. Sawyer*, 1 Jones, L. 308; *Porter v. Durham*, 74 N. C. 787; *Laumier v. Francis*, 23 Mo. 751; *Jones v. Hannovan*, 35 Mo. 462; *Livingston v. McDonald*, 21 Iowa, 160; *Ogborn v. Connor*, 46 Cal. 448; *Brown v. McAllister*, 39 Cal. 573; *Goldsmith v. Alsas*, 53 Ga. 189; *McCormick v. Kansas City, St. J. C. B. R. Co.* 70 Mo. 359; *Gould, Waters*, 468.

The rule of the common law is accepted in England, Massachusetts, Maine, Vermont, New York, Rhode Island, New Jersey and Wisconsin, that a land owner may appropriate to his own use or export from his land all mere surface water or superficially percolating waters, and any person from whose land it is withheld or whose water supply is depleted, will, in the absence of an express grant, have no right of action for such diversion or obstruction. *Greutrex v. Hayward*, 8 Exch. 291; *Wood v. Waud*, 3 Exch. 748; *Broadbent v. Ramsbotham*, 11 Exch. 662; *Rawstron v. Taylor*, Id. 368; *Barkley v. Wilcox*, 86 N. Y. 140; *Ruffum v. Harris*, 5 R. I. 243; *Chatfield v. Wilson*, 28 Vt. 49. See *En- 6 L. R. A.*

nor v. Barwell, 2 Giff. 410, 423, *et seq.*; *Curtiss v. Ayrault*, 47 N. Y. 73.

In Massachusetts and New Jersey an owner of land may erect structures upon it of any size, height or depth, irrespective of their effect upon mere surface water or the natural drainage. *Parks v. Newburyport*, 10 Gray, 28; *Bates v. Smith*, 100 Mass. 181; *Dowlsby v. Speer*, 31 N. J. L. 351; *Gannon v. Hargadon*, 10 Allen, 106.

In New Hampshire a land owner may disturb the natural drainage only to the degree necessary in the reasonable use of his own land; and what is such reasonable use is ordinarily for the jury to determine only under appropriate instructions. *Bassett v. Salisbury Mfg. Co.* 43 N. H. 569; *Swett v. Cutts*, 50 N. H. 439. See *Hoyt v. Hudson*, 27 Wis. 656, and *Hurdman v. North Eastern R. Co.* L. R. 3 C. P. Div. 168, as to reasonable use. See also *Williamson v. Look's Creek Canal Co.* 76 N. C. 478.

The courts of Pennsylvania, Illinois, North Carolina, California and Louisiana have adopted the civil-law rule, and it has been referred to with approval by the courts of Ohio and Missouri. *Tootile v. Clifton*, 22 Ohio St. 247; *Barkley v. Wilcox*, 86 N. Y. 140, 145.

In States where the rule of the civil law prevails, it appears that the owner of city property may be held to a stricter liability respecting surface water than the owner of an estate in an agricultural district. *Bentz v. Armstrong*, 8 Watts & S. 40; *Young v. Leedom*, 67 Pa. 351; *Vanderweele v. Taylor*, 65 N. Y. 341; *Livingston v. McDonald*, 21 Iowa, 160; *Whitney v. Sanders*, 8 Pittsb. L. J. 226; *Phinlay v. Augusta*, 47 Ga. 280; *Freudenstein v. Heine*, 6 Mo. App. 237; *Gormley v. Sanford*, 50 Ill. 159; *Gould, Waters*, 468. See, on same subject, *Jordan v. St. Paul etc. R. Co. post*, —.

in the case of *Taylor v. Fickas*, 64 Ind. 167, to mean "that everyone must so enjoy his property, according to his legal right, as not to injure the legal right in the property of another." The lot-owner has the legal right to support to his lot from the adjoining land. If such support be removed, and by reason of such removal the lot caves, and is injured, by reason of which the lot-owner suffers damages, he has a right of action against the person removing the support for the amount of the damages sustained to the land. The measure of damages is the diminution in the value of the lot or land. That is a matter easily arrived at,—the difference in the value of the lot by reason of the injury. Thus the damages sustained may be arrived at with reasonable certainty and without complication. To pursue any other course to arrive at the damage we enter a field of uncertainty, involving the cost of labor and material to supply the support removed, the manner of its construction, its sufficiency and durability, and when completed we have a different support, or a support of different material, and an artificial instead of a natural one.

Sutherland on Damages states the law as follows (vol. 3, pp. 417, 418): "There is incident to the land, in its natural condition, a right of support from the adjoining land; and if land not subject to artificial pressure sinks and falls away, in consequence of the removal of such support, the owner is entitled to damages to the extent of the injury sustained. The measure of damages is not the cost of restoring the lot to its former situation, or building a wall to support it, but it is the diminution of value of the plaintiff's lot by reason of the defendant's act." *McGuire v. Grant*, 25 N. J. L. 356.

Instructions 1 and 2 properly stated the measure of damages, but instruction 3 is erroneous. It tells the jury, as we interpret it, that if the defendant removed the lateral support he would be liable to the plaintiff for the damages resulting to the buildings thereon, regardless of the manner in which the same was done,—whether the injury was caused by the negligent and careless manner in which the dirt was removed, or whether it was removed in a careful or prudent manner. It may be claimed that as the complaint charges that the defendant negligently, unskillfully and carelessly did such work, he caused the sides of the lots to cave and produced the injury, and that as the charge tells the jury that if they find the defendant removed the soil adjoining plaintiff, as charged in the complaint, and as a result of such removal the fences and buildings were destroyed, the defendant is liable, that the instruction was to the effect that if the injury resulted from the carelessness and negligence of the defendant in re-

moving the lateral support he would be liable; but we do not think the charge warrants this construction. The jury are nowhere told in the instructions as to the nature of the charge in the complaint, or told that there would be any difference in the liability of the defendant whether the earth was removed in a careless and negligent manner, by reason of which negligence the injury resulted, and the liability for the damage to the buildings if the excavation had been made in a careful and prudent manner.

Washburn on Real Property (vol. 2, p. 880) states the law as follows: "Of a nature somewhat akin to the easement of light connected with the ownership of a house is that of support, or the right of having one's land, and the structures erected thereon, supported by the land of a neighboring proprietor. The proposition may be stated thus: A, owning a piece of land without any buildings upon it, has a natural right of lateral support for his land from the adjoining land. This right exists independent of grant or prescription, and is also an absolute right; so that if his neighbor excavates the adjoining land, and in consequence A's land falls, he may have an action, although A's excavation was not carelessly or unskillfully performed. This natural right does not extend to any buildings A may place upon his land, and therefore if A builds his house upon the verge of his own land he does not thereby acquire a right to have it derive its support from the land adjoining it until it shall have stood and had the advantage of such support for twenty years. In the mean time such adjacent owner may excavate his own land for such purposes as he sees fit, provided he does not dig carelessly or recklessly; and if in so doing the adjacent earth gives way, and the house falls by reason of the additional weight thereby placed upon the natural soil, the owner of the house is without remedy. It was his own folly to place it there."

This doctrine is fully supported by the authorities. *Moody v. McCulland*, 84 Am. Dec. 771; *Beard v. Murphy*, 86 Am. Dec. 693; *Charles v. Rankin*, 22 Mo. 566, 66 Am. Dec. 644, and note, 649; *Lasala v. Holbrook*, 4 Paige, 169, 25 Am. Dec. 524.

The third instruction given by the court was erroneous, and for this error the cause must be reversed. What we have said in regard to the instructions given shows that the instructions asked for by appellant on the question of damages were erroneous, and were properly refused.

Judgment reversed, at costs of appellee, with instructions to sustain the motion for new trial.

ALABAMA SUPREME COURT.

Rebecca J. ADERHOLDT, *Appt.*,

v.

Sam HENRY *et al.*

(....Ala....)

1. A bona fide purchaser, with a stipulation for a good and sufficient title, of 6 L. R. A.

a portion of lands subject to a vendor's lien, is entitled to have the remaining portions of the land first sold to satisfy the lien, whether the same have been subsequently sold or devised, if the subsequent alienees have notice, actual or constructive, of the antecedent conveyance.

2. When a vendor sells part of a tract subject to a mortgage which covers the en-

tire tract, the vendor and purchaser stand on the same level and must contribute towards payment of the mortgage in proportion to their several interests.

3. Parties to a suit to enforce the lien for the purchase price of a tract of land charged by a testator with the payment of a vendor's lien upon that and other lands, and sold for that purpose, are not estopped by the decree in that suit from enforcing contribution by a purchaser at a sale under the decree, who purchases subject to the original lien, towards the payment thereof.

4. Where land is charged by the testator with the payment of a vendor's lien upon that and other lands, and is sold for that purpose and the purchase money not paid, whereupon it is resold under a decree in a proceeding to enforce the lien for such purchase money, if the purchaser at such resale buys subject to the original lien, he has no claim to a preference, in respect thereto, over the devisees of the other lands subject to such lien.

5. A purchaser for a valuable consideration of a portion of land subject to a vendor's lien, who after the vendor's death purchases other lands subject thereto, which are specially charged with the payment thereof, and sold for that purpose, thereby becomes liable for the purchase money, and, instead of having preference over devisees of other portions of the lands so subject, must have the land for which he paid value first sold under the vendor's lien, and the proceeds applied in satisfaction thereof, at least to the extent of the unpaid balance which he agreed to pay for the lands charged, although he has lost the latter by reason of his failure to pay the purchase money and their being sold under proceedings to enforce the lien therefor.

(May 29, 1899.)

APPEAL by defendant, Aderholdt, from a decree of the Chancery Court of Etowah County fixing the order in which several parcels of land subject to a vendor's lien should be sold for the payment of the same. *Reversed.*

On October 26, 1872, one J. W. Maddox purchased certain lands to secure the purchase money of which he gave his notes, which by successive transfers became vested in one Ward and his wife.

Maddox died on May 26, 1876, leaving a will by which he appointed his daughter Rebecca J. Maddox, subsequently Aderholdt, executrix, and directed a part of the lands so purchased, described as the mill tract, to be sold for the payment of his debts. Rebecca qualified as executrix and acted as such, and under the power contained in the will on December 23, 1876, sold the mill tract to W. F. Prickett and C. B. Maddox.

On September 2, 1879, Ward filed his bill to enforce the vendor's lien for the balance of the purchase money, the notes remaining unpaid, and made all the heirs of Maddox, together with Prickett, parties thereto.

Prickett and Maddox did not pay the purchase money for the mill tract, and the executrix filed her bill on September 22, 1879, to enforce her vendor's lien thereon; she obtained a decree and under it the mill tract was sold to one Sam Henry, who paid the purchase money therefor.

Subsequently a decree was reached in the 6 L. R. A.

Ward suit ordering a sale of the whole of the lands to enforce payment of the purchase money which remained unpaid on the purchase by J. W. Maddox, deceased.

Thereafter Henry bought Ward's interest in such decree and filed a petition to ascertain in which order the various parcels of the lands formerly belonging to J. W. Maddox should be sold to satisfy the decree enforcing the vendor's lien.

From the decree rendered by the chancellor upon that petition Mrs. Aderholdt took this appeal.

The other material facts appear in the opinion of the court.

Mr. Amos E. Goodhue for appellant.

Messrs. W. H. Denson and Watts & Son for appellees.

Clopton, J., delivered the opinion of the court:

A court of equity, in charging land subject to an incumbrance, which has been successively sold and conveyed, with covenant of warranty, in parcels to different persons, pursues the inverse order of alienation. This general rule has been so repeatedly and uniformly affirmed that, as has been said, it should be regarded *res judicata*. *Mobile M. D. & Mut. Ins. Co. v. Huder*, 85 Ala. 718; *Prickett v. Sibert*, 75 Ala. 315.

The application of the rule rests on the equitable principle that an incumbrancer, having a paramount lien on the entire land, shall first exhaust that parcel, the sale of which will not prejudice a bona fide purchaser of another parcel. In order to successfully invoke the protection of the rule, the alienees first in order must be bona fide purchasers, and the successive alienees have notice, actual or constructive, of the antecedent sale and conveyance. Want of notice of the common incumbrance is not requisite. If any are bona fide purchasers without notice, their right to hold the property discharged of the incumbrance is governed by different principles. Generally, the rule may be invoked whenever the alienee has a right, as against the common vendor, to have the parcel bought and paid for by him free from the incumbrance. Facts and circumstances affecting and qualifying the rights and equities of the different purchasers, as between themselves, may materially modify the application of the rule. It will not be applied if its application works injustice. With this general statement of the rule and its qualifications, we pass to a consideration of the equities of the parties.

A bill was filed by the transferees of a note given by J. W. Maddox for a part of the purchase money of the land, which had been bought by him in October, 1872, to enforce a vendor's lien. A final decree of sale was made in November, 1883. Maddox having died before the filing of the bill, his heirs and devisees were made defendants. He sold and conveyed, in his lifetime, parcels of the land to different persons, and by his will devised a part of it to be sold for the payment of his debts, and other portions to some of his children. The alienations first in the order of time bear date May 25, 1876; on which day he conveyed, with covenant of warranty, by three separate convey-

ances. different parcels to John H. Burton, C. B. Maddox, and F. W. L. Maddox. It is satisfactorily shown by the evidence that the first two conveyances were made on a valuable consideration. The last is a voluntary conveyance. As to Burton, the evidence discloses no fact or circumstance which impairs or displaces his right to a preference over the others. Being a bona fide purchaser, with a stipulation for a good and unincumbered title, he is unquestionably entitled to have the other portions of the land sold before his is resorted to. C. B. Maddox, though a purchaser for a valuable consideration, occupies an entirely different position, as will be hereafter shown.

The next point of consideration relates to the equities between appellee Henry and the devisees; to a clear understanding of which a statement of other facts is requisite. On the same day on which the conveyances above mentioned were made, J. W. Maddox made his will, and died a few days thereafter. By the will, power was conferred on the executrix to sell for the payment of his debts those parts of the land designated in the record as the "Mill Tract," and a half interest in three acres previously conveyed to C. B. Maddox, and also one acre on which the store-house stood. The executrix executed the power of sale December 23, 1876. At the sale, C. B. Maddox purchased the one acre, and the half interest in the three acres; the purchase money for which he paid. C. B. Maddox and Prickett purchased the mill tract. In consequence of their failure to pay the purchase money, the executrix filed a bill in September, 1879, to subject it to the payment thereof. On October 23, 1880, a decree was rendered ascertaining that Maddox and Prickett were indebted about the sum of \$2,800, and ordering the land to be sold for its payment. It was sold by the register under the decree January 8, 1881, and bought by Henry for \$400.

The bill on which the present decree of sale was made was filed before the bill on which the decree was rendered, under which Henry bought, and was pending at the time of his purchase. He necessarily had notice of the vendor's lien, and purchased subject to it. There is evidence showing that the existence and amount of the vendor's lien were considered and estimated by him in determining the price which he was willing to pay for the land. The rule to pursue the inverse order of alienation does not extend to a case where a part of the land is sold subject to the paramount incumbrance. When a vendor sells a part of a tract subject to a mortgage which covers the entire tract, the vendor and purchaser stand on the same level, and must contribute in proportion to their respective interests. Successive purchasers of an equity of redemption sold by the sheriff in parcels, at different times, are not liable in the inverse order of alienation. Black, *Ch. J.*, says: "Two purchasers at a sheriff's sale, subject to a mortgage, which is a common incumbrance on the land of both, stand on a level. Neither of them has done or suffered anything which entitles him to a preference over the other. Equality is equity. They must pay the mortgage in proportion to the value of their respective lots." *Carpenter v. Koons*, 20 Pa. 227.

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The contention of counsel, that the devisees are estopped by the decree under which Henry bought, on the ground that they were parties, cannot be sustained. By the purchase, Henry acquired all the title and interest in and to the mill tract which they had, as heirs and devisees, and they are estopped from asserting any right or title to that particular land. But the question here is not a question of right or title to the land, but of the equities between successive purchasers and devisees of parcels of land covered by a common vendor's lien, subject to which all of them took their respective interests. The devisees are affected by all the equities to which the devised parcels were subject in the hands of the testator, and Henry's equity is the same as if he had purchased from the testator subject to the vendor's lien. If a mortgagor sells a part of the mortgaged lands subject to the mortgage, the part which he retains and the part sold are ratably liable to the mortgage debt. Henry, having purchased subject to the vendor's lien, has no claim to a preference over the devisees. The equities between them are equal, and equality of burden becomes equity. Their several parcels are liable to contribute in proportion to their respective values. In such case, the principle of contribution applies. The same observations apply to F. W. L. Maddox's part, he being a mere volunteer. *Aldrich v. Cooper*, 3 Lead. Cas. Eq. (4th Am. ed.) 804.

"When the deeds to the successive grantees are not warranty, or equivalent thereto, but simply purport to convey the mortgagor's right, title and interest in the parcels, the intention is clear that the grantees, respectively, assume their portions of the burdens." 8 Pom. Eq. Jur. § 1225.

The remaining question relates to the equities between C. B. Maddox and the other parties. The interest of the testator in the mill tract was specially charged with the payment of his debts, and was sold for that purpose. C. B. Maddox became the purchaser. The payment of the purchase money of the mill tract, and its application to the debts, would have relieved the land of the vendor's lien, and the devisees and Henry would have received their parts or parcels free of incumbrance. C. B. Maddox owes now, on account of the purchase money, more than enough to pay the amount of the decree of sale. Being aware that the mill tract was specially charged and sold to pay the debts of the testator, his purchase imposed an obligation to furnish the money for that purpose, and thus relieve the balance of the land. It is still his legal and equitable duty to pay what he owes in exoneration of the other parcels.

Says Mr. Pomeroy: "Although the deeds are warranties, so that the doctrine will otherwise apply, any particular grantee may by his subsequent omissions, or by his subsequent dealings with other grantees, disturb the order of the equities in his own favor, and create equities in behalf of other owners, and even render his own parcel primarily liable, as between all the grantees." 2 Pom. Eq. Jur. § 1225.

It would be inequitable to allow him, by his failure to pay the purchase money for the mill tract, to throw the burden of the vendor's lien

on the other owners, and be himself relieved. The other parties have a superior equity; and in adjusting the equities between them the court should direct his land to be first sold.

In determining the proportions which should

be contributed by the parcels owned by Henry, F. W. L. Maddox and the devisees, the court will be governed by the rule settled in *Mobile M. D. & Mut. Ins. Co. v. Huder*, 35 Ala. 718. *Reversed and remanded.*

MICHIGAN SUPREME COURT.

Martin E. ELLIS, *Appt.*,

v.

John W. HILTON.

(....Mich.....)

Expenses incurred in good faith in attempting a cure may be recovered in addition to the actual value of the animal at the time the injury occurred, in a suit for damages for an injury to an animal by which it was rendered entirely worthless, although defendant was not consulted in relation to the matter of the attempted cure.

(*Campbell, J., dissents.*)

(November 15, 1889.)

ERROR to the Circuit Court for Grand Traverse County to review a judgment in favor of plaintiff, but for a less amount than he claimed, in an action to recover damages for injuries to a horse, alleged to have resulted from defendant's negligence. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. Pratt & Davis, for plaintiff, appellant:

Compensation or recompense for the actual loss sustained is what the courts in all cases seek to award as the measure of damages.

Allison v. Chandler, 11 Mich. 542; *Warren v. Cole*, 15 Mich. 265; *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447; *Gilbert v. Kennedy*, 22 Mich. 117; *Winchester v. Craig*, 33 Mich. 205, 209; *Bennett v. Beam*, 42 Mich. 346.

After the horse was injured plaintiff's duty was to save himself harmless, if he could, and to do all that prudence and good judgment would dictate, to relieve the defendant from loss.

Cubit v. O'Dett, 51 Mich. 850; *Dennis v. Huyck*, 48 Mich. 620.

If treatment was determined on, cost and expense incurred in feeding, caring for and treating the animal within reasonable limits would be a proper charge against the defendant.

Addison, Torts, § 590; Sedgwick, Damages,

6th ed. title *Injury to Animals*; *Watson v. Lisbon Bridge*, 14 Me. 201; *Sutherland, Damages*, p. 106; *Hughes v. Quentin*, 8 Carr. & P. 703, and authority in point; *Dean v. Chicago & N. R. Co.* 43 Wis. 308; *Oleson v. Brown*, 41 Wis. 415.

The case of *Sullivan Co. v. Arnett*, 116 Ind. 438, is directly in point.

Mr. J. R. Adsit, with *Mr. Lorin Roberts*, for defendant, appellee:

In the case of domestic animals injured, the proper rule of damages, as in the case of other perishable chattels, should usually be the reduced value at the time.

Davidson v. Michigan Cent. R. Co. 49 Mich. 481.

In *Keyes v. Minneapolis & St. L. R. Co.* 86 Minn. 290, the court stated that the owner was entitled to recover for the diminished market value of the animals after cure, and, in addition thereto, such expense as he incurred in reasonable attempts to effect a cure, provided the whole damages did not exceed the original value of the property.

See also *Graves v. Moses*, 18 Minn. 335 (Gil. 807); 2 Thomp. Neg. 1261; *Gillett v. Western R. Corp.* 8 Allen, 560; *Wheeler v. Townshend*, 42 Vt. 15; *Street v. Laumier*, 84 Mo. 469; *Johnson v. Holyoke*, 105 Mass. 80; *Oleson v. Brown*, 41 Wis. 413; *Shelbyville R. Co. v. Newark*, 4 Ind. 471; *New Haven Steamboat Co. v. Vanderbilt*, 16 Conn. 420; *Williamson v. Barrett*, 51 U. S. 18 How. 101 (14 L. ed. 68). |

Long, J., delivered the opinion of the court:

This is an action to recover damages against the defendant for negligently placing a stake in a public street in Traverse City, which plaintiff's horse ran against, and was injured. It was conceded on the trial by counsel for defendant that the horse of plaintiff was so injured that it was entirely worthless. Plaintiff claimed damages, not only for the full value of the horse, but also for what he expended in attempting to effect a cure, and on the trial stated to the court that plaintiff was entitled to re-

NOTE.—*Damages for injury to personal property; duty of party injured.*

The measure of damages in ordinary cases where property is not entirely lost or destroyed, or practically and substantially so, but is only impaired in value or partially destroyed, is the difference between the value before the injury and immediately thereafter, and reasonable expense incurred, or value of time spent in reasonable endeavors to preserve or restore the property injured (*Field, Damages*, 621; *Eastman v. Sanborn*, 3 Allen, 594; *Harrison v. Missouri Pac. R. Co.* 5 West. Rep. 305, 88 Mo. 625); and if injured the difference between its value before and after the injury and the reasonable expense of its care, the temporary loss of its use and interest from the date of the action. *Atlanta & 6 L. R. A.*

West Point R. Co. v. Hudson, 62 Ga. 679; *Jackson v. St. Louis, I. M. & S. R. Co.* 74 Mo. 526; *Toledo, P. & W. R. Co. v. Johnston*, 74 Ill. 63; *Meyer v. Atlantic & P. R. Co.* 64 Mo. 542; *Whittaker's Smith*, Neg. 98.

It is the duty of one injured in his estate by the fault of another to use all reasonable means to protect himself against injurious consequences. *Lloyd v. Lloyd* (Vt.) 6 New Eng. Rep. 250.

It is the duty of a party to protect himself from the injurious consequences of the wrongful act of another if he can do so by ordinary effort and care and at moderate and reasonable expense; and for such reasonable exertion and expense in that behalf he may charge the wrong-doer. 3 Parsons, Cont. 178; *Field, Damages*, 19; *Harrison v. Missouri Pac. R. Co.* *supra*.

cover a reasonable expense in trying to cure the horse before it was decided that she was actually worthless. The court ruled, however, that the damages could not exceed the value of the animal. A claim is made by the declaration for moneys expended in trying to effect a cure of the horse after the injury.

Upon the trial the plaintiff testified that he put the horse, after the injury, into the hands of a veterinary, and paid him \$35 for care and treatment. On his cross-examination, he also testified that the veterinary said "there was hopes of curing her, if the muscles were not too badly bruised. He didn't say he could cure her. He thought there was a chance he might."

Dr. DeCow, the veterinary, was called, and testified, as to the injury, that the stake entered the breast of the horse, on the left side, about six inches; that the muscles were bruised, and the left leg perfectly helpless. He got the wound healed, but on account of the severe bruise of the muscles the leg became paralyzed and useless. On being asked whether he thought she could be helped when he first saw her, he stated that he did not know but she might; that she might be helped, and kept for breeding purposes, and be of some value.

It is evident from the testimony that the plaintiff acted in good faith in attempting the cure, and under the belief that the mare could be helped, and be of some value. The court below, however, seems to have based its ruling that no greater damages could be recovered than the value of the animal, and that these moneys expended in attempting a cure could not be recovered, upon the ground that the defendant was not consulted in relation to the matter of the attempted cure. Whatever damages the plaintiff sustained were occasioned by the negligent conduct of the defendant, and recovery in such cases is always permitted for such amount as shall compensate for the actual loss. If the horse had been killed outright the only loss would have been its actual value. The horse was seriously injured; but the plaintiff, acting in good faith, and in the belief that she might be helped and made of some value, expended this \$35 in care and medical treatment. He is the loser of the actual value of the horse, and what he in good faith thus expended. He is permitted to recover the value, but cut off from what he has paid out. This is not compensation.

Counsel for defendant contends that such damages cannot exceed the actual value of the property lost, because the loss or destruction is total. There may be cases holding to this rule; but it seems to me the rule is well stated, and based upon good reason, in *Watson v. Lisbon Bridge*, 14 Me. 201, in which the court says: "Plaintiff is entitled to a fair indemnity for his loss. He has lost the value of his horse, and also what he has expended in endeavoring to cure him. The jury having allowed this part of his claim, it must be understood that it was an expense prudently incurred, in the reasonable expectation that it would prove beneficial. It was incurred, not to aggravate, but to lessen, the amount for which the defendants might be held liable. Had it proved successful, they would have had the benefit of it. As it turned out otherwise, it is but just, in our

judgment, that they should sustain the loss."

In *Murphy v. McGraw*, 74 Mich. —, 41 N. W. Rep. 917, it appeared on the trial that the horse was worthless at the time of purchase by reason of a disease called "eczema." The court charged the jury that if the plaintiff was led by defendant to keep on trying to cure the horse the expense thereof would be chargeable to the defendant, as would also be the case if there were any circumstances, in the judgment of the jury, which rendered it reasonable that he should keep on trying as long as he did to effect the cure. The plaintiff recovered for such expense and on the hearing here the charge of the trial court was held correct.

It is a question, under the circumstances, for the jury to determine whether the plaintiff acted in good faith, and upon a reasonable belief that the horse could be cured, or made of some value, if properly taken care of; and the trial court was in error in withdrawing that part of the case from them. Such damages, of course, must always be confined within reasonable bounds, and no one would be justified, under any circumstances, in expending more than the animal was worth in attempting a cure. This is the only error we need notice.

The judgment of the court below must be reversed, with costs, and a new trial ordered.

Champlin and Morse, JJ., concurred with Long, J.

Sherwood, Ch. J.:

I concur in the result.

Campbell, J.:

I think the rule laid down at the circuit the proper one.

, Amos CHAFFEE, Appt.,
v.

TELEPHONE & TELEGRAPH CON-
STRUCTION CO.

(....Mich....)

The fact that telegraph and telephone poles and wires prevented the extinguishment of a fire does not make the company owning them liable for the loss, where the owner of the building burned, on whose land they stood, had built by the side of them, and had permitted a tenant to use one of the wires, and had never objected to them in any way before the fire.

(November 15, 1889.)

ERROR to the Circuit Court for Wayne County to review a judgment entered upon a verdict directed for defendant in an action to recover damages for the destruction of plaintiff's property by fire because of the alleged interference of defendant's wires with efforts to extinguish it. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. Otto Kirchner, for plaintiff, appellant:

The planting of poles in the alley and stretching and maintaining the wires through the same by defendant, was a clear invasion of plaintiff's rights.

Every continuance of a nuisance is a new nuisance.

Addison, Torts (abr.), p. 119; Cooley, Torts, 2d ed. 738.

The damage to plaintiff as a result of the injury was not only the probable, but it was the necessary, result of it, known and declared to be such by defendant one year before the fire.

See *Metallic Comp. Co. v. Fitchburg R. Co.* 109 Mass. 277.

The act of the defendant in planting the poles and stretching and maintaining wires over them through the alley in the rear of plaintiff's premises was the proximate cause of the destruction of plaintiff's building.

See *Louisiana Mut. Ins. Co. v. Tweed*, 74 U. S. 7 Wall. 52 (19 L. ed. 67); *Field, Damages*, § 5; *Sutherland, Damages*, p. 48; *Atkinson v. Newcastle & G. W. W. Co. L. R. 6 Exch. 404*; *Scott v. Hunter*, 46 Pa. 192; *Allegheny v. Campbell*, 107 Pa. 580; *Dickinson v. Boyle*, 17 Pick. 78; *McAfee v. Crawford*, 54 U. S. 18 How. 447 (14 L. ed. 217).

Long continuance of a nuisance is no defense to an action therefor.

Reid v. Atlanta, 78 Ga. 528; *Pettis v. Johnson*, 56 Ind. 189; *Gray v. Boston Gas Light Co.* 114 Mass. 149; *Philadelphia, W. & B. R. Co. v. State*, 20 Md. 157; *McCormick's App.* 57 Pa. 55.

Mr. Ashley Pond, with **Mr. William H. Wells**, for defendant, appellee.

Morse, J., delivered the opinion of the court:

Plaintiff was the owner of lot 73 in section 2 of the Governor and Judges' Plan in the City of Detroit, and of a valuable brick building thereon that yielded a monthly rent of \$250. It was situated on the south side of Larned Street west, in the block bounded by Larned Street and Jefferson Avenue on the north and south, and by Griswold and Shelby Streets on the east and west, respectively. The block was intersected by an alley twenty feet wide, running between Jefferson Avenue and Larned Street, from Griswold Street westerly to Shelby Street. The defendant put up and maintained sixty wires, stretched on cross-arms, each six feet long, attached to poles planted in the ground (eight to each pole), through said alley, in the rear of plaintiff's building. There were also twelve telegraph wires stretched through said alley by another company.

On the 2d day of March, 1888, a fire broke out in the building, and everything burned except the walls. Some of the brick walls were not damaged so as to require to be taken down, but a part of them were. It is claimed that these wires prevented the fire department from extinguishing the fire. Mr. Tryon, the secretary of the fire department, testified, as did Mr. Elliott, the assistant chief engineer, that on account of these wires it was impossible for the firemen to raise the ladders, which were on trucks. Mr. Tryon, some time before the fire, notified Mr. Phillips, the manager of the defendant Company, that these wires in the alley would prevent the fire department from raising its ladders in the event of a fire. Mr. Phillips replied that this was undoubtedly correct, but that the defendant Company were preparing to get its wires under ground, and that it would strip that alley as soon as possible,—probably the first thing it did. When the firemen first reached the premises the fire was in the third story. Evidence was given on behalf of the plaintiff tending to show that if it had not

been for these wires the first and second stories of the building could have been saved intact, except the damage from the water thrown on the fire. The plaintiff sues in trespass on the case, claiming damages, and contends: *first*, that the alley was a private way appurtenant to his lot and building; *second*, that the erection of the wires by defendant in the alley was a trespass, and their maintenance a nuisance, every continuance of which was a new nuisance; *third*, that, in contemplation of law, defendant, by its wires, was at the fire, and by force and arms prevented its extinction, and in so doing was the direct and immediate cause of the destruction of plaintiff's building. The defendant claims: *first*, that the defendant was not unlawfully maintaining the wires in the alley; *second*, the act complained of was not the proximate cause of the loss; *third*, the damages sought to be shown by the plaintiff's testimony are vague and speculative.

The first contention of the defendant is based upon the long acquiescence of the plaintiff in the maintenance of the wires in the alley. The circuit judge before whom the case was tried, Hon. Cornelius J. Reilly, of the Wayne Circuit Court, at the close of the testimony directed a verdict for the defendant. In the view that I take of the case, it is not necessary to discuss much of the evidence, or any point in the case save the first plea of the defendant. The evidence is uncontradicted that the building was erected five years before the trial of the suit. Before the erection of the burned building the lot was occupied by a dwelling-house, which had been there a great many years. The plaintiff testifies that the wires were placed there "a good while ago, and were there when the brick building, which was burned, was erected." He knew the poles were there, and what the wires were used for. "I asked no questions about it. From the time I first knew the wires were there, I understood what they were there for." He never asked the defendant to remove them, nor protested against their maintenance in the alley, nor in any way manifested any dissent to the action of the defendant in keeping and using them there. He testifies that one of his tenants used a telephone in his building, and says: "I never objected, or found fault with the defendant Company for maintaining its wires there."

I can see no legal or equitable reason why the plaintiff, tacitly assenting to the maintenance of the wires in this alley, by allowing his tenant to use a telephone connected therewith, and by permitting them to remain there without the least objection, should be allowed, after this fire, to place the damage, or any part of it, upon the defendant; nor can I find any law to sustain his action. It is contended by the counsel for plaintiff that the maintenance of the wires in the alley was a nuisance, and a continuing one from day to day, each continuance being a new nuisance; that the defendant was liable to the plaintiff in an action at law for the obstruction of the alley every day, up to and including the day of the fire; and that therefore the acquiescence of the plaintiff for one or more days cannot be used to infer an implied license for its continuance another day. The following cases are cited to support this contention: *Reid v. Atlanta*, 78 Ga. 528; *Gray*

v. Boston Gas-Light Co. 114 Mass. 149; *Philadelphia, W. & B. R. Co. v. State*, 20 Md. 157; *Pettis v. Johnson*, 56 Ind. 139.

These cases do not meet the question presented here. Failure to protest against a nuisance for a long space of time will not prevent an action to abate it, upon the principle that each day of its continuance is a new nuisance; and many courts hold that the right to maintain a nuisance can never be gained by prescription. But I can find no authority anywhere, and I should doubt its being good law if I did find it, that will permit a man to build by the side of these telegraph and telephone poles and wires, without any protest or demur whatsoever against their standing there, when they are on his own land, and go on for years, without finding any fault whatever, and allow a tenant to use one of the wires for business purposes in his building, and then, when a fire arises, and the poles are found to hinder the firemen in their work of extinguishing it, charge up to the corporation maintaining these poles the loss occasioned by such fire. To do this would be to violate one of the plainest principles of justice; and the law, in my opinion, will not permit it.

I do not doubt the right of Mr. Chaffee to have moved at any moment to abate this nuisance; but while he acquiesced in it, and virtually was using it, or deriving some benefit from it, through a tenant in his building, he cannot be permitted to recover damages because of its maintenance upon his premises. If there can be any assent which is not shown by express words, the plaintiff assented to the continuance of these poles upon his premises, and such assent was not a question for the jury. It was shown without dispute by his own testimony. There was clearly, to my mind, an implied assent that the poles might remain there, and no hint anywhere, not even in his testimony on the trial, that he ever considered them a nuisance until they were demonstrated to be so by the fire. Until something was done by Chaffee to notify the defendant that he found some fault with the maintenance of these poles in the alley, he could not recover damages for their being there.

The judgment was right, and must be affirmed.
Sherwood, Ch. J., and Champlin and Long, JJ., concurred with Morse, J.

Campbell, J., dissenting:

Whatever may be its effect as a circumstance on the question of damages, I think there can be no doubt of the right of any land owner to sue for some damages for any encroachment on his property rights. Delay in complaining may sometimes cut off a right to sue in equity, but nothing short of statutory limitations can bar a suit at law; and where a wrongful entry or intrusion is made without license or permission, no license can be legally determined from inaction. There is some difficulty in ascertaining the precise effect of the wires in connection with the fire. But such difficulty is no defense to an action, and a wrong-doer, and not the injured party, must bear this difficulty. Whether the danger of interference with putting out fires is a natural one, to which damage may be attached, is at least a question for the jury. That serious damage and fatal casual-

ties have arisen from the placing of numerous wires near high buildings is a matter of common knowledge, and there can be no doubt it is a wrong unless consented to. It is not in the power of a city to license anyone to damage or encroach on the property of individuals, and no justification can be based on it. I do not think it can be held, as matter of law, that Mr. Chaffee is estopped from complaining of the action of the defendant, or from recovering some damages. Nor do I think we can prevent a jury from considering the amount of damages, under proper instructions as to the law, the facts not being subject to judicial determination. I think there should be a new trial.

David M. RICHARDSON

Christian H. BUHL *et al.*, *Appts.*

(....Mich....)

1. **Courts will take notice of their own motion of illegal contracts** which come before them for adjudication, and will leave the parties where they have placed themselves.
2. **The organization of a corporation for the purpose of controlling the manufacture and trade in matches in the United States and Canada, by getting all manufacturers of matches to enter into a combination giving such corporation the whole control of the business, or by buying out those who would not so enter, and buying off any others who might propose**

NOTE.—Contracts creating monopolies, void as against public policy.

Agreements to stifle competition in trade are void, and conspiracies to injure trade are indictable at common law. *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33.

An agreement between several commercial firms, by which they bound themselves for the term of three months not to sell any India cotton bagging, except with the consent of a majority of their number, was held unlawful in *India Bagging Assn. v. Kook*, 14 La. Ann. 164. And see *Craft v. McConoughy*, 79 Ill. 348; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 686.

A division of the profits of a fraudulent transaction is sufficient evidence of a combination to defraud. *Kimmell v. Geeting*, 2 Grant, 125.

An agreement between the proprietors of five lines of canal boats to charge a uniform rate and divide the common earnings is a conspiracy. *Hooker v. Vandewater*, 4 Denio, 349.

A contract arising out of such an agreement is illegal and void. *Stanton v. Allen*, 5 Denio, 434.

So a combination to restrain trade is unlawful. *Com. v. Hunt*, 45 Mass. 111; *Com. v. Wallace*, 16 Gray, 221; *Com. v. Prius*, 75 Mass. 127; *Com. v. Eastman*, 1 Cush. 189; *Morris Run Coal Co. v. Barclay Coal Co.* 68 Pa. 173.

A combination of ship owners to keep trade in their own hands by giving a rebate on freights is not unlawful as to a rival carrier excluded therefrom. *Mogul Steamship Co. v. McGregor*, L. R. 21 Q. B. Div. 544.

How far contracts in restraint of competition in trade are sustainable, see *Lealie v. Lorillard*, 1 L. R. A. 456, note, 110 N. Y. 619.

Monopolies unlawful.

Monopolies are contrary to public policy. *Case of the Monopolies*, 11 Coke, 84 b; *Rex v. Waddington*

to engage in the business, is an unlawful enterprise, being an attempt to create a monopoly.

3. An agreement intended to aid in the formation and organization of an illegal corporation designed to secure a monopoly of a certain business by which, in consideration of indorsements and other financial aid to a shareholder to enable him to raise funds necessary to join the enterprise, the indorsers are to have a share of the net earnings of his stock, is void on grounds of public policy.

(November 15, 1889.)

A PPEAL by defendants from a decree of the Circuit Court for Wayne County in favor of plaintiff in an action to redeem certain pledged stock, to enjoin a contemplated sale thereof by the pledgees, and for an accounting and the repayment of certain moneys which the pledgees had, as alleged, collected over and above the sum due them. *Reversed.*

The facts are fully stated in the opinions.

Mr. Henry A. Harmon for defendants, appellants.

Mr. Willard M. Lillibridge for complainant, appellee.

Mr. F. A. Baker filed a brief in support of motion for rehearing, insisting that the alleged illegalities of the Diamond Match Company do not vitiate the contracts in question in this case, and relying upon *Willson v. Owen*, 30 Mich. 474, and cases cited.

Sherwood, Ch. J., delivered the opinion of the court:

In 1879 the Richardson Match Company was

located at Detroit. It was organized under the laws of this State, and the complainant owned or controlled all of its stock. Its business was manufacturing matches, but for sixteen months previous to the 3d day of July, 1879, its factory had not been in operation. The capital stock of the company then was \$75,000, consisting of 8,000 shares of \$25 each. On the representations of the complainant to defendant Buhl as to the earning capacity of the match factory, the defendants became security for complainant on his bond to the government for \$80,000, and indorsed the commercial paper of the company to the amount of about \$50,000. To secure the defendants on these liabilities Mr. Richardson assigned to defendant Buhl 1,800 shares of the stock in the Richardson Match Company, and received from him therefor the following receipt and agreement.

Received of Mr. D. M. Richardson one thousand eight hundred shares of the stock of the Richardson Match Company, to be held by me for three years from July 1, 1879, as trustee, for the following purposes: To vote the same at all stockholders' meetings, both regular and special; to receive the dividends paid thereon, and retain the same, except one-sixth portion thereof, which I am to pay to D. M. Richardson. At the expiration of said three years, if all the obligations which I or R. A. Alger have assumed for said company are fully paid and satisfied, I am to transfer said stock to said D. M. Richardson.

[Signed]

C. H. Buhl.

Detroit, July 3d, 1879.

1 East, 167. See *People v. North River Sugar Ref. Co.* (N. Y.) 2 L. R. A. 33.

An act affecting the public injuriously, though neither illegal nor immoral, but which is intended to effect a purpose tending to the prejudice of the public at large, is indictable at the common law as a criminal conspiracy. *King v. Journeymen Tailors*, 8 Mod. 10; *King v. Edwards, Strange*, 707.

So of a conspiracy to injure trade. *Rex v. Cope*, 1 Strange, 144.

A conspiracy is not the subject of a civil action until a third person has suffered a damage from something done under it. Then, and not before, he may sue; and the wrong inflicted, not the combination to do it, is the real foundation of the action. *Savile v. Roberts*, 1 Ld. Raym. 374, 378; *Hutchins v. Hutchins*, 7 Hill, 104, 108; *Herron v. Nichols*, 25 Cal. 555.

No relief in law or equity in case of fraudulent contracts.

Contracts entered into through fraud are illegal and void and parties thereto are in contemplation of law *in pari delicto*, and neither law nor equity will afford relief to either of them. *McClintock v. Loiseau*, 2 L. R. A. 816, and *note*, 81 W. Va. 865; *Cobbs v. Hixson*, 4 L. R. A. 682, *note*, 75 Mich. 260.

The courts of this country have uniformly refused to assist either party in the enforcement of a contract to violate the law. *Michigan Bank v. Niles*, 1 Doug. 401, 41 Am. Dec. 583; *Jackson v. Shawl*, 29 Cal. 271; *Mitchell v. Smith*, 4 U. S. 4 Dall. 269 (1 L. ed. 828), 1 Binn. 110, 2 Am. Dec. 417; *Maybin v. Coulton*, 4 U. S. 4 Dall. 296 (1 L. ed. 841); *Duncanson v. McLure*, 4 U. S. 4 Dall. 308 (1 L. ed. 845); *Nichols v. Ruggles*, 3 Day, 145, 3 Am. Dec. 262; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 (6 L. ed. 468); *Hannay v. Eve*, 7 U. S. 3 Cranch, 242 (2 L. ed. 427); *Patton v. Nicholson*, 16 U. S. 3 Wheat. 204 (4 L. ed. 371); *Cambioso v. Maffett*, 2 Wash. C. C. 98; *Bartle v. Nutt*, 4 L. R. A.

29 U. S. 4 Pet. 134 (7 L. ed. 825); *Craig v. Missouri*, 29 U. S. 4 Pet. 410 (7 L. ed. 908).

The law aids no one to violate its behests, but leaves a party as it finds him, remediless to the consequences of his own folly and turpitude. *Am. L. Ins. & T. Co. v. Dobbin, Hill & D.* 269; *Nellis v. Clark*, 20 Wend. 24, 4 Hill, 424; *Perkins v. Savage*, 15 Wend. 412; *De Groot v. Van Duzer*, 20 Wend. 393.

Illegal contracts are not such only as stipulate for something that is unlawful, but where the intention of one of the parties is to enable the other to violate the law, it is corrupted by such illegal intention and is void. *Tatum v. Kelley*, 25 Ark. 211; *Branch Bank v. Crocheron*, 5 Ala. 250; *Beach v. Kezar*, 1 N. H. 184; *Steele v. Curle*, 4 Dana, 381; *Girard v. Richardson*, 1 Esp. 13; *Langton v. Hughes*, 1 Maule & S. 598; *Lightfoot v. Tenant*, 1 Bos. & P. 551; *Farmer v. Russell*, 1 Bos. & P. 236.

Whatever the parties have fraudulently or illegally contracted to execute, the law refuses to compel the contractor to execute, or pay damages for not executing. It will leave the parties where it finds them. *Pepper v. Haight*, 20 Barb. 438.

A contract, though distinguishable from, yet growing out of, and made in aid of, an illegal contract is in contemplation of the Act against gambling and betting, and is void. *McLain v. Huffman*, 30 Ark. 421.

But it has been held that a contract, innocent in itself, will not be avoided because it may by possibility facilitate an illegal transaction; to render it void the connection with the illegal transaction must be direct and not remote or conjectural. See *De Groot v. Van Duzer*, 17 Wend. 170.

Judicial notice. See comprehensive *note* to *Olive v. State*, 4 L. R. A. 33, 86 Ala. 33; *Com. v. King* (Mass.) 5 L. R. A. 638; *Missouri Pac. R. Co. v. Lewis*, 2 L. R. A. 67, 24 Neb. 483; *Skinner v. Harrison Twp.* 3 L. R. A. 137, 116 Ind. 122.

The 1,800 shares of stock thus assigned to Buhl gave him and Alger control of the Richardson Match Company, and the agreement that they should retain five sixths of the dividends made upon that stock gave them one half of all the dividends or profits earned by the company. After the receipt was given, Gen. Alger became president of the company and a director, and Mr. Buhl and two of his sons, with Mr. Richardson, were the other directors. Frank Buhl, one of the sons, was made secretary and treasurer at a salary of \$1,200 per year. The Richardson Match Company was conducted under the arrangement above stated until December 24, 1880. The paper indorsed by Buhl and Alger was discounted at 7 per cent at the Detroit National Bank, in which they were interested, and the interest paid by the company in its ordinary course of business.

The Diamond Match Company was organized on the 3d day of December, 1880, under the laws of the State of Connecticut, for the purpose of uniting in one corporation all the match manufactories in the United States. Its object was to monopolize and control the business of making all the friction matches in the country, and to establish the price thereof; and it became necessary to buy many plants which had become established in the business, or were preparing therefor, and all the property used in connection therewith, and to obtain promises from the owners and manufacturers that they would not engage in the business themselves, or indirectly through others, for ten or more years thereafter; and, for the purpose of obtaining the control and good-will of such factories and their properties, large powers were given by the Legislature to the Diamond Match Company when organized, and under the by-laws by which it was controlled. The extent to which it was allowed to go in this direction in the accomplishment of its purposes appears in the articles of incorporation, in which it is stated, among other things, that the business of the company is "to manufacture, buy, sell and deal in friction matches of all kinds, and all articles entering into the composition and manufacture thereof; to manufacture, buy, sell and deal in machines and machinery, whether applicable to the manufacture of friction matches or to other purposes; to purchase, own and sell exclusive rights under letters patent relating to the manufacture of friction matches, and to machines and machinery, whether applicable to the manufacture of friction matches or to other purposes; to manufacture, buy, sell and deal in animal pokes, tobacco pipes, curry combs, brushes, shoe-blackening and shoe-dressing, and all articles entering into the composition and manufacture thereof; to purchase, own and sell exclusive rights under letters patent relating to the manufacture of all the articles herein enumerated, and to machines and machinery applicable to the manufacture thereof; to buy, sell, own and deal in any real or personal property necessary or convenient to the prosecution of said business,—and generally to do all things incidental to said business, and the proper management thereof."

The Diamond Match Company, in carrying out its purposes, found it necessary, in many instances, to buy a large quantity of useless material, and to pay large and exorbitant prices

for the property purchased, which they could not make available; and in many cases in no other way was it possible to purchase the inactivity of manufacturers, and those who intended to enter into the business, and who would otherwise become competitors of the company in the trade. For the purpose of showing upon the books of the company the amount it was obliged to pay for unnecessary and useless property, and the excess in prices for the property they could use, and to silence and prevent all competition, the company opened two accounts,—one headed "Real Estate and Machinery," and the other "Purchase Account." The capital stock of the company consisted of \$2,250,000, divided into \$1,400,000 of common stock, and \$850,000 of preferred stock. For five years the preferred stock was entitled to an annual dividend of 10 per cent before any dividend was to be paid on the common stock. All corporations and individuals in the country, engaged in the business of making friction matches, desiring or consenting to transfer their property to the Diamond Match Company, did so upon valuations agreed upon, and received their pay therefor in the stock of the Diamond Match Company at par, and gave a bond to the company of the tenor and effect of that given by the Richardson Match Company when it entered the company, a copy of the condition of which reads as follows: "And The Richardson Match Co. hereby covenant and agree to and with the said The Diamond Match Company, that it shall not and will not at any time or times, within twenty years from the date thereof, directly or indirectly engage in the manufacture or sale of friction matches, and that it will not aid, assist or encourage anyone else in said business, in the State of Michigan or anywhere else, where its doing so may conflict with the business and interests, or diminish the sales, or lessen the profits, of the Diamond Match Co.; and it is understood by it that the above covenant not to engage in the match business is a valuable and influencing consideration, without which the Diamond Match Company would not have purchased the above property; and for the true and faithful performance of said covenant it hereby binds itself, its successors and assigns, heirs, executors and administrators, unto the said Diamond Match Company in the sum of \$50,000, to be recovered and paid as and for liquidated damages."

Mr. Richardson's individual bond is in substantially the same form, in a penalty of \$25,000. Each proprietor subscribed for a certain amount of preferred stock, which he paid for by transferring to the company such matches and match materials as he or it had on hand when they entered the company, at an appraised value, and, if this was insufficient to pay for such stock, the balance was paid in cash; but common stock was paid for all real estate, machinery, patents, good-will, bonds to stay out of the business, and all other property transferred to the company at the valuation agreed upon when the proprietor or proprietors came into the company, except matches and match materials, for which preferred stock was issued. Under the arrangement by which any party sold and conveyed a match factory or other property to the company, he was to buy

at its par value one half as much preferred stock as he had received in common stock for his property. This was intended as the working capital for the new company, and every person who conveyed property to the company was obliged to give to the company a bond, such as is hereinbefore mentioned.

Under the policy above stated, through the energy of its officers and managers, the Diamond Match Company succeeded in securing control, substantially, of all the factories in the country, with their several properties, and the owners thereof were brought under its dictation, and the great monopoly became complete, and, as was expected by its proprietors, the gains realized by the company were enormous. Schedule A of the testimony shows that among the match factories that passed into the control of the Diamond Match Company at the time of its organization was that of the Richardson Match Company of Detroit, and at that time the agreement of July 8, 1879, between Richardson and Buhl, hereinbefore referred to, was in full force, as was the bond to the United States; and the liability of defendants, as Richardson's indorsers, was also in existence. One was for \$65,000, and the other about \$30,000 or \$35,000, and as security against the payment of which defendants held 1,800 shares of the Richardson Match Company's stock; and, as further security, the company had been reorganized, and its management and control placed under the direction of the defendants, as hereinbefore stated, and which was successful. Its earnings after its reorganization were \$29,675.-89, and no dividends were declared, and it is conceded the defendants are entitled to \$14,887.69 of these earnings; and it further appears that the defendants have never been called upon to pay anything on account of their said liability for the complainant, or the Richardson Match Company. This was the situation of the Richardson Match Company, and Mr. Richardson, who had been in its employ since its reorganization, as general manager, at the time the Diamond Match Company was formed. It was, however, necessary, in consequence of the uncanceled liabilities of the defendants, and the desire of Mr. Richardson to raise more money to take the position he wished to in the new company, that a different agreement should be made from that of July 8, 1879, and that it should be between the complainant and defendants, and consummated before the Richardson Match Company became finally merged in the Diamond Match Company; and for this purpose Mr. Richardson, on the 22d day of November, 1880, submitted to the defendants the following proposition:

Detroit, Mich., Nov. 22, 1880.

Messrs. Buhl and Alger:

Proposition by me is as follows, viz.: *First*. To terminate the existing contract on the first day of January next, and to divide the net earnings on the basis of an inventory to be taken at that time, and to receive the dividend therefor. *Second*. To indorse my notes for the necessary amount to purchase \$100,000 of the preferred stock of the proposed new company, or so much thereof as shall be equal to 50 per cent of the value of the factory, after deducting my share of the net earnings, allowance to be made for the payment of my personal debts.

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Their interest in the earnings of said stock to cease on the 1st day of July, 1882, provided said notes shall have been paid from the dividends upon said stock, or otherwise, on or before said 1st day of July, 1882; the dividends received upon said stock to be applied to the payment of said notes. Said Buhl and Alger to receive one half of the dividends on the common and preferred stock of said company up to said 1st day of July, 1882, at the time of final settlement; provided, however, that in the event that no inventory of the assets and debts of the proposed new company shall be made on the 1st day of July, 1882, then the basis of settlement shall be as follows: Said Buhl and Alger shall receive one quarter of the dividends made for the year 1882, and one half the dividends for 1881, after deducting therefrom the amount paid for interest on the mortgage on the factory property, and upon the notes so indorsed. The common and preferred stock to be assigned to Mr. C. H. Buhl, except \$30,000, which is to be assigned to said proposed new company as collateral security for the payment of the mortgages on the factory, and a further sum of \$5,000 to be held by me. *Third*. In the event said notes shall not have been paid, and the debt duly liquidated, on or before the 1st day of July, 1882, said Buhl and Alger shall receive one half the dividends for the full term of two years from January 1, 1881, to January 1, 1883, after deducting from the total dividends of said company the interest on said mortgage and said notes. Upon settlement being made under the second or the third proposition, as herein stated, [said stock] shall be reconveyed to me.

This proposition was accepted, with the following addition, made by Gen. Alger, and which was assented to by Mr. Richardson: "If, upon the expiration of two years from January 1, 1881, said notes are not paid, then Buhl and Alger are authorized to sell the necessary amount of stock to pay for the same, unless some further arrangement for carrying them along is agreed upon between them and myself."

Mr. Richardson testifies that, upon the basis of the contract contained in the foregoing proposition, as modified by Gen. Alger's addition thereto, he attended the meeting for the organization of the Diamond Match Company, and put into the new company the factory of the Richardson Match Company, at the sum of \$190,000, and subscribed for \$95,000 of the preferred stock. The \$190,000 for the factory was paid for in common stock.

The defendants gave their indorsements to the amount of \$35,000 to enable the complainant to pay for his preferred stock, which he paid into the Diamond Match Company. The contract, as modified by Gen. Alger, had not yet been signed by the parties. At the General's suggestion, a meeting of the parties was had on the 27th of December, 1880, in Detroit, at which Gen. Alger proposed that an additional claim should be made to the modified contract. Mr. Richardson objected to the proposed change, but to which, he claims, under the then situation and circumstances, he was finally compelled to yield his assent; and the contract, as finally concluded, reads as follows:

Memorandum of agreement between David M. Richardson, of the first part, and Christian

H. Buhl and Russell A. Alger, of the second part, all of Detroit, Michigan, witnesseth as follows:

Whereas, it is deemed expedient to wind up the business of the Richardson Match Company, and to unite its interests with the other match manufacturing interests of the United States in one corporation, to be known as the "Diamond Match Company" organized under the laws of Connecticut; and whereas, said Richardson desires to furnish \$95,000 towards the necessary working capital of said Diamond Match Company, and also to sell his factory, and the machinery connected with same, to said Diamond Match Company: Now, therefore, for the purpose of making such consolidation, the parties hereto consent that the lands, buildings, machinery, tools and fixtures of the Richardson Match Company be sold and conveyed to the said Diamond Match Company for the sum of one hundred and ninety thousand dollars (\$190,000), to be paid for in the common stock of said Diamond Match Company at its par value. And as it will be necessary for said Richardson to borrow the principal part of said \$95,000, for which he is to receive \$95,000 of the preferred stock of said Diamond Match Company at its par value, the said second parties agree to indorse the said Richardson's notes for such sum as is required to make up said ninety-five thousand dollars (\$95,000), after deducting the amount of the net earnings due said Richardson from the proceeds of the Richardson Match Company since July 1, 1879, and to raise the money on said notes.

An inventory of all the matches and match materials of the said Richardson Match Company on hand January 1, 1881, shall be made, and such property sold. The inventory and valuation of said personal property, upon which the same is sold, shall be the basis of settlement between the parties in the division of the profits of the Richardson Match Company. The first party is to assume the payment of the principal and interest of a mortgage on the property of the Richardson Match Company for \$28,200, held by the Connecticut Mutual Life Insurance Company, and is to deposit with said Diamond Match Company \$40,000 of said common stock, at its par value, as security for such payment. All the remaining stock, both preferred and common, is to be taken in the name of the first party, and, with the exception of ten shares of said common stock, is to be immediately transferred by him to said C. H. Buhl, to be held by said Buhl as security for the indorsements as above stated, and any and all other indebtedness of said first party or said Richardson Match Company to said parties, or either of them, and also as security to said second parties for their interest in the profits upon the said stock of the Diamond Match Company. The debts due to the said Richardson Match Company are to be collected, and its indebtedness paid.

A settlement is to be made between the parties hereto, and the profits divided, as provided in the agreement of July 8, 1879, except that the share of the profits belonging to said first party shall be applied to the payment of his debt to the Richardson Match Company, and in payment of any moneys due from him to

either of said second parties; and what remains shall be contributed by him as a part of said \$95,000, and on the sum contributed he shall receive interest from the dividends paid on said stock. The dividends on the stock of the Diamond Match Company, both common and preferred, including the \$40,000 pledged as aforesaid, and the ten shares retained by said Richardson, for one year and six months from the first day of January, 1881, shall be applied: *first*, to the payment of interest on said mortgage to the Connecticut Mutual Life Insurance Company; *second*, to the payment of interest on the notes so indorsed by said second parties; and, *third*, to the payment of interest to each of the parties hereto on the money advanced by them respectively in making up said sum of \$95,000. Of what there remains, one quarter shall be paid to each of the said second parties, and the other half applied to the payment of the principal of the notes so indorsed by said second parties, and of any advances that may be made by them. The said second parties agree that they will advance to said first party the dividends belonging to them as aforesaid, to be used in taking up said notes indorsed by them, and take therefor the notes of said first party, payable on or before March 1, 1883, with interest at the rate of 7 per cent per annum, and hold said stock as security for the payment thereof. If all said notes indorsed by said second parties as aforesaid are not paid by September 1, 1882, then said second parties shall be entitled each to one fourth of the dividends on all said stock for the whole of the year 1882. The notes to be given by said first party to said second parties for any cash that they may advance to make up said \$95,000 shall bear interest at 7 per cent per annum, and be payable on or before September 1, 1882.

If all of the notes indorsed by said second parties as aforesaid, and any notes given by said first party to said second parties, are not paid by March 1, 1883, the said second parties are hereby authorized to sell said stock at public auction after thirty days' published notice, and apply the proceeds, or so much thereof as may be required, to the payment of said notes, interest and expenses; the above provisions to apply to all original notes and renewals thereof. *It is expressly understood that said second parties are to receive one half [each one quarter], after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one half the dividends; and in settlement with said first party, he is to pay them, in addition to one half of the dividends declared, the one half of any surplus or reserved fund which, if divided, would pertain to said stock; and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half year, the earnings of the whole year shall be averaged so that the said second parties shall receive the full half of the earnings of said stock for the whole year; provided, that on such settlement the second parties shall estimate such earnings from the trial balances or books of said Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company,*

and shall take into consideration improvements that have been made out of the earnings thereof.

[Signed] David M. Richardson,
R. A. Alger,
C. H. Buhl.
Detroit, December 28, 1880.

That portion of this contract printed in italics is the clause added at the suggestion of Gen. Alger, and objected to by Mr. Richardson. In other respects, the agreement is substantially the same as that agreed upon in Richardson's proposition, dated November 22, 1880.

A supplementary agreement was entered into November 22, 1881, extending the contract of December 28, 1880, so that it should cover the entire period of two years. It is as follows:

"It is also agreed that the earnings of the stock of the Diamond Match Company, both common and preferred, including the \$40,000 pledged to the Diamond Match Company, and the ten shares held by said Richardson, for two years after the first day of January, 1881, shall be applied, as stated in said agreement of December 28, 1880; it being the intention hereof to provide that said second parties shall each receive one quarter of the earnings of said stock for two years from the 1st day of January, 1881,—that is, one quarter of the full earnings of the stock for 1881 and 1882, instead of for one year and six months, as stated in said agreement. In all other respects, except providing security for additional loans, as hereinbefore stated, said agreement is to remain in force and unchanged."

It is conceded that the liability of the defendants for the complainant upon their indorsements did not exceed at any time \$85,000, and that at the time of the commencement of this suit such liability of defendants, both upon such indorsements and upon the bond to the government, except a small note of \$3,150, had been paid, and that said note has since been satisfied, and that said defendants have never been obliged to pay a dollar on account of such liability. The Richardson stock, held by Buhl, in the Richardson Match Company was exchanged for stock in the Diamond Match Company, which took the place of the other. The dividends received on the Richardson stock amounted to \$114,000, and the Richardson Match Company, when its business was closed up, showed profits to be divided of \$29,675.39, or an aggregate of profits of \$143,675.39. The interest paid on the mortgage on the Richardson match factory and on the paper indorsed amounted to \$9,609.29, showing a net profit to be divided of \$134,066, and leaving \$67,033 to go to Buhl and Alger, and the same amount to Richardson. At the time the bill was filed Buhl and Alger had received \$68,400, and since that time \$24,400, making an aggregate of \$25,767 more than one half of the amount to be divided, as claimed by complainant. It is this last amount, with interest thereon, making a total of \$35,319.25, for which complainant claimed and obtained at the circuit a decree, and from which defendants appeal.

"Complainant alleges that the said sum of \$68,400, so received by the said defendants, comprises the full one half of all the net earnings of said stock so held by the defendant Buhl

during the years 1881 and 1882, together with the amounts received as aforesaid by them from the net earnings of the stock of the Richardson Match Company; not charging against said stock any loss on account of the purchase and sale by said Diamond Match Company of other match factories. And your orator, upon like information and belief, avers that, during the said two years, the said stock has earned no surplus, and that there is no reserve fund which, if divided, would pertain to said stock, and that the said defendants have now received all that is due them upon the said stock, under the terms of the three contracts above referred to."

The foregoing allegations are denied by the defendants, and they allege that the net earnings of the Richardson stock in the Diamond Match Company for 1881 were \$81,099.31, and for 1882 are \$139,757.92; and that there is still due them on their share thereof \$58,683, less the dividend of \$24,400 received by them since the bill was filed. Thus it will be discovered that the issue in the case is made upon the proper construction of the contract of December 28, 1880, assuming that said contract is in all respects a valid instrument.

When the Diamond Match Company opened the books containing the account of its transactions, as has been hereinbefore alluded to, all of its purchases were kept in two accounts. Under the head of "Purchase Account" were matches and match material, appraised at cash value; and it would appear that under the head of "Real Estate and Machinery Account," everything else purchased by the company as taken and appraised was included. This account was represented by the common stock of the company, with which it was purchased; the other by preferred stock, which was given for it. There seems to be a general understanding that the property contained in the purchase account, or very much of it, was taken by the company at a large over-valuation,—in some instances many times its worth was given; and it is claimed in like manner there was an over-valuation made and listed under the head of "Real Estate and Machinery Account," that this became necessary in order to make the desired purchases, and secure the complete monopoly intended,—that is to say, to increase the value of the company's stock and its gains by destroying all competition, whether the result of individual enterprise or corporate action, and to secure the non-action of the proprietors of the factories taken in or purchased. The parties to this suit were all benefited by such action in proportion to the amount of stock held by each, as all were stockholders. It is true the complainant's stock, or a large portion of it, was at the time held by defendants as security; but that does not change the rules or the results which govern and follow the action taken by the company.

There appear in the record, as returned to this court from the books of the Diamond Match Company, commencing with August 1, 1881, nineteen trial balances, ending with August 1, 1883. That of December 31, 1881, shows a credit to the profit and loss account of \$647,433.42, and a debit of \$7,175.67, leaving a balance to the credit of that account of \$640,257.76. The trial balance of December

80, 1882, shows a credit to the profit and loss account of \$1,118,848.42, and a debit of \$15,496.29, leaving a balance to the credit of that account of \$1,102,352.13. The board of directors, on February 9, 1882, adopted the following preamble and resolutions:

"Whereas, the several ledgers and general balance sheets of the company, at date of December 31, 1881, show the aggregate net earnings of all the factories earning a profit to the sum of \$647,433.43, and the aggregate losses of the factories making losses to be \$7,175.87, making total net earnings, \$640,257.76; and whereas, there are standing on the several ledgers of the company various purchase accounts, which are debited, with an aggregate sum of \$173,733.89, which represent the cost of same up to December 31, 1881; and whereas, the actual value of said purchase accounts is \$5,500; therefore, resolved, that the difference of \$168,233.89 between the actual value and the book value of these purchase accounts be charged to Dr. of net earnings of the company for 1881, and that the president be instructed to furnish the managers with the proper forms of entries to carry this resolution into effect. Whereas, many of the real estate and machinery accounts of this company have a book value, or are charged with a cost sum in excess of their actual value; therefore, resolved, that \$247,023.87 of the sum described as net earnings be applied to the reductions of the book values of such real estate and machinery accounts, and in such proportions as the executive committee may approve, and that the president be requested to furnish the managers with the proper entries to carry this resolution into effect on the several books of account and ledgers of the company."

At the same meeting of the board of directors, a 10 per cent dividend was declared. Three 10 per cent dividends were declared for 1882; the last one at a meeting of the board February 14, 1883. At the same meeting it was resolved "that the balance remaining as credit of profit and loss account, after providing for the dividend declared at this meeting, be applied to the reduction of the book values of the company's real estate and machinery accounts, such reduction to be apportioned among the several properties by the executive committee; the amount so to be applied being \$310,922.26." Subsequently a reduction was made in the purchase account of \$117,429.87. This fact is admitted by a stipulation of the parties, and by said stipulation the following is given as a tabulated statement of the action of the company's board of directors in disposing of the profit and loss account for the two years in question:

1881.		
To the credit of profit-and-loss account.....		\$640,257 76
Dividends	\$225,000 00	
Charged off purchase acct. 168,233 89		
Charged off real estate and machinery acct.....	247,023 87	
		\$640,257 76
1882.		
To the credit of profit and loss acct.....		\$1,102,352 13
Dividends	\$675,000 00	
Charged off purchase acct. 117,429 87		
Charged off real estate and machinery acct.....	310,922 26	
		\$1,103,352 13

The defendants claim that they are entitled under their agreement to their share of the
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amounts charged off, the same as though these amounts had not been so disposed of upon the books. Complainant claims that defendants are entitled to one half of the dividends paid, and no more; that dividends and net earnings mean the same thing, as used in the contract between the parties in this case; and that they have received the amount to which they are entitled. It is undoubtedly true that "the function of a profit and loss account is to show earnings, or the lack of them; and that every item being credited which ought to be credited, and everything being charged which ought to be charged, the profit and loss account will show what the net earnings or losses are;" and I am satisfied that the learned counsel for the complainant is correct when he says "that the first thing to be done by any manufacturer, who would ascertain his net earnings during the preceding year, is to take a careful inventory of what he has left, including his plant and machinery, and then make just and full allowances for all losses and shrinkages of every kind that he has suffered in his property during the year, and for all expenses of every kind, ordinary or extraordinary, that have occurred during the year, and, having made such inventory, and deducted such losses and shrinkage of every kind, his net earnings will be the difference between all his investments in his business and all his expenses of every kind on the one hand, and this new inventory, with the deductions properly made, and all that he has received of every kind on the other hand; and if his books are properly kept, and proper deductions made, these net earnings will finally appear on the balance sheet to the credit of the profit-and-loss account."

There is no dispute as to what the items "charged off" in the account represented, and that they stood upon the books of the company, under the direction of its managers, in the account as debited to the company. It represented the agreed valuation of the property purchased by the company, or taken into it at its organization, and for which common stock of the company was issued or given to the owner or owners, and included therein is the bond, required in each instance where a purchase was made, that the vendor would not prosecute the business for a series of years thereafter.

The stock was taken at par, the amount of the valuation and the amount of the stock being equal, and the value of the stock was never less than when taken, and remained at par except when it sold for more; and it is a little difficult to see why it should be said, so long as this was the case, that there was a loss to the company or a shrinkage in value. It is true the value of the chattel property and real estate conveyed to the company may have greatly depreciated; but at the same time the rights surrendered to the company by the owner under his bond might, in the mean time, have greatly appreciated. It seems quite certain that no means are shown, if any exist, by which such loss or depreciation could be made to appear to a board of directors or to anyone else with any degree of certainty.

But in this case a different question arises. Alger and Buhl, as regards the complainant, and their rights under this contract, occupy

the position of third parties, and their interests are controlled by these relations to the company. The amount they were to receive for their indorsements in no way depended upon the discretionary power of the board of directors. The net profits of the company mentioned in the contract served only to fix the amount they were to receive for their indorsements of the complainant's commercial paper. He had their indorsements to the extent he desired, and greatly to his pecuniary advantage, as the record plainly shows. Notwithstanding the success of the company's operations has given to the terms upon which he received the aid of defendants almost the appearance of extortionate requirements, however, the hazard of the venture very much modifies this appearance when it is considered that a failure of the enterprise might have resulted in great financial disaster to defendants.

No question is raised as to the validity of the contract between the parties, or upon its invalidity upon the ground of public policy, or for any other cause. It is treated by the parties on both sides as a valid instrument, to be construed and enforced by the court as such, and no unwillingness is expressed by either side to abide the correct construction when ascertained; but it is claimed by complainant that, if the construction is to be given to it contended for by defendant's counsel, equity and good conscience will have been violated to an extent requiring the exercise of the restraining power of a court of chancery to prevent the injury and wrong, not intended by the defendants when the instrument was made, and which at that time was entirely unanticipated by complainant. But it must be recollected that the object to be accomplished by the reorganization of the enterprise was by all the parties the same; that the means to be resorted to in the accomplishment of the object desired, if successful, had no respect for the equitable or first right of any person under other and different circumstances; and that the complainant, as well as the defendants, were active participants in the business of the company and its proceeds, seeking the accomplishment of the same object, and participated largely in adopting the means to be employed for that purpose; and if such object or means were reprehensible or inequitable, all the parties, the complainant as well as the defendants, are "under the same condemnation," and a court of equity will leave the parties, when such is the case, where it finds them,—outside the rules of courts of justice, "*in pari delicto*,"—and they must settle their own grievances and unlawful transactions.

The fact in this case appears plainly that the amount promised the defendants, and for which defendants ask payment, was to enable the complainant to occupy a place in the company which would give him a better position to share in the profits of the monopoly equally with the defendants. If it were our duty to adjudicate the rights of these parties, we should, under the circumstances, give the same construction to the contract in question, and apply the same rules, we would to any other agreement where no equitable considerations are involved. There is nothing ambiguous in the language used, nor is the object intended ob-

scure. It was to organize and put into operation one of the greatest monopolies of the age, or rather to aid in so doing. This is not a case where the complainant, as a stockholder, is seeking to obtain profits or dividends wrongfully withheld from him, or applied by a board of directors to an improper purpose, and the same rules do not govern the question that would be raised upon such an issue; but the simple question in the case is, What should the parties be held to mean from the language they have used, and does the action taken by the board of directors in disposing of the earnings of the stock during the two years in question bind the defendants as to the amount they are entitled to receive under their contract? It is evident to me that it does not, but that the defendants, independent of such action, may go behind it if necessary, and show that there has been no shrinkage of values,—no losses sustained,—and first what the net earnings of the stock have been during the two years. Except in case it becomes necessary to make estimates of earnings of the stock, it must be made from the trial balances, as they appear upon the books of the company; and in which case the defendants are to make proper allowances for the loss and shrinkage of the company's property, and shall take into consideration improvements that have necessarily been made in the proper conduct of the business.

It is expressly stated in the agreement that the defendants were not to receive one half of the dividends merely which might be declared, but one half of the net earnings of the stock; and it is not stated in the contract how or by whom such net earnings are to be ascertained. That portion of the contract upon which the contest arises best speaks for itself, and I do not think there is any chance for two opinions on the subject of its proper construction. It says: "It is expressly understood that said second parties are to receive one half [each one quarter], after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one half of the dividends; and in settlement with said first party he is to pay them, in addition to one half of the dividends declared, the one half of any surplus or reserved fund which, if divided, would pertain to said stock; and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half year, the earnings of the whole year shall be averaged so that the said second parties shall receive the full half of the earnings of said stock for the whole year; provided, that on such settlement the second parties shall estimate such earnings from the trial balance on books of said Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof."

A close inspection of this paragraph of the contract very clearly discloses, I think, that in the settlement to be made between these parties it was expressly provided that in ascertaining the half of the net earnings of the stock, to

which the defendants were entitled, no such "charging off" from such earnings was to be allowed; and I do not think, as is urged by complainant's counsel, "that, in the absence of bad faith or mistake, the action of the board of directors in reducing the amounts to the credit of the profit and loss accounts is conclusive upon the parties to this suit as to the amount of the earnings or profits to be divided between them;" and it is of no consequence whether their action in this regard can be impeached or not, if the defendants are not bound by the action of the board of directors. There is no doubt but that the Diamond Match Company in doing a legitimate business would have had the right to have the par value of its shares of stock maintained out of the profits or earnings of the company, and it was maintained; and for that purpose it was entirely unnecessary for its board of directors to direct any "charging off," as was done in this case. Its stock was not only at all times at par, but, as we have before said, largely above par, and has always been at a premium; and from its earnings the year after the agreement ended the complainant himself received a stock dividend amounting to \$70,000. If it were necessary, but little difficulty would be found, I think, in showing that the sums "charged off" were not properly expenses or losses in running the business of the company. I think the learned counsel for defendants was right in saying: "It was an acquisition of the very property the company at the outset had determined to acquire, and was of more permanent value than if it had been invested in new factories. The object of the company was to crush others, that it might be valuable. It did that, and expended out of its earnings for 1881 and 1882 \$285,603.76, not as an expense of running the business, but for the purpose, and with the inevitable effect, of increasing its property. What was acquired with this money was none the less property because intangible. Every dollar thus expended added itself to the value of the business, and became a permanent part of it.

Richardson owns \$285,000 of the stock of this company [exclusive of the \$70,000 acquired by stock dividend from earnings of 1883], every dollar of which was permanently enhanced in value by these expenditures. It was a permanent investment. The company had determined to monopolize the business, and therefore the more perfect the monopoly became the more valuable its property became. Every factory it bought and closed, every patent it acquired, every good-will it purchased, every man it bought up, added to the value of its stock not only the amount paid, but, from the very necessity of the case, very much more. Of course, when the agreement between these parties now before us for construction was entered into, no one could certainly tell that the defendants could even realize a dollar of profits from this venture, while their liabilities assumed were very large. It could not be known that the dividends would ever be sufficient even to pay the interest on the notes indorsed, or the mortgage of \$28,000 covering the property, which was their only security, and which was to be first paid before they could realize anything by way of profit. The success of the enterprise was one not altogether free from doubt.

Upon this point, Richardson himself says in his testimony he considered he was assuming a great risk in turning his factory into the Diamond Match Company. Such was the complexion of things at the time the contract was made as viewed by him, and he had then had twenty-five years' experience in the business. If the parties could have known then what they know now, or could they have foreseen the almost fabulous future pecuniary success of this company, the contract made would have been regarded as both unconscionable and oppressive.

But in construing the instrument, if a valid one, the circumstances and surroundings under which it was made should be taken into consideration. Neither mistake nor fraud is claimed to have been used by the parties, or either of them, at the time it was procured and entered into, and we are asked to treat it as valid and binding, and construe it accordingly; and in this respect so far in the discussion I have complied with counsel's request, and in so doing have been unable to take any view of the case which will sustain the decree made by the learned circuit judge. But an examination of the record, and the character of the transactions out of which the contract grew, and the object intended to be accomplished by it, as I have found them, raise another, and far more important, question, and which it becomes the imperative duty of this court to pass upon, whether raised by counsel or not.

When a contract is brought before us for construction and adjudication, its validity is necessarily involved, and it is usually the first point to which the attention of the court is challenged by counsel; but in this case, when, upon the argument, attention was called to this feature of the case, it was allowed to pass by counsel upon both sides without discussion. I have therefore expressed my views of the case as presented by the parties, and will now pass to the question which it is not needful for counsel to present in order to secure the action of this court in disposing of the same.

I think no one can read the contract in question, and fail to discover that considerations of public policy are largely involved. The intention of the agreement is to aid in securing the objects sought to be attained in the formation and organization of the Diamond Match Company. This object is openly and boldly avowed. Not only does this appear in its organization, and in the business it proposes to conduct, and in the modes and manner of carrying it on, but the testimony of Gen. Alger himself avers it, and settles its character beyond question. The organization is a manufacturing company. The business in which it is engaged is making friction matches. Its articles provide for the aggregation of an enormous amount of capital, sufficient to buy up and absorb all that kind of business done in the United States and Canada, to prevent any other person or corporation from engaging in or carrying on the same, thereby preventing all competition in the sale of the article manufactured. This is the mode of conducting the business, and the manner of carrying it on. The sole object of the corporation is to make money, by having it in its power to raise the price of the article, or diminish the quantity to be made and used, at its pleasure.

Thus both the supply of the article and the price thereof are made to depend upon the action of a half dozen individuals, more or less, to satisfy their cupidity and avarice, who may happen to have the controlling interest in this corporation, an artificial person, governed by a single motive or purpose, which is to accumulate money regardless of the wants or necessities of over 60,000,000 of people. The article thus completely under their control for the last fifty years has come to be regarded as one of necessity, not only in every household in the land, but one of daily use by almost every individual in the country. It is difficult to conceive of a monopoly which can affect a greater number of people, or one more extensive in its effect on the country, than that of the Diamond Match Company. It was to aid that company in its purposes, and in carrying out its object, that the contract in this case was made between these parties, and which we are now asked to aid in enforcing. Monopoly in trade or in any kind of business in this country is odious to our form of government. It is sometimes permitted to aid the government in carrying on a great public enterprise, or public work under governmental control, in the interest of the public. Its tendency is, however, destructive of free institutions, and repugnant to the instincts of a free people, and contrary to the whole scope and spirit of the Federal Constitution, and is not allowed to exist under express provision in several of our State Constitutions. Indeed, it is doubtful if free government can long exist in a country where such enormous amounts of money are allowed to be accumulated in the vaults of corporations, to be used at discretion in controlling the property and business of the country against the interest of the public and that of the people, for the personal gain and aggrandizement of a few individuals. It is always destructive of individual rights, and of that free competition which is the life of business, and it revives and perpetuates one of the great evils which it was the object of the framers of our form of government to eradicate and prevent. It is alike destructive to both individual enterprise and individual prosperity, whether conferred upon corporations or individuals, and therefore public policy is, and ought to be, as well as public sentiment, against it. All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and intolerable, and ought to receive the condemnation of all courts.

In my judgment, not only is the enterprise in which the Diamond Match Company is engaged an unlawful one, but the contract in question in this case, being made to further its objects and purposes, is void upon the ground that it is against public policy.

The decree at the Circuit should be reversed, and the complainant's bill dismissed, with costs.

Champlin, J.:

I concur with the chief justice in dismissing the bill of complaint, for reasons which render it unnecessary to discuss the merits of the controversy between the parties.

It appears from the testimony that the Diamond Match Company was organized for the

purpose of controlling the manufacture and trade in matches in the United States and Canada. The object was to get all the manufacturers of matches in the United States to enter into a combination and agreement, by which the manufacture and output of all the match factories should be controlled by the Diamond Match Company. Those manufacturers who would not enter into the scheme were to be bought out; those who proposed to engage in the business were to be bought off, and a strict watch was to be exercised to discover any person who proposed to engage in such business, that he might be prevented, if possible. All who entered into the combination, and all who were bought off, were required to enter into bonds to the Diamond Match Company that they would not, directly or indirectly, engage in the manufacture or sale of friction matches, nor aid nor assist nor encourage anyone else in said business, where, by doing so, it might conflict with the business interests, or diminish the sales, or lessen the profits, of the Diamond Match Company. These restrictions varied in individual cases as to the time it was to continue, from ten to twenty years. Thirty-one manufacturers, being, substantially, all the factories where matches were made in the United States, either went into the combination, or were purchased by the Diamond Match Company, and out of this number all were closed except about thirteen. Gen. Alger was a witness in the case, and was asked by his counsel the following question:

"Q. It appears that during the years 1881 and 1882 large sums of money were expended to keep men out of the match business, remove competition, buy machinery and patents, and in some instances purchase other match factories. I will ask you to state the reasons, if any there are, why those sums should not be treated as an expense of the business, and charged off from this account?" To which he replied:

"A. Because the price of matches was kept up to correspond, so as to pay these expenses, and make large dividends above what could have been made had those factories been in the market to compete with the business."

It also appears from the testimony of Gen. Alger that the organization of the Diamond Match Company was in a measure due to his exertions. There is no doubt that all the parties to this suit were active participants in perfecting the combination called "The Diamond Match Company," and that the present dispute grows out of that transaction, and is the fruit of the scheme by which all competition in the manufacture of matches was stifled, opposition in the business crushed, and the whole business of the country in that line engrossed by the Diamond Match Company.

Such a vast combination as has been entered into under the above name is a menace to the public. Its object and direct tendency is to prevent free and fair competition, and control prices throughout the national domain. It is no answer to say that this monopoly has in fact reduced the price of friction matches. That policy may have been necessary to crush competition. The fact exists that it rests in the discretion of this company at any time to raise the price to an exorbitant degree. Such com-

binations have frequently been condemned by courts as unlawful, and against public policy. *Hooker v. Vandewater*, 4 Denio, 849; *Stanton v. Allen*, 5 Denio, 484; *Morris Coal Co. v. Barclay Coal Co.* 68 Pa. 186; *Central Ohio Salt Co. v. Guthrie*, 35 Ohio St. 872; *Craft v. McConoughy*, 79 Ill. 348; *Hoffman v. Brooks*, 11 Cin. W. Law Bul. 258; *Hannah v. Fife*, 27 Mich. 172; *Alger v. Thacher*, 19 Pick. 51.

It is also well settled that, if a contract be void as against public policy, the court will neither enforce it while executory, nor relieve a party from loss by having performed it in part. *Foots v. Emerson*, 10 Vt. 844; and see *Hanson v. Power*, 8 Dana, 91; *Pratt v. Adams*, 7 Paige, 616; *Pratt v. Oliver*, 1 McLean, 800, 2 McLean, 277; *Stanton v. Allen*, *supra*.

It is not necessary that the parties, or either of them, should rely upon the fact that the contract is one which it is against the policy of the law to enforce. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves.

Campbell, J., concurred with **Champlin, J.**

Long, J.:

I concur in the result reached by *Mr. Justice Sherwood* in this case. I am not, however, entirely satisfied with many of the reasons he gives for his conclusions.

It clearly appears that the defendants were never members of the Diamond Match Company, and never held a dollar of its stock, except by way of security for the loan of their credit to complainant. In 1879 D. M. Richardson was the head of a corporation, organized under the laws of this State, having a capital of \$75,000, consisting of 3,000 shares at \$25 each; but such was its financial condition that for more than sixteen months prior to July 3, 1879, its doors were closed, and all operations suspended. In these straits complainant called upon defendant Buhl, and induced him, in conjunction with Gen. Alger, on that date to indorse the commercial paper of the corporation to the amount of \$50,000, and to become security on his government bond in the sum of \$80,000. In order to be secured, defendants took 1,800 shares of the capital stock of the corporation, with a right to vote it at stockholders' meetings, to receive dividends thereon, paying one sixth part of such dividends to complainant, and, at the expiration of three years, if all the obligations to defendants were paid, the whole of the stock held by defendants was to be transferred to complainant. Defendants, after this arrangement was made, gave their attention to the business, and it was carried on, till December 24, 1880, under that arrangement. During this time, under the management of the defendants from July 3, 1879, to December 24, 1880, a period of a little over sixteen months, this corporation, whose doors had been closed for the prior sixteen months, had earned nearly \$30,000.

On November 22, 1880, complainant made a written proposition to the defendants to modify and change, in great measure, the agreement of July 3, 1879, which was agreed to by the defendants, after some additions were made at

the instance of Gen. Alger. This proposition, and the amendment thereto, are set out in full in the opinion of *Mr. Justice Sherwood*, and need not be stated here. This new arrangement was not yet signed by the parties, and on December 27, 1880, the parties met, and a contract was formulated, with certain other additions, which the parties finally all assented to and signed. It appears that before this contract was finally agreed upon and executed, and on December 3, 1880, the Diamond Match Company was organized under the laws of the State of Connecticut, and complainant desired to transfer the property and business of the Richardson Match Company to that, and to take its stock in payment therefor. In order to do this complainant was compelled to take one half as much stock in the new company as his properties and business were placed at in the new company, and to pay cash therefor. The property and business were placed in the new company at \$190,000, in shares of the new company's common stock, and complainant took \$95,000 of the preferred shares. In order to raise this amount of money complainant again called upon the defendants to indorse notes to that amount, less the net earnings of the Richardson Match Company since July 3, 1879. The defendants agreed to advance to complainant the dividends belonging to them arising from the business of the Richardson Match Company, to be used in taking up the notes indorsed by them, and to take the notes of the complainant therefor, payable March 1, 1883, with interest at 7 per cent, and it was provided that all notes given to defendants by complainant to make up the \$95,000 should draw interest at 7 per cent. The Connecticut Mutual Life Insurance Company held a mortgage of \$28,200 on the properties of the Richardson Match Company. It was provided in the contract that, upon a transfer of these properties over to the Diamond Match Company, complainant should deposit with it \$40,000 of the common stock to secure the payment of this mortgage, and that complainant should take all the balance of the stock, both common and preferred, in his own name, and at once indorse it over to defendant Buhl, to secure the defendants upon their indorsements, and their interest in the profits of the Diamond Match Company. The contract also provided that, if these notes were not paid by March 1, 1883, defendants might sell these shares of stock at public auction, after thirty days' published notice, to meet such payments, interest and expenses. The rights and interests of the parties were then fixed by the contract in the following terms:

"It is expressly understood that said second parties are to receive one half [each one quarter], after deducting the payments for interest as above stated, of the net earnings of said stock, and not merely one half the dividends; and in settlement with said first party he is to pay to them in addition the one half of any surplus or reserved fund which, if divided, would pertain to said stock, and on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account; and, if such settlement is made at the end of a half year, the earnings of

the whole year shall be averaged, so that the said second parties shall receive the full half of the earnings of said stock for the whole year: provided, that on such settlement the second parties shall estimate such earnings from the trial balance or books of said Diamond Match Company, and shall make such allowances as to them shall seem just and equitable for loss and shrinkage in values of said Diamond Match Company, and shall take into consideration improvements that have been made out of the earnings thereof."

This contract was executed on December 28, 1880, and the Richardson Match Company's properties and business transferred to the Diamond Match Company, and the stock transferred to Mr. Buhl, as the contract provided. It is conceded that since the making of this contract the notes signed by defendants have been paid from dividends received from the Diamond Match Company. The whole contention, therefore, arises upon the construction of this portion of the contract referring to net profits, and the interests of defendants thereunder. It appears that in the organization of the Diamond Match Company the various parties put in their plants and good-will of the business at exorbitant prices,—much more than they were actually worth; and also gave a bond not to engage in similar business, for which they were paid large amounts in stock of the company. Upon an inventory of the property the following year, the properties were put in at their actual worth. The accounts of the company were kept upon the ledger under two general heads,—one Real Estate and Machinery Accounts, and the other Purchase Accounts. Under the new inventory large deficits appeared in these two accounts, and, under a resolution of the board of directors, sufficient of the earnings of the company were taken out and applied to make up these balances, and these accounts were charged off. Complainant claims that the balance to be divided among the stockholders after these deductions, and deductions for expenses, represented the net profits; and that defendants, under their contract with him, must share in this loss.

Defendants claim that they are entitled, under the agreement, to their share of the amounts charged off the same as though these amounts were not so disposed of by the board of directors upon the books. I think the defendants are correct in their interpretation of the contract. The contract is not ambiguous. It was entered into by all the parties understandingly, and no fraud or mistake is charged. The contract expressly provided that "on such settlement no loss that may be charged on account of the purchase and sale by said Diamond Match Company of other match factories shall be taken into account," etc. Whatever the rights of the parties may be as between the complainant and the Diamond Match Company to charge these amounts off, and apply the earnings of the company to such purpose, certainly the defendants could in no manner be bound by the action of the board of directors in that regard. They were not members of that company, and held the stock directly from the complainant by way of security for their indorsements, and for the payment of their claims, which were certainly and definitely

fixed by the contract. The net earnings of the company, as mentioned in the contract, served only to fix the amount they were to receive.

The complainant states in his bill that the net earnings of the stock of said company, so held as security by defendants, including these amounts charged off applicable thereto, amounted, in the year 1881, to the sum of \$81,099.81, and for the year 1882 amounted to \$189,757.93. While these amounts are large, yet complainant gets one half, and the defendants each one quarter, by the terms of the contract. As is well stated by *Mr. Justice Sherwood*: "Of course, when the parties entered into the contract, no one could certainly tell that the defendants would ever realize a dollar of profits from the venture, while their liabilities assumed were very large." It could not be known that the net earnings would ever be sufficient to pay the interest on the notes indorsed, or the mortgage of \$28,000 covering the property, and which was to be first paid before the defendants could have any of the earnings applied upon these notes, or share in any balance. The success of the enterprise was not free from doubt, and complainant himself thought he was assuming a great risk in turning the property into the Diamond Match Company. He took this risk, and the defendants shared it with him therein by the indorsement of his notes to nearly \$85,000. They were together to get one half of the net earnings for a certain definite period after the payment of these notes and mortgage. Complainant was then entitled to the whole stock, freed and unincumbered from any claims of defendants whatever, and the stock was to be assigned to him. The stock had made fabulous earnings, more than complainant or defendants could have ever anticipated or hoped.

Complainant, as appears from this record, has reaped the benefits of defendants' financial standing and business abilities. The defendants found him with a plant stocked at \$75,000, and his shop closed. They opened the doors, and put the machinery in motion, which, according to complainant's statement, has an earning capacity of more than \$100,000 annually, and made the complainant the owner and possessor of \$190,000 of the common stock and \$95,000 of the preferred shares fully paid for. It would seem that one ought to be satisfied with such results, and be willing that those who have carried the burden, and upon whom the loss would fall if disaster overtook the enterprise, should share in the profits when crowned with success, especially when the rights, duties and obligations of the parties are fixed with so much certainty as appears by this contract. Complainant's bill is entirely devoid of equity, and there is nothing appearing in the record showing that defendants have not treated the complainant in the most honorable manner, and under the true interpretation of the contract.

Whether the organization of the Diamond Match Company is one against public policy. I do not propose to discuss. Defendants are not members of the company, nor have they ever been. They claim the right to sell and dispose of this stock so held by them as security, and to realize therefrom the amount then due under the contract. By the terms of the contract

they have the right to pursue this course. By the decree of the court below they were restrained from making this sale.

I agree with *Mr. Justice* Sherwood that the

decree of the court below be reversed with costs.

Morse, J., did not sit.

Motion for rehearing overruled.

INDIANA SUPREME COURT.

Charles PALMER, *Appt.*,

v.

William POOR.

(....Ind.....)

1. Inserting the figure "8" in a blank before the words "per cent interest" in a promissory note, is a material alteration.
2. Under a paragraph of an answer denying the execution of a note, it may be proved that the note was altered after it had been signed, as well as that it had not been delivered.
3. A promissory note is not delivered so that it can become valid, even in the hands of a bona fide purchaser, where the maker signs his name to it through fear of violence, and it is snatched up as soon as signed and carried away against his will.
4. The verified plea of non est factum is unaffected by other answers containing admissions.
5. An affidavit that plaintiff "believes that he cannot have a fair and impartial trial before the regular judge of this court" is insufficient to secure a change of judge.

(November 23, 1889.)

APPEAL by plaintiff from a judgment of the Circuit Court for Madison County in favor of defendant in an action upon a promissory note. *Affirmed.*

The case sufficiently appears in the opinion. *Mr. William S. Diven* for appellant.

Messrs. W. A. Kittinger and L. M. Schwinn for appellee.

Elliott, Ch. J., delivered the opinion of the court:

The appellant's complaint is founded on a promissory note which it is alleged was executed by the appellee to A. J. Selby, by Selby indorsed to Theodore Fields, and by the latter to the appellant, before maturity and for value. The note is negotiable by the law-merchant. The third paragraph of the appellee's answer admits that he signed the note; but avers that after it was signed it was altered without his knowledge or consent by inserting the figure "8" before the words "per cent interest," thus making it bear interest at the rate of 8 per cent per annum, whereas, as it was written when

NOTE.—Alteration of written instrument, effect of.

The material alteration of a written instrument without the knowledge or consent of the maker renders it absolutely void, even in the hands of an innocent holder. *Angle v. Northwestern L. Ins. Co.* 92 U. S. 330 (23 L. ed. 556); *Wood v. Steele*, 73 U. S. 6 Wall. 80 (18 L. ed. 725); *Hardy v. Norton*, 66 Barb. 527.

Any material alteration (as a change in date) vitiates commercial paper. *Crawford v. West Side Bank*, 1 Cent. Rep. 263, 100 N. Y. 50.

A material alteration of a note or bill without authority, express or implied, will avoid it as to previous parties not consenting thereto. *Diets v. Harder*, 72 Ind. 203.

A material alteration of a note by one of the makers, with the consent of the payee, but without the knowledge or consent of the other makers, is, as to them, a fraudulent alteration. *McVey v. Ely*, 5 Lea, 438.

One of two makers delivering a note to the payee with knowledge of the alteration is bound by the note as altered. *Cannon v. Grigsby*, 3 West. Rep. 87, 116 Ill. 151.

The rule as to alteration of written instruments applies to negotiable promissory notes as well as to other written instruments. *Wilson v. Hayes*, 4 L. R. A. 193, note, 40 Minn. 531.

The alteration without authority or direction from the holder by one of the makers, if material, discharges an accommodation indorser and all prior parties not consenting thereto. *Ruby v. Talbott* (N. M.) 3 L. R. A. 724.

Alteration of promissory note by filling in blanks.

A promissory note is not void because it is delivered with a blank for the name of the payee, which is afterwards filled by one of the makers who negotiates the note, inserting the name of the

payee, in his presence. *Hardy v. Norton*, 66 Barb. 527.

In a promissory note, the date, amount, name of payee and place of payment may be filled in after delivery; but a special agreement cannot be inserted. *Weyerhaeuser v. Dun*, 1 Cent. Rep. 1, 100 N. Y. 150.

Where, after a party has signed a note as accommodation indorser, the words "interest on this note has been paid to maturity," are without his knowledge stricken out, he cannot be held on the note. *Hert v. Oehler*, 80 Ind. 83.

A memorandum on the back of a note, that the note is to be binding on the signers only on certain conditions, executed contemporaneously with the note and delivered with it, is a substantial part of the contract created by the note. *Grimison v. Russell*, 14 Neb. 521.

The maker of a negotiable note is discharged from liability, when the payee fraudulently alters the note so as to make it bear interest, contrary to his agreement with the maker. *Washington Sav. Bank v. Eeky*, 41 Mo. 272.

While the delivery of the note to the maker gave him an implied authority to fill the blanks by inserting any time and place of payment he chose, it did not authorize the addition of the words, "with interest;" and this was a material alteration which invalidated the note as against defendant, in the absence of proof of some authority therefor, aside from the delivery. *McGrath v. Clark*, 56 N. Y. 84.

Altering a note so that it should draw interest a month sooner than it did as it was executed releases the surety, although he had afterwards, but without knowledge of the alteration, made a payment on the note. *Benedict v. Miner*, 58 Ill. 19.

The addition of the clause "at 8 per cent interest," without the maker's knowledge or assent, to a note

signed, it did not bear interest. The alteration in the note was a material one, and would undoubtedly vitiate the note had it remained in the hands of the payee.

"It is a material alteration," says Mr. Randolph, "to add an interest clause, even without any fraud on the holder's part." 3 Randolph, Com. Paper, § 1756.

This conclusion is fully sustained by the decided cases. *Hert v. Oehler*, 80 Ind. 83; *Bowman v. Mitchell*, 79 Ind. 84, and cases cited; *Schneewind v. Hacket*, 54 Ind. 248; *Shanks v. Albert*, 47 Ind. 461; *Boustead v. Cuyler*, 116 Pa. 551, 8 Cent. Rep. 128; 1 Am. & Eng. Cyclop. Law, 509.

The ruling question, therefore, is whether the material alteration will avoid the note in the hands of the appellant. Our opinion is that, upon the facts stated in the answer, it does vitiate the note in his hands.

The rule sanctioned by our cases is thus stated in *Bowman v. Mitchell*, *supra*: "When an instrument is altered after its execution, it will be presumed, until the contrary is shown, that the alteration was made by the party claiming under it, or by one under whom he claims; and it is not necessary, in an answer stating that an instrument sued on has been altered, to allege that it was altered by the party claiming under it, or by one under whom he claims." *Cochran v. Nebeker*, 48 Ind. 459; *Noll v. Smith*, 64 Ind. 511; *Eckert v. Louis*, 84 Ind. 99; *Koons v. Davis*, Id. 387.

The answer made a *prima facie* case, which the appellant could only defeat by showing that there was negligence on the part of the

maker of the note; that the note was acquired for value, without notice of any fraud, and before maturity. *Giberson v. Jolley*, 22 N. E. Rep. 306 (this term); *Koons v. Davis*, *supra*.

In the case of *Marshall v. Drescher*, 68 Ind. 359, the circumstances were such as to create the implication that the holder of the note had authority to fill the blank left in the instrument, and it was under this ground that the note there under consideration was held valid. The case of *McCoy v. Lockwood*, 71 Ind. 319, asserts the doctrine that a material alteration will avoid a note even in the hands of a bona fide indorsee; refers to the cases of *Holland v. Hatch*, 11 Ind. 497, *Schneewind v. Hacket*, 54 Ind. 248, and *Collier v. Waugh*, 64 Ind. 456, with approval; and denies that a note in the hands of a bona fide holder is enforceable where it was altered by writing in it a place of payment. The decision in that case is therefore strongly against the appellant.

The fourth paragraph of the answer contains much useless verbiage, but there are enough material facts stated to constitute a defense. Rejecting the useless matter, and summarizing its material allegations, its substance is this: The defendant was old, infirm and ignorant. The payee of the note and the indorsees fraudulently conspired to cheat and defraud him. To effect their fraudulent purpose, they falsely represented to him that they were introducing paints for the New York Roofing Company; that they would send to him ten gallons of the paint free of charge. They asked him to furnish his address. He complied, and wrote it

payable one day after date, is such a material alteration as will avoid the note. *Craighead v. McLoney*, 99 Pa. 211.

Inserting in a note, after delivery, a higher rate of interest than it provides for, is a material alteration avoiding both the note and the mortgage secured thereby. *Bowman v. Mitchell*, 79 Ind. 84.

Where a promissory note was signed by G. and L., payable "on demand with interest," the memorandum written below: "Interest on the above note to be 9 per cent. G.,"—was not a material alteration of the note so far as L. was concerned. *Littlefield v. Coombs*, 71 Me. 110.

It is a material alteration of a note to convert it from a simple to an annual interest-bearing note, and such an alteration made without the consent of the payor, after signing, renders the note void. *Kennedy v. Moore*, 17 S. C. 464.

In a note "with interest at the rate of 10 per cent," the addition of the word "annually" was not a material alteration. *Leonard v. Phillips*, 39 Mich. 182.

Alteration of a promissory note by filling a blank left therein, so as to make the note draw 10 per cent interest, will not affect its validity in the hands of a bona fide indorsee for value before maturity, unless the defendant shows affirmatively that such purchaser had notice of the facts at the time he received the note. *Rainbolt v. Eddy*, 34 Iowa, 440.

The addition of the words "at 10 per cent" to a bond, without consent of the parties thereto, is a material alteration and vacates the same. *Long v. Mason*, 84 N. C. 15.

A note made without interest, being afterwards altered so as to bear interest at 9 per cent, without the consent of the maker and indorser, will not be received in evidence. *Lewis v. Shepherd*, 1 Mackey (D. C.) 46.

Where the payee of a note drawn so as to pay him one per cent a month, without the knowledge of the 6 L. R. A.

maker, scratched out the word "one" with the purpose of benefiting the latter, such alteration rendered the note null. *Moore v. Hutchinson*, 69 Mo. 429.

The maker of a note, altered as to rate of interest and place of payment before delivery, who retains property purchased by it, is held to have acquiesced in the alteration. *Cannon v. Grigsby*, 3 West. Rep. 87, 116 Ill. 151.

An indorser who delivers the note to the maker, who raises it before delivering it to the payee by inserting words and figures in a blank space left in the note, and so as readily to deceive third parties, is not liable even to a bona fide holder. *Burrows v. Klunk*, 3 L. R. A. 576, 70 Md. 451.

Effect of filling blanks in deeds. See *Reed v. Morton*, 1 L. R. A. 736, 24 Neb. 760.

Delivery essential to validity of note.

A delivery of commercial paper to the payee, either actual or constructive, is necessary to the validity of a promissory note. *First Nat. Bank of Centraira v. Strang*, 72 Ill. 559.

Intentional delivery is essential to its validity, for possession, while *prima facie* evidence of a good title, is nevertheless not conclusive. *Roberts v. Bethell*, 12 C. B. 778; *Cox v. Troy*, 5 Barn. & Ald. 474; *Bayley v. Taber*, 5 Mass. 286; *Woodford v. Dorwin*, 3 Vt. 82; *Lansing v. Gaine*, 2 Johns. 300; *Marvin v. McCullum*, 20 Johns. 238; *Devries v. Shumate*, 58 Md. 216; *Ward v. Churn*, 13 Gratt. 801; *Howe v. Ould*, 23 Gratt. 7; *Hopper v. Elland*, 21 Ala. 714; *Richards v. Darst*, 51 Ill. 141; *Freeman v. Ellison*, 37 Mich. 459; *Tiedeman*, Com. Paper, 87.

Commercial paper takes effect only from the time of delivery, and delivery is presumed to have been made on its date; before the day of maturity; but it may be shown by parol evidence that the paper had been delivered on some other day in order to rebut the presumption. *Woodford v. Dorwin*, *su-*

on a postal card. Afterwards two persons in the service of the conspirators came to him, and one of them represented that he was an attorney at law. They presented the postal card, upon which was written an order for 100 gallons of paint, 10 gallons to be free of charge, and 90 gallons to be paid for at \$2.25 per gallon. This order was written above the defendant's signature, and was there written without his knowledge. The agents presented the card, stated to the defendant that unless he signed a note they would do violence to him, and would at once sue him in the United States court, compel him to pay a large amount of costs, and sell his farm. Clark, one of the agents who represented the confederates, pretended to draw a weapon from his pocket, while the man with him stood guard at the front door of the defendant's house, and demanded that the defendant should sign the note. The defendant was then at his house, on his farm, no one with him but his wife, and she, as was the defendant himself, was old, feeble and ill. The defendant, through fear of violence, signed his name to the note as he was ordered to do. As soon as it was signed Clark snatched it up, and against the will of the defendant, carried it away. The defendant demanded the return of the note, but Clark hurried from the house with it. No paint was ever delivered to the defendant, and he never received anything of value from the payee of the note or his confederates.

The answer shows a fraudulent conspiracy, and shows, also, that by a cunningly devised scheme the confederates secured the defendant's signature to the note, and it is therefore unques-

tionably sufficient, irrespective of the allegations of force and violence. It would be good even if it did not show that the appellant was a conspirator, participating in the fraud; for it is well settled by our decisions that, where a note is obtained by fraud, the holder cannot recover upon it unless he shows that he bought it before maturity without notice, and that he paid value for it. *Giberson v. Jolley*, 22 N. E. Rep. 306 (this term); *New v. Walker*, 108 Ind. 365, 6 West. Rep. 869; *Eichelberger v. Old Nat. Bank*, 103 Ind. 402, 1 West. Rep. 481; *Scotten v. Randolph*, 96 Ind. 531; *Mitchell v. Tomlinson*, 91 Ind. 167; *Coffing v. Hurdy*, 86 Ind. 369; *Baldwin v. Barrows*, Id. 351; *Baldwin v. Fagan*, 83 Ind. 447; *Zook v. Simonson*, 72 Ind. 83; *Harrison v. Indiana State Bank*, 28 Ind. 133; *Smith v. Popular Loan & Bldg. Assn.* 93 Pa. 19; *Munroe v. Cooper*, 5 Pick. 412.

The answer contains one paragraph, duly verified, denying the execution of the note, and under this paragraph it was competent to prove that the note was altered after it had been signed, as well as that it was not delivered. The evidence that there was a material alteration of the note is strong and satisfactory, but so is the evidence that the appellant bought for value, before maturity, and without notice of any fraud. Waiving a decision of the question as to whether the appellee was entitled to succeed upon the ground that the note was materially altered (although our inclination is with him on that question), we put our decision upon the ground that the evidence satisfactorily shows that the note was not delivered, and for that reason we sustain the judgment. Delivery

pro; *Lovejoy v. Whipple*, 18 Vt. 379; *Churchill v. Gardner*, 7 T. R. 596; *Smith v. McClure*, 5 East, 476.

Where there has been no delivery the bill or note is without value even in the hands of an innocent purchaser. *Churchill v. Gardner and Smith v. McClure*, *supra*; *Binney v. Plumley*, 5 Vt. 500; *Peets v. Bratt*, 6 Barb. 662; *Black v. Duncan*, 60 Ind. 522; *Chester & T. Coal & R. Co. v. Lickiss*, 72 Ill. 521.

Coupons payable to bearer are promissory notes, and the holder of them acquires his title by delivery. *Perrine v. Thompson*, 17 Blatchf. 18.

A bill or note found among the papers of the drawer or maker at his death, cannot be sued on by the payee. *Disher v. Disher*, 1 P. Wms. 204.

A made a note payable to B at the request of her father, his creditor, who promised to give it to her. It was then placed in his private papers, whence, without his consent, it was taken by B. There was no valid delivery of the note to B. *Hatton v. Jones*, 78 Ind. 466.

A, desiring to purchase goods of B, agreed that his mother-in-law should become surety upon his notes. A induced his mother-in-law to sign them, upon the understanding that C should approve the act before they should be delivered. A delivered them to B's agent. C refused his approval. It was held that A was entitled to have them canceled as to her. *Devries v. Shumate*, 53 Md. 211.

A left with B an envelope addressed to C and others, with directions to deliver it to himself if he should call for it; otherwise that it should not be opened during his lifetime. On the death of A, B opened the envelope, and found in it three promissory notes signed by A, and payable to C, D and E, to whom he accordingly sent them. It was held good delivery. *Giddings v. Giddings*, 61 Vt. 227.

But where there is no proof that the notes were ever in the possession of the payee, or delivered to anyone for his use, the mere fact that they were

found, about five years after maturity, among papers of his deceased sister, the maker's daughter, is not sufficient to make them valid obligations, where, under the circumstances, it seems as likely that the maker put them in her hands for his own purposes as that she obtained them in any other way. *Gordon v. Adams*, 127 Ill. 223.

A note cannot be given to the payee as an escrow, but to a third person. *Henshaw v. Dutton*, 59 Mo. 139.

A note placed in escrow takes effect the instant the conditions of the escrow are performed, even though the depository has not formally delivered it to the payee. *Taylor v. Thomas*, 13 Kan. 217.

In Tennessee a promissory note may be delivered by the maker to the payee upon condition or as an escrow. *Alexander v. Wilkes*, 11 Lea, 221.

Where payee objected only to the form of notes, and retained them, to see if the form could not be changed, but agreeing to accept them if this could not be effected, it was held a sufficient delivery to give them effect. *Bodley v. Higgins*, 73 Ill. 875.

The production of an instrument in the form of a promissory note, with a seal attached, supported by proof of the handwriting of the obligor, is sufficient evidence of delivery and of the ownership of the holder. *Pate v. Brown*, 85 N. C. 166.

The delivery of an unindorsed promissory note passes an equitable title. *Carpenter v. Tucker*, 98 N. C. 316.

An indorsement upon a note and a delivery thereof transfer the legal title to the person named as indorsee. *Brown v. McWhite*, 80 S. C. 356.

An indorsement in blank before delivery makes an indorser liable, under the Pennsylvania Statute of Frauds of 1886, as second indorser only, and creates no liability to the payee. *Temple v. Baker*, 3 L. R. A. 709, 125 Pa. 634, 24 W. N. C. 1.

is part of the execution of a promissory note, and until delivered it is destitute of force. 1 Daniel, Neg. Inst. § 68; *Mahon v. Sawyer*, 18 Ind. 78; *Prather v. Zulauf*, 38 Ind. 155; *Oline v. Guthrie*, 42 Ind. 237; *Pickering v. Cording*, 92 Ind. 806.

It cannot be justly said that the appellee was guilty of negligence in suffering the payee to get possession of the note, for the evidence makes quite a strong case in appellee's favor, much stronger than the case of *Oline v. Guthrie*, *supra*. The verified plea of *non est factum* stands as a complete defense, unaffected by the other answers, and the appellant cannot avail himself of the statements in other answers as

conclusive admissions. A denial is not neutralized by affirmative pleas.

We do not find it necessary to approve or condemn the decision in *Stevens v. Burr*, 61 Ind. 464, but we think it proper to say that some of the expressions there used are broader than the facts required, and that these expressions cannot be regarded as authoritative. We are clear that the affidavit for a change of judge was not such as the Statute requires, inasmuch as it does not state any one of the causes enumerated, but merely avers that the plaintiff "believes that he cannot have a fair and impartial trial before the regular judge of this court."

Judgment affirmed.

COLORADO SUPREME COURT.

Re Henry TYSON, Petitioner.

(....Colo.....)

1. A law substituting the state penitentiary for the county jail as the place of confinement and execution of persons sentenced to be hanged is not invalid as an *ex post facto* law in respect to crimes already committed. The fact that the confinement is designated as solitary is unimportant where the Statute in fact gives the prisoner as many liberties as the former one.
2. A law shortening the time between sentence and execution of a person condemned to death is void as to previous offenses as an *ex post facto* law.
3. A "week of time," within the meaning of the Statute prescribing that such week shall be appointed within which a condemned person shall be executed, means a period beginning and ending Saturday night at midnight.
4. A provision for the fixing of a week of time not less than two weeks from the day of sentence for execution of a criminal does not shorten the minimum time which a prior Statute fixed at not less than fifteen days.

(November 22, 1890.)

APPPLICATION for a writ of habeas corpus to obtain the release of one in confinement under sentence of death, upon the alleged ground that the law under which the sentence was rendered was *ex post facto* and void. *Denied.*

The case fully appears in the opinion.

Messrs. Wycoff & Brierley, for petitioner: This is an *ex post facto* law as to the crime of which Henry Tyson was convicted.

Calder v. Bull, 3 U. S. 3 Dall. 390 (1 L. ed. 650); *Cummings v. Missouri*, 71 U. S. 4 Wall 278 (18 L. ed. 356); *Cooley*, Const. Lim. §§ 265, 270 *et seq.*; 1 Bishop, Cr. L. § 219; *Hartung v. People*, 22 N. Y. 105, 26 N. Y. 154, 28 N. Y. 400; *Re Petty*, 22 Kan. 477; *Shepherd v. People*, 25 N. Y. 406; *Ratzky v. People*, 29 N. Y. 124; *Kuckler v. People*, 5 Park. Cr. Rep.

NOTE.—The term "*ex post facto*" applies only to legislation concerning crimes, and not to criminal practice and procedure. *State v. Cooler*, 3 L. R. A. 181, note, 80 S. C. 105.

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212; *Hirschburg v. People*, 6 Colo. 145; *Garvey v. People*, 6 Colo. 559; *Packer v. People*, 8 Colo. 361.

An *ex post facto* law is one which renders an act punishable in a manner in which it was not punishable when committed (*Fletcher v. Peck*, 10 U. S. 6 Cranch, 87, 8 L. ed. 162; *Sedgwick*, Stat. and Const. L. 2d ed. 558; 1 Kent, Com. 409); a statute imposing punishment for a previous act which, without the statute, would not be so punishable.

Moore v. State, 48 N. J. L. 208, 39 Am. Rep. 558, 2 Crim. Law Mag. 220; *State, Houston, v. Willis*, 66 Mo. 131; *Roberts v. State*, 2 Overton (Tenn.), 423; *United States v. Bryan*, 18 U. S. 9 Cranch, 874 (3 L. ed. 764); *Barron v. Baltimore*, 32 U. S. 7 Pet. 243 (8 L. ed. 572); *Matthews v. Zane*, 20 U. S. 7 Wheat. 164 (5 L. ed. 435); *Devereaux v. Marr*, 25 U. S. 12 Wheat. 213 (6 L. ed. 605); *McNeil v. Bright*, 4 Mass. 282; *Denn v. Goldtrap*, Coxe, N. J. 272; *Murray v. State*, 1 Tex. App. 417; *Maul v. State*, 25 Tex. 166; *Wilson v. Ohio & M. R. Co.* 64 Ill. 542; *Marion v. State*, 16 Neb. 349.

On petition for rehearing.

The week in which the execution is to take place cannot be held to be a calendar week, while the weeks preceding are to be taken as weeks of seven days dating from the day of sentence.

Judges are not to mould the language of a statute to meet an alleged convenience, or an alleged hardship.

See Endlich, Interpretation of Statutes, § 4.

Every departure from the clear language of a statute is in effect an assumption of legislative powers by the court.

Endlich, Interpretation of Statutes, § 9, p. 12; *Brewer v. Blougher*, 39 U. S. 14 Pet. 178 (10 L. ed. 408); *Clearfoss v. State*, 42 Md. 403.

A week is a period of seven days (Endlich, Interpretation of Statutes, § 389, p. 545; *Re North Whitehall Twp.* 47 Pa. 156); and that without reference to the time when it commences.

Anderson, Law Dict. p. 111; *State v. Yellow Jacket S. Min. Co.* 5 Nev. 490; *Ronkendorff v. Taylor*, 29 U. S. 4 Pet. 361 (7 L. ed. 886); *Bremle v. Bell*, 12 Abb. Pr. 176.

A month in law is not to be construed as a calendar month, unless expressly stated.

Loring v. Halling, 15 Johns. 119; *Leffingwell v. White*, 1 Johns. Cas. 99.

A week must be a period of seven days commencing at any definite period and running to a definite period seven days from the first.

Iowa Code 1873, § 45, subd. 23.

Time is recorded by following the hours forward, and is so recorded as to make the period a consecutive one.

Hedderich v. State, 101 Ind. 564; *Harper v. Ely*, 56 Ill. 180; *Price v. Whitman*, 8 Cal. 412. See also *Bunce v. Reed*, 16 Barb. 847; *Olcott v. Robinson*, 20 Barb. 148; *Savings & Loan Society v. Thompson*, 33 Cal. 847; *Bowman v. Wood*, 41 Ill. 203.

A law is an *ex post facto* law when it takes away any of the advantages that a prisoner has under the old one.

Burns v. People, 1 Park. Cr. Rep. 182; *People v. Butler*, 3 Park. Cr. Rep. 377.

If the law is even changed after the act has been committed, to the disadvantage of the prisoner, it is an *ex post facto* law.

Ratzky v. People, 29 N. Y. 124. See *Com. v. McDonough*, 18 Allen, 581; *Com. v. Marshall*, 11 Pick. 350; *Shepherd v. People*, 25 N. Y. 406; *Fletcher v. Peck*, 10 U. S. 6 Cranch, 87 (8 L. ed. 162); *Lapeyre v. United States*, 84 U. S. 17 Wall. 206 (21 L. ed. 610); *Cooley, Const. Lim.* §§ 265, 270; *Bishop, Cr. L.* § 219; *Kring v. Missouri*, 107 U. S. 231 (27 L. ed. 506).

Messrs. Samuel W. Jones, Atty-Gen., and H. Riddle for the State.

Hayt, J., delivered the opinion of the court:

The petitioner was indicted at the April Term of the District Court of Arapahoe County for the murder of one John King. The murder is charged to have been committed upon the eighteenth day of May, A. D. 1889. The cause was tried, and a verdict of guilty of murder of the first degree rendered some time during the following June, although sentence was not pronounced upon the verdict until the 26th day of July, at which time he was sentenced to suffer the death penalty within the walls of the state penitentiary, at such time during the third week in the month of August following as the warden of said institution might select. The week of execution has been postponed from time to time by order of the governor, the petitioner, at the time of issuing this writ of habeas corpus, being in custody of the sheriff of Arapahoe County, awaiting a judicial determination of an inquisition of lunacy which had been commenced at the instance of his counsel. By the law in force at the time of trial, as well as at the time the offense was alleged to have been committed, the penalty for murder of the first degree was death; and, by statute, it was provided that this punishment should be inflicted by hanging the person convicted, by the neck, until dead, at such time as the court should direct, not less than fifteen, nor more than twenty-five days from the time of sentence. Gen. Laws, § 729.

Under this law, it was the practice to keep the defendant in close confinement in the county jail from the time sentence was pronounced until the day appointed for execution. He was then executed, under the direction of the sheriff, within the county where the conviction was obtained.

The Seventh General Assembly enacted a law substituting the state penitentiary for the jail of the county as the place of such confinement, and directing that, whenever it became necessary to inflict the death penalty in the future, the person convicted should be executed within the walls of such penitentiary. This Statute contains no saving clause, but extends to all cases in which the death penalty is thereafter to be inflicted, without regard to the time at which the crime may have been committed, whether before or after the adoption of the Act; and also contains a clause repealing all other Acts or parts of Acts in conflict therewith. Other provisions of the Statute will be given in another portion of the opinion. The Act received the governor's approval upon the 19th day of April, 1889, and went into effect ninety days thereafter. The petitioner having been sentenced upon the verdict of the jury after this Law had gone into effect, and in accordance with its terms, we are now asked to declare such sentence void, and discharge the prisoner, for the alleged reason that such Law is *ex post facto* as to him, and, consequently, obnoxious to both the Federal and State Constitutions, the argument advanced being that the prisoner was in jeopardy under the old law, but that, such law having been repealed since his trial, he cannot be punished thereunder; that the new law is *ex post facto* and unconstitutional as to him; therefore he cannot be punished at all, but must be discharged.

In our judgment, the new law does not come under the constitutional inhibition relied upon. *Calder v. Bull*, 3 U. S. 3 Dall. 386-390 [1 L. ed. 648, 650], is recognized as the leading case in this country upon the subject, and in that case Chase, J., said: "I will state what laws I consider *ex post facto* laws, within the words and the intent of the prohibition: (1) Every law that makes an action done before the passing of the law, and which was innocent when done, criminal, and punishes such action. (2) Every law that aggravates a crime, or makes it greater than it was when committed. (3) Every law that changes the punishment, and inflicts a greater punishment than the law annexed to the crime when committed. (4) Every law that alters the legal rules of evidence, and receives less or different testimony than the law required, at the time of the commission of the offense, in order to convict the offender."

The Statute of which complaint is made does not attempt to make that criminal which was not criminal before. It does not aggravate the crime, nor alter the rules of evidence. It cannot, therefore, be considered as an *ex post facto* law under the rule given, unless it changes the punishment for the offense to the disadvantage of the defendant. That it does so change the punishment is urged by counsel, in that it changes the place of execution, and provides for solitary confinement in the penitentiary for the period between sentence and execution; and for the further reason that it permits the court to shorten the time between sentence and execution from fifteen days to two weeks, as it is said. Other changes were enumerated in the argument, but these are the ones principally urged, the others being subsidiary; if these objections are not well taken, the others fall with them.

It is to be remembered that by section 2 of the Act of 1888, the same being section 709 of the General Statutes, murder is divided into two degrees, *i. e.*, murder of the first degree, and murder of the second degree. This section has stood from its adoption unrepealed and without amendment. By this Act, death was fixed as the punishment for murder of the first degree. By section 729, Gen. Stat., it is provided that this punishment shall be inflicted by hanging, and this is not changed by the Amendment of 1889. So it will be seen that at the time of the perpetration of the crime, and at the time of the trial, the punishment for murder in the first degree was death by hanging; and such is still the law. It is a part of the public history of the State that prior to the passage of this Act the death penalty with us was usually inflicted in public, at a previously advertised hour, in the presence of a large concourse of people, and the particulars of the execution published in the public journals. In deference to the wish of many good citizens, who were of the opinion that the tendency of such proceedings was detrimental to the public morals, the recent Statute was passed, requiring executions in the future to be conducted privately, at the penitentiary, enjoining secrecy upon the few persons required or permitted to be present; and making it a misdemeanor, punishable by fine, for such persons to disclose the details of the execution, or for the press to publish the same. To accomplish the desired change, it became necessary to change certain incidents connected with the punishment, but no attempt was made to change the punishment itself. This remains the same as before the passage of the Act.

To the argument based upon the change in the place of execution, we say that, in legal contemplation, there is no difference between an execution in one place within the State and in another. The punishment is not aggravated by being inflicted in the County of Fremont, rather than in the County of Arapahoe, where the trial took place. The penalty has not been changed but only the locality where it is to be inflicted. The case of *Carter v. Burt*, 12 Allen, 425, is directly in point upon this question. In that case a prisoner had been convicted of being a common seller of intoxicating liquors without license, and sentenced to pay a fine of \$50, and to be imprisoned in the house of correction for three months. By the Statute in force at the time the offense was committed, it was provided that the imprisonment in such cases should be in the house of correction in the county where the court was holden; while by a subsequent enactment, in force at the time of sentence, it was provided that any person under sentence for such offenses might be committed, at the discretion of the court, "to the house of correction in any county in the Commonwealth in the same manner as such person might be committed in the county where the court is so holden." It was claimed in argument that the latter law aggravated the punishment, and was therefore *ex post facto* as to such offense; but the court held that such argument was fallacious, that the rights of a person convicted were not materially affected by the change, and that the punishment was not

aggravated by an imprisonment in one county rather than in another.

If the argument in this case, based upon the change in the place of execution, is sound, then, in case future legislation should change the location of the penitentiary to a county other than Fremont, and thereby change the place of execution, it would likewise follow that a change so made would be subject to the same objections,—a conclusion we cannot indorse. We think the argument unsound, and that the constitutional objection based thereon is not well taken.

In arriving at this result, we have not overlooked the case of *Garvey v. People*, 6 Colo. 559. It seems to us, however, that counsel have confounded certain incidents connected with the administration of the penalty with the punishment itself.

Counsel say that the punishment in this case is aggravated by reason of the change in place of confinement from the county jail to the penitentiary. We are aware that in many well-considered cases it has been held that a change in the place of confinement from an institution where criminals convicted of minor offenses are incarcerated to one established for the imprisonment of those convicted of more heinous crimes has been held as an aggravation of the punishment, on account of the disgrace and reproach attached to the confinement with criminals of a more depraved and infamous character; but this reason can have no application in the case of one convicted of willful, deliberate and premeditated murder, and awaiting execution therefor. And, the reason for the rule failing, the rule itself must also fail. Aside from this, the defendant is imprisoned for the purpose only that he may be produced at the time set for his execution, the confinement being no part of the punishment, but simply an incident connected therewith, referable to penal administration as its primary object; and such changes may be made applicable to past as well as future offenses. *Hartung v. People*, 22 N. Y. 95-105; *Cooley*, Const. Lim. 271, 272. And, although the Statute designates such confinement as solitary, provision is made in the same paragraph of the Act in which this term is used for his "attendants, counsel, physician, a spiritual adviser of his own selection, and members of his family" to visit him in accordance with the prison regulations, the effect of which is to give the prisoner as many liberties as he would have been entitled to under the old law. So, while the imprisonment is designated as solitary, it is not so in fact, as solitary imprisonment is usually understood.

It is said in argument that under the new Statute the time between the date of the sentence and the execution may be shortened, the former law providing against the court's directing the execution to take place within less than fifteen days from the time of sentence, while under the new enactment it is provided that the judge passing sentence "shall appoint and designate in the warrant of conviction a week of time within which such sentence must be executed. Such week, so appointed, shall be not less than two nor more than four weeks from the day of passing such sentence;" the particular time of execution within the week

being left to be fixed by the warden of the penitentiary. If under this Act the defendant might be hanged within less than the minimum of time from the date of passing sentence enjoined by the former Statute, we would unhesitatingly say that the law could not be made applicable to his case; as to hold otherwise would be contrary to the rule forbidding a change of punishment to the disadvantage of the defendant, after the commission of the crime, and slight changes in this respect have been held sufficient to make the law *ex post facto* and void as to past offenses.

Thus in *Com. v. McDonough*, 18 Allen, 581, it was decided that a law enacted after the commission of the offense of which the defendant was charged, which decreased the maximum of imprisonment that might have been inflicted and also the fine, was unconstitutional as to that offense, for the reason that it fixed the minimum of imprisonment at three months, whereas, before that time, there was no minimum fixed to the court's discretion.

A careful examination of the Statute of 1889 discloses, however, the fact to be that in no event will the terms of the Act permit an execution to take place thereunder within less than fifteen days from the time of sentence, as provided in the former Act. In arriving at this conclusion we do not rely in the least upon the distinction which some courts have drawn between cases where time is to be computed from an act done and those in which it is to be reckoned from a given day, holding that in the former case the day upon which such act is performed is to be counted, and in the latter not. See *Arnold v. United States*, 13 U. S. 9 Cranch, 104 [8 L. ed. 671]; and also cases cited in Bouvier's Law Dictionary, under the word "Time."

We prefer to rest our decision upon something different, and, as we think, more substantial. The command of the Statute is that a week of time shall be fixed by the court within which the sentence must be executed, such week not to be less than two weeks, nor more than four weeks, from the day of passing sentence. We are of the opinion that the week of time so to be fixed must be held to be a calendar week, *i. e.*, a period of time extending from 12 midnight, Saturday, until 12 midnight, the following Saturday. By consulting lexicographers of established accuracy, this conclusion will be found to be in accordance with the primary and usual definition given to the word "week." "Week. The period of seven days; particularly the period of seven days commencing with Sunday." Worcester. Dict. "A period of seven days; usually, that reckoned from one Sabbath or Sunday to the next."

Webst. Dict. "Seven days of time. The week commences immediately after 12 o'clock on the night between Saturday and Sunday, and ends at 12 o'clock, seven days, of twenty four hours each, thereafter." Bouvier, L. Dict.

The word was judicially construed in accordance with the foregoing definitions in the case of *Ronkendorff v. Taylor*, 29 U. S. 4 Pet. 361 [7 L. ed. 886], where it is said: "A week is a definite period of time, commencing on Sunday and ending on Saturday." It follows from this construction that while in most cases more than two full calendar weeks must necessarily elapse, under the Statute, between the time of sentence and the execution, in no case could such execution take place within less than fifteen days from the date of sentence. Sunday being a non-judicial day, the most favorable case possible in support of the theory advanced by counsel for the prisoner—that the time could be shortened under the late Act—would arise if a defendant should be sentenced upon a Saturday. For convenience, we will assume that such Saturday is the first day of the month. The week of execution could in no event commence to run until the third Sunday thereafter,—the sixteenth day of the month,—which would be the earliest possible day for the sentence to be executed, under the terms of the Act. And the same result would follow under the former law, requiring at least fifteen days from the time of sentence to the execution; as it has been decided in this State that when time is to be computed, either prior or subsequent to a day named, the usual rule is to exclude either the first or last day of the designated period and include the other. *Stebbins v. Anthony*, 5 Colo. 348.

So, under either law in the case supposed, a sentence might be executed upon the sixteenth day, for aught that appears in either Act to the contrary. We are not, on account of the illustration given, to be understood as sanctioning the execution of the death penalty upon the Sabbath day. Such a course would be highly improper, if not positively illegal. If the latter, an additional day would be gained under the new law. In addition to the authorities hereinbefore cited, we refer to the following in support of the conclusion reached in this opinion: 1 Bish. Crim. Law, § 290 *et seq.*; Whart. Crim. Law, § 81; Wade, Retro. Laws, § 233; *State v. Arlin*, 39 N. H. 179; *Marion v. State*, 20 Neb. 238.

It appearing that the sentence pronounced by the district court is in accordance with the views herein expressed, the prisoner must be remanded, and it is so ordered.

Petition for rehearing denied.

NEW YORK COURT OF APPEALS.

Leland FAIRBANKS, Jr., *Appt.*,

v.

Winthrop SARGENT, *Exr.*, etc., of Henry W. Sargent, Deceased, *Respnt.*

(....N. Y....)

1. An agreement by an attorney to prosecute and if possible collect certain claims,
 6 L. R. A.

and to extinguish the debt due him by the owner thereof for past services, furnishes ample consideration for an agreement by the latter that he shall receive a fixed share of whatever is obtained as the result of such prosecution.

2. Such agreement that the attorney shall have a fixed share of the results obtained constitutes an equitable assignment to him of the stipulated share, although the sole right to

compromise the claims and to bring suit thereon is reserved to the creditor.

3. **The test of the existence of an equitable assignment** of a claim is whether or not the debtor would be justified in paying the debt, or the portion contracted about, to the person claiming to be assignee.
4. **Neither the pledgee nor the pledgor of a claim can compromise** with the debtor without the assent of the other; at least where the debtor has notice of the pledge.
5. **A mere pledgee of claims acquires no right** to a share of them which has previously been equitably assigned.
6. **The moment a creditor attains legal title and possession** of bonds received in payment of a claim, the equity of another to whom he had previously made an equitable assignment of a share of the claim becomes a legal title, and the creditor's possession as to that share is the possession of the assignee.
7. **The equity of an attorney**, to whom an equitable assignment was made of a share of claims which were to be, and which were, collected by his efforts, although the power to bring suit and the sole right to compromise was reserved to the creditor, is not inferior to that of one to whom they were assigned as collateral security for a precedent debt, and who could not prevent a compromise by the creditor if sufficient was obtained to satisfy his claim.

(November 26, 1889.)

APP^{EAL} by plaintiff from a judgment of the General Term of the Supreme Court, First Department, reversing a judgment of the Special Term in favor of plaintiff in an action to recover possession of certain bonds or to recover their value. *Reversed.*

In January, 1869, one Underwood owned a claim resting in open account against one Zabriskie rising out of certain stock transactions between them, upon which he claimed a sum exceeding \$100,000. Zabriskie disputed his liability thereon, and Underwood, not being able to obtain payment, entered into a contract in writing with the plaintiff, an attorney residing in New York City, by which it was agreed between them that Fairbanks, for his services in endeavoring to collect certain claims owned by Underwood, among which was that against Zabriskie, "is to have one sixth of whatever amount of money, securities or property shall be received on account of such claims as shall be settled without suit, and one third of whatever amount of money, securities or property shall be collected or in any way be realized or received (whether on settlement or without settlement), on account of such of said claims as shall be put in suit either in this or in any other State or country." Said Underwood "is to decide upon the terms and mode of settlement as to each and every of said claims, whether such settlement be before or after suit brought."

As additional compensation for his services Fairbanks was to be paid in cash by Underwood at the rate of \$3,600 a year, in equal monthly payments of \$300, and "is to be released from whatever indebtedness he is now owing" to Underwood, and from whatever indebtedness he shall hereafter be under to him. The compensation provided for the services of Fairbanks was to be in full satisfaction and

payment of whatever services he had rendered for Underwood prior thereto.

In January thereafter Fairbanks, by Underwood's direction, caused suit to be brought to recover the claim against Zabriskie in a court of competent jurisdiction in the State of New Jersey, that being the State where Zabriskie resided; and the action was steadily prosecuted by Fairbanks until it was settled as thereafter stated.

In 1871, Underwood, being indebted to Henry W. Sargent, the defendant's testator, by an assignment in writing, transferred his claim against Zabriskie to Sargent as collateral security. On or about June 18, 1872, Underwood, at the earnest request of Sargent, and without the knowledge of the plaintiff, consented that the claim against Zabriskie should be settled and compromised by the payment by him of the sum of \$25,000 in full of said claim, and that the money so paid should be received and applied by Sargent in extinguishment of said claim of Sargent against Underwood.

Thereupon and on the same day Sargent received from Zabriskie, instead and in lieu of \$20,000 in cash, forty bonds or securities, each for the payment of \$500.

Upon the receipt of the said bonds, Sargent surrendered to Underwood the assignment of the Zabriskie claim, and gave to Underwood a general release from all claims and demands, and Underwood wrote and delivered to one Gray, the agent of Zabriskie, a written order addressed to the attorneys in New Jersey who had charge of the action against Zabriskie, stating that the action had been settled, and directing them to discontinue it upon payment by Zabriskie of their costs and charges and those of the referee. Underwood also at or about the same time executed and delivered a release of all claims against Zabriskie to Gray, to be delivered to Zabriskie upon the payment of the price agreed upon for such settlement.

Fairbanks brought this action against Sargent to recover one third of the bonds so received or the value thereof, upon the ground that the agreement between him and Underwood constituted an equitable assignment of one third of the property received on such settlement. Upon the trial the complaint was dismissed and this judgment was affirmed by the general term, but the court of appeals reversed it and sent the case back for a new trial.

At the second trial, plaintiff recovered in the trial court, and this judgment having been reversed by the general term, he again brought the case to this court.

Mr. A. C. Brown for appellant.

Messrs. Edward C. Perkins and James C. Carter for respondent.

Finch, J., delivered the opinion of the court:

Our first inquiry respects the character and extent of the right which Fairbanks acquired under his contract. We have already held that its terms operated as an equitable assignment to him of one third or one sixth of whatever money or property should be collected out of or received from Zabriskie in discharge of the latter's debt. 104 N. Y. 108, 5 Cent. Rep. 919.

Ordinarily, we should content ourselves with a simple reference to that decision. But its correctness has been so challenged on this ap-

peal, and assailed with so much of force and ability, as to justify on our part a reconsideration of the question in the light of the latter argument.

Let us therefore give our attention to the terms of the contract. Underwood's claim against Zabriskie grew out of stock transactions. Fairbanks was a lawyer, and, not only that, but one exceptionally versed in the peculiar rules and customs of the stock exchange, and the law governing that class of transactions. He had already rendered services to Underwood, for which the latter was in his debt, with probably slight ability to pay, unless out of uncertain claims against others. Standing in this relation, the parties contracted. Fairbanks agreed to prosecute, and, as far as he was able, collect the specified claims, of which that against Zabriskie was one. To that extent, his agreement was for the rendition of future services. He also agreed to extinguish, and by his contract did extinguish, the debt due him for past services, taking in exchange the covenants of the new agreement. There was therefore ample consideration for the promises of Underwood which followed. These were that for the services rendered and to be rendered by Fairbanks the latter should receive a fixed share of the money, property or securities which should be obtained from the debtors named. The claims themselves against such debtors were not attempted to be assigned. The title to them remained in Underwood, as the legal owner. Suits against the debtors were to be, and were, brought in the name of Underwood; and he alone, by the stipulations of the agreement, was authorized to dictate on what terms settlements should be made, and when and against whom actions should be brought. He thus never transferred to Fairbanks the legal title to the claim against Zabriskie; and what he did do was, in its ultimate effect, one of two things, as it seems to me, necessarily and inevitably. The contract was either a simple agreement for compensation to be enforced against Underwood, or it was an equitable assignment of a definite share of the proceeds of the claim against Zabriskie.

Obviously, it was something more than, and quite different from, a mere agreement for compensation measured by results. That would have given to Fairbanks only a personal claim against Underwood, and scarcely served to induce on his part further services and expenses upon the credit already precarious. And, not compensation in general, but a specific share in a specific fund or specific property, was the exact and material point of the contract, upon which the rights of both parties hinged. Underwood, having liberty to take in settlement from his debtors property or securities, was not to be called upon for a share of their value in cash, or liable generally for a due reward, but was free to throw Fairbanks upon his contract claim for a share of the precise thing received, as his sole right and only remedy.

On the other hand, the latter was not to depend upon the solvency or promise of Underwood for his pay, but was made secure by a stipulated right to have, as owner, a defined share of the fund or proceeds expected to result from his labor and skill. There could be

no legal assignment of a fund not in existence, or proceeds not realized, but equity treats them as if existing or realized, and the contract for their receipt by Fairbanks as an equitable assignment of the stipulated share to him, and, as a consequence, makes him the equitable assignee of so much of the debt or demand as is represented by his share of the proceeds.

I think we have never failed to hold this doctrine on a similar state of facts. We discussed the subject somewhat in *Williams v. Ingersoll*, 89 N. Y. 508, and there said: "It is a rule in equity that anything which shows an intention to assign on the one side, and from which an assent to receive may be inferred on the other, will operate as an assignment, if sustained by a sufficient consideration."

In *Thurber v. Chambers*, 66 N. Y. 49, we inferred an equitable assignment upon facts vastly weaker than those in the present case; and the cases in the federal court of *Wylie v. Coas*, 56 U. S. 15 How. 415 [14 L. ed. 753], and *Trist v. Child*, 88 U. S. 21 Wall. 441 [22 L. ed. 628], are to the same purport.

The test is an inquiry whether the debtor would be justified in paying the debt, or the portion contracted about, to the person claiming to be assignee. It is not at all doubtful that Zabriskie, after his liability had been settled at the amount of the bonds which he delivered, and leaving out of view the transaction with Sargent, would have been perfectly protected in paying over one third of them to Fairbanks.

Up to this point, the general term does not differ with us. On the first hearing they explicitly took this ground, and on the last they intimate no change of opinion. They concede the attitude of the plaintiff as an equitable assignee of one third of the Zabriskie debt. It was reserved for the learned counsel of the respondent to attack that doctrine on the argument here. The pith of his contention is that Fairbanks had none of the powers and rights which make an assignee, and so was none at all; and this because the agreement reserved to Underwood the right to determine when suits should be brought, and what compromise should be made. But these reserved rights may have lessened the value of the thing assigned without neutralizing or destroying the assignment itself. They related to the process of collection, and not to the right assigned, except as possibly lessened by that process. If no collection has been needed, if Zabriskie had come with the money in his hand to pay the whole debt, and had been apprised of the contract with Fairbanks, he could have paid over, and it would have been his legal duty to have paid over, to the latter his share of the debt as the equitable owner and assignee of that share. That, under the arrangement made, he was at liberty to pay less, and that Fairbanks could not object to his paying less, does not prevent Fairbanks from being the equitable assignee of his share of the debt as settled.

The learned counsel for the respondent criticizes the language of the agreement, in comparison with that used in the *Williams Case*. In that, he says, the assignee was given a lien upon the fund in express terms. It seems to me that in the present case the language is stronger, instead of weaker. Fairbanks was

armed with more than a mere lien by its words. He was "to have one sixth of whatever amount of money, securities or property shall be received." That is, he was to have, to possess, to own, as his, the stipulated proportion of the precise thing received; that proportion to be ascertained and measured by its amount or value. And that such was the meaning is further indicated by the expression relating to his monthly salary of "money compensation." It is in that manner distinguished from the realized proceeds, which he was to have only in their realized form. I have no doubt remaining that up to this stage of the case, at least, our previous conclusion was entirely sound.

But it does not follow that we are yet absolved from a recollection of the reservations to Underwood which accompanied his equitable assignment to Fairbanks, or a further consideration of their effect; for the former followed that transfer by an assignment of his claim against Zabriskie to Sargent as collateral security for a debt due to him. There is no real foundation for the distinction now asserted between the facts on the previous trial and those in the present record, as it respects the character of that assignment. The distinction was kindly meant as a route of retreat from an indefensible position; but we must decline to avail ourselves of it. It may be that we then supposed that the written assignment was absolute in form, but delivered and taking effect as a collateral security, while now it appears that the collateral character of the transfer was expressed in the writing itself. The form is of no consequence. Whether the collateral character of the assignment was evidenced by the writing, or by the parol delivery, is immaterial; for the fact itself was fully recognized in our previous opinion. Again and again, and with even further reiteration, the transfer was described as collateral, and none of us were for a moment misled in that respect; and so we cannot travel the bridge carefully constructed to encourage a retreat, but should consider the question whether we were right or wrong, which is raised anew by the decision of the general term.

What, then, were the rights which Sargent acquired by the assignment of the Zabriskie debt; *first*, as against Underwood; and, *second*, as against Fairbanks? The counsel on both sides appear to agree that as between assignor and assignee the transfer must be deemed to have been in the nature of the pledge. They unite in saying that a reference to the law governing that class of bailments will accurately describe the relations and rights of the parties; and, so agreeing, we ought to be content. Waiving then, for the present, any question of rights acquired by Sargent as a bona fide purchaser, let us determine and measure those which he acquired under the assignment treated as a pledge. The pledgee obtains a special property in the thing pledged, while the pledgor remains general owner. If the property consists of a thing in action, the pledgee may sue upon it, and collect it, or receive voluntary payment of it from the debtor. The pledgee may require such payment, and the debtor cannot resist his title. To the extent of his debt, the pledgee may appropriate

the proceeds to his own use, and hold the balance, if any, in trust for the pledgor. But the pledgee cannot compromise the debt without the assent of the pledgor. *Garlick v. James*, 12 Johns. 146; *Bowman v. Wood*, 15 Mass. 534.

With that assent he may do so; and, if he does, the question who it is that we must regard as having made the settlement is matter here in dispute between the litigants. Much depends upon the facts; and to those we shall recur in their due order, after having measured Sargent's right as against Fairbanks.

The latter was equitable assignee of one third of the Zabriskie debt, and to that extent was the equitable owner. Putting aside still all questions relating to a bona fide purchase, it follows that Underwood could only pledge what he had, and could not incumber the interest of Fairbanks. We so decided on the previous appeal, citing *Bush v. Lathrop*, 22 N. Y. 535, as that case has been limited. Sargent, therefore, became pledgee, or had the rights of a pledgee, only to the extent of Underwood's title, and obtained no right, by pure force of the assignment, to the interest already owned by Fairbanks. It is true that sometimes, where one clothes another with an apparent ownership or power of disposition, he will not be allowed to assert his right, as against an innocent purchaser, dealing upon the faith of such apparent ownership; and the opinion of the general term applies that doctrine to Fairbanks, because, when becoming assignee, he "had placed in Underwood power to act." We need only say, as to that suggestion, that the counsel for the respondent admits that the doctrine is inapplicable to the facts, although he seeks to enlist in his service the fundamental equity on which it is founded. So that, I think, we correctly held that Sargent, by his collateral assignment, or pledge, acquired no right in, to or against the ownership of Fairbanks.

But, nevertheless, upon what afterwards occurred, the respondent confronts us with a very able argument, which seems to turn the flank of the position thus far maintained. It is founded upon the settlement which was made with Zabriskie, and which appears to have been negotiated by and between three persons, viz.: Underwood, acting for himself, Monell, representing Sargent, and Gray, as agent for Zabriskie. The terms of the arrangement, stated in their legal order, were that Sargent should surrender his assignment, to enable Underwood to effectually release Zabriskie; that the latter should thereupon pay Underwood \$20,000 in bonds, in full of his debt, and be wholly discharged; that Underwood should then pay Sargent the same bonds, in full of his debt, and should be finally released. If I state these facts somewhat differently from the view presented in our previous decision, it is not because there were not strong circumstances sustaining that view. The whole arrangement was planned and negotiated by Sargent and Zabriskie, represented, respectively, by Monell and Gray. Underwood simply giving his assent. The bonds, it is found, did not go through his hands, personally, and he never even knew that they were substituted for money; but they passed directly from Zabriskie, through Gray, to Sargent. And yet the truth is that upon

the theory of a pledge now, but not then conceded, it required both Underwood and Sargent to act together and concurrently in order to effect the result. It is said that Sargent did not make the settlement, for he was only pledgee and could not; but, with equal force, it may be urged that Underwood did not, for he was only general owner, and could not. The palpable truth is that both acted, and the compromise was the product of their joint action. And so, without any worry over the question as to which of them made the settlement, I am willing to put the facts into what is claimed to be their logical and legal order, and yield to the respondent the benefit of saying that Sargent enabled Underwood to settle, and Underwood settled.

Upon that assumption it is apparent that Sargent must be put in one of two positions. We are compelled to say that he received the bonds from Underwood by force of the assignment which he held, and which he surrendered only upon that condition, which is the truth; or that, having abandoned his hold on the Zabriskie debt, he took them simply from Underwood, in discharge of the latter's liability. The last alternative may be dismissed, because it is contrary to the facts. Sargent never abandoned his hold on the debt. His fingers, once closed upon it, were never unlocked. His surrender of the assignment was on condition of the receipt of its fruits, and they took its place as the thing pledged (*Farwell v. Importers & T. Nat. Bank*, 90 N. Y. 483), and subject, as was the debt, to the right of Fairbanks. The pledgee may return the property to the pledgor for some special purpose without losing his right, and the pledge will remain. *Macomber v. Parker*, 14 Pick. 497.

The surrender of the assignment, and the receipt of its fruits, were legally at one and the same instant; and there never was a moment when Sargent stood merely in the attitude of a purchaser of the bonds. The situation was therefore aptly described by the learned counsel for the respondent in his supplemental brief, although that description was explicitly stated to be for the purposes of his final argument, which it is now our duty to meet. I use his words because I have none which are so accurate and compact. He says: "Fairbanks and Sargent were both assignees of a chose in action, that is, holders of a mere equity; and, as such assignees, it may be admitted, for the sake of the argument, but for no other purpose, that Fairbanks had a better title, because it was a prior one. . . . Sargent, having acquired his equity without notice of Fairbanks' right, proceeded to make his title available and reduce the chose in action to possession by inducing Underwood to make a settlement, or by making a settlement himself, and procuring Underwood's assent to it,—whichever way anyone may please to put it."

That is the learned counsel's sketch of the situation, which corresponds perfectly with the opening sentence of our previous opinion, and which stated the fundamental question involved. It was a conflict of equities, equal except in time. The learned counsel then formulates his solution of the difficulty. He says: "The rule is that an assignee of a mere equity, like a chose in action, must, indeed, stand upon 6 L. R. A.

the title of his assignor, and must fail, if his assignor had made a prior assignment of the same equity; but if, in addition to his equity, he succeeds in acquiring the legal title without notice of the prior assignment, that title cannot be taken from him by the prior assignee."

I concede the rule for the sake of the argument, and may admit for the same purpose, and for that only, that it would end this case in the defendant's favor, were it not for the further fact that Fairbanks not only had the prior one of the two equal equities, but also obtained the prior legal title to his interest. For recall events in their order. Gray, who represented Zabriskie in the negotiation, acted for all parties in the execution of the agreement. Underwood gave him a formal release of Zabriskie, but upon the condition that he should deliver it only upon receiving from Zabriskie the stipulated payment.

Gray testifies: "Mr. Underwood had prepared the release to Zabriskie for the \$20,000. He gave it to me, and requested me not to deliver it to Zabriskie until I received the \$20,000. I took it in that way. . . . He wanted me to hold the release and bonds in escrow for him (Underwood), and, when Judge Monell should bring a release, and the assignment he held against Underwood, he would authorize me to deliver the bonds or money."

The moment the release was delivered the bonds became in the legal possession of Underwood, through the actual possession of his agent, Gray, duly constituted for that special purpose. Underwood, therefore, at that instant had both the legal title and possession; and it was from and through him, and not from and through Zabriskie, that Sargent acquired his title. At the moment, therefore, when the bonds became Underwood's, and in the possession of his agent, the equity of Fairbanks became a legal title to one third of the bonds in the hands of his co-owner. His equity was gone. The debt to which it pertained was dead and extinguished; and in the instant that the bonds came to the legal ownership of Underwood the share of Fairbanks came to his legal ownership, and the possession of Underwood became his possession. For, consider. Put Sargent and his rights out of the way, to simplify the question. If, after the delivery of the release to Zabriskie and the receipt of the payment by Gray, Fairbanks had proceeded to assert his right, is there the least doubt that he could have treated Underwood as a tenant in common with himself of the bonds, or as holding for him his divisible share? I think there can be no question about that. When the bonds struck the hands of Underwood the equity of Fairbanks became a legal title to the extent of his right. That right was equitable while the proceeds were unrealized, because only the power of equity could treat them as realized; but when they became actually realized, and passed to Underwood as the exact and tangible proceeds contemplated by the contract, there was no longer need of the power of equity to imagine them, for there they were, the very realized proceeds, one third of which, by force of the contract, was that instant the property of Fairbanks, by a legal title. Underwood could hold them in no other way than for him.

self and his associate; and so, not only was the equity of Sargent through his assignment subject to the prior equity of Fairbanks, but the latter drew to himself a legal title prior to the legal title of Sargent.

And here, it seems to me, we get out into the open air, where vision becomes clearer, and are enabled to see the incorrectness of the argument founded upon the assumed attitude of Sargent as a bona fide purchaser without notice. The counsel's brief declares: "If Underwood never had assigned the Zabriskie claim to Sargent, but had received the \$20,000 directly from Zabriskie, and had then paid it over to Sargent in consideration of a release by the latter of his debt, there could not have been a pretense that the plaintiff had any just claim upon it. The equitable owner of moneys cannot follow them into the hands of a purchaser for value without notice." It is not needful to discuss that proposition; for we now see that it is not an equitable owner of moneys who pursues, but a legal owner of property, following what is his, in the hands of one who got no title, and could get none, however innocent his action or expensive his contract (*Ballard v. Burgett*, 40 N. Y. 314; *Weaver v. Barden*, 49 N. Y. 286), it being admitted that in this branch of the argument no aid is derived from the doctrine of negotiability, in its strict sense. And I think it becomes obvious that, as Fairbanks' equity was prior to that of Sargent, so the former's legal title was paramount to that of the latter. Nor is the result changed if we disregard the order in which the law arranges the component events of the one completed transaction, and treat them, according to the fact, as occurring at one and the same instant of time. In that view, there is no priority of legal title in Fairbanks over Sargent, neither is there any in Sargent over Fairbanks; and, the legal titles vesting equally and at the same instant, the prior equity of Fairbanks is not defeated.

Hitherto I have treated the equities of the parties on their merits as equal, but without overlooking the contention which I promised to recollect, that those of Sargent were superior in their quality, because Fairbanks left in Underwood the power to bring or not to bring suits, and the sole right to compromise. We are invited to make "ownership" the synonym of "*dominium*," control, and to measure the respective rights by that standard. Very well; let us do so. Nothing need be said about the first reservation, since Sargent took his assignment after suit had been commenced against Zabriskie, and when Fairbanks was actively prosecuting it, and had become the master of its movement, and Sargent knew both facts. And now as to the right to compromise. Fairbanks had only an equitable right to the extent of his share. Sargent had only an equitable right to the extent of his debt. One had an equitable property in the Zabriskie claim; the other had a special property in it, which was also equitable. Fairbanks left Underwood apparent owner. Sargent left him general own-

er, with the same outside mask. If Fairbanks had no right to compromise, neither had Sargent. If the former left that power in Underwood, so, also, did the latter. The sole difference is that Sargent could resist a compromise below the amount of his debt, and Fairbanks could not prevent one at all. But that difference is quite balanced by the fact that one equity was supported by new services rendered on the faith of its existence, while the consideration of the other was a precedent debt. Sargent, if his equity failed, could be restored to his original position. He would have lost nothing, but only failed to gain something, and would not be bound by a release fraudulently obtained, or mistakenly given, while Fairbanks could not get back his services and labor wasted and expended in vain. The bonds in dispute were the product, almost wholly, of the persevering skill of Fairbanks. The attorney of Underwood in New Jersey describes, as a witness, how utterly he was dependent upon the plaintiff's knowledge and ability. He persevered until he literally made Zabriskie's life miserable, and drove to his aid the friends who advanced the means of compromise. While Fairbanks was training his guns upon Zabriskie, furnishing the powder and bearing the smoke of the battle, and faithfully earning his stipulated share of results, Sargent was looking to the possible victory, from a station out of the smoke and noise, as a means of collecting a debt of Underwood, the amount and details of which he did not know.

If it is true that Fairbanks notified no one of his rights, at least no occasion seemed to require that notification: while, on the other hand, Sargent's counsel called upon Fairbanks, urging him to push Zabriskie, and never revealed that his client held an assignment of the claim, and meant to have the benefit of the latter's services, and leave him to an insolvent for his pay. The equity of Fairbanks was strengthened by his effort to create the fund; that of Sargent was founded on the collection of a desperate debt. That he may not be able to use the product of Fairbanks' labor and skill to repair his own misfortunes in stocks does not in the least disturb our sense of justice: so that, on a careful comparison of equities, I think we deal liberally with Sargent when we treat them merely as equal on their merits, and in their inherent qualities.

We are thus required to affirm the correctness of our previous decision in all its material and essential elements. If we have departed from some of its details, it is because the later argument has led us over a new and different road, and fuller reflection has in some minor matters shifted the balance of judgment; but on the whole case we stand where we did, and satisfied that the plaintiff should succeed. The question of damages, we think, was correctly decided by the special term, and it follows that *the judgment of the General Term should be reversed, and that of the Special Term affirmed, with costs.*

All concur, except **Gray, J.**, not sitting.

PENNSYLVANIA SUPREME COURT.

Joseph DIERSTEIN, *Pff in Err.*,

v.

Mary SCHUBKAGEL.

(....Pa....)

1. The sufficiency of the evidence to support a verdict cannot be considered on an assignment of error for refusal to grant a nonsuit or to arrest judgment.
2. Evidence that the settlement of a suit for money loaned, and of a prosecution for fornication committed on a certain day, included a cause of action for breach of a promise of marriage made on the same day, is admissible in a suit for such breach of promise.
3. Communications to a law student, although made while he is employed to advise and assist in a law-suit, are not privileged.

(January 6, 1890.)

ERROR to the Court of Common Pleas, No. 2, of Allegheny County to review a judgment in favor of plaintiff in an action to recover damages for breach of a promise of marriage. *Reversed.*

At the trial plaintiff offered evidence of a promise by defendant to marry her and of a breach of the same.

Defendant offered to prove by Henry Ferring, a law student, that in 1887 he had acted as attorney for plaintiff in this suit and had brought against defendant a suit to recover back money loaned, and filed against him an information for fornication, and that such suits, together with the claim which was the basis of this suit, were all settled and withdrawn upon payment by defendant of \$200.

This offer was ruled out on the ground that Ferring, having acted as plaintiff's attorney, was incompetent to testify. (First assignment of error.)

Defendant then offered to prove by Alderman Stork, before whom such two cases were brought, that he settled the same as shown by certain transcripts shown to the court, and that the settlement included the present cause of action.

This offer was excluded. (Third assignment of error.)

The court charged *inter alia* as follows:

"If the plaintiff has lost any money, if she has lost the pleasures and comforts that go with the relationship of that kind; if she has lost the advantages of maintenance—because when a man takes a wife he has to take the responsibility as well as the fun. He must fur-

NOTE.—Attorney and client, privileged communication.

Communications between attorney and client are privileged, and it makes no difference that the client offered no compensation, and the attorney made or expected to make no charge, for his services. *March v. Ludlum*, 8 Sandf. Ch. 35; 1 Pom. Eq. Jur. 200; *People v. Stout*, 8 Park. Cr. Rep. 676.

Any communication made to an attorney by his client with reference to the object or subject of his professional employment, is entitled to protection as a privileged communication. *Clarke v. Richards*, 3 E. D. Smith, 89; *Rogers v. Lyon*, 64 Barb. 373; *Bacon v. Frisbie*, 80 N. Y. 394; *Williams v. Fitch*, 13 N. Y. 551; *Pearsall v. Elmer*, 5 Redf. 181; *Carnes v. Platt*, 13 Jones & S. 530; *Hoiman v. Kimball*, 22 Vt. 555; *Barnes v. Harris*, 7 Cush. 579; *Hoy v. Morris*, 18 Gray, 512; *Goddard v. Gardner*, 28 Conn. 172; *Crosby v. Berger*, 11 Paige, 377; *Sanford v. Sanford*, 61 Barb. 255, 5 Lana. 496; *Smith v. Smith*, 1 Thomp. & C. 63.

To be privileged the matters must have been communicated between a client and his professional legal adviser, or some person acting at that time as that legal adviser's agent or clerk, and may be made to such legal adviser personally, or through the means of any intermediate agent employed expressly to make the communication, either by writing or orally. *Anderson v. British Columbia Bank*, L. R. 2 Ch. Div. 644; *Wilson v. Northampton & B. R. Co.* L. R. 14 Eq. 477; *Macfarlan v. Rolt*, L. R. 14 Eq. 580; *Jenkyns v. Bushby*, L. R. 3 Eq. 647; *Goodall v. Little*, 1 Sim. N. S. 155; *Lafone v. Falkland Islands Co.* 4 Kay & J. 34; *Reid v. Langlois*, 1 Maon. & G. 627; *Russell v. Jackson*, 9 Hare, 387; *Stuyvesant v. Peckham*, 3 Edw. Ch. 679; *Parker v. Carter*, 4 Munf. 278; 1 Pom. Eq. Jur. 200.

Protection of clients.

Protection to clients in the conduct of their business, and in securing their rights and avoiding liabilities, renders perfect freedom in their intercourse with their counsel, while acting as such, essential, and this although the subject of consulta-

tion may only by possibility become the subject of judicial investigation. *Clarke v. Richards*, 3 E. D. Smith, 95; *Moore v. Terrell*, 4 Barn. & Ad. 371; *Bank of Utica v. Mersereau*, 3 Barb. Ch. 523.

Equity will neither compel nor permit a solicitor to disclose what his client had communicated to him in professional confidence, nor compel the production of letters which had passed between him or other intermediate agents upon the business, containing or asking legal advice or opinions, nor cases prepared at the instance of the client for the opinion of counsel. *Mitchell's Case*, 12 Abb. Pr. 260; *Peck v. Williams*, 13 Abb. Pr. 71.

All such communications are privileged, whether such advice relates to a suit pending, one contemplated, or to any other matter proper for such advice or aid. *Britton v. Lorenz*, 45 N. Y. 57; *Woodruff v. Hursen*, 32 Barb. 552.

It is for the court to determine from the facts whether the attorney was acting in a professional capacity, even though he disclaims it. *Bacon v. Frisbie*, 80 N. Y. 394.

Communications between a person and his former attorney, in respect to matters in which he has so acted, and arising therefrom, are privileged. *Myers v. Dorman*, 34 Hun, 115.

An attorney is not obliged, upon a trial, to produce papers intrusted to him by his client, nor can he be compelled as a witness to state their contents. *Jackson v. Denison*, 4 Wend. 558; *Jackson v. Burtis*, 14 Johns. 391.

Privilege may be waived.

The law will not compel them to make disclosures, nor will courts permit disclosures to be made without the assent of their clients. This, however, is a rule of law for the protection of the client, which he is at liberty to waive. *McLellan v. Longfellow*, 32 Me. 494; *Edington v. Mutual L. Ins. Co.* 5 Hun, 11; *Aiken v. Kilburne*, 27 Me. 263; *Hatton v. Robinson*, 14 Pick. 424.

Even if the suit of the third person were against one client alone where the privileged communication was made to two clients the consent of both

nish means for her support. The law imposes that upon the relationship, and she would be entitled to a support, and if you find that he was in shape to furnish that, you take that into consideration, and the law permits evidence to be offered as to the extent of the man's ability—that is to indicate the character of the home and home comforts, that his means will furnish to her, as his wife, of which she may be deprived in the future by the breach." (Sixth assignment of error.)

"If he has money and has undertaken to get rid of it with a view to avoid responsibility, then you ought not to allow that; you ought to let the lawyers hunt it up, if it is concealed in that way, and whether or not the defendant is old he has taken upon himself that he has the capacity to perform the duties of a husband, because he has married since." (Seventh assignment of error.)

The fifth assignment of error related to the refusal of the court to grant a compulsory nonsuit.

The tenth referred to the refusal to grant a motion for new trial and in arrest of judgment.

The plaintiff recovered judgment for \$600, and defendant took this writ.

Messrs. William W. Whitesell and Frank Whitesell, for plaintiff in error:

The rule regarding privileged communica-

tions cannot be applied to a law student and alderman.

See *Brewster v. Sterrett*, 83 Pa. 115; *Holmes v. Comegys*, 1 U. S. 1 Dall. 489 (1 L. ed. 213); *Heister v. Davis*, 8 Yeates, 4; *Re Matthews' Estate*, 5 Pa. L. J. 149; *Parry v. Almond*, 12 Serg. & R. 284.

Counsel may testify against his client as to matters which occurred in open court.

See *Levers v. Van Buskirk*, 4 Pa. 809; *Heaton v. Findlay*, 12 Pa. 804; *Beeson v. Beeson*, 9 Pa. 279; *Jeanes v. Fridenberg*, 8 Pa. L. J. 199.

Messrs. Robb & Fitzsimmons for defendant in error.

McCollum, J., delivered the opinion of the court:

This suit was brought on the 2d of September, 1887, and the plaintiff was then sixty-four, and the defendant sixty-eight, years old. She became a widow in 1885, and he a widower on the 15th of June, 1887. According to her claim he commenced courting her on the 1st of July, and on the 15th of that month promised to marry her. While the courtship, as described by her and her witnesses, was brief, it was unremitting and ardent, and in consequence of it the aged suitor became a defendant in a prosecution for the crime of fornication, and in an action for breach of promise of marriage.

would be required. *Whiting v. Barney*, 38 Barb. 367; *Strode v. Seaton*, 2 Ad. & El. 171.

Exceptions to rule.

Where the communications are made in the presence of all the parties to the controversy, they are not privileged, but the evidence is competent between such parties. *Britton v. Lorenz*, 45 N. Y. 57; *Whiting v. Barney*, 30 N. Y. 330.

So communications made to a counselor in the course of his professional employment by persons other than the client or his agent are not privileged. The rule extends only to communications made by or on behalf of the client. *Randolph v. Quidnick Co.* 23 Fed. Rep. 279.

The rule covers only information obtained solely from a person coming to the witness in the character of client. *Bogert v. Bogert*, 2 Edw. Ch. 309; *Marsh v. Howe*, 38 Barb. 649; *Rochester City Bank v. Suydam*, 5 How. Pr. 254; *Althouse v. Wells*, 40 Hun, 336.

A communication made after the relation of attorney and client has ceased is not privileged. *Mandeville v. Guernsey*, 38 Barb. 225.

An attorney who acted for both parties may testify in a subsequent litigation between the representatives of the parties, to what took place between them. *Sherman v. Scott*, 27 Hun, 331; *Rosenburg v. Rosenberg*, 40 Hun, 91.

But where parties having hostile claims employ a common attorney, what transpires is privileged in the action between them and a third party. *Root v. Wright*, 84 N. Y. 72.

If the communication be made in the presence of the adverse party it is not privileged. *Prouty v. Eaton*, 41 Barb. 409; *Hebbard v. Haughian*, 70 N. Y. 64; *Coveney v. Tannahill*, 1 Hill, 33; *Kellogg v. Kellogg*, 6 Barb. 118; *Mallory v. Benjamin*, 9 How. Pr. 419; *Estate of Hoyt*, 7 N. Y. Civ. Proc. Rep. 374; *Hoyt v. Jackson*, 8 Dem. 388.

Terms of compromise offered by an attorney to the creditors of his client are not confidential and not protected. *McFavish v. Denning*, Anth. N. P. 155.

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The attorney who acts as the conduit through whom a conveyance is made must testify to the circumstances attending its execution. *Foster v. Wilkinson*, 37 Hun, 243.

An attorney may testify to handwriting which he might know without being intrusted with it by his client. *Johnson v. Davenport*, 19 Johns. 184.

An attorney who witnesses the execution of an instrument must testify to it the same as any other witness. *Bank of Utica v. Mercereau*, 3 Barb. Ch. 587; *Shufelt v. Watrous*, 16 N. Y. Week. Dig. 198; *Foster v. Wilkinson*, 37 Hun, 243.

The privilege does not apply to cases where the attorney learned of the matters not as a professional man, but by personal observation, and where they were not communicated as secrets, though the client may have given the same information. *Davies v. Waters*, 9 Mees. & W. 611; *Brandt v. Klein*, 17 Johns. 385; *Chillioothe F. R. & B. Co. v. Jameson*, 48 Ill. 281; *Jackson v. McVey*, 18 Johns. 330.

The privilege does not extend to cases where the advice was given with a view of breaking the law. *Graham v. People*, 63 Barb. 488; *People v. Sheriff of N. Y.* 29 Barb. 622.

But this exception exists only in case of crimes strictly so called. *Peck v. Williams*, 18 Abb. Pr. 71; *People v. Blakely*, 4 Park. Cr. Rep. 476; *Pearson v. People*, 18 Hun, 249.

Testimony of third persons.

A third person may testify to what passes between attorney and client. *Cary v. White*, 69 N. Y. 336; *Armstrong v. People*, 70 N. Y. 38.

Although the clerk of an attorney or counsel is forbidden to disclose confidential communications made in his presence (*Sibley v. Waffa*, 16 N. Y. 180; *Brand v. Brand*, 39 How. Pr. 261; *Taylor v. Forster*, 2 Car. & P. 195; *Bowman v. Norton*, 5 Car. & P. 177; *Rex v. Upper Boddington*, 8 Dow. & R. 726), yet in *Jackson v. French*, 8 Wend. 337, it is asserted that the privilege is confined to counsel, to an interpreter, and perhaps to the clerks of the attorney or counsel, though as to the latter the cases differ.

We cannot pass on the sufficiency of the evidence to support a verdict on a refusal to grant a nonsuit, or to arrest judgment. "When the error alleged is in arresting judgment, we cannot look into the testimony for aid in pronouncing upon the action of the court. The question is upon the sufficiency of the plaintiff's narrative. If that be sound the plaintiff is in general entitled to judgment on his verdict." *Aronson v. Cleveland & P. R. Co.* 70 Pa. 68.

"It is error to nonsuit a plaintiff who has presented a case sufficient to go to the jury; but it is not error to refuse a nonsuit; for when the defendant has given his evidence, he has it still in his power to ask the court to instruct the jury upon the insufficiency of the plaintiff's evidence to maintain the action." *Lehman v. Kellerman*, 65 Pa. 489.

The excerpts from the charge which constitute the sixth and seventh specifications are, when read in place, unobjectionable and free from error.

The offers to prove that this cause of action was included in a settlement by the parties of two cases before Alderman Stork were material, and should have been allowed. In one of these cases it was claimed by the plaintiff that the defendant had carnal knowledge of her on the 15th of July. It related to an act committed on the day it is alleged the promise of marriage was made. The propriety of joining in one settlement two causes of action of this nature arising between the same parties on the same day cannot be doubted.

Ferring and Stork were competent to testify to the terms of the settlement, and what was

included in it. It was made in their presence, and they assisted in making it. It is difficult to see what there was in the nature of a confidential communication about it. Ferring was a law student, employed by the plaintiff to advise and assist her in her suit against the defendant. But her communications to him while so employed are not privileged. A law student is in this respect on no higher plane than a blacksmith retained in a like service.

In *Barnes v. Harris*, 7 Cush. 578, it was held: that communications made while seeking legal advice in a consultation with a student-at-law in an attorney's office, he not being the agent or clerk of the attorney for any purpose, are not protected.

In Greenleaf on Evidence (vol. 1, § 239) the rule on this subject is stated thus: "It seems indispensable to the existence of the privilege that the relation of counsel or attorney and client should exist, and that the communication be made in faith of the relation. And then the privilege of secrecy only extends to the parties to the relation, and their necessary agents and assistants. Hence, the privilege does not attach if one is accidentally present, or casually overhears the conversation, or if the person be not a member of the profession, although supposed to be so by his client; or if he was acting as a mere scrivener, although of the legal profession."

The first and third specifications of error are sustained, and as we discover no merit in the remaining specifications, they are dismissed.

Judgment reversed, and venire facias de novo awarded.

GEORGIA SUPREME COURT.

Thomas W. COSKERY, *Plff. in Err.*,

James W. NAGLE.

(....Ga.....)

1. Where a porter of a hotel meets a guest at a railroad depot and indicates to

him a conveyance by which he can reach the hotel, and receives from him a check for his baggage, the hotel proprietor at that instant incurs a liability for the safe keeping of such baggage and its redelivery to the owner; and a limitation of the authority of the porter, unknown to the guest, which permits him simply to advertise the hotel and suggest it to strangers, and forbids him to receive baggage, is immaterial.

NOTE.—*Innkeeper and guest; relation, when exists.*

An innkeeper is one whose business is to entertain travelers and passengers. *Carter v. Hobbs*, 12 Mich. 56; *Howth v. Franklin*, 20 Tex. 801; *Bacon, Abr. Inn*.

A guest is a traveler, wayfarer or transient visitor to an inn, coming from a distance and seeking lodging and entertainment. *Curtis v. Murphy*, 63 Wis. 6.

If a person stops at an inn as a traveler, and is received as such, the relation of innkeeper and guest is immediately established with all its privileges and liabilities, and continues as long as he sojourns as a traveler. *Ross v. Mellin*, 36 Minn. 421; *Jalie v. Cardinal*, 36 Wis. 118.

He is presumed to continue such till the contrary appears. *Luak v. Belote*, 22 Minn. 468; *Jalie v. Cardinal*, 36 Wis. 118.

It is not necessary that one should have food and lodgings to be a guest; the purchase of liquor makes him a guest, and if he is robbed while drinking the innkeeper is liable. *Bennett v. Mellor*, 5 T. R. 273; *McDonald v. Edgerton*, 5 Barb. 560; *Clute v. Wiggins*, 14 Johns. 176; 2 Kent, Com. 502.

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But in Massachusetts it is held that persons going into an inn to drink liquor are not guests, within the Massachusetts statute. *Com. v. Moore*, 5 New Eng. Rep. 301, 145 Mass. 244.

So in Ohio, to entitle a visitor at an inn to be treated as a guest, it must appear that the visit was for purposes which the common law recognizes as purposes for which inns are kept. *Arcade Hotel Co. v. Wiatt*, 2 West. Rep. 308, 44 Ohio St. 32.

In an action to recover for loss of property the evidence must show that at the time of the loss the plaintiff was a guest. *Strauss v. County Hotel & Wine Co. L. R. 12 Q. B. Div. 27*; *Hickman v. Thomas*, 16 Ala. 668; *Chamberlain v. Masterson*, 26 Ala. 877; *Pinkerton v. Woodward*, 33 Cal. 557; *Walling v. Potter*, 35 Conn. 188; *Shoecraft v. Bailey*, 25 Iowa, 553; *Norcross v. Norcross*, 58 Me. 168; *Hall v. Pike*, 100 Mass. 496; *Carter v. Hobbs*, 12 Mich. 56; *Wiser v. Chesley*, 53 Mo. 547; *Ingalbee v. Wood*, 63 N. Y. 577; *Mowers v. Fethers*, 61 N. Y. 34; *Henderson v. Ardery*, 36 Pa. 452; *Houser v. Tully*, 62 Pa. 32; *Bemis v. Phelps*, 41 Vt. 5; *Jalie v. Cardinal*, 36 Wis. 118.

The payment of a stipulated sum per week does not change the relation from that of guest to that

2. The failure of the guest to inform the porter that the baggage contains valuable jewelry and clothing is not such negligence as will prevent his recovery against the proprietor for the loss of the baggage.

3. The proprietor of a hotel is liable for the loss of baggage of guests through the negligence of a carrier to whom it has been delivered for transportation to the hotel, and whose apparent duty is, by authority of such proprietor, to transport guests and baggage to such hotel; and any private arrangement between the proprietor and carrier unknown to the guest is immaterial.

(November 18, 1889.)

ERROR to the Richmond City Court to reverse a judgment in favor of plaintiff in an action against a hotel keeper to recover the value of certain baggage alleged to have been lost while in possession of defendant's servants for transportation to the hotel. *Affirmed.*

The facts fully appear in the opinion.

Mr. William K. Miller, for plaintiff in error:

If the defendant's porter was not charged with the duty averred in the declaration, then plaintiff has no case and defendant is not liable. The existence of the custom of defendant to have his porter meet the trains and transfer baggage to the hotel is a question of fact and should have been submitted to the jury by the court.

Macon Co. v. Chapman, 74 Ga. 107.

An innkeeper has a lien on the goods intrusted to him. Where he has no lien he is not liable as an innkeeper, and he has a lien only where the property has been delivered to him by a traveler or guest.

Sasseen v. Clark, 87 Ga. 242. See Code, 1906.

The liability of the innkeeper for the goods of his guest intrusted to his care or to the care

of his servant begins at the place the innkeeper usually takes charge of his guest. If the custom be to deliver at the cars, or if he undertakes to do so, the proof should show a compliance with such undertaking. But the beginning and the termination of the liability of an innkeeper depend a great deal upon the common usages of the country.

Ibid.

In this case the check was, according to the custom at Augusta and of the hotel, delivered to an independent agent to present to the railroad company to obtain the valise and bring it to the hotel.

Wilson v. White, 71 Ga. 510; *Perry v. Cent. R. Co.* 66 Ga. 746.

The valise was never in the possession of the hotel keeper or his agent, and he is not liable. *Sasseen v. Clark*, 87 Ga. 250.

There can be no constructive delivery to an innkeeper outside of his hotel.

Code, 2118.

The custom of any particular trade or business shall be binding when it is such universal practice as to justify the conclusion that it became by implication a part of the contract.

Code, § 1, par. 4.

Any negligence of the guest contributing to the loss is sufficient defense to the landlord.

Code, 2120; 2 Thomp. Neg. p. 1215; *Schouler*, Bailm. p. 274; *Fisher v. Kelsey*, 121 U. S. 385 (90 L. ed. 930).

Mr. William H. Flemming for defendant in error.

Blandford, J., delivered the opinion of the court:

1. The plaintiff was met at the depot by a porter of the hotel, who wore a cap with the name of the hotel on it, and who cried the name of the hotel, and he was shown by this porter to the omnibus which was to take him

of lodger. *Lima v. Dwinelle*, 7 Alb. L. J. 44; *Betts v. Salisbury*, 12 Alb. L. J. 387; *Berkshire Wool Co. v. Proctor*, 7 Cush. 417; *Hall v. Pike*, 100 Mass. 496; *Norcross v. Norcross*, 58 Me. 163.

But regular boarders are not guests. *Johnson v. Reynolds*, 3 Kan. 267; *Lusk v. Beloit*, 22 Minn. 468.

So the relation of innkeeper and guest does not exist as to the use of a room for exhibition of samples of jewelry offered for sale. *Arcade Hotel Co. v. Wiatt*, 44 Ohio, 45.

Inn defined.

An inn is a house where the traveler is furnished with everything which he has occasion for while on his journey. *Thompson v. Laey*, 3 Barn. & Ald. 285.

It is a house of entertainment for all who choose to visit it. *Wintermute v. Clark*, 5 Sandf. 247; *Walling v. Potter*, 36 Conn. 185.

A house kept open publicly for lodging and entertainment of travelers, for a reasonable compensation. 2 Kent, Com. 596; *Bonner v. Welborn*, 7 Ga. 307.

It is a term synonymous with "tavern" and "hotel," but not with "boarding-house," "restaurant" or "lodging-house." *Pinkerton v. Woodward*, 38 Cal. 568; *People v. Jones*, 54 Barb. 316; *Anderson*, Dict. 547.

A house at which transient guests and regular boarders are entertained, although not licensed, is an inn within Ala. Code, § 4082, prohibiting card-playing at inns. *Foster v. State*, 84 Ala. 451.

A guest-room in a hotel is a part of a public hotel 6 L. R. A.

or tavern, in that it is for the use of the public business of the house in the entertainment of its guests, and only becomes private after it is appropriated by a guest. *Comer v. State*, 26 Tex. App. 508.

Responsibility of innkeepers as bailees.

They are responsible for the well and safe keeping and custody of the goods and chattels of their guests, and even the absence of negligence will not exempt them from liability. *Shaw v. Berry*, 41 Me. 478.

They are not bound to receive and keep property of a person who is neither a traveler nor a guest. *Grinnell v. Cook*, 3 Hill. 485.

It is not necessary that the goods should be placed in the special keeping of the innkeeper; if they were within the inn it is enough. *Norcross v. Norcross*, 58 Me. 163; *Burrows v. Trieber*, 21 Md. 820; *McDonald v. Edgerton*, 5 Barb. 580; *Packard v. Northerncraft*, 2 Met. (Ky.) 439; *Bennett v. Mellor*, 5 T. R. 273; 2 Kent, Com. 598.

They are liable for the loss of goods of a boarder only where they have been guilty of culpable negligence. *Manning v. Wells*, 9 Humph. 746.

The innkeeper is not liable, under Mass. Pub. Stat., chap. 1102, § 12, for the loss of a commercial traveler's trunk containing goods for sale, in the absence of special agreement or deposit for safe-keeping, unless the loss resulted from his willful default or neglect, or that of his servants. *Becker v. Haynes*, 29 Fed. Rep. 441.

Where a person severs his present connection with a hotel by surrendering his room and paying his

to the hotel. He delivered to the porter the check for his baggage, telling him that he was anxious to have it promptly; to which the porter replied that it would come right along in another wagon. The porter, in the presence of the plaintiff, gave the check to another man, who, according to the plaintiff's testimony, he "did not know was any other than an *attaché* of the hotel." The plaintiff had stopped at the same hotel about a week before, at which time this porter was connected with the hotel in the same way, and, when he intrusted his check to him on this occasion, he recognized him as the same porter who on the former occasion had performed similar services for him. The plaintiff did not know that the omnibus or the wagon which brought the baggage was run by another person than the proprietor of the hotel, and when he paid his fare on the former occasion supposed he was paying it to the hotel. The omnibus was the usual mode of conveyance from the depot to the hotel, the proprietor of the hotel having agreed with the transfer company for the omnibus and wagon to run to the hotel, and one of the omnibuses had the name of the hotel on it. He was taken to the hotel and received as a guest. The valise was not delivered to the hotel. It was delivered by the railroad company to the holder of the check, and there was no further trace of it. The plaintiff demanded it of the hotel proprietor, and was then told by him that the transfer company was liable. He brought suit against the hotel proprietor for the value of his valise and its contents, and a verdict for the full amount was rendered in his favor.

An innkeeper is bound to extraordinary diligence in preserving the property of his guests intrusted to his care. Code § 2117. It need not be so intrusted by actual delivery. *Id.* § 2118. In case of loss, the presumption is

want of proper diligence in the landlord. Negligence or default of the guest himself, of which the loss is a consequence, is a sufficient defense. *Id.* § 2120.

It has been held by this court that "where a hotel keeper sends his porter to the cars, to receive the baggage of persons traveling, and baggage is delivered to the porter, and the traveler becomes the guest of the hotel, the liability of the innkeeper, as such, for the baggage, begins on the delivery to the porter, and continues until redelivery to the actual custody of the guest." *Sasseen v. Clark*, 37 Ga. 242.

The innkeeper (who is the plaintiff in error here) seeks to escape the effect of this decision by evidence that the porter in the present case was not authorized to receive baggage, checks for baggage or guests at the depot, his duty being simply to advertise the hotel and suggest it to strangers. We do not think that this makes any difference in the present case, it not being shown that the plaintiff knew of any such limitation upon the porter's authority. He simply knew that he was the porter of the hotel,—a servant whose duty ordinarily, as the name implies, is to carry parcels and luggage. "Where the innkeeper sends his carriage driver or porter to the railroad station to solicit custom, he may become responsible for his guest's baggage from the moment the traveler confides it to the driver's or the porter's hands." *Schouler*, *Bailm.* 269, citing *Sasseen v. Clark*, *supra*, and *Dickinson v. Winchester*, 4 Cush. 114.

In the latter case the doctrine of *respondet superior*, which is invoked by the defendant here, is discussed by Shaw, *Ch. J.*, and the distinction made that while the innkeeper, who had employed the conveyance of another to meet at the cars and carry to his hotel passengers who should choose to come there, might

bill before delivery of his trunk, he thereby relieves the proprietor from the extraordinary liability incident to the relation of innkeeper and guest. *Wear v. Gleason* (Ark.) 12 S. W. Rep. 756.

Where a guest pays his bill and has his name stricken from the register, but leaves his valise in his room with a friend, and it is stolen, the innkeeper is not liable. *Miller v. Peeples*, 60 Miss. 319; *Galley v. Clerk*, Cro. Jac. 188.

Liability of innkeeper for injury or loss of property of guest.

The common-law liability of an innkeeper has been generally changed by statute. *Fisher v. Kelsey*, 121 U. S. 383 (30 L. ed. 900).

An innkeeper is liable for an injury to a horse stabled by him for reward, caused by negligent construction or condition of stall, although the owner boards or lodges elsewhere. *Russell v. Fagan* (Del.) 6 Cent. Rep. 864.

Liability of an innkeeper, imposed by the law for the protection of the baggage of the guest, can be avoided only when the loss of the baggage is occasioned by the act of God, the public enemy, or the misconduct of the guest or friend whom he brings with him. *O'Brien v. Vail*, 23 Fla. 627.

Either case or assumption lies for the loss of baggage through negligence of the innkeeper. *Dickinson v. Winchester*, 4 Cush. 114.

The liability of the innkeeper for money, etc., is not limited to what is reasonably necessary for traveling. *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417; *Wilkins v. Barie*, 44 N. Y. 172; *Smith v. Wilson*, 36 Minn. 334.

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He is liable for money stolen from his guest, the guest himself not having been negligent, and there being no evidence to show how or by whom it was stolen. *Dunbar v. Day*, 12 Neb. 566.

But an innkeeper keeping a safe is not liable for loss of the guest's watch, if not deposited therein. *Stewart v. Parsons*, 24 Wis. 241.

An innkeeper is not liable as such for loss of money deposited with him for safe keeping by one who is not a guest. The clerk of the innkeeper has no authority to bind him, either as innkeeper or special bailee. *Arcade Hotel Co. v. Wiatt*, 2 West. Rep. 368, 44 Ohio St. 32.

As insurer of property committed to his care.

The prevailing authorities make him an insurer of the property committed to his care, against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property. *Mason v. Thompson*, 9 Pick. 230; *Murray v. Marshall*, 9 Colo. 483; *Richmond v. Smith*, 8 Barn. & C. 9; *Piper v. Manny*, 21 Wend. 232; *Grinnell v. Cook*, 3 Hill, 485; *Manning v. Wells*, 9 Humph. 746; *Thickstun v. Howard*, 3 Blackf. 535; *Luak v. Belote*, 22 Minn. 468; *Mateer v. Brown*, 1 Cal. 221; *Shaw v. Berry*, 31 Me. 478; *O'Brien v. Vail*, 23 Fla. 627; 3 Kent, Com. 594; *Story*, *Bailm.* § 465.

Delivery by an innkeeper to an apparent stranger, of baggage owned by a guest who had gone away, without an effort to verify his claim to the property, and without inquiry as to its ownership, shows a culpable indifference to the safety of property committed to his care, rendering him answerable

not be liable if the carriage driver had negligently run over somebody in the street, yet he would be liable for the negligent loss of a traveler's baggage by the carriage driver, where travelers were directed by him, in his own interest, to such conveyance, and he would be estopped to deny that the person thus actually employed was his agent for that purpose. "The usages of travel, together with the vast variety of goods, parcels and baggage which are customarily carried by travelers, are to be considered in determining what circumstances will charge the innkeeper with the care of property coming to his house. Horses and carriages are properly intrusted to the hostler, and parcels to the agent or servant accustomed to receive them." Edw. Ballm. § 460.

The defendant insisted that the plaintiff was negligent in having failed to call the porter's attention to the fact that his valise contained valuable jewelry and clothing; and in support of this position we are cited to the case of *Fowler v. Dorlon*, 24 Barb. 884. On examination it does not seem to help the plaintiff in error on this point, and seems to be against him in another respect. The plaintiff in that case, on alighting from the train at the depot, gave the check for his valise to one Blake, with a request to get his valise. Blake was an employé of the stage line which had its office in the hotel, and he boarded at the hotel, and, with the knowledge of the proprietor, had been in the habit of soliciting custom for the house. Blake got the valise, returned, and set it down, and went off and left it, in order to attend to his duties with the stage company.

The plaintiff, who saw him approaching with the valise, but did not see him set it down, went on his way to the defendant's hotel, where he was received as a guest. He

had said nothing to Blake evincing an intention to become the defendant's guest, but simply handed him the check, and told him to get the valise. In discussing the plaintiff's diligence the court says: "He was not bound to disclose the fact that the valise contained money." The court adds: "If he thought fit to intrust a man in the situation of Blake with so valuable an article, it would seem but a reasonable exercise of prudence that he should at least request him to deliver it at the hotel without delay."

The evidence shows that this was done in the present case. As to the authority of Blake as agent of the hotel, the court below in that case charged that "if Blake was in the actual employment of the defendants, or, though not in their actual employment, if he was acting with the knowledge and approbation of the defendants, in such a manner as to induce the guests of the defendants to believe that he was their servant, they were liable for his acts, and the baggage received by him of Barker [the plaintiff] was within the custody of the defendants as innkeepers." The only criticism the court made upon this charge was that "the judge should have gone further, and should have submitted to the jury the distinct question whether Blake received the baggage as the servant of the defendants. As the charge stands in the case, this fact seems to have been assumed. But there are no exceptions to the charge, and . . . this defect is not available to the defendants."

An English case which seems in point is the following: *Bather v. Day*, 8 L. T. N. S. 205 [1868]. The plaintiff arrived at the defendant's inn with a mare and gig, which were taken to a stable yard some distance from the inn, where it was customary to take horses

for the value of the goods in case of their loss. *Wear v. Gleason* (Ark.) 12 S. W. Rep. 764.

There is default in the innkeeper whenever there is a loss not arising from the guest's negligence. *Morgan v. Ravey*, 6 Hurlst. & N. 265; *Sasseen v. Clark*, 37 Ga. 242; *Pinkerton v. Woodward*, 33 Cal. 567; *Cheesebrough v. Taylor*, 12 Abb. Pr. 227; *McDonald v. Edgerton*, 5 Barb. 590; *Grinnell v. Cook*, 3 Hill, 488; *Wilkins v. Earle*, 44 N. Y. 172; *Fuller v. Coats*, 18 Ohio St. 343; *Jalie v. Cardinal*, 35 Wis. 118.

His liability for loss of property of his guest is the same in character and extent as that of a common carrier. *Eloox v. Hill*, 98 U. S. 224 (23 L. ed. 104); *Southern Exp. Co. v. Frink*, 67 Ga. 206; 1 Bl. Com. 430; *Story*, Ballm. § 470.

Contributory negligence of guest defeats recovery.

The contributory negligence of the guest will defeat a recovery. *Jalie v. Cardinal*, 35 Wis. 118; *Armistead v. Wilde*, 17 Q. B. 261; *Chamberlain v. Masteron*, 26 Ala. 371; *Kelsey v. Berry*, 43 Ill. 469; *Fowler v. Dorlon*, 24 Barb. 884; *Hadley v. Upshaw*, 27 Tex. 547; *Hawley v. Smith*, 25 Wend. 642.

On a claim against an innkeeper for loss sustained by a guest the innkeeper may show that the loss is attributable to the negligence of the guest. *Spring v. Hager*, 5 New Eng. Rep. 186, 145 Mass. 186.

Merely consenting to be placed to sleep in a room with a stranger guest is not such negligence as will defeat a recovery if his goods are stolen. *Olson v. Crossman*, 31 Minn. 232.

The mere fact of the guest omitting to lock his door is not of itself such contributory negligence as will defeat a recovery; but it is to be considered with other facts. *Oppenheim v. White Lion Hotel* 6 L. R. A.

Co. L. R. 6 C. P. 515; *Spice v. Bacon*, 36 L. T. N. S. 896; *Mitchell v. Woods*, 16 L. T. N. S. 678; *Bohler v. Owens*, 60 Ga. 185; *Classen v. Leopold*, 2 Sweeney, 705.

Giving a guest a key to lock his door will not dispense with care on the part of the landlord. *Burgess v. Clements*, 4 Maule & S. 311.

The object of giving him a key is to enable him to secure his own privacy at his pleasure. *Calve's Case*, 8 Coke, 82.

Noncompliance with regulations; notice.

The statutes relieve an innkeeper from liability for only such loss as is actually attributable to non-compliance with the regulations of the inn; evidence merely of noncompliance will not exonerate the innkeeper. *Burbank v. Chapin*, 1 New Eng. Rep. 79, 140 Mass. 123.

Where regulations are not brought to the notice of a guest the fact that after locking his door he does not search for a bolt is not evidence of negligence on his part, relieving the innkeeper from liability for loss. *Spring v. Hager*, 5 New Eng. Rep. 186, 145 Mass. 186.

Notice brought home to a guest will not absolve the innkeeper from liability. *Olson v. Crossman*, 31 Minn. 232.

The failure of a guest to comply with printed regulations of which he has no notice, directing, upon leaving his room, "to lock the door and leave the key at the office," will not exempt the innkeeper from liability for loss of wearing apparel stolen from the room, without proof shown by the innkeeper that such loss was occasioned by failure to comply with the regulations. *Burbank v. Chapin*, *supra*.

and vehicles of guests. One Rowles, who acted as hostler for the guests, kept this stable, and was an independent livery-stable keeper, doing business with the public generally, besides the guests of the inn. He received no wages from the inn, and did not reside there. While the plaintiff was temporarily away from the inn, but while the horse was still in the stable, the stable keeper negligently injured the horse. The plaintiff sued the innkeeper, and the innkeeper contended that the rule of master and servant did not apply so as to make her responsible, the stables not being hers, but the stable keeper's. The court gave judgment against the innkeeper, and the court of exchequer, on appeal, affirmed the judgment, holding that while, as between the stable keeper and the innkeeper, the stables were not under the innkeeper's control, yet, as between the innkeeper and the plaintiff, they were the stables of the inn, and the stable man the hostler of the inn. The court said: "We cannot enter into the private arrangement between the keeper and the person acting as her 'master of the horse.' It is the apparent relation, . . . and not the private one, with which we have to deal. The respondent was a guest, and the horse was 'taken around to the stables in the usual way.'" etc.

The liability of an innkeeper, at common law and in this State, is that of an insurer. We know that this is a harsh rule, but it seems to have been the policy of the law of England, which was adopted by this State, to hold landlords and proprietors of inns or hotels, or houses kept for the accommodation of transient guests, wayfarers and travelers, to the utmost responsibility and liability for the baggage and goods of such persons intrusted to their care. When a traveler arrives at the depot, and is met by one who is the porter of an inn, hotel or house kept for the purpose above stated, who indicates to the traveler a certain

conveyance by which he can go to such place or not, and the traveler delivers to him his baggage or the check therefor, the traveler is thereby a guest of such inn, hotel or house, so far as to render the proprietor thereof liable for the safe keeping or redelivery of the same. The liability of the proprietor commences from the time of the delivery of the baggage or check to the porter. All that the traveler must do is to assure himself that the person representing himself as such porter is in fact the porter of the house. Any private arrangement between the landlord and a carrier for the transportation of persons and baggage to his house does not affect the traveler, who has the right to assume, without any knowledge to the contrary, that such carrier is in fact authorized by the proprietor of the house to safely and securely transport himself and his baggage, and, when loss occurs by the negligence of such carrier, the proprietor of the house is liable to the traveler. And this rule is founded, not upon the fact that the law gives to the landlord or proprietor of the house a lien upon the baggage or goods committed to his care, but upon the policy of the law that such should be the liability of the proprietor. In this case there never could have been any lien of the landlord upon the baggage at the time the loss occurred, but the liability of the landlord was the same notwithstanding no such lien existed. The lien of the landlord grows out of the indebtedness of the guest for his board during his stay at the house. These views, we think, are sufficiently sustained by the authorities above referred to.

2. The exceptions which have been taken by the plaintiff in error to the charge of the court and refusals to charge, in our opinion, are immaterial, under the facts of the case.

The verdict was demanded by the evidence and the law, and *the judgment is affirmed.*

NEW YORK COURT OF APPEALS (2d Div.)

Sarah F. GALUSHA, *Respt.*,

v.

Norman H. GALUSHA, *Appt.*

(....N. Y.....)

1. A valid tripartite agreement for separation of husband and wife is not

affected by a subsequent act of adultery on the part of one of the parties, nor by a decree of absolute divorce therefor, where no relief is asked in the suit against the agreement, or its validity attacked in any way; nor has the court, in granting the divorce, power to set such agreement aside.

2. No additional allowance can be

NOTE.—Articles of separation no bar to divorce.

Articles of separation between husband and wife are no bar to an action for divorce. *Galusha v. Galusha*, 43 Hun, 185.

Articles which contain no express stipulation against divorce are not *per se* a bar to a divorce prayed for by the injured party for causes existing prior to the execution of the articles. *Fosdick v. Fosdick*, 1 New Eng. Rep. 38, 15 R. I. 181.

They are not *per se* a bar to a divorce for causes previously existing and known to the petitioner. *Id.*; *Squires v. Squires*, 53 Vt. 208, 38 Am. Rep. 670; *Rogers v. Rogers*, 4 Paige, 516.

A deed of separation is no bar to a suit for divorce for cruelties which occurred before the separation. *Id.*; *J. G. v. H. G.* 38 Md. 401; *Beeby v. G L. R. A.*

Beeby, 1 Hagg. Ecol. 789; *Wilson v. Wilson*, 40 Iowa, 230; *Kremelberg v. Kremelberg*, 58 Md. 558, 567; *Brown v. Brown*, L. R. 3 P. & D. 202; *Morrall v. Morrall*, L. R. 6 P. Div. 98. But see *Walker v. Walker*, 73 U. S. 9. Wall. 743 (19 L. ed. 814).

This was the rule in the ecclesiastical courts. *Durant v. Durant*, 1 Hagg. Ecol. 738; *Westmeath v. Westmeath*, 2 Hagg. Supp. 1, 4 Eng. Ecol. 238; *Sperling v. Sperling*, 3 Swabey & Tr. 211; *Hunt v. Hunt*, 32 L. J. N. S. Prob. 168.

Although in some cases of a deed of separation, in connection with lapse of time and other circumstances showing the application not bona fide, the application has been denied. *Matthews v. Matthews*, 1 Swabey & Tr. 499; *Williams v. Williams*, 35 L. J. N. S. Ch. 12.

granted to a wife on divorce, where a prior valid agreement for separation making a provision for her, which she and her trustee have covenanted to accept in full for her support and maintenance during her life, is still in force.

(*Follett, Ch. J., dissents.*)

(December 10, 1889.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fifth Department, modifying, and affirming as modified, a judgment of the Monroe Special Term granting plaintiff an absolute divorce from defendant and fixing the alimony to be paid. *Modified and affirmed*

Statement by Parker, J.:

Appeal from a judgment of the General Term of the Supreme Court, Fifth Department, modifying a judgment of the Special Term, granting an absolute divorce on the ground of adultery, so as to reduce the amount of alimony to \$3,000 per annum; and further modifying the judgment by the insertion of a provision declaring the force and legal effect of a separation agreement between the parties terminated, and as thus modified affirming the judgment, without costs of appeal to either party. The plaintiff in her complaint alleged adultery on the part of the defendant with three persons. Defendant, in his answer, denied the allegations as to two of the parties named, and set up as a defense to the demand for alimony a separation agreement dated April 30, 1888, executed by the parties to this action and one Galusha Phillips, as trustee. It appears that for a number of years before final separation the relations existing between husband and wife were not pleasant. At times they lived apart. The evidence tended to show that a little while before making the separation

agreement the wife discovered that her husband had been inconstant to the marriage vow, and they immediately separated. The other party to these improper relations was an employé of the defendant, with whom the complaint avers Mr. Galusha had adulterous intercourse, both before and after the separation. After separation, negotiations for a settlement upon the wife of a sum of money, necessary for her support and maintenance, were had. Such negotiations resulted in the making and execution, through the intervention of a trustee, of a separation agreement. By its terms the husband bound himself to pay to the wife the sum of \$5,000, to be hers absolutely, for the purchase of a house; the sum of \$1,000 for her medical attendance; to give to her the furniture in the house, together with the horse and necessary outfit. He also covenanted, on the part of himself, his heirs, executors and personal representatives, to pay to the wife \$100, on the first day of each month, during her natural life. On the part of the wife and Galusha Phillips, trustee, it was agreed to accept and take said sums in full payment and satisfaction for her maintenance and support during her natural life. The said Galusha Phillips, trustee, agreed that the wife should fully support and maintain herself, and that he would save the husband harmless from the payment of any and all sums of money for or on account of the full support and maintenance, medical attendance, and any and all expenses, legal or otherwise, of Sarah F. Galusha, for and during her natural life. It was further agreed that, after the death of the husband, the wife should have the right to continue the agreement, and receive the \$100 per month from the husband's estate. In which event she was to release all right of dower and claims of every kind against the estate.

A deed of separation constitutes no bar to the claim for alimony. *Miller v. Miller*, 1 N. J. Eq. 386; *Wilson v. Wilson*, 40 Iowa, 230; *Logan v. Logan*, 2 B. Mon. 142.

Unless some suitable provision is made in the deed of separation for the wife, she is not barred of her right to alimony. *Miller v. Miller* and *Logan v. Logan*, *supra*.

Enforcement of articles of separation.

In articles of separation between husband and wife, through the intervention of a trustee, the covenant on the part of the husband to pay a stipulated sum for her support, and that of her trustee to indemnify the husband from liability for her debts, are not illegal or contrary to public policy. *Anderson v. Anderson*, 1 Edw. (Ch. 380); *Dupre v. Reib*, 156 How. Pr. 230, 7 Abb. N. C. 258. See *Heyer v. Burger*, Hoffm. 1; *Champlin v. Champlin*, Hoffm. 55; *Carson v. Murray*, 3 Paige, 433; *Rogers v. Rogers*, 4 Paige, 518.

This court will not interfere, by virtue of its general jurisdiction, to compel a husband and wife to live together when they have separated, nor force them to live apart when they are cohabiting. But if they agree to live separately and do separate accordingly, and the husband stipulate to allow the wife a maintenance, equity, acting upon the contract, will enforce such contract against the husband, so long as the separation continues. *Calkins v. Long*, 22 Barb. 108.

Formerly English courts refused to enforce or recognize deeds of separation (*Spering v. Sper-* 6 L. R. A.

ing, 3 Swabey & Tr. 211); but there has been a change in this respect. *Hunt v. Hunt*, 4 DeG. F. & J. 221; *Besant v. Wood*, L. R. 12 Ch. Div. 606; *Matthews v. Matthews*, 3 Swabey & Tr. 161.

Effect of divorce on articles of separation.

A deed of separation is not a bar to a divorce, nor is a divorce a good defense to the enforcement of the provisions of a separation agreement. *Kremelberg v. Kremelberg*, 52 Md. 553, 563; *Goslin v. Clark*, 12 O. B. N. S. 681, 692; *Charlesworth v. Holt*, 43 L. J. N. S. Exch. 26; *Jee v. Thurlow*, 2 Barn. & C. 547; *Grant v. Budd*, 30 L. T. N. S. 313, 320; *Blaker v. Cooper*, 7 Serg. & R. 500, 502; *Andrus v. Randon*, 34 Tex. 536.

Although a judgment for divorce simply will not have the effect to annul articles of separation, the allowance of alimony may have the effect of defeating the operation of the agreement and putting an end to it. *Galusha v. Galusha*, 43 Hun, 185; *Carpenter v. Osborn*, 3 Cent. Rep. 804, 102 N. Y. 552.

The divorce subsequently obtained by the wife, for cause existing prior to the articles of separation, does not render the agreement null and void. *Clark v. Foedick*, 13 Daly, 504.

A plea of dismissal of a former suit for an absolute divorce will not oust jurisdiction in a subsequent suit for allowance of temporary alimony, attorney's fees, etc. *Flier v. Flier*, *ante*, 399.

Agreements of separation between husband and wife through the medium of a trustee are valid and binding. *Winn v. Sanford*, 1 L. R. A. 5, 12, *note*, 148 Mass. 30.

The action resulted in a judgment against the defendant, dissolving the marriage between them, because of adultery committed by the defendant. The decree further awarded to the plaintiff the sum of \$3,750 yearly. No reference whatever was made in the decree to the agreement of separation. On appeal the general term so modified the judgment as to reduce the annual amount of alimony to \$3,000, and also by the insertion of a provision terminating the force and legal effect of the separation agreement. As thus modified, the judgment was affirmed.

The defendant appeals to this court.

Mr. Essek Cowen, with Mr. William H. Bowman, for appellant:

A subsequent divorce does not avoid a contract between husband and wife for separation.

Anderson v. Anderson, 1 Edw. Ch. 880; *Wright v. Miller*, 1 Sandf. Ch. 103, and cases cited; *Carpenter v. Osborn*, 8 Cent. Rep. 804, 103 N. Y. 552.

The agreement of separation being valid and binding between the parties, it is not within the power of the general term to annul and destroy it, nor make a further allowance of alimony while that agreement is in force.

See *Rose v. Rose*, 11 Paige, 166; *Collins v. Collins*, 80 N. Y. 1; *Middleton v. Middleton*, 18 Ill. App. 472; *Carpenter v. Osborn*, 8 Cent. Rep. 804, 103 N. Y. 552.

Messrs. Stull & Foote, for respondent:

The defendant's conviction of guilt as an adulterer has entirely changed the status of the parties, so that the separation agreement is no longer obligatory upon plaintiff.

Albee v. Wyman, 10 Gray, 223.

A *feme covert* cannot make a valid agreement with her husband for a separation, except under the sanction of a court of chancery, and in a case where the conduct of her husband has been such as to entitle her to a separation.

Rogers v. Rogers, 4 Paige, 516; *Foadick v. Foadick*, 1 New Eng. Rep. 85, 15 R. I. 180, 32 Alb. L. J. 398.

An ante-nuptial agreement of this character is no bar to alimony.

Foster v. Foster, 56 Vt. 540; *Morrison v. Morrison*, 49 N. H. 69. See also *Pinckard v. Pinckard*, 22 Ga. 81.

Parker, J., delivered the opinion of the court:

Was it error to disregard the agreement between the parties to this action and the trustee, providing for the support of this plaintiff during her life, and to make such an allowance as to the court seems just?—is the question presented for our consideration. The trial court apparently adopted the view that, inasmuch as the statute empowers the court to require the wrong-doing husband to provide for the support of the wife, it may permit the agreement to stand, and, in addition thereto, compel the defendant to pay such other or further sum as the surrounding circumstances suggest to be just. On the other hand, the general term proceed upon the theory that the plaintiff is not entitled to her support under and by virtue of an agreement in which she and her trustee contract that the defendant

shall not be called upon to pay any other sum for that purpose, and at the same time be permitted to receive an additional allowance for her support by virtue of a judgment of the court, and therefore modified the judgment appealed from by the insertion of a provision declaring the termination of the force and legal effect of the separation agreement. It is well, therefore, at the outset, to consider the validity and binding force of this contract which one court ignores and another brushes away.

Marriage is favored in the law, and, as a contract not to marry is against public policy and void, so, too, is a contract between husband and wife to be divorced, or in the happening of a future event to live apart. But, while a contract to separate in the future is void, it is now too well settled, both in England and this country, to admit of discussion, that after a separation has taken place a contract may be made, through the intervention of a trustee, which is effective to bind the husband to contribute the sums therein provided for the future support of the wife. 1 Bishop, Mar. and Div. §§ 637, 650; *Carson v. Murray*, 3 Paige, 488; *Magee v. Magee*, 67 Barb. 487; *Pettit v. Pettit*, 107 N. Y. 677, 10 Cent. Rep. 265; *Calkins v. Long*, 22 Barb. 97.

The contract of separation is also valid, so far as relates to the indemnity given to the husband by the trustee. Such covenants are mutual and dependent. *Wallace v. Bassett*, 41 Barb. 92; *Dupre v. Rein*, 7 Abb. N. C. 256.

The contract between these parties was made after actual separation, and through the intervention of a trustee. By its terms, the defendant obligated himself to pay, for the benefit of this plaintiff, certain fixed sums of money, and in addition thereto to pay to the trustee, for her benefit, \$100 monthly during her natural life. On the part of the plaintiff and the trustee, it was covenanted to "accept said payments in full payment and satisfaction for the maintenance and support of said Sarah F. Galusha during her natural life; and the said Galusha Phillips, trustee, in consideration of the several payments hereinbefore mentioned, does hereby agree to and with the said party of the first part that said Sarah F. Galusha shall fully support and maintain herself, and provide all things of all kinds necessary for her full support and maintenance; and that said Sarah F. Galusha will perform all acts and covenants which she has herein agreed to do and perform, and to save said party of the first part harmless from the payment of all sums of money for or on account of the full support, maintenance, medical attendance and any and all expenses, legal or otherwise, of said Sarah F. Galusha, for and during her natural life."

In view of the situation of the parties, the contract was, at the time of its execution, valid and binding upon all the parties thereto. The defendant has fully performed on his part, and it would seem as if he were entitled to the protection which it was stipulated that full performance should give to him.

The argument that, upon the granting of the decree of divorce, there was a failure of consideration to support the agreement, is without force. The consideration for an agreement of separation fails, and the contract is avoided, when separation does not take place, or where,

after it has taken place, the parties are reconciled and cohabitation resumed. Neither of these events happened. The suggestion that the subsequent violation of the marriage vow by the defendant may be treated as vitiating the separation agreement does not require extended consideration, for it is without potency. Because of the marriage relation, the husband was bound to support his wife. This legal obligation constituted the basis for a settlement of their affairs, and the making of an agreement by which it should be definitely determined how much he should be obliged to contribute and she entitled to receive from him for her support. After its making, it was not in the power of either party, acting alone and against the will of the other, to do an act which would destroy or affect that contract. The act of adultery did not of itself subvert the marriage contract. It enabled the wife, through the aid of the courts, to relieve herself from the legal restraints of the marriage tie. But she need not have availed herself of that privilege. She might have determined to condone the offense. Condonation is favored in the law. The wrongful act of the husband, then, did not of itself avoid even the marriage contract. Much less was it potent to affect a contract founded, not upon a promise to faithfully observe the marriage vows, but, instead, upon a legal obligation to support and maintain the wife. Neither did the act of the wife, in availing herself of the husband's wrong to free herself from matrimonial bonds, affect the separation agreement. At the time of the execution of the agreement husband and wife had separated. It was fully determined that they should not live together again. In that situation the wife demanded, and the husband ceded, a separate support. The agreement provided, not merely for her support during their joint lives, but also that, in event of death, his estate should contribute a like support each year, so long as she should live. By its terms the parties attempted a severance and settlement of their relations towards each other, in all respects save one, which should last for all time. They were powerless to dissolve the marriage tie, and, of course, did not attempt it. But they did make a settlement which was intended to separate them forever, as absolutely as it was in their power to do.

The language of *Chief Judge Ruger*, in delivering the opinion of the court in *Carpenter v. Osborn*, 103 N. Y. 559, 3 Cent. Rep. 804, is applicable to the agreement here: "There is no express or implied condition in the contract that the plaintiff should continue to remain the wife of John Carpenter, but the obligation to pay interest was to continue unconditionally during her natural life."

No attempt was made to shorten the period of payment should divorce or marriage thereafter result. It is written that the death of the wife shall constitute the event which shall terminate the agreement, and the court will not attempt to read it as if it affirmed otherwise.

The parties to that agreement were powerless to provide that they should not be visited with the legal consequences of adultery. Any agreement to that effect would have been void. Such was and is the law, and they are pre-

sumed to have known it, and to have made their contract with the knowledge and understanding that, in the event of the commission of the act of adultery by either the husband or the wife, the other party would be at liberty either to permit the legal relation of husband and wife to continue, or sunder the marriage tie in an action brought for that purpose. No provision was inserted that this contract for maintenance should be affected by the subsequent wrongful act of either party, and none can be implied. A succeeding illegal act by one of the parties, whether adultery or assault and battery, would render the offending party liable to incur the legal penalty thereof; but it could not affect a prior agreement for maintenance, in the absence of a stipulation providing for such a result. The views thus expressed lead to the conclusion that the separation agreement was not affected by the decree granting an absolute divorce. The position thus taken seems to be supported, either assertively or by acquiescence, by text-writers and decisions. *Stewart, Mar. and Div. § 191; Grant v. Budd*, 80 L. T. N. S. 819; *Charlesworth v. Holt*, 48 L. J. N. S. Exch. 25; *Clark v. Foadick*, 18 Daly, 500; *Wright v. Miller*, 1 Sandf. Ch. 103; *Carpenter v. Osborn*, 103 N. Y. 559, 3 Cent. Rep. 804; *Jee v. Thurlow*, 2 Barn. & C. 547; *Kremelberg v. Kremelberg*, 53 Md. 553.

We have, then, a valid tripartite agreement, and a subsequent judgment of divorce rendered in an action wherein two of the parties to the agreement only are plaintiff and defendant. The plaintiff did not in her complaint ask, as a part of the relief, that the separation agreement be set aside. She did not allege that it had been obtained fraudulently, or by means of duress. In no way whatever was its validity attacked, or a foundation laid which would have empowered a court of equity to set it aside. The subsequent order of the general term, therefore, in directing such modification of the judgment of divorce as would terminate the force and legal effect of this valid separation agreement cannot be sustained. The authority conferred upon the court by the Code, to require the defendant to provide suitably for the support of the plaintiff as justice requires [Code Civ. Proc. § 1759], is not so broad and comprehensive as to admit of a construction conferring upon the court power to ignore all existing rules as to parties, pleadings and proof, and arbitrarily set aside a valid agreement, because in the judgment of the court one of the parties agreed to accept from the other a less sum of money than she ought.

We must now consider briefly whether the trial court should have granted an allowance in addition to the sum which the parties had voluntarily agreed was sufficient for the support of the wife, and which both the wife and trustee covenanted to accept in full for her support and maintenance during her natural life. There are a number of cases where, notwithstanding a voluntary settlement by a husband upon his wife, the court has made an additional allowance, upon the ground that the settlement was inadequate for her support. 3 Bishop, Mar. and Div. § 375, and cases cited. But our attention has not been called to a case in which the court has held that where the wife, by the intervention of a trustee, makes a

valid agreement that the settlement is sufficient for her support, and indemnifies the husband against any further payment therefor, the court will make a further allowance while that agreement is in force. The Statute authorizes the court, in the final judgment dissolving the marriage, to require the defendant to provide suitably for the support of the plaintiff as justice requires, having regard to the circumstances of the respective parties. It directs this to be done because, upon the dissolution of the marriage relation, the legal obligation of the husband to support the wife ceases. But for the power thus conferred upon the court the result of the husband's misconduct would be to relieve him from the duty of supporting the wife whom he had wronged. But this authority to protect the wife in her means of support was not intended to take away from her the right to make such a settlement as she might deem best, for her support and maintenance. The law looks favorably upon and encourages settlements made outside of court, between parties to a controversy. If, as in this case, the parties have legal capacity to contract, the subject of settlement is lawful, and the contract, without fraud or duress, is properly and voluntarily executed, the court will not interfere. To hold otherwise would be not only to establish a rule in violation of well-settled principles, but, in effect, it would enable the court to disregard entirely settlements of this character; for, if the court can decree that the husband must pay more than the parties have agreed upon, it is difficult to see any reason why it may not adjudge that the sum stipulated is in excess of the wife's requirements, and decree that the husband contribute a smaller amount. The views expressed lead to the conclusion that the judgment appealed from should be modified by striking out the provision terminating the force and effect of the separation agreement, dated April 30, 1883. It should be further modified by striking out the provision allowing alimony, and, *as thus modified, the judgment should be affirmed.*

All concur, except **Follett, Ch. J.**, dissenting, and **Bradley** and **Haight, JJ.**, not sitting.

The following dissenting opinion applies to the above case and to that of *Clark v. Foodick*, ante, p. 132.

Follett, Ch. J., dissenting:

I cannot assent to either of these judgments. The husband was by law bound to support his wife so long as the marital relation existed. As a substitute for that obligation, the husband

contracted to pay fixed sums at stated times in the future, in consideration of which the wife and her next friend contracted to relieve the husband from his obligation. The contract arose out of the rights and liabilities of the marital relation, was wholly executory, and rested on the presumption that the relation and those rights and liabilities would continue. The judgment dissolving the relation cut down the consideration upon which the executory stipulations rested, and destroyed the contract. The defendant was no longer under any obligation to support the plaintiff as his wife, for she was not his wife. The stipulation of the woman and of her next friend, that they would save the man harmless from his obligation to support her, was without further foundation or consideration. Under the statutes the court, upon the dissolution of the marriage, was free to fix the amount which the man should hereafter pay for the future support of the woman. It is said the parties have contracted and have not limited the duration of the contract to the period during which the relation of husband and wife should exist. This relation is initiated by contract, but when established it ceases to exist solely by virtue of the contract, and becomes a status in which, and in the obligations arising out of it, the State has an interest, and public policy forbids that its obligations shall be made the subject of bargain and sale, like rights in property, as may suit the caprice of the parties.

The consequences which may flow from judgments affecting an institution which is the recognized foundation of civilization should be regarded. Suppose that a husband and wife, who have separated, afterwards contract to live apart, the husband agreeing to pay stipulated sums at fixed times for the support of his wife, and the wife and her next friend contract to save the husband harmless from his obligation to support her. Subsequently, the wife lives in open adultery, it may be with her next friend. Under the doctrine of these judgments, it seems to me that the husband would be compelled to continue the payment for the support of the woman and paramour. But it is said that such consequences may be prevented by the insertion of appropriate stipulations in future contracts; but I think consequences so pregnant with evil to the marital relation ought not to be left to the chance of contract. It must be remembered that we are not dealing with executed contracts by which property has been conveyed in consideration of the relation, nor with contracts between husband and wife resting upon their rights of property.

NEW YORK COURT OF APPEALS (2d Div.).

Helen D. ADAMS, *Rept.*,

v.

IRVING NATIONAL BANK of New York, *Appt.*

(....N. Y....)

Payment by a wife of her husband's

NOTE.—*Acts done under duress and compulsion may be annulled.*

Duress, in its more extended sense, means that degree of constraint or danger, either actually in-
6 L. R. A.

debt, induced by threats of his arrest on the eve of their departure for Europe, and her fear of the effect thereof on his shattered and feeble health, is made under such undue influence that she may recover back the money paid even if there was a lawful ground for his arrest.

(December 3, 1889.)

flited or threatened and impending, which is sufficient, in severity or in apprehension, to overcome the mind and will of a person of ordinary firmness. *Chitty, Cont. 217; 2 Greenl. Ev. 233; Flanigan v.*

APPPEAL by defendant from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment of the Trial Term in favor of plaintiff in an action brought to recover back money alleged to have been paid under undue influence. *Affirmed.*

Statement by Brown, J.:

Appeal from a judgment of the General Term of the Superior Court of the City of New York, which affirmed a judgment in favor of the plaintiff, entered upon a verdict of a jury.

This action was to recover money claimed to have been obtained from the plaintiff by threats, coercion and undue influence. The facts out of which it arose are as follows: The plaintiff is the wife of Jay L. Adams, who was adjudged a bankrupt in 1878. The defendant was a creditor of Adams to the amount of several thousand dollars. Adams' health was broken as a result of his misfortunes, and the plaintiff had been advised to go with him to Europe, and their passage had been engaged for June 17, 1879. Shortly prior to this date Adams was examined in the bankrupt court by counsel for the defendant, and the fact was developed that an entry on the stub of his check-book, which read, "F. Munoz, taxes and expenses," did not relate to any "taxes or expenses," and that Munoz was merely the messenger who received the money from the Bank, the check having been payable to bearer. That Adams had received the money, and had delivered it to a Mr. Warner, with the request that it be kept for him, and at the time of the examination it was still in Warner's possession. Adams claimed that, in secreting this money, his intention was to pay an indebtedness to the widow of his brother. It had not been applied to that purpose, and he admitted, had it not been discovered, he might have changed his mind, and applied it to other purposes. The money was obtained from Warner after this disclosure, and delivered to the assignee in bankruptcy. A few days before the date on which Adams

and his wife were to sail for Europe, Adams heard that the defendant and its attorney were threatening to arrest him unless some settlement was made. He immediately went to Mr. Castre, vice-president, and a director of the the defendant, and a personal friend of Adams and his wife, and talked with him about the arrest, and asked him if he would become his bail. Castre consented to do so, but suggested that some settlement be made with the Bank, and that the plaintiff had the means to make such settlement, and advised him to go to the office of the counsel of the Bank, and make some adjustment of the claim. Adams informed his wife that he had heard he was to be arrested and she went to see Mr. Castre. She testified to this interview, in substance, as follows: That she asked Mr. Castre if he had heard anything about the arrest, and he said he had. That he had heard it was the intention of the attorney of the Bank to arrest her husband on board the steamer. She asked if her husband had committed any crime, and Castre replied that he had not, but that any man could be arrested, and asked: "How would you like to have your husband arrested on Saturday night, too late to obtain bail?" That Castre proposed the settlement, advised her not to consult a lawyer, and told her she had nearly money enough in the Irving Savings Bank, and that the pursuit would be withdrawn if the money was paid. She further testified that she was excited, and was willing to make the payment to save her husband. Plaintiff paid \$2,000 to the Bank, and agreed to pay \$2,000 more in monthly installments of \$50 each. She paid \$400, and then refused to pay more, and subsequently brought this action to recover back the money that it had obtained from her by undue influence and duress.

Mr. John E. Parsons, for appellant:

Where there is no actual arrest or imprisonment and no actual force, and it is claimed that money was obtained or a promise induced by duress *per minas*, it is not sufficient to show,

Minneapolis, 36 Minn. 406; Brown v. Pierce, 74 U. S. 7 Wall. 214 (19 L. ed. 128).

Compulsion, to excuse, must be such as deprives a person of his free agency. Com. v. Hadley, 11 Met. 68; Com. v. Drew, 8 Cush. 273; State v. Bryant, 14 Mo. 340; State v. Matthis, 1 Hill, L. 37; Com. v. Gillespie, 7 Serg. & R. 469.

Text-writers usually divide the subject into two classes, namely, duress *per minas* and duress of imprisonment; and that classification was uniformly adopted in the early history of the common law, and is generally preserved in the decisions of the English courts to the present time. 3 Inst. 482; 2 Rolle, Abr. 124; Brown v. Pierce, 74 U. S. 7 Wall. 215 (19 L. ed. 137).

Duress *per minas*, as defined at common law, is where the party enters into a contract (1) for fear of loss of life; (2) for fear of loss of limb; (3) for fear of mayhem; (4) for fear of imprisonment; and many modern decisions of the courts of that country still restrict the operations of the rule within those limits. 8 Bacon, Abr. title *Duress*, 252; Brown v. Pierce, 74 U. S. 7 Wall. 215 (19 L. ed. 137).

Such circumstances as imposition, oppression, duress, threats, undue influence, taking advantage of necessities or of weakness, and the like, as a means of inducing the party to enter into the agreement, or of procuring him to execute and

perform it after it had been voluntarily entered into, are grounds for annulling the contract. Smith v. Bromley, 2 Deug. 633, note; Browning v. Morris, Cowp. 690; Smith v. Cuff, 6 Maule & S. 180; Atkinson v. Denby, 7 Hurlst. & N. 934; Boanquet v. Dashwood, Cas. t. Talb. 33, 40, 41; Osborne v. Williams, 18 Ves. Jr. 379; Bayley v. Williams, 4 Giff. 633.

Actual force upon the person, or personal restraint, or fear of personal injury or imprisonment, excuses acts committed during the continuance of such duress. United States v. Vigor, 2 U. S. 2 Dall. 346 (1 L. ed. 409); United States v. Haskrell, 4 Wash. C. C. 402; Brown v. Pierce, 74 U. S. 7 Wall. 205 (19 L. ed. 134); Strong v. Grannis, 26 Barb. 122; State v. Learned, 41 Vt. 535; Simmons v. Trumbo, 9 W. Va. 358; Skate v. Beale, 11 Ad. & El. 933; Reg. v. Tyler, 8 Car. & P. 616; 1 Bishop, Cr. L. 6th ed. § 346; 1 Whart. Cr. L. 397; 1 Bouvier, L. Dict. *Duress*.

The fear of imprisonment is enough to constitute duress. 2 Inst. 483; Co. Litt. 253 b; Vin Abr. *Duress* (B), pl. 28; Com. Dig. *Pleader*, 3 W. 20; Bacon, Abr. *Duress* (A); Chitty, Cont. 163, ed. 1839; Whitefield v. Longfellow, 123 Me. 146; Eddy v. Herrin, 17 Me. 388; 1 Cowen, Tr. 264; Foshay v. Ferguson, 5 Hill, 157.

To constitute duress by threats of illegal arrest, the act which the party seeks to avoid must have

in order to recover back the money or avoid the promise that the threats were uttered; it must also be shown that they restrained the will of the party against whom they were used, and induced the payment or promise, and it must also be shown that the threat was of an unlawful arrest.

Metropolitan L. Ins. Co. v. Meeker, 85 N. Y. 614; *Story*, Cont. § 400; *Knapp v. Hyde*, 60 Barb. 80; *Farmer v. Walter*, 2 Edw. Ch. 601; *Smith v. Rowley*, 66 Barb. 502; *Solinger v. Earle*, 82 N. Y. 898; *Haynes v. Rudd*, 3 Cent. Rep. 449, 102 N. Y. 872; *Dunham v. Griswold*, 1 Cent. Rep. 805, 100 N. Y. 224.

Messrs. Austin G. Fox and William F. Scott, for respondent:

If the payee by any threat or any representation creates in the mind of the other any fear or apprehension, the payment is not voluntary, and must be refunded.

Story, Eq. Jur. 13th ed. § 289; *Adams*, Doc. Eq. *182; *Seear v. Cohen*, 45 L. T. N. S. 589; *Williams v. Bayley*, 14 L. T. N. S. 802; *Ingersoll v. Roe*, 65 Barb. 846; *Foley v. Green*, 1 New Eng. Rep. 17, 4 R. I. 618; *Clark v. Fisher*, 1 Paige, 176; *Foshay v. Ferguson*, 5 Hill, 154; *Scholey v. Mumford*, 60 N. Y. 498; *Stenton v. Jerome*, 54 N. Y. 480; *Schoener v. Lissauer*, 86 Hun, 100, 9 Cent. Rep. 448, 107 N. Y. 111; *Harris v. Carmody*, 131 Mass. 54.

The situation of the defendant is no better if there was ground for a lawful arrest of plaintiff's husband.

Badie v. Skimmon, 36 N. Y. 9; *Ingersoll v. Roe*, *Clark v. Fisher* and *Schoener v. Lissauer*, *supra*; *Fisher v. Bishop*, 36 Hun, 112, 10 Cent. Rep. 707, 106 N. Y. 25; *Coffman v. Lookout Bank*, 5 Lea, 282, 40 Am. Rep. 81; *Taylor v. Jaques*, 106 Mass. 291; *Jordan v. Elliott* (Pa.) 15 Cent. L. J. 232; *First Nat. Bank v. Bryan*, 62 Iowa, 41.

Brown, J., delivered the opinion of the court:

The evidence as to the statements and representations made to the plaintiff to induce

her to make the settlement with the Bank was conflicting. The jury were, however, entitled to, and upon the defendant's appeal we must assume they did, adopt the view of the transaction properly inferable from the plaintiff's evidence. This evidence justified the inference that the payment to the Bank was not the free, unconstrained and voluntary act of the plaintiff, but was induced by the fear of her husband's arrest on the eve of their departure for Europe, and the effect such an act might have upon his health, at that time shattered and feeble from the misfortune that had overtaken him. It cannot be successfully claimed, in view of the finding of the jury, that Mr. Castre did not act for the Bank. Although perhaps not in the first instance a party to any attempt to secure a settlement of the claim from the plaintiff, in all that he did after he was consulted he acted for the Bank, and he testified: "I supposed Mrs. Adams was able to take care of herself. I performed my duty towards the Bank, in which I was a stockholder, and let her look after herself." The Bank, having received the proceeds of the settlement, cannot now be heard to deny the agency through which it was obtained. *Krumm v. Beach*, 96 N. Y. 898.

It is claimed by the appellant that the plaintiff was not entitled to recover, if there was a lawful ground for the arrest of her husband; in other words, that a threat of unlawful arrest and imprisonment is necessary to constitute a duress *per minas*. This was the strict common-law rule applied in cases where the duress was against the person seeking to be relieved from his contract. But in practice the narrowness of this doctrine was much mitigated, and money paid under practical compulsion was in many cases allowed to be recovered back, as, for example, payment made to obtain goods wrongfully detained; excessive fees, when taken under color of office; excessive charges collected for performance of a duty, etc. In all such cases there was a moral coercion which destroyed the contract. The rule cited by the

been done by him through fear of such threatened arrest. *Flanigan v. Minneapolis*, 36 Minn. 406.

An arrest for a just cause and under lawful authority, if it be made for unlawful purposes, may be construed a duress so as to avoid a contract which the party made for his deliverance. *Richardson v. Duncan*, 8 N. H. 508; *Puller, N. P.* 172; 2 Inst. 482; *Com. Dig. Pleader*, 3 W, 19; *Vin. Abr. Duress* (B), pl. 25; *Whitefield v. Longfellow* and *Foshay v. Ferguson*, *supra*.

Equitable relief from acts induced by duress and coercion.

Courts of equity relieve a party when he does an act or makes a contract when he is under the influence of extreme terror, or of apprehension short of duress; for in cases of this sort he has no free will but stands *in vinculis*. 1 *Story*, Eq. Jur. § 239.

Circumstances of extreme necessity or distress of a party, although not accompanied by any direct duress or restraint, may also overcome free agency, and justify the court in setting aside the contract on account of some attending oppression. *Whelan v. Whelan*, 8 Cow. 537; *Sears v. Shafer*, 1 Barb. 406, 6 N. Y. 272; *Howell v. Ransom*, 11 Paige, 538; *Ellis v. Messervy*, 1d. 467, 5 Denio, 640; *Lomerson v. Johnston*, 10 Cent. Rep. 868, 44 N. J. Eq. 108.

If one party acts under oppression, injustice, 6 L. R. A.

hardship, undue influence or great inequality of age or condition, although he may be *in delicto*, he is not *in part delicto* and may have relief in equity. 1 *Story*, Eq. Jur. § 300; *Osborne v. Williams*, 18 Ves. Jr. 379; *Phalen v. Clark*, 19 Conn. 421; *Pinckston v. Brown*, 4 Jones, Eq. 494; *Freelove v. Cole*, 41 Barb. 818; *Goodenough v. Spencer*, 15 Abb. Pr. N. S. 243, 46 How. Pr. 347.

Duress which will avoid a contract is either unlawful restraint or imprisonment, or, if lawful, it must be accompanied by circumstances of unnecessary pain, privation or danger; or the arrest, though made under legal authority, must be for an unlawful purpose. *Sanford v. Sornborger* (Neb.) 41 N. W. Rep. 1102.

Money paid, when recoverable back.

Money paid upon an illegal contract may, while the contract remains executory, be recovered in an action for disaffirmance, and on the ground that the contract is void. *Colton v. Thurland*, 5 T. R. 406; *Smith v. Bickmore*, 4 Taunt. 474; *Hastelow v. Jackson*, 8 Barn. & C. 221; *Vischer v. Yates*, 11 Johns. 29; *Yates v. Foot*, 12 Johns. 18; *Utica Ins. Co. v. Kip*, 8 Cow. 20; *Munt v. Stokes*, 4 T. R. 594; *Edgar v. Fowler*, 3 East, 225; *Morgan v. Groff*, 4 Barb. 524.

appellant has no application to a case like the present, where money has been obtained from a wife by threats to imprison her husband, and none of the cases cited by the appellant so hold.

Metropolitan L. Ins. Co. v. Meeker, 85 N. Y. 614, was a case where the defendant was held to be estopped to deny the validity of a mortgage.

In *Haynes v. Rudd*, 88 N. Y. 251, and 102 N. Y. 372, 8 Cent. Rep. 449, the decisions went upon the ground that the note was given to compound a felony, and the contract was for that reason illegal.

Smith v. Rowley, 66 Barb. 502, was decided on grounds similar to *Haynes v. Rudd*.

In *Solinger v. Earle*, 82 N. Y. 393, plaintiff gave the note in suit to induce the defendant to sign a composition of debts of a firm of Newman & Bernhard. The note was transferred to a bona fide holder, and, having been compelled to pay it, plaintiff brought the suit to recover from defendants the amount paid. The court held the contract was illegal, and the same rule that would have protected plaintiff in an action on the note by the payees protected the defendant in resisting an action to recover back the money paid on it.

Farmer v. Walter, 2 Edw. Ch. 601; *Knapp v. Hyde*, 60 Barb. 80; *Dunham v. Grinwood*, 100 N. Y. 224, 1 Cent. Rep. 305; *Quincey v. White*, 63 N. Y. 870,—were actions in which the contract was made by the person against whom the duress was claimed to have been exerted.

It is not an accurate use of language to apply the term "duress" to the facts upon which the plaintiff seeks to recover. The case falls rather within the equitable principle which renders voidable contracts obtained by undue influence. However we may classify the case, the rule is firmly established that, in relation to husband and wife or parent and child, each may avoid a contract induced and obtained by threats of imprisonment of the other, and it is of no consequence whether the threat is of a lawful or unlawful imprisonment. *Eadie v. Simmon*, 26 N. Y. 9, is a leading authority on this question. In that case an assignment of a life insurance policy was obtained by threats to prosecute the plaintiff's husband criminally for embezzlement. The husband whose life was insured having died, the action was brought to determine the ownership of the money due from the insurance company. Judge Smith, who delivered the opinion of the court, says: "The assignment from the plaintiff to the defendant was most clearly extorted by a species of force, terrorism and coercion which overcame free agency; in which fear sought security in concession to threats and to apprehensions of injury. It was made as the only way of escape from a sort of moral duress more distressing than any fear of bodily injury or physical constraint. . . . A deed executed at such a time, under such circumstances, should be deemed obtained by undue influence, and ought not to stand."

Five judges appear to have concurred in the part of the opinion quoted. Judge Denio concurred on the ground that the policy was not assignable, and Judge Wright dissented. The case was cited as an example of duress of person in *Peyser v. New York*, 70 N. Y. 501, and 6 L. R. A.

as an authority for avoiding a note obtained by duress in *Osborn v. Robbins*, 36 N. Y. 371. It has frequently been cited in the supreme court (*Fisher v. Bishop*, 86 Hun, 114; *Haynes v. Rudd*, 80 Hun, 287; *Ingersoll v. Roe*, 65 Barb. 357; *Schoener v. Lissauer*, 86 Hun, 102), and in other States, and in the text-books, and has thus become a leading authority upon the question under discussion. It is nowhere suggested in that case, either in the facts or in the opinion, that it was necessary, to sustain the judgment in favor of the plaintiff, that the threat must have been of an unlawful or illegal arrest. For all that appears, the husband was guilty of the charge made, and on that assumption it is peculiarly like the case at bar. Other authorities sustain the same principle.

In *Haynes v. Rudd*, 80 Hun, 287, it was said: "We think that when threats of a lawful prosecution are purposely resorted to for the purpose of overcoming the will of the party threatened by intimidating or terrifying him, they amount to such duress or pressure as will avoid a contract thereby obtained." This statement of the law was not disturbed by this court, the reversal being put on other grounds.

In *Schoener v. Lissauer*, 107 N. Y. 111, 9 Cent. Rep. 443, a bond and mortgage was obtained from the mortgagor by the threat that, unless it was given, his son, who was charged with embezzlement, would go to state's prison. The mortgage was set aside, and this court sustained the judgment. After stating the facts, it was said by Judge Rapallo: "On the merits this judgment is sustained by *Bayley v. Williams*, 4 Giff. 688, affirmed, L. R. 1 H. L. 200, and *Davies v. London & P. M. Ins. Co.* L. R. 8 Ch. Div. 469." The first case cited by Judge Rapallo fully sustains the recovery in the case at bar.

In *Harris v. Carmody*, 181 Mass. 51, a mortgage was obtained from a father on the threat that his son, who was charged with forging his father's name to notes held by the plaintiff, would be sent to the state prison. It was held that the father could avoid the mortgage on the ground that it was made to relieve the son from duress. See also *Taylor v. Jaques*, 106 Mass. 291.

In none of the cases cited was it suggested that the threat which induced the making of the contract was of an illegal prosecution or an unlawful arrest, and in most of them it appears that the person charged with an offense was guilty. The principle which appears to underlie all of this class of cases is that, whenever a party is so situated as to exercise a controlling influence over the will, conduct and interest of another, contracts thus made will be set aside. 1 Story, Eq. Jur. §§ 239-251; 2 Pom. Eq. Jur. §§ 942, 943; *Lomerson v. Johnston*, 44 N. J. Eq. 93, 10 Cent. Rep. 868; *Ingersoll v. Roe*, 65 Barb. 346; *Fisher v. Bishop*, 86 Hun, 112, 108 N. Y. 25, 10 Cent. Rep. 707; *Barry v. Equitable L. Assur. Society*, 69 N. Y. 587.

In the last case cited it was said: "Where there exist coercion, threats, compulsion and undue influence, there is no volition. There is no intention or purpose but to yield to moral pressure, for relief from it. A case is presented more analogous to a parting with property by robbery. No title is made through a possession thus acquired."

It was not error, therefore, for the court to deny the motion to dismiss the complaint on the ground that there was no evidence that the money was paid under duress. Upon the evidence it was a question of fact whether the agreement was executed and the money paid in consequence of threats and undue influence. *Dunham v. Griswold*, 100 N. Y. 224, 1 Cent. Rep. 805.

If the money was paid by the plaintiff through fear produced by Mr. Castre's representations that, if the claim was not settled her husband would be arrested and imprisoned, the payment was not a voluntary one, and the defendant obtained no title to the money received. This question was settled in plaintiff's favor by the verdict of the jury.

The point made by the appellant, that the transaction was a compounding of a felony, does not appear to be raised by any appropriate exception in the case. It was not suggested on the trial either in the motion to dismiss or in the requests to charge. There was no instruction asked or given to the jury on the subject. The question is therefore not before this court.

Upon the question of ratification the court instructed the jury as follows: "Before there can be a ratification to prevent her recovery in this action there must be some distinct act of hers, after knowledge of the facts, and knowledge by her that she had a right to rescind the agreement." An exception was taken to this part of the charge, and the claim is now made that this court should hold as matter of law that plaintiff had waived her claim. The defendant appears to have acquiesced in the submission of this question to the jury as one of fact for their determination. It was not made one of the grounds of the motion to dismiss. In part, at least, the charge of the court was correct. I do not understand the learned counsel for the appellant to criticize that part of the charge relating to ratification by some act, "after knowledge of the facts." If any qualification was proper in the expression as to her "knowledge . . . that she had a right to rescind," it was the duty of the appellant to suggest it. A general exception cannot be sustained. *Smedis v. Brooklyn & R. B. R. Co.* 88 N. Y. 15; *Doyle v. New York Eye & Ear Infirmary*, 80 N. Y. 634.

We have carefully examined the exceptions to the admission of testimony, and, while some of the evidence was immaterial, we think none of the rulings are of a character to call for a reversal of the judgment.

The judgment should be affirmed, with costs.

All concur, except *Bradley, J.*, not voting.

Mary J. DARROW, *Resp't.*,

FAMILY FUND SOCIETY, *Appt.*

(.....N. Y.....)

1. The beneficiary in a certificate of membership in a benefit society by

which the society contracts to pay, upon the death of the member holding the certificate, a certain sum to be obtained by an assessment upon its surviving members, need not resort to equity to compel the making of an assessment in case the society fails to make the same, and consequently has no money with which to pay the claim when it is due; but he may sue directly upon the contract.

2. Lack of sufficient money in the death fund to pay a claim on an insurance certificate is no defense to an action at law to recover the amount due thereon, although the promise was to pay from the death fund, where by the same contract the association undertook to make a call upon its members if the fund was insufficient to meet the claim when it became due.

3. Suicide is not a crime under Penal Code, §§ 172, 173, which make it a crime to attempt to commit suicide.

4. A contract of insurance will be strictly construed as against the insurer for the purpose of upholding it.

5. The death by suicide of a person insured does not render the policy void under a provision that it shall be void if the member die "in violation of or attempt to violate any criminal law," although the attempt to commit suicide is made a crime by statute, where the statute does not cover a case of suicide actually accomplished.

(November 23, 1889.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Saratoga Circuit in favor of plaintiff in an action upon a mutual benefit certificate, and also affirming an order denying defendant's motion for new trial. *Affirmed.*

The case is sufficiently stated in the opinion. *Mr. George Wilcox*, for appellant:

Where there is a promise to pay out of a particular fund, the promisee is restricted to the fund thus specified, and has no remedy if the fund does not come into the promisor's possession.

Wharton, Cont. § 598; *Munger v. Shannon*, 61 N. Y. 251; *Snell v. Cheney*, 88 Ill. 258; *Atkinson v. Mauks*, 1 Cow. 691; 1 Edwards, Bills and Notes, 8d ed. § 157.

If at the death of the member the fund is insufficient to pay the claim, the only obligation is to levy one assessment upon the members to meet the claim. The remedy is not an action at law to recover what would be the amount of an assessment if made, but in equity to compel an assessment.

Bailey v. Mut. Ben. Assn. 71 Iowa, 689; *Smith v. Covenant Mut. Ben. Assn. of Galzburg* (Wis.), 24 Fed. Rep. 685; *Eberle v. Kauffeld*, 2 How. Pr. N. S. 488.

The bond or agreement in suit provides that the same shall be void if the member named therein shall die in violation of or attempt to violate any criminal law of the State. For the construction of such clause see *Bradley v. Mut.*

NOTE.—Life insurance, death caused by crime.

Death by execution of a sentence of death for felony avoids a contract of life insurance on grounds of public policy, although there is no express exemption of liability in such case. *Amicable* 6 L. R. A.

Society v. Bolland, 2 Dow. & C. 1, 4 Bligh, N. R. 194. The phrase "in known violation of any law" means a voluntary criminal act. *Cluff v. Mut. Ben. L. Ins. Co.* 13 Allen, 306, 90 Mass. 317.

But see, in connection with the case, *Bradley v.*

Ben. L. Ins. Co. 45 N. Y. 422; *Murray v. New York L. Ins. Co.* 96 N. Y. 614.

James H. Darrow committed the acts described in Penal Code, § 174, and which section 178 declares to be criminal acts; and the death was the direct result of such violation of law.

Mr. Edgar T. Brackett, for respondent:

The claim that the plaintiff should have instituted some proceeding, equitable or otherwise, to compel the levy of an assessment to pay her claim, instead of bringing an action, is not tenable.

See *Freeman v. Nat. Ben. Society*, 42 Hun, 252; *O'Brien v. Home Ben. Society*, 51 Hun, 496; *Fulmer v. Union Mut. Assn.* 12 N. Y. S. R. 847; *Hankinson v. Page*, 12 N. Y. Civ. Proc. Rep. 279; *Wiegand v. Equitable Reserve F. L. Assn.* 24 N. Y. S. R. 498; *Smith v. Buffalo*, 44 Hun, 156; *Baldwin v. Oswego*, 2 Keyes, 183-186; *Beard v. Brooklyn*, 81 Barb. 142; *Peck v. Equitable Acc. Assn.* 52 Hun, 255.

The suicide of an insured is no defense to a policy, unless it is so stipulated and provided in the policy.

Patrick v. Excelsior L. Ins. Co. 67 Barb. 202; *Fitch v. Am. Popular L. Ins. Co.* 59 N. Y. 557.

The language used does not contemplate suicide.

See *Patrick v. Excelsior L. Ins. Co.* 67 Barb. 202; *Darrow v. Family Fund Society*, 42 Hun, 246; *Menham v. New York State Mut. Ben. Assn.* 46 Hun, 868.

Bradley, J., delivered the opinion of the court:

The defendant is an Insurance Association, organized pursuant to chapter 175, Laws 1888. On January 14, 1885, James H. Darrow was admitted as a member of the association by a certificate and policy or undertaking, whereby,

Mut. Ben. L. Ins. Co. 45 N. Y. 422, arising upon the same state of facts, in which the point is not decided. *Contra*, *Bloom v. Franklin L. Ins. Co.* 97 Ind. 478, holding that the phrase applies also to a known violation of a positive law of a civil character.

The death of the insured by a shot from the pistol of a person upon whom he and his brother had committed a violent assault is in consequence "of the violation of the laws," whether the pistol was discharged intentionally or by accident. *Murray v. New York Life Ins. Co.* 96 N. Y. 617.

The death of an intoxicated man who was killed while making an assault upon his brother's wife, by a blow from his brother, will not make an insurance company liable on a policy providing that it shall be forfeited in case of death by reason of intemperance or while engaged in the known violation of law. *Bloom v. Franklin L. Ins. Co.* *supra*.

One killed under circumstances which make the person causing his death guilty of a felony, although he had previously been engaged in an altercation with him, does not die in the "known violation of the law" so as to avoid the policy (*Harper v. Phoenix Ins. Co.* 18 Mo. 109, 10 Mo. 506); nor does one killed in lawful self defense. *Overton v. St. Louis Mut. L. Ins. Co.* 39 Mo. 122.

One killed just as he was about to go away from a house, after he had committed adultery with a woman, by her husband who was separated from her, does not die "in consequence of his violation of any law," as his offense in committing adultery

upon the terms and conditions mentioned in it, the defendant bound itself to pay to the plaintiff, within sixty days after the requisite proof of death of such member, \$5,000 "from the death fund of the Society at the time of said death," as in the policy "mentioned and provided." This member died in December, 1885. The defendant denies its liability to the plaintiff; and one of its alleged defenses is that the money in its death fund at the time of the death of Darrow was not sufficient to pay the claim.

By the contract it is provided that, whenever the death fund is insufficient to meet the existing claims by death, "a call shall be made upon this entire class of membership in force," in the manner provided, "for a mortuary payment as per mortuary rates," referred to, "but not more than one call shall be made to meet one death;" and that 80 per cent of the net amount received from the call shall be deposited in a bank, and be used for payment of death claims only, and the remaining 20 per cent shall be set apart as a reserve fund, to meet any contingency that may arise by reason of extra mortality; and that such reserve fund, so accumulated, shall, at the time and in the manner mentioned, be apportioned, and the surviving members credited with it. The members pay an admission fee and annual dues, which produce a fund for expenses; but the death fund is supplied by assessment calls upon the members, and they are required to pay within thirty days from the date of the notice or call for payment. Thus the association is enabled to make collection, after the death of a member, in time to meet the engagement assumed by the contract, by which it may take sixty days to pay the beneficiary.

It is contended by the counsel for the defendant that its liability in an action at law upon its contract is dependent upon money being in the death fund, applicable to the payment of the

was then a past act. *Goetsman v. Connecticut Mut. Ins. Co.* 3 Hun, 517, 5 Thomp. & C. 672.

Suicide to avoid arrest for crime does not avoid a policy conditioned to be void if the assured shall die in consequence of the "violation of any criminal law." *Kerr v. Minnesota Mut. Ben. Assn.* 39 Minn. 174.

Death by assassination is covered by an insurance against death by external, violent and accidental means. *Hutchcraft v. Travelers Ins. Co.* 37 Ky. 300, 28 Am. L. Reg. 42.

But the insurer's liability therefor is excluded by an exception against liability for "intentional injuries inflicted by the insured or any other person." *Travelers Ins. Co. v. McConkey*, 127 U. S. 661 (32 L. ed. 306); *Hutchcraft v. Travelers Ins. Co.* 37 Ky. 300, 28 Am. L. Reg. 42; *Fischer v. Travelers Ins. Co.* 77 Cal. 248.

An exception, in insurance on a slave, of death "by means of invasion, insurrection, riot or civil commotion, or of any military or usurped authority or by the hands of justice," does not exempt from liability for his death while a fugitive in armed resistance to patrols attempting to capture him. *Spruill v. North Carolina Mut. L. Ins. Co.* 1 Jones, L. 128.

See further, as to intentional injuries, a portion of the note to *Paul v. Travelers Ins. Co.* 8 L. R. A. 445, 112 N. Y. 472; also, as "to violations of law," note to *Blackstone v. Standard L. & Acc. Ins. Co.* (Mich.) 8 L. R. A. 498.

claim; and that the extent of such liability, within the stipulated sum, is measured by the amount in that fund so applicable at the time of the death of the member on account of whose death the beneficiary seeks to recover. It is further argued that if the Association fail to make the call, by way of assessment of the members, to supply the death fund to meet the demand upon it, the remedy of the beneficiary is, in equity, to require the defendant to proceed to make the assessment.

While the promise to pay was to do so from the death fund at the time of the death of the member, the defendant, also, by the same contract, undertook to make the call upon the members, if that fund then was insufficient to meet the claim. The reasonable construction of these provisions, in view of the apparent purpose of the contract, is that the Association should pay the amount to which the beneficiary might be entitled, and that it be paid from the death fund, if that is sufficient at the time of death, and, if not, the amount should be produced through the means provided for assessment of the members for the purpose. This is the duty of the defendant when the beneficiary is entitled to payment, and it arises upon the proper information of the death of the member. This duty is the contract undertaking of the defendant, supported by the power, without any order or direction of the court, to enable it to perform its promise to pay. Its purpose is to supply the means to do so; and there is no well-founded reason to support the claim that the sole remedy of a beneficiary entitled to payment is, in a court of equity, to compel the Society to make the call upon the members.

The only method by which the defendant can supply itself with the means of performing its engagements to pay death claims is by assessment. And it is within the contemplation of the parties, as represented by the provisions of the contract, that the instrumentalities furnished will be employed by the Association to enable it to do so; and it cannot rely upon its failure to perform its plain duty in that respect to defeat a recovery.

In this case, for reasons which will be referred to, the defendant did not intend to pay the claim in question, or any portion of it, and therefore, as is evident, purposely omitted to exercise the means provided to raise the money to pay the plaintiff. What has already been said tends, to some extent, to meet the contention that a death claim is payable out of a particular fund, designated as the "death fund," and that upon it depends the amount of recovery. The principle sought to be applied in support of that proposition is not applicable to the extent essential to its availability as a defense. The plaintiff in the complaint alleges that "the defendant has a sum sufficient in its death fund to pay the said sum so due to the plaintiff, or, if it has not, has members enough liable to call for assessment to pay the same to the plaintiff in full." And it clearly appeared by the evidence that a single assessment of the members liable to call at the time of the death of Darrow, on account of this claim, at the mortuary rates prescribed, would have produced a sum in excess of the amount which the defendant undertook by the policy to pay the plaintiff. And it must be assumed in this case,

as nothing appears to the contrary, that the collection, through the means provided, of the requisite amount, was dependent on no contingency, and, therefore, the funds were and are at the command of the defendant to make the payment. The assertion of the defendant that it has not sufficient funds applicable to that purpose in hand to do so is founded upon its failure to perform the duty imposed upon it by the contract, and which it undertook to perform, provided the plaintiff's alleged claim, resulting from the death of the member, was valid.

It was alleged as a defense, and the defendant offered to prove on the trial, that the member, Darrow, died from the effects of poison taken by him, and which was administered by himself, with intent to take his own life. The evidence was excluded, and exception taken. The fact that he committed suicide was no defense, unless it came within some condition of contract of insurance relieving the defendant from liability in such case. *Fitch v. Am. Popular L. Ins. Co.* 59 N. Y. 557.

The provision relied upon to support the defense so alleged is the provision in the contract that it should "be void if the member herein shall die in consequence of a duel, or by the hand of justice, or in violation of, or attempt to violate, any criminal law of the United States, or of any State or country in which the member herein named may be." The death of Darrow was in this State. At common law, suicide was a crime, and the consequence was the forfeiture of the chattels real and personal of the *felo de se*. 4 Bl. Com. 190.

It is not a crime in this State. Penal Code, §§ 172, 173.

The attempt to commit suicide is made a crime by the Statute, which provides that "a person who, with intent to take his own life, commits upon himself any act dangerous to human life, or which, if committed upon or towards another person, and followed by death as a consequence, would render the perpetrator chargeable with homicide, is guilty of attempting suicide" (Id. § 174), and is guilty of a felony punishable by imprisonment, etc. Id. § 178.

While the attempt to commit suicide is a crime, the accomplishment of the purpose to do so is not. It is with much force urged on the part of the defendant that the criminally unlawful attempt preceded the death, and that it was no less a violation of law because such was the result or consequence of it; that, whether successful or unsuccessful, there was an attempt within the Statute. Although that may be so in some sense, in common parlance, an attempt to commit crime imports a purpose, not fully accomplished, to commit it. It is the attempt to commit suicide that is the crime, while the taking one's own life is no violation of the criminal law. The attempt, in such case, to commit crime would be merely an unaccomplished purpose to attempt suicide, and therefore the peculiarity of the offense referred to is such that it cannot come within the provision of the Statute that "a person may be convicted of an attempt to commit a crime, although it appears on the trial that the crime was consummated, unless the court, in its discretion, discharges the jury, and directs the defendant to be tried for the crime itself." Id. § 685.

As the attempt to commit suicide is the only crime involved in the purpose and act of a party having in view the taking his own life, it is not seen how there can, in the law, be recognized an attempt to commit the crime; for whatever may be done with the intent and purpose of suicide is involved in the attempt to do it, and thus constitutes an ingredient of the main and only offense. It must, for the purpose of question here, be assumed that Darrow had the purpose of taking his own life, and that he fully accomplished such purpose. The result of his act, influenced by such intent, then, was his death. By the act of taking his own life he violated no criminal law, unless the attempt to do it may be distinguished from the act accomplished. An act is characterized by the purpose, when ascertained, of the party doing it, or by its result. If the act fail to accomplish its purpose, it constitutes an attempt; but if the result of it is the consummation of the purpose, the act is not commonly designated as an attempt. The common acceptance of terms used, and which do not necessarily have a technical meaning, is entitled to some consideration in the construction of contracts, where the intention of the parties is sought for, as it must be, in the language employed. For the purpose of upholding the contract of insurance, its provisions will be strictly construed as against the insurer. *McMaster v. North America Ins. Co.* 55 N. Y. 222; *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256.

When its terms permit more than one construction, that one will be adopted which supports its validity (*Coyne v. Weaver*, 84 N. Y. 386); and it is only when no other is permissible by the language used that a construction which works a forfeiture will be given to such an instrument. *Hitchcock v. North Western Ins. Co.* 26 N. Y. 69; *Griffey v. New York Cent. Ins. Co.* 1 Cent. Rep. 528, 100 N. Y. 417.

The reason assigned for such rule of construction is that the insurer is supposed to have chosen the language to express the terms of the contract; and it has become a rule of law that, if it be left in doubt whether words of the contract "were used in an enlarged or a restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee." *Hoffman v. Aetna Ins. Co.* 83 N. Y. 405, 418.

There is nothing in the language of the policy to indicate that the defendant had reason to suppose that the promisee understood that

suicide of the member came within its terms; and words may easily have been employed to embrace it within a condition, if it had been in the contemplation of the defendant as an act of forfeiture of the claim of the beneficiary upon the contract. Inasmuch as suicide is not a violation of the criminal law, the words do not necessarily or clearly import that the act which produces it is within the provision in question, or that it was within the intention of the defendant. And that is a sufficient reason why they should not be extended, or their meaning refined by interpretation, with a view to treat the act causing death as within the invalidating condition of the policy. *Griffey v. New York Cent. Ins. Co. supra.*

Thus far the question has not been considered whether the mere consequence or result of an act of the member in violation of criminal law would come within such provision. If literally construed, it might not. The contract is rendered void if the member "die . . . in violation of, or attempt to violate any criminal law." It is not death in consequence of the violation of law, but death in or during the act of violation of law, that is expressed by the words used.

In *Bradley v. Mut. L. Ins. Co.* 45 N. Y. 422, the conclusion was warranted that at the time of his death the assured was engaged in the violation of law; and such was the case in *Cluff v. Mut. L. Ins. Co.* 18 Allen, 808, where a policy on the same life, and containing the same provision, was the subject of the action, and the defense was the same.

In *Murray v. New York L. Ins. Co.* 96 N. Y. 614, the provision of the policy was such that if the assured should die "in, or in consequence of, . . . a violation of the laws," etc., the policy would be void.

It may be, if the mortal injury is received while the assured is engaged in the criminal act, that the death following as the consequence comes within the import of the provision. But the view taken renders it unnecessary to consider that question and no opinion is expressed upon it. The conclusion is that the death of the member by suicide did not, within the meaning of any provision of the policy, render it for that reason void; and therefore the exclusion of the evidence upon that subject was not error. No other question requires the expression of consideration.

The judgment should be affirmed.

All concur, except Haight, J., not sitting.

MICHIGAN SUPREME COURT

Henry HESS, *Appt.*,

v.

Leman L. CULVER.

(....Mich.....)

1. The fact that a transaction is against public policy in law will not prevent a remedy

against one party who is guilty of fraud by means of his persuasive or other influence over the other party in favor of the latter who is not consciously wrong, but who is actually deceived by the fraud and misrepresentations of the former party.

2. The maker of a note given for Bohemian oats, purchased at a price greatly beyond their value and never delivered, who was

NOTE.—Nature of contract determines its validity. It is the nature of the contract which determines its validity. *McNamara v. Gargett*, 12 West. Rep. 6 L. R. A.

660, 66 Mich. 454; *Holladay v. Patterson*, 5 Or. 177-180; *Richardson v. Crandall*, 48 N. Y. 348-353.

Wherever any contract conflicts with the morals

induced to give it by persistent acts and misrepresentations concerning the salable prospects of the oats to be grown, and the responsibility and legal character of a mythical corporation whose bond is given him agreeing to sell for him twice the quantity purchased at the same price per bushel, may recover from the person defrauding him the damages thereby sustained, when he has been compelled to pay the note to a bona fide holder; and he will not be denied relief on the ground that he is *in part delicto*.

3. Fraudulent representations as to an alleged corporation which has no legal existence, and whose pretense of legal existence is a fraud, are not within the statute which requires fraudulent representations as to the character, etc., of another party to be in writing in order to sustain an action for fraud.

(November 8, 1889.)

ERROR to the Circuit Court for Bay County to review a judgment upon a verdict directed for defendant in an action to recover the amount collected from plaintiff upon certain promissory notes alleged to have been obtained from him by the fraud of defendant. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. T. A. E. & J. C. Weadock*, for plaintiff, appellant:

of the time, and contravenes any established interest in society, it is void as being against public policy. Story, Conf. L. § 546; *McNamara v. Gargett, supra*.

In the law of contracts, the first purpose of the courts is to look to the welfare of the public; and if the enforcement of the agreement would be inimical to its interests, no relief could be granted to the party injured, even though it might result beneficially to the party who made and violated the agreement. *McNamara v. Gargett, supra*; *Metzger v. Cleveland*, 8 Ind. L. Mag. 42.

If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. 1 Parsons, Cont. 457; *Snyder v. Willey*, 33 Mich. 488; *Lyon v. Waldo*, 36 Mich. 353; *McNamara v. Gargett, supra*; *Niver v. Best*, 10 Barb. 366; *Wynne v. Whisenant*, 37 Ala. 46; *Valentine v. Stewart*, 15 Cal. 387; *Raguet v. Roll*, 7 Ohio, 76.

The whole contract is tainted and avoided by the part of the consideration which is illegal. *McNamara v. Gargett, supra*.

Such contracts in this State have already had the seal of condemnation stamped upon them by the legislative branch of the state government,—Act, No. 20, Pub. Acts 1887, being "An Act to prevent the taking of bonds, promissory notes and other evidence of indebtedness, in whole or part consideration of bonds, contracts and other agreements for the sale of grain, seeds and other cereals at a fictitious price, and to prevent the sale and transfer of such evidences of indebtedness and to provide a punishment therefor." *Ibid*.

Bohemian oats transactions fraudulent and void.

Several instruments made at one and the same time, and having relation to the same subject matter, must be taken to be parts of one transaction, and construed together, for the purpose of showing the true contract between the parties. *Sutton v. Beckwith*, 12 West. Rep. 649, 68 Mich. 308; *Singer Mfg. Co. v. Haines*, 36 Mich. 386; *Smith v. Van Blarcom*, 45 Mich. 371; *Dudgeon v. Haggart*, 17 Mich. 275; 6 L. R. A.

It was for the jury to decide, as a question of fact, whether the plaintiff was deceived by the defendant, whom he had theretofore regarded as an honorable man, into giving his notes to "sharpers" and "swindlers," or whether he was equally guilty with them of a fraud which would prevent recovery.

Wheaton v. Beecher, 9 West. Rep. 890, 66 Mich. 307. See *Sutton v. Beckwith*, 12 West. Rep. 647, 68 Mich. 308; *McNamara v. Gargett*, 12 West. Rep. 650, 68 Mich. 454.

Messrs. Simonson, Gillett & Court-right, for defendant, appellee:

The scheme upon its face was a transparent fraud and a gambling contract and was thoroughly explained to and fully understood by plaintiff. The design to defraud third parties was mutual and was entered into by plaintiff after a full understanding of the scheme. In such cases the court leaves the parties where it finds them.

McNamara v. Gargett, 12 West. Rep. 650, 68 Mich. 454. See *Murphy v. Bedell*, 53 Mich. 487; *Timmermann v. Bidwell*, 62 Mich. 205; *Davis v. Seeley*, 71 Mich. —, 38 N. W. Rep. 901.

The representations, [not being in writing, come squarely within section 6183, How. Stat., which provides that "no action shall be brought

Eberts v. Selover, 44 Mich. 519; *Chapman v. Colby*, 47 Mich. 46-51; *Bronson v. Green*, Walk. Ch. 56; *Makepeace v. Harvard College*, 10 Pick. 298-302; *Jackson v. McKenny*, 8 Wend. 233.

If at the time the note in question was procured, it was represented to defendant that the party executing the bond and undertaking to effect a sale of oats for him was a corporation, and was thoroughly responsible and had \$150,000 deposited as security for performance of the contract made by it, that the obligor in the bond given was incorporated, and the defendant relied upon such circumstances, and the same were false, then the note was fraudulently procured, and the plaintiff must show that his immediate indorser or himself was a bona fide holder for value. *Mace v. Kennedy*, 12 West. Rep. 655, 68 Mich. 389.

Where the consideration of the note was not the forty bushels of oats at \$10 per bushel, but the agreement or bond, executed and delivered at the same time as the note, the transaction, as a whole, appealed to the cupidity of the maker. He was to receive \$800 for eighty bushels of oats before he was to pay \$400 for the forty bushels delivered to him. This agreement formed the consideration of his note. *Sutton v. Beckwith, supra*.

Nor was this agreement or bond a collateral undertaking. It was executed at the same time as the note, and a part of the same transaction. *Ibid*.

As against parties having notice, the note and contract are void on the ground of public policy. It is upon its face a gambling contract. *McNamara v. Gargett*, 12 West. Rep. 650, 68 Mich. 454.

The holder of a note executed under such a contract, who purchases with knowledge of the consideration and that such a corporation did not and could not exist under the law, cannot recover against the maker. *Ibid*.

The negotiation of the note by the payee to the plaintiff was a fraud upon the maker, and nothing but the negotiable quality of the note, as it appeared standing alone, could deprive the defendant of his right to show the whole contract of which it was only a part. *Sutton v. Beckwith, supra*; *Smith v. Van Blarcom*, 45 Mich. 373. See *Evans v. Stuhberg*, post, 501, note.

to charge any person upon or by reason of any favorable representation or assurance made concerning the character, conduct, ability, trade or dealings of any other person unless such representations be made in writing and signed by the party to be charged thereby or by some person thereunto by him lawfully authorized."

No representation was made except as to the character, credit and dealings of the company, thus bringing the case within the following decisions:

Bush v. Sprague, 51 Mich. 41; *Osburn v. Lovell*, 36 Mich. 246; 2 *Addison, Torts*, § 1179; *Wells v. Prince*, 15 Gray, 562; *Daniel v. Robinson*, 9 West. Rep. 878, 66 Mich. 296; *French v. Fitch*, 112 West. Rep. 424, 68 Mich. 115; *Huntington v. Wellington*, 13 Mich. 10; *Hunter v. Randall*, 62 Me. 423, 16 Am. Rep. 490; *Ball v. Farley*, 81 Ala. 238; *Haslock v. Fergusson*, 7 Ad. & El. 86; *Swann v. Phillips*, 8 Ad. & El. 457.

False representations by an agent of an insurance company concerning its ability and solvency are within the statute, and must be in writing even though it is alleged that his object was to secure his own commissions as agent.

Wells v. Prince, 15 Gray, 562.

The motive of defendant is immaterial.

Kimball v. Comstock, 14 Gray, 510; *Mann v. Blanchard*, 2 Allen, 386; *Browne, Fr.* § 184. See also *McKinney v. Whiting*, 8 Allen, 207.

Campbell, J., delivered the opinion of the court.

Plaintiff, who is a farmer near Bay City, was induced by the representations of defendant to give his notes, payable to bearer, for \$375 and interest, and deliver them to defendant, who got them discounted by a *bona fide* holder, and plaintiff had to pay them. This suit was brought to recover against Culver for having obtained the notes by fraud, and without consideration. The only consideration agreed on was the purchase of Bohemian oats at \$15 a bushel, and the bond of what purported to be, but was not, a Michigan corporation, agreeing to sell for plaintiff fifty bushels at the same price on a commission of one third. No delivery was made to plaintiff of any oats, and the bond was fictitious, if not in law a forgery, there being no such corporation as purported to issue it. The declaration set forth, and the testimony showed, that plaintiff was led by defendant's persistent arts and misrepresentations concerning the salable prospects of the oats to be grown, and the responsibility and legal character of the mythical corporation, to give his notes, for which he received no consideration whatever. The court below, however, held that he had no cause of action, and directed a verdict for the defendant. This could only be upon one of two theories relied on, namely: *first*, that the transaction was illegal, and the parties *in pari delicto*; and, *second*, that defendant was not liable for false representations not in writing.

So far as the first point is concerned, it seems to be based on a false theory. If plaintiff were seeking to enforce such a bond as was palmed off on him, his ignorance that it was illegal in its purposes would not perhaps absolve him from the consequences of trusting to a void contract. But it has been held by this court in

repeated instances that, while a man is, for public reasons, held responsible for his conduct, although ignorant of law, there is no conclusive presumption that he actually knows the law. *Black v. Ward*, 27 Mich. 191; *Stan-ton v. Hart*, Id. 539.

Where a man is defrauded, as often happens, by the misrepresentations of someone who assumes knowledge, and where, under the circumstances, he is actually deceived, and not consciously wrong, the fact that the transaction is against public policy in law will not necessarily compel the victim to submit to the fraud of the actual villain. The only rigid rule forbidding relief is where parties are in equal guilt. While the law does not draw fine distinctions in ascertaining equality of wrong, it recognizes the fact that one party to such an arrangement is not necessarily an equal party in guilt, or consciously guilty at all, and will not deny relief to an injured party against the one who is really the deceiver, and who commits fraud by means of his persuasive or other influence over his victim. Even actual knowledge of legal rights and liabilities is not always conclusive against relief. *Wartemberg v. Spiegel*, 81 Mich. 400; *Barnes v. Brown*, 33 Mich. 146.

Our statutes make this clear distinction in regard to gaining contracts. The winner cannot enforce his winnings against the loser, but the loser may recover back money actually paid. How. Stat. § 2024. Where this may be done in case of open gambling, where the loser knew all about it, the law is not so squeamish as to refuse redress to a loser who was defrauded into paying money without understanding fully that the dealing was improper. One of the elements in this fraud was that defendant accomplished it by representing that the alleged company was a corporation authorized to do the acts referred to by the laws of this State, and therefore having full legal sanction and recognition in its doings, so that plaintiff had no reason to suppose the dealings would be subject to any lawful objection.

The other point suggested has no support in the statutes. The legal provision concerning the necessity of representations in writing to sustain an action, upon favorable assurances concerning the character, conduct, ability, trade or dealings of another person, was intended to reach cases where the plaintiff has dealt with and given credit to the person favorably mentioned, and done so on the faith of the assurances. That statute cannot apply to conspiracies or frauds, where the representation is made to enable the party making it to profit by it. Moreover, in the present case, the false showing was not concerning the responsibility of an existing person whose personality was known, but concerning an alleged corporation that was no corporation, and whose pretense of legal existence was itself a fraud.

Bush v. Sprague, 51 Mich. 41, is in point on more than one question in this case. Here, if the testimony is true, defendant, by false and fraudulent pretenses, and without any consideration at all, got from plaintiff notes which he had to pay, and divided the plunder between himself and his confederates. Upon the facts, if believed, the cause of action was complete. The case should have gone to the jury.

The judgment must be reversed, with costs, and a new trial granted.

Sherwood, Ch. J., did not sit; the other Justices concurred.

Honora EVANS

v.

William STUHRBERG, *Appl.*

(....Mich.....)

One who sells a note which is void in his hands, on grounds of public policy, fraudulently representing it to be good, is liable to the purchaser for the money paid therefor when the maker has refused payment, although the purchaser, as a bona fide holder, might have collected it from the maker.

(November 15, 1899.)

ERROR to the Circuit Court for Livingston County to review a judgment in favor of plaintiff in an action to recover of the seller of a void note the amount paid him therefor by the purchaser. *Affirmed.*

The facts are fully stated in the opinion.

Mr. Rollin H. Person, for defendant, appellant:

The plaintiff being a bona fide purchaser, the fact that the note was given for Bohemian oats in no wise affected its validity in her hands.

Davis v. Seeley, 71 Mich.—, 38 N. W. Rep. 901; 2 Parsons, Notes and Bills, ed. 1865, 141.

The fact that the note was a Bohemian oat note, being no defense to its collection, was therefore unimportant, and being no injury, could be no basis for recovery.

See *Rynsford v. Phelps*, 49 Mich. 315; *Post v. Campau*, 42 Mich. 96.

NOTE—Transactions based on separate instruments construed.

A note and bond made contemporaneously, pursuant to the same agreement, must, as between the original parties, be construed together and treated as parts of the contract. *Watson v. Blossom*, 18 N. Y. S. R. 730.

The time of payment, as fixed by a note, may be controlled by a separate written agreement, made and entered into by the parties at the time of the execution of the note. *Jacobs v. Mitchell*, 46 Ohio St.—, 22 Ohio L. J. 383.

(Bohemian oats transactions.)

Where by fraudulent representations defendant obtained plaintiff's note for the purchase price of Bohemian oats at an exorbitant price in return for an agreement and bond of a fictitious corporation to sell a larger quantity for plaintiff at the same price on commission, the question of plaintiff's right to recover is one for the jury to determine. *Hess v. Culver* (Mich.), 43 N. W. Rep. 994.

The false showing was not concerning the responsibility of an existing person whose personality was known, but concerning an alleged corporation that was no corporation and whose pretense of legal existence was itself a fraud. *Bush v. Sprague*, 51 Mich. 41; *Hess v. Culver*, *supra*.

It is a fact of which courts may take knowledge that notes known as "Bohemian oat notes" are all obtained and given upon schemes or arrangements similar one to the other, and void, as against public policy, between the maker and payee, or any

6 L. R. A.

Messrs. D. Shields and B. T. O. Clark, for plaintiff, appellee:

If there be an intentional concealment or suppression of material facts in the making of a contract, in a case, in which both parties have not equal access to the means of information, it will be deemed unfair dealing, and vitiate and avoid the contract.

2 Kent, Com. 4th ed. 482.

When plaintiff proved the representations, and that they were false, and were believed and relied upon, and that she was injured thereby, she was entitled to recover in an action on the case, and she could waive that form of action and bring assumpsit.

Carter v. Glass, 44 Mich. 154.

Morse, J., delivered the opinion of the court:

The plaintiff brought suit in the Livingston County Circuit Court, alleging, in substance, that the defendant sold her a note for \$200, executed by one Charles E. Holdridge, representing to the Rev. James G. Doherty, who was acting as her agent in the purchase of the note, that the note was good and collectible, and that Holdridge was worth about \$5,000, which said Holdridge owned; that she relied upon such warranty in the purchase on the note; that the said note was not good or collectible, and that said Holdridge was irresponsible and financially worthless; that the defendant represented that the note was given for a good, legal and valuable consideration, when in fact it was a Bohemian oat note, and worthless, and of no value; that she demanded payment of said note from the maker, Holdridge, who refused payment. Afterwards she caused a tender of the note to be made to defendant, and demanded payment of the same, or the refunding of the money paid by her to him for

other person having knowledge or information of the scheme upon which they are based, and by which they are procured. *Ward v. Doane* (Mich.), 43 N. W. Rep. 990.

The transaction in all respects similar to the Bohemian oat deals will be held void by this court on the ground of public policy. See *Sutton v. Beckwith*, 12 West. Rep. 647, 63 Mich. 333; *Mace v. Kennedy*, 12 West. Rep. 654, 63 Mich. 389; *McNamara v. Gargett*, 12 West. Rep. 660, 63 Mich. 454; *Davis v. Seeley*, 71 Mich.—, 38 N. W. Rep. 901; *Goodrich v. McDonald* (Mich.), 43 N. W. Rep. 1020.

The lower courts of the State of New York seem to be at variance with the current of decisions, but the question has not yet been settled by the Court of Appeals of that State. See *Hall v. Bergen*, 19 Barb. 122, distinguished in *Watson v. Blossom*, 18 N. Y. S. R. 731.

Action on note given for purchase of Bohemian oats.

An action on the note cannot be maintained until the terms of the concurrent written agreement have been complied with; and such is the rule in an action by a holder who acquired his title with notice of the agreement. *Jacobs v. Mitchell*, 46 Ohio St.—, 22 Ohio L. J. 383.

The affidavit of defense setting up fraud in the procurement of the note, giving the particulars thereof, and averring upon information and belief that the note was passed to the plaintiffs by the active agent in the fraud "in payment and satisfaction of an old debt," establishes a good defense against

said note, which demand was refused by the defendant. The defendant pleaded the general issue, and gave notice under said plea that after the note had become due the maker, Holdridge, had offered and tendered the plaintiff as payment or part payment of said note a horse of the value of \$200, which plaintiff refused to accept. The plaintiff had judgment in the court below.

The testimony on the part of the plaintiff was to the effect that defendant offered to sell the note to Mr. Doherty, who was a catholic priest, then stationed at Brighton. Father Doherty, as he was called in the record, had no money at the time, but thought perhaps plaintiff, who was his housekeeper, might buy the note. He spoke to her about it, and acted as her agent in the transaction. He testified that defendant told him that the note was all right and represented that Holdridge was good, and that, after all his debts were paid, he would have at least \$5,000 left, and that the note would not have been purchased except for these representations of defendant.

Testimony was also given tending to show that the note was a Bohemian oat note of the usual kind afloat in this State, and accompanied by the usual bond which had not been performed, and that the representations as to the financial worth of Holdridge were untrue. Plaintiff paid \$195 for the note. Defendant admitted that he knew the note was given for Bohemian oats when he sold it to Father Doherty, but testified that Holdridge told him that he went into the transaction for speculation, and that he was going to make money out of it "right immediately to pay it." "He said: 'You will certainly have it paid when it is due.'" This was before he bought the note; and he says: "I would not have bought the note except for Holdridge's assurances, because

it was a Bohemian oat note." Defendant paid \$180 for the note. He also testified that Holdridge told him that he would be pleased to have him buy it, because defendant lived near by, and he could pay it at home. He admits that he told Father Doherty that the note was good, and that Holdridge was good for it. Did not tell him it was a Bohemian oat note. Did not tell him that Holdridge would have \$5,000 left when his debts were paid. Evidence was also given on the part of defendant tending to show that the maker of the note was financially responsible for the amount of it. It was shown that plaintiff made no effort to collect the note of Holdridge after the demand and refusal of payment.

The counsel for the defendant assigns as the principal error in the case that the court permitted testimony to be given showing the note to have been given for Bohemian oats, and instructed the jury that if the note was a Bohemian oat note it was not a good, but a void, note. It is argued that the plaintiff, having no knowledge that the note was given for Bohemian oats, and purchasing it before due for value, was a *bona fide* holder of the note, and could collect it; that the maker never declined to pay it on the ground that it was a Bohemian oat note, and never claimed that as a defense; that the note was a good note as soon as it passed into plaintiff's hands, and that, therefore, the fact that it was a Bohemian oat note in no wise affected its validity in her hands, and that such fact was entirely immaterial and irrelevant; that, therefore, the case should have been submitted to the jury solely upon the maker's financial responsibility. We think the circuit judge fairly submitted the case to the jury, and that he did not err in admitting the testimony as to the consideration of the note.

The court instructed the jury that if Holdridge

any but a bona fide holder for value before maturity. Gere v. Unger, 125 Pa. 649; Hutchinson v. Boggs, 28 Pa. 294.

Complicity in a wrong may defeat a party who, by action, seeks to enforce an executory contract based upon it, or to obtain affirmative relief against the contract, as by injunction or cancellation; but such complicity does not preclude a defendant from pleading the facts as a defense, although he may be *in pari delicto*. Roll v. Raguet, 4 Ohio, 400; McQuade v. Rosecrans, 36 Ohio St. 442; Kahn v. Walton, 46 Ohio St. 195, 21 Ohio L. J. 146; Jacobs v. Mitchell, *supra*.

The maker, when sued upon a note, may, as a defense, show that it was founded upon an illegal agreement, although it appears that he is *in pari delicto*, where the suit is by a party to the agreement, or by one having acquired his title with notice. Jacobs v. Mitchell, *supra*.

In an action upon such a note the accompanying bond is properly admitted in evidence. Goodrich v. McDonald (Mich.) 43 N. W. Rep. 1019.

Commercial paper, negotiation of.

A party taking commercial paper in regular course of business for value, before maturity, has the right to assume that it is valid, and that it will be so treated in his hands until it is shown to be void by force of some statute, or until it is made to appear that when he received it he was chargeable with notice of facts, which, as between the parties to it, would be available as a defense to defeat recovery upon it. Watson v. Blossom, 18 N. Y. S. R. 730; Welch v. Sage, 47 N. Y. 147; Sey-
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bel v. Nat. Currency Bank, 54 N. Y. 238; Dutchess Co. Mut. Ins. Co. v. Hachfield, 73 N. Y. 223; Parker v. Conner, 93 N. Y. 127.

Transferee of void note cannot recover.

The indorsee of a note void as against public policy cannot recover of the indorser, if he had knowledge of the character of the note at time of the purchase. Ward v. Doane (Mich.) 43 N. W. Rep. 980.

If the transferees of the note knew that it was a Bohemian oat note when they purchased it, and bought it of payee, then public policy also requires that any contract between them and payee, the object and purpose of which was to give life to this illegal paper, shall be also void, upon the same grounds as those which destroyed its validity at its inception. This note is void as to all parties acquainted with its character. McNamara v. Garrett, 12 West. Rep. 660, 68 Mich. 454; Ward v. Doane, *supra*.

The transferee of a promissory note given under such circumstances, with knowledge of the circumstances, is not a bona fide purchaser. Goodrich v. McDonald (Mich.) 43 N. W. Rep. 1019.

A person must not only pay for a note, but he must buy it in good faith; that is, take it without knowledge of the illegality or fraudulent character of the note originally. The burden is upon the plaintiff to show by a preponderance of evidence that the purchase of this note was in good faith and for value. Goodrich v. McDonald, *supra*; Mace v. Kennedy, 12 West. Rep. 654, 68 Mich. 383.

told defendant the note was all right, and that he would pay it when it was due, this would estop Holdridge from making any defense to the note, and that it would be a good note so far as its being given for Bohemian grain was concerned. This was as favorable as the defendant could ask, under the law as laid down by this court in reference to these notes.

This note was void between the parties on the ground of public policy. It was also void and dead in the hands of defendant, as he had knowledge of the fraudulent transaction, unless something had occurred between him and the maker which estopped the latter from pleading its invalidity. Holdridge denied telling defendant that the note was all right, or that he would pay it, and the jury, it is admitted upon this conflict in the testimony, found against the defendant. Then the case stands like this: When defendant presented this note to Father Doherty he knew it was a void note, and that he could not collect it. When he told Doherty that the note was good, and thereby induced him to purchase it for plaintiff, he cannot be permitted by the law to take advantage of his own fraud, or thus to evade the law which seeks to discourage and prevent these illegal transactions. If this note was made good in the hands of the plaintiff because she was an innocent purchaser, she was made such innocent purchaser by the fraud of the defendant, who concealed from her not only the original consideration of

the note, but warranted it to be a good note when he knew it was not a valid one, except as it might be made so by the success of his deception and falsehood. The law in such a case will not force the plaintiff to collect the note against the maker, though she may be able to do so, nor allow the defendant to reap a profit from his fraud as well as to galvanize by such fraud a dead note into life. This would not be in accord with that public policy which forbids the contract in its inception, and which endeavors to prevent those engaged in it, or having guilty knowledge of it, to profit thereby.

The commercial law in favor of innocent purchasers was intended for the benefit of the innocent purchaser, and for the security of those handling commercial paper in the due and honest course of business. It was not intended as a shield to those fraudulently putting in circulation illegal or void notes, or passing them upon innocent purchasers by fraudulent or false representations or warranties. And it is much better, if it can be done, that the innocent holder shall recover its value, or the money paid for it, from such false warrantor, than that he shall undertake to recover it from the maker.

There is no error to be found in the record, and the judgment will be affirmed, with costs.

Long, J., did not sit; the other Justices concurred.

NEW YORK COURT OF APPEALS.

William MCCREERY *et al.*, *Appls.*,

v.

Melville C. DAY *et al.*, *Exrs.*, etc., of Cornelius K. Garrison, Deceased, *Repts.*

(.....N. Y.....)

1. Where a contract is rescinded while in the course of performance any claim in respect of performance or of what has been or is to be paid or received thereon will ordinarily be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission.

2. Where the parties to an executory contract which is in course of performance mutually agree to discharge each other from reciprocal obligations thereunder, and to substitute a new and different contract in place thereof, the agreement of each will respectively furnish a sufficient consideration for the agreement of the other.

3. A contract under seal may be discharged, even before breach, by the substitution therefor of an executory parol agreement,

and the subsequent complete performance of such agreement.

4. A claim for interest will not survive payment of the principal sum in the absence of special circumstances to take the case out of the general rule.

(January 14, 1890.)

APPPEAL by plaintiffs from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the New York Special Term in favor of defendants in an action to recover the amount due under an alleged contract. *Affirmed.*

On March 2, 1882, plaintiffs had a contract with the Pittsburgh, Youngstown & Chicago Railroad Company for the construction of its road, by which they were to receive stock and bonds of the company in payment for work, labor and materials furnished by them. On that day they, as parties of the first part, entered into a contract with one C. H. Andrews, party of the second part, and C. K. Garrison, party of the third part, by which they sold to

NOTE.—Contract; effect of rescission.

A contract cannot be rescinded by one of the parties without the consent of the other, except for nonperformance by such other of his covenants. *White v. Hand*, 76 Ga. 8.

The mutual rescission of a contract in accordance with an offer to receive back the articles sold, "and in this way settle the matter," is a bar to any action for prior breaches of the contract. *Alden v. Thurber*, 149 Mass. 271.

Where a contract has been entirely rescinded, 6 L. R. A.

subsequent conversations in which one party acknowledges the rights of the other do not amount to a new contract. *Simpson v. Applegate*, 75 Cal. 342.

Although an oral agreement to rescind a contract for land is not such as a court would specifically enforce, it is a good ground for refusing to enforce the original contract. *Perry v. McLain* (Miss.) 5 So. Rep. 518.

Rescinding contract, effect of. See *Katz v. Bedford*, 1 L. R. A. 825, note, 77 Cal. 319.

Garrison a one-fourth interest in their construction contract, and by which Garrison agreed to pay them a certain sum of money therefor, and to assume a share of the expense which would be necessary to carry the contract to completion.

Subsequently a memorandum was indorsed on that contract to the effect that the parties thereto agreed that it should be annulled, the same having been superseded by certain agreements mentioned which had been made in lieu thereof.

This action was brought to enforce Garrison's alleged liability under the former contract.

Further facts appear in the opinion.

Mr. J. W. Hawes, for appellants:

The cases in which the annulment or modification of contracts has been upheld on the mere mutual promises or understanding of the parties, are those of contracts while still executory and before any breach.

See *Roe v. Conway*, 74 N. Y. 201; *Tves v. Zinsser*, 76 N. Y. 549; *Howard v. Wilmington & S. R. Co.* 1 Gill, 811; *Killip v. Metzen*, 50 N. Y. 658.

A new agreement does not surrender rights already fixed.

Allaire v. Whitney, 1 Hill, 484; *Bowman v. Teall*, 23 Wend. 306; *Hill v. Blake*, 16 Jones & S. 253; *McKnight v. Dunlop*, 5 N. Y. 537; *Hinsdale v. White*, 6 Hill, 507; *McKeon v. Whitney*, 8 Denio, 452; *Johnson v. Oppenheim*, 55 N. Y. 280; *Barber v. Rose*, 5 Hill, 76; *Shute v. Hamilton*, 8 Daly, 462; *Harrison v. Missouri P. R. Co.* 74 Mo. 864; *Cleveland & T. R. Co. v. Perkins*, 17 Mich. 296; *Mallory v. Lord*, 29 Barb. 454; *Coon v. Reed*, 1 Hill, 511; *Towers v. Barrett*, 1 T. R. 183; *Davis v. Street*, 1 Car. & P. 18; *Barber v. Lyon*, 8 Blackf. 215.

When both parties agree to put an end to a contract, one of them may bring an action to recover money paid by him upon it,—suit for goods delivered on a contract afterwards rescinded.

Kelsey v. United States, 1 Ct. Cl. 874; *Watkins v. Hodges*, 6 Harr. & J. 88; *Gillet v. Maynard*, 5 Johns. 85; *Thompson v. Lyons*, 22 Jones & S. 101; *McMaster v. State*, 11 Cent. Rep. 298, 108 N. Y. 542; *Sperry v. Miller*, 16 N. Y. 407; *Endriss v. Belle Isle Ice Co.* 49 Mich. 279; *Grannemann v. Kloepper*, 24 Ill. App. 277; *Russell v. Allerton*, 11 Cent. Rep. 95, 108 N. Y. 286; *Porteous v. Williams*, 21 Jones & S. 242.

The alleged annulment is void for want of consideration.

Vanderbilt v. Schreyer, 91 N. Y. 392; *Smith v. Kerr*, 10 Cent. Rep. 482, 108 N. Y. 31; *Little v. Rees*, 84 Minn. 277; *Signer v. Newcomb*, 6 N. Y. S. R. 315; *Wharton v. Missouri Car Foundry Co.* 1 Mo. App. 577.

The first contract, being under seal, could not be modified or canceled by the subsequent writings, which are unsealed.

Eddy v. Graves, 23 Wend. 82; *Delacroix v. Bulkley*, 18 Wend. 71; *Hume v. Taylor*, 63 Ill. 43; *Roe v. Conway*, 74 N. Y. 201.

Mr. Melville C. Day, with **Mr. William Bronk**, for respondents:

Where a contract is rescinded or annulled by the mutual agreement of parties without any reservation as to the time the act of annulment is to take effect or other restriction, the con-

tract is absolutely at an end, and is no longer available to either party for any purpose.

Beach v. Endress, 51 Barb. 570; *Fullager v. Reville*, 3 Hun, 600; *Roe v. Conway*, 74 N. Y. 206; *Larkin v. Hardenbrook*, 90 N. Y. 338; *McKnight v. Dunlop*, 5 N. Y. 548.

Andrews, J., delivered the opinion of the court:

The parties, by their agreement indorsed on the contract of March 2, 1882, in terms annulled that contract, and declared that it should be of no further effect. The claim that the annulment of the contract did not discharge Garrison's obligation under the original contract to pay his proportion of expenditures made by the plaintiffs for the construction of the Pittsburgh, Youngstown & Chicago Railroad, between the date of the contract and its annulment, depends on the intention to be deduced from the agreement of annulment, construed in light of the attending circumstances. Where a contract is rescinded while in course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily "be referred to the agreement of rescission; and, in general, no such claim can be made, unless expressly or impliedly reserved upon the rescission." Leake, Cont. 788, and cases cited.

The agreement annulling the original contract recites that that contract had been "superseded by agreements and arrangements made in lieu thereof," embodied in Garrison's letter of November 6, 1882, and the several contracts executed by the parties to that contract, and others bearing date October 25, 1882. In construing the scope of the agreement annulling the original contract, the letter and the contracts of October 25, 1882, are to be deemed incorporated into the agreement. Construing these several writings together, they plainly show that the parties intended that Garrison should be discharged from all liability under his contract of March 2, 1882, for any expenditures theretofore made or thereafter to be made, in constructing the line between Pittsburgh and Newcastle Junction. The letter was written after Garrison had received the contracts dated October 25, 1882, for execution, and declares that he will sign them on the condition and understanding that he is not to pay anything more than Mr. Humphrey's company pays, under the plaintiff's agreement with him of April 13, 1882, "that is, \$150,000, and one fourth-of the cost of the road to Newcastle Junction after that date."

The agreement with Mr. Humphrey of April 13, 1882, provided for the construction of the part of the line of the Pittsburgh, Youngstown & Chicago Railroad between Newcastle Junction and Akron, by a new corporation to be formed, and that Humphrey should pay the plaintiffs \$150,000 for expenditures incurred and rights acquired on that branch of the road prior to the making of the contract, and also one fourth of all expenditures thereafter made in its completion. The letter goes on to state that the agreement with Mr. Humphrey was made "after consulting with me; and, as it insured my road [Wheeling & Lake Erie Railroad] a line to Pittsburgh, I was ready to assent to it, in place of the agreement of the 2d of

March; and you know I have so considered it since, and that I was owner of one fourth of the new company, all previous agreements between us being superseded. I do not want any interest in the road from Newcastle Junction to Pittsburgh. I will pay whatever Mr. Humphrey's company has paid on the agreement of the 18th of April."

The clear import of the proposition of Mr. Garrison in his letter is that he would sign the contracts of October 25, 1882, provided he should be placed in the same position in respect to the enterprise as that occupied by the company represented by Mr. Humphrey, and be relieved from all interest in, or obligation to contribute to the construction of, the part of the Pittsburgh, Youngstown & Chicago Railroad between Pittsburgh and Newcastle Junction. Garrison thereafter executed the contracts of October 25, 1882, relating to the construction of the road between Newcastle Junction and Akron, whereby he assumed other and different obligations from those he had assumed by his contract with the plaintiffs of March 2, 1882.

The main claim in the action is to recover from Garrison's estate, under the contract of March 2, 1882, for a share of expenditures made by the plaintiffs in the construction of the part of the Pittsburgh, Youngstown & Chicago Railroad between Pittsburgh and Newcastle Junction after the date of that contract, and before the execution of the annulment agreement. The agreement annulling the prior contract is supported by an adequate consideration. The new obligation which Garrison assumed under the contracts of October 25, 1882, was alone a sufficient consideration. *Memphis v. Brown*, 87 U. S. 20 Wall. 289 [22 L. ed. 264].

There was a consideration also, in the mutual agreement of the parties to the prior contract, which was still executory, although in the course of performance, to discharge each other from reciprocal obligations thereunder, and to substitute a new and different agreement in place thereof.

The contract of March 2, 1882, is sealed, while the agreement annulling it is unsealed. Upon this fact the plaintiffs make a point, founded on the doctrine of the common law that a contract under seal cannot be dissolved by a new parol executory agreement, although supported by a good and valuable consideration; "for," as is said, "every contract or agreement ought to be dissolved by matter of as high a nature as the first deed." *Countess of Rutland's Case*, 5 Coke, 25 b.

The application of this rule often produced great inconvenience and injustice; and the rule itself has been overlaid with distinctions, invented by the judges of the common-law courts to escape or mitigate its rigor in particular cases. But in equity the form of the new agreement was not regarded; and, under the recent blending of the jurisdiction of law and equity, and the right given by the modern rules of procedure in this country and in England to interpose equitable defenses in legal actions, the common-law rule has lost much of its former importance. A recent English writer, referring to the effect of the common-law Procedure Acts in England, says: "The ancient technical rule of the common law, that a con-

tract under seal cannot be varied or discharged by a parol agreement, is thus practically superseded." Leake, *Cont.* § 802.

Courts of equity often interfered by injunction to restrain proceedings at law to enforce judgments, covenants or obligations equitably discharged by transactions of which courts at law had no cognizance. See 2 Story, *Eq. Jur.* § 1573.

It is a necessary consequence of our changed system of procedure that whatever formerly would have constituted a good ground in equity for restraining the enforcement of a contract or decreeing its discharge will now constitute a good equitable defense to an action on the contract itself. It was one of the subtle distinctions of the common law, as to the discharge of covenants by matter *in pais*, that, although a specialty before breach could not be discharged by a parol agreement, although founded on a good consideration, nor even by an accord and satisfaction, yet, after breach, the damages, if unliquidated, could be discharged by an executed parol agreement, because, as was said, in the latter case the cause of action is founded, "not merely on the deed, but on the deed and the subsequent wrong." Broom, *Legal Maxims*, 848, and cases cited.

The absurd results to which the common-law doctrine sometimes led is illustrated by the case of *Spence v. Healey*, 8 Exch. 668, in which it was held that a plea to an action on covenant for the payment of a sum certain, that, before breach, defendant satisfied the covenant by the delivery to and acceptance by the plaintiff of goods, machinery, etc., in satisfaction, was bad, *Martin, B.*, saying: "I am sorry that I am compelled to agree in holding that the plea is bad. It is difficult to see the correctness of the reasons upon which the rule is founded."

I suppose there can be no doubt that the fact presented by the plea in the case of *Spence v. Healey* would have constituted a good ground for relief in equity. The technical distinction between a satisfaction before or after breach seems to have been disregarded in this State, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is treated as a good accord and satisfaction of the covenant. *Fleming v. Gilbert*, 3 Johns. 530; *Lattimore v. Harsen*, 14 Johns. 830; *Dearborn v. Cross*, 7 Cow. 45; *Allen v. Juquish* (Cowan, J.), 21 Wend. 633.

So, also, a new agreement, although without performance, if based on a good consideration, will be a satisfaction, if accepted as such. *Kromer v. Heim*, 75 N. Y. 574, and cases cited.

In the present case, it may be justly said that when the agreement annulling the contract of March 2, 1882, was executed there had been no breach by Garrison of his covenant therein, as he had not been called upon by the plaintiffs to pay his share of the construction account. But it was the plain intention of the parties that the new arrangement then entered into should be a substitute for the liability of Garrison, present and prospective, under the contract of March 2, 1882. The transaction constituted a new agreement in satisfaction of the prior covenant, and was accepted as such. Moreover, it admitted by the reply that the contracts of October 25, 1882, were carried out.

It is a case, therefore, of an executory parol contract, made in substitution of the prior sealed contract, afterwards fully executed, which clearly, under the authorities in this State, discharged the prior contract.

In respect to the claim to recover interest during the time the payment of the \$150,000 was delayed, it is a sufficient answer that the complaint admits that the principal sum was fully paid prior to September 13, 1883. The

claim for interest did not survive, there being no special circumstances to take the case out of the general rule. *Cutter v. New York*, 92 N. Y. 166, and cases cited.

We are of opinion that the facts admitted in the pleadings disclose that there was no right of action, and that the complaint, for this reason, was properly dismissed.

The judgment should therefore be affirmed.

All concur.

PENNSYLVANIA SUPREME COURT.

William McKENDRY *et al.*, *Pliffs. in Err.*,
v.

Elizabeth J. McKENDRY, by Next Friend.

(.....Pa.....)

1. An equitable ejectment action by the wife in the name of her next friend may be maintained in Pennsylvania against her husband, from whom she is at the time separated, under the Acts of 1848 and 1866, giving her the right to a separate estate and to maintain actions therefor, where the property is not occupied by them as a home, and the husband's possession is inconsistent with such occupation.

2. Whether the character of the occupation by a husband of his wife's real property was consistent with an agreement to make it their home is a question for the jury,

where he, while living apart from her, has taken another family into the house.

(January 6, 1890.)

ERROR to the Court of Common Pleas, No. 1, of Allegheny County to review a judgment in favor of plaintiff in an action of ejectment. *Affirmed.*

William and Elizabeth J. McKendry were married in 1885. The wife was the owner of a tract of land under a devise from her father. She notified the tenant in possession thereof to surrender possession on April 1, 1886. Mr. and Mrs. McKendry then made arrangements to live upon this land as their home, and made some preparations to do so. Before possession was taken under that arrangement differences

NOTE.—*Husband and wife; actions between, under modern statutes; ejectment.*

A married woman may maintain ejectment against her husband for her separate real estate, where statutes give her the right to control and manage her separate property, and to bring suits concerning it. *Crater v. Crater*, 118 Ind. 521; *Wood v. Wood*, 83 N. Y. 576; *Minier v. Minier*, 4 Lans. 421, overruling *Gould v. Gould*, 29 How. Pr. 461.

Actions generally.

A wife cannot, during marriage, sue her husband except as authorized by statute. *Heyob v. Her Husband*, 18 La. Ann. 41; *Moore v. Moore*, Id. 613.

A statute giving a married woman the right to sue and be sued as if unmarried does not authorize actions between her and her husband. *Smith v. Gorman*, 41 Me. 405; *Hobbs v. Hobbs*, 70 Me. 381; *Crowther v. Crowther*, 55 Me. 358; but see other cases following.

The invalidity of a formal marriage not judicially declared null, does not give the wife the right to sue the husband (1848). *Griffith v. Smith*, 1 Pa. L. J. 479.

A married woman cannot, under the Illinois Statutes, sue her husband at law except for her separate property. She cannot sustain a *act. fa.* against him to compel payment of alimony (1875). *Chestnut v. Chestnut*, 77 Ill. 348.

A husband may confess judgment in favor of his wife without intervention of a trustee. *Rose v. Latschaw*, 90 Pa. 238; *Lahr's App.* Id. 507. *Contra*, *Countz v. Markling*, 80 Ark. 17.

A wife who is tenant in common with her husband may bring suit for partition. *Moore v. Moore*, 47 N. Y. 467.

A wife can obtain a money judgment against her husband only when she claims a separation of property and dissolution of the community. *Vredenburgh v. Behan*, 32 La. Ann. 475.

Demand of paraphernal property by the wife
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under La. Code, arts. 2387, 2391, may include restitution of proceeds of that sold by the husband, although dissolution of the community is not demanded. *Joly v. Weber*, 86 La. Ann. 306.

A man may sue his wife in her executorial capacity for a debt due him from the testator. *Alexander v. Alexander*, 12 La. Ann. 588.

A married woman may summon her husband as trustee for debtor, at least where the husband himself does not raise the objection of her coverture. *Tunks v. Grover*, 57 Me. 587.

An independent suit to enforce a trust in or lien upon property purchased by the husband and conveyed to the wife cannot be maintained by him pending a suit for divorce. *Rose v. Rose*, 93 Ind. 179.

A wife cannot sue her husband without a *prochein am.* *Ward v. Ward*, 2 Dev. Eq. (N. C.) 553; *Thomas v. Thomas*, 18 Barb. 149; *Coit v. Coit*, 6 How. Pr. 83.

The New York decisions were made under Code Proc., § 114, authorizing her to "sue or be sued alone." The present Code of Civil Procedure, § 450, says she may sue "as if she was single."

A wife cannot sue her husband *in forma pauperis*. *Ward v. Ward*, *supra*.

Whether she shall give security for costs is in the discretion of the court (1854). *Thomas v. Thomas*, 18 Barb. 149.

A wife may sue to set aside a fraudulent conveyance made by her husband to evade a decree for alimony. *Kamp v. Kamp*, 46 How. Pr. 143.

On contracts.

A husband may sue his wife for money loaned to her for use in her separate business on her express promise to repay it. *Harrell v. Harrell*, 117 Ind. 94.

A husband cannot sue his wife for services rendered her while they were living together. *Perkins v. Perkins*, 7 Lans. 19, 63 Barb. 531.

After divorce he may sue her for moneys ad-

arose between them and they separated. She subsequently rented the property, but the husband got possession of the key and took actual possession of the premises taking with him the family of one John Fessler.

Mrs. McKendry thereupon brought this action against her husband and Fessler to recover possession of the premises.

At the trial defendants requested the court to charge the jury that plaintiff could not maintain the action. This request was refused. (First assignment of error.)

The defendants offered to introduce in evidence an exemplification of the record of a proceeding in which one Jerome Prosser was convicted of adultery with Mrs. McKendry, for the purpose of showing that she was the cause of the trouble in the McKendry family. This offer was refused and the refusal became the basis of the fifth and sixth assignments of error.

Further facts appear in the opinion.

Messrs. Robb & Fitzsimmons, for plaintiffs in error:

Under the provisions of the Acts of 1848 and 1856, the wife could not oust the husband, by an action of ejectment, from a home they had mutually agreed to make and live in, the same having been made desolate by her wanton and unlawful acts.

Ritter v. Ritter, 81 Pa. 396; *Pettit v. Frets*, 33 Pa. 118; *Hoar v. Aze*, 23 Pa. 384; *Mander-*

vanced to pay off a mortgage and to make valuable improvements on her premises at her request during coverture. *Blake v. Blake*, 64 Me. 177.

A divorced wife cannot sue her former husband at law upon an implied contract arising during coverture. *Pittman v. Pittman*, 4 Or. 238.

A divorced woman can maintain an action against her former husband for services performed before their marriage. *Carlton v. Carlton*, 72 Me. 115, 39 Am. Rep. 307.

Specific performance may be decreed of a contract to convey to a wife premises bought, largely improved by money loaned by her for that purpose. *Hixon v. Cuppy*, 33 Ind. 310.

A married woman cannot, by her next friend, maintain an action of debt against her husband during coverture, under Pa. Act 1848. *Ritter v. Ritter*, 31 Pa. 396.

Covenant will not lie under the Pa. Act of 1856, by a wife in the name of her next friend, against her husband, for waste permitted by him on land conveyed to him by her for life by antenuptial contract, although they have separated. *Miller v. Miller*, 44 Pa. 170.

A wife can sue her husband upon a note executed by him in her favor before marriage (*Wilson v. Wilson*, 36 Cal. 447); also where the note was made during coverture. *May v. May*, 9 Neb. 16; *Greer v. Greer*, 24 Kan. 101. *Contra*, *Roseberry v. Roseberry*, 27 W. Va. 759; *Crowther v. Crowther*, 55 Me. 353.

And she may maintain suit against him on a note given her in consideration of marriage. *Wright v. Wright*, 54 N. Y. 437.

A wife may sue on a note which was given to settle a suit brought by her for divorce, where, after returning to her husband and living with him several years, she has again left him and the note has been assigned to her. *Adams v. Adams*, 24 Hun, 401.

Suits against firm to which husband belongs.

A wife may sue a firm of which her husband is a member (he joining with her in obedience to stat-
6 L. R. A.

bach v. Mock, 29 Pa. 43; *Miller v. Miller*, 44 Pa. 170; *May v. May*, 62 Pa. 206; *Husbands, Rights of Married Women*, p. 85.

She could bring an action only in case of conduct on his part which would entitle her to a divorce.

Butler v. Butler, 1 Pars. 337; *Gordon v. Gordon*, 48 Pa. 288; *Richards v. Richards*, 87 Pa. 227, 1 Grant, 889; *Eshbach v. Eshbach*, 23 Pa. 848; *Waring v. Waring*, 2 Phill. 183; *Groves' App.* 37 Pa. 448; *Miles v. Miles*, 76 Pa. 357; *Jones v. Jones*, 66 Pa. 494; *May v. May*, 62 Pa. 206; *Bealor v. Hahn*, 9 Cent. Rep. 599, 117 Pa. 173.

A woman married cannot be able to control and enjoy her property as if she were sole, without leaving her at liberty practically to annul the marriage tie at pleasure.

Cole v. Van Riper, 44 Ill. 58.

Messrs. A. Blakeley and A. M. Blakeley for defendant in error.

Paxson, Ch. J., delivered the opinion of the court:

The first specification of error presents the question whether the plaintiff can maintain this action against the defendants, one of whom is her husband. It was an action of ejectment brought in the court below, to recover the possession of certain real estate, admittedly the separate property of the wife. It is clear she could not sustain such suit at common law.

ute) on a claim arising out of her separate estate. *Alexander v. Alexander* (Va.) 1 L. R. A. 125; *Benson v. Morgan*, 50 Mich. 77; *Osborn v. Osborn*, 36 Mich. 48; *Moore v. Foote*, 34 Mich. 443. *Contra*, *Kuts's App.* 40 Pa. 90 (under Pa. Act 1848).

But with her husband's consent she may sue a firm of which he is a member on a contract of lease of her separate real estate. *Freiler v. Kear*, 3 L. R. A. 330, 126 Pa. 470.

She may recover of a firm to which her husband belongs for money loaned to him for use in the firm's business. *Devin v. Devin*, 17 How. Pr. 514.

She may sue a firm of which he is a member for services to the firm. *Adams v. Curtis*, 4 Lana. 164. *Contra*, *Edwards v. Stevens*, 3 Allen, 815.

Torts.

Neither husband nor wife can sue the other for a tort during coverture. *Peters v. Peters*, 43 Iowa, 182.

A wife cannot sue her husband for slander (*Freethy v. Freethy*, 42 Barb. 641); nor for assault and battery during coverture (*Longendyke v. Longendyke*, 44 Barb. 366; *Schultz v. Schultz*, 89 N. Y. 644), even if suit is brought after divorce. *Abbott v. Abbott*, 67 Me. 304.

He may sue her for property seized and carried away by her. *Berdell v. Parkhurst*, 19 Hun, 368.

A wife living apart from her husband can maintain replevin against him for her individual property. *White v. White*, 58 Mich. 543; *Howland v. Howland*, 20 Hun, 472. *Contra*, *Hobbs v. Hobbs*, 70 Me. 383.

A wife may sue her husband for money converted by him. *Whitney v. Whitney*, 49 Barb. 313.

The remedy of a married woman for injury to her property by her husband is now at law under Illinois Statutes. *Larison v. Larison*, 9 Ill. App. 27.

A wife deserted by her husband may attach his property, although he is not a seafaring man nor she a *feme sole trader*. *Bohrman v. Bohrman*, 13 Phila. 390.

Can she do so by force of any Act of Assembly? We throw out of the case the Act approved June 3, 1887 (Pub. Laws, 332), relating to husband and wife, for the reason that this suit was commenced before its passage. The rights of the parties must be measured by the law as it stood on the day when the writ issued.

Without going into tedious detail in regard to the legislation affecting the property rights of married women, the sixth section of the Act of April 11, 1848 (Pub. Laws, 536), secures to them the full use and enjoyment of their property of every description, whether real, personal or mixed, as fully after marriage as before; it is not liable for her husband's debts, nor can he mortgage or incur it. There are various other provisions in subsequent Acts of Assembly relating to the separate earnings of the wife her right to be declared a *feme sole* trader, etc., which it is not necessary to refer to in detail. Then comes the Act of April 11, 1856 (Pub. Laws, 315), the third section of which provides that "whosoever any husband shall have deserted or separated himself from his wife, or neglected or refused to support her, or she shall have been divorced from his bed and board, it shall be lawful for her to protect her reputation by an action for slander or libel; and she shall also have the right, by action, to recover her separate earnings or property: *Provided*, That if her husband be the defendant, the action shall be in the name of a next friend." The plaintiff contends that her suit can be sustained under this last Act.

The Act of 1848, which secures to a married woman the use and enjoyment of her separate estate, contains no provision by which her rights thereto can be enforced against her husband. It may very well be that a common-law action could not be maintained against him for that purpose. The Act having given the right, there must be a remedy to enforce it, otherwise it would fail of its purpose in part, at least. If a husband were to deprive his wife of the use and enjoyment of her separate estate, it would be an act contrary to law and prejudicial to her interests, and we have no doubt a court of equity could interfere to restrain such action.

Many such questions may arise as to what would constitute an interference by the husband with the separate property of the wife. If they are living together on her property, her right to eject him therefrom arbitrarily may well be questioned. The home of the husband is the home of the wife, and the home of the wife must necessarily be the home of the husband, if he chooses to avail himself of it; otherwise all unity of person between them would be destroyed, which we do not think was intended by the Act of 1848. But if the husband desert his wife we do not think he can take possession of her real estate and hold it as against herself and her tenants.

Upon the trial of the cause below the learned judge submitted to the jury the question whether this husband and wife took possession of the property in dispute under an agreement

or arrangement between them that they were to make it their home; and instructed them that if the possession was taken in pursuance of such an arrangement the plaintiff could not recover. This clearly appears from that portion of the charge embraced in the third specification. "It is a question," said the learned judge, "you will consider, whether that possession was in pursuance of this arrangement made with his wife, or whether it was inconsistent with that arrangement. If it was in pursuance of that arrangement, she would not be entitled to recover; but if it was inconsistent with that arrangement (and it is for you to say whether or not the bringing of a family into a three-roomed house is inconsistent with his possession in pursuance of that arrangement) she would be entitled to recover. He must not only have taken possession, but he must retain it in pursuance of that agreement."

We fail to discover error in this instruction. The whole matter of the unhappy difficulties between these parties, and the facts which led up to the occupation of the premises were before the jury, and they have found that the possession of the husband was inconsistent with the alleged agreement. With this fact found against them, the only point left the defendants is the question whether the action of ejectment can be maintained. As before intimated, we think a bill in equity would lie against the husband at the suit of the wife to protect her in the enjoyment of her separate estate, independently of the Act of 1856. As before observed, it is an act contrary to law and prejudicial to the interests of the wife for a husband to deprive her of the possession and enjoyment of her separate estate, and as there is no remedy at law provided for such case we have no doubt that the jurisdiction of equity would attach under the Act of 1836, conferring equity powers upon the courts. The action of ejectment is often a substitute for a bill in equity, and we have in our practice what is known as an equitable ejectment. It is used constantly to enforce specific performance of contracts for the sale of real estate, and in some other instances. It is a convenient and plastic remedy, and more speedy than a bill in equity. The learned judge below treated this suit throughout as an equitable ejectment, and, while it is not so technically, we see no objection to regarding it as substantially such a proceeding. If it were necessary to frame a new writ to meet the exigencies of this case, we have ample power to do so under the third section of the Act of June 16, 1836 (Pub. Laws, 785). It is not needed that we should frame a new writ where we have one already in existence which will accomplish all that is needed. Regarding this action as a substitute for a bill in equity, we are of opinion that it can be sustained.

There is no merit in the fifth and sixth specifications. The record referred to was properly excluded. The plaintiff was not a party to that proceeding, and it cannot be given in evidence to affect her.

Judgment affirmed.

ARKANSAS SUPREME COURT.

CITY OF FAYETTEVILLE, *App't.*,
v.
James CARTER.

(....Ark.....)

The power to regulate the soliciting from travelers of patronage for hotels, etc., conferred upon municipal corporations by § 751, Mansf. Dig., gives them the right to charge a license fee sufficient in amount to cover expense of the license and of the enforcement of such police superintendence as may be lawfully exercised over the business; and unless the contrary appears courts will presume the amount fixed upon reasonable, and will not interfere with the discretion exercised in fixing it. In the absence of evidence a fee of \$12.50 will not be held unreasonable.

(December 7, 1889.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Washington County in favor of defendant upon appeal from Mayor's Court of the City of Fayetteville, in an action to recover the penalty provided for violation of a city ordinance. *Reversed.*

The case sufficiently appears in the opinion.

Mr. C. R. Buckner, for appellant:

The license fee demanded is not a tax upon an occupation, but a compensation for issuing the license, for keeping the necessary record and for municipal supervision over the business, and the sum of \$12.50 per annum is not excessive.

Fort Smith v. Ayers, 43 Ark. 82, and cases there cited.

Mr. J. M. Gunter for appellee.

Battle J., delivered the opinion of the court:

Section 751, Mansf. Dig., provides that all

municipal corporations shall have power "to regulate drumming or soliciting persons who arrive on trains or otherwise, for hotels, boarding-houses, bath-houses or doctors, and to license such drummers, and to provide that each drummer shall wear a badge, plainly exposed to view, showing for whom and for what he is drumming or soliciting patronage, and to punish by fine any violation" of such provision.

In pursuance of this section, the council of the City of Fayetteville passed an ordinance forbidding all persons to drum or solicit patronage from persons, who arrive on trains or otherwise, for any hotel or boarding-house, without having first obtained a license to do so, and paid therefor the sum of \$12.50, and making a violation thereof an offense punishable by fine. In a prosecution against appellee, this ordinance, without any evidence of its invalidity except the ordinance itself, was held void, because the \$12.50 was an unreasonable fee for the license.

The authority of a municipal corporation to pass an ordinance requiring solicitors of patronage for hotels and boarding-houses to take out a license, and pay a reasonable fee therefor, is conceded by both parties. The only question presented for our consideration is, Is the fee fixed by the ordinance in question reasonable?

The power to license and regulate, granted by the Statute, was conferred solely for police purposes, and municipal corporations have no right to use it as a means of increasing their revenues. They can require a reasonable fee to be paid for a license. The amount they have a right to demand for such fee depends upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed. A fee sufficient to cover the expense of issuing the

NOTE—*License of occupations and privileged taxes.*

Where a license is required as a condition precedent to the pursuit of an occupation, and not with reference to revenue, the provisions of the Constitution as to equality and uniformity in taxation do not apply. *Addison v. Saulnier*, 19 Cal. 82; *Thomasson v. State*, 15 Ind. 449; *New Orleans v. Turpin*, 13 La. Ann. 58; *Baker v. Cincinnati*, 11 Ohio St. 534.

The provisions of the Constitution as to equality and uniformity apply to property alone, and not to taxation on privileges or occupations. *Egyptian Levee Co. v. Hardin*, 27 Mo. 496; *Washington v. State*, 13 Ark. 732; *McGee v. Mathis*, 21 Ark. 40; *People v. Coleman*, 4 Cal. 46; *Bohler v. Schneider*, 49 Ga. 196; *Home Ins. Co. v. Augusta*, 50 Ga. 530; *Slaughter v. Com.* 13 Gratt. 737; *Eyre v. Jacob*, 14 Gratt. 422; *Adams v. Somerville*, 2 Head, 383; *Aulanier v. Governor*, 1 Tex. 655; *Texas Banking Ins. Co. v. State*, 42 Tex. 636; *Wiggins Ferry Co. v. East St. Louis*, 102 Ill. 560; *Walker v. Springfield*, 94 Ill. 364; *St. Louis v. Green*, 7 Mo. App. 468; *Ex parte Robinson*, 12 Nev. 233; *Gatlin v. Tarboro*, 78 N. C. 119; *Boyé v. Girardey*, 23 La. Ann. 717; *Walters v. Duke*, 31 La. Ann. 668; *Western U. Tel. Co. v. Mayer*, 23 Ohio St. 537; *Glasgow v. Rowe*, 43 Mo. 479. See *Young v. Henderson*, 76 N. C. 420.

They have no application to licenses. *People v. Hartwell*, 12 Mich. 508; *State v. Jones*, 19 Ind. 356; 6 L. R. A.

Dishon v. Smith, 10 Iowa, 218; *State v. Orvis*, 20 Wis. 235.

They do not prohibit indirect taxation by way of licenses upon particular pursuits. Such indirect taxation may be made effectual as a police regulation. *Anderson v. Kerns Drain Co.* 14 Ind. 190; *Bright v. McCullough*, 27 Ind. 223; *Ash v. People*, 11 Mich. 347; *Pleuler v. State*, 11 Neb. 547.

And so especially when the license required is imposed with reference to the purposes of police. *Addison v. Saulnier*, 19 Cal. 82; *Thomasson v. State*, 15 Ind. 449; *New Orleans v. Turpin*, 13 La. Ann. 58; *Baker v. Cincinnati*, 11 Ohio St. 534.

As a police regulation the price of licenses may be graduated by the populousness of the community in which the privilege is to be exercised. *Ex parte Marshall*, 64 Ala. 266.

The usual method is to tax peddlers a specific sum by the year. *Wynne v. Wright*, 1 Dev. & B. L. 19; *Cowles v. Brittain*, 2 Hawks, 204; *Wilmington v. Roby*, 3 Ired. L. 250.

A fee for a license regulating occupations or business should be limited to the necessary expense of the regulation. *St. Louis v. Boatmen's Ins. & T. Co.* 47 Mo. 150.

License fees are not taxes, but prices paid for the privilege of exercising a franchise. *Chaddock v. Day*, 4 L. R. A. 809, 75 Mich. 527.

As to municipal taxation of occupations, see *Richmond & D. R. Co. v. Reidsville*, 2 L. R. A. 284, note, 2 Intern. Com. Rep. 416, 101 N. C. 404.

As the attempt to commit suicide is the only crime involved in the purpose and act of a party having in view the taking his own life, it is not seen how there can, in the law, be recognized an attempt to commit the crime; for whatever may be done with the intent and purpose of suicide is involved in the attempt to do it, and thus constitutes an ingredient of the main and only offense. It must, for the purpose of question here, be assumed that Darrow had the purpose of taking his own life, and that he fully accomplished such purpose. The result of his act, influenced by such intent, then, was his death. By the act of taking his own life he violated no criminal law, unless the attempt to do it may be distinguished from the act accomplished. An act is characterized by the purpose, when ascertained, of the party doing it, or by its result. If the act fail to accomplish its purpose, it constitutes an attempt; but if the result of it is the consummation of the purpose, the act is not commonly designated as an attempt. The common acceptance of terms used, and which do not necessarily have a technical meaning, is entitled to some consideration in the construction of contracts, where the intention of the parties is sought for, as it must be, in the language employed. For the purpose of upholding the contract of insurance, its provisions will be strictly construed as against the insurer. *McMaster v. North America Ins. Co.* 55 N. Y. 222; *Dilleber v. Home L. Ins. Co.* 69 N. Y. 258.

When its terms permit more than one construction, that one will be adopted which supports its validity (*Coyne v. Weaver*, 84 N. Y. 386); and it is only when no other is permissible by the language used that a construction which works a forfeiture will be given to such an instrument. *Hitchcock v. North Western Ins. Co.* 26 N. Y. 69; *Griffey v. New York Cent. Ins. Co.* 1 Cent. Rep. 528, 100 N. Y. 417.

The reason assigned for such rule of construction is that the insurer is supposed to have chosen the language to express the terms of the contract; and it has become a rule of law that, if it be left in doubt whether words of the contract "were used in an enlarged or a restricted sense, other things being equal, the construction will be adopted which is most beneficial to the promisee." *Hoffman v. Aetna Ins. Co.* 32 N. Y. 405, 418.

There is nothing in the language of the policy to indicate that the defendant had reason to suppose that the promisee understood that

suicide of the member came within its terms; and words may easily have been employed to embrace it within a condition, if it had been in the contemplation of the defendant as an act of forfeiture of the claim of the beneficiary upon the contract. Inasmuch as suicide is not a violation of the criminal law, the words do not necessarily or clearly import that the act which produces it is within the provision in question, or that it was within the intention of the defendant. And that is a sufficient reason why they should not be extended, or their meaning refined by interpretation, with a view to treat the act causing death as within the invalidating condition of the policy. *Griffey v. New York Cent. Ins. Co. supra.*

Thus far the question has not been considered whether the mere consequence or result of an act of the member in violation of criminal law would come within such provision. If literally construed, it might not. The contract is rendered void if the member "die . . . in violation of, or attempt to violate any criminal law." It is not death in consequence of the violation of law, but death in or during the act of violation of law, that is expressed by the words used.

In *Bradley v. Mut. L. Ins. Co.* 45 N. Y. 422, the conclusion was warranted that at the time of his death the assured was engaged in the violation of law; and such was the case in *Cluff v. Mut. L. Ins. Co.* 13 Allen, 308, where a policy on the same life, and containing the same provision, was the subject of the action, and the defense was the same.

In *Murray v. New York L. Ins. Co.* 96 N. Y. 614, the provision of the policy was such that if the assured should die "in, or in consequence of, . . . a violation of the laws," etc., the policy would be void.

It may be, if the mortal injury is received while the assured is engaged in the criminal act, that the death following as the consequence comes within the import of the provision. But the view taken renders it unnecessary to consider that question and no opinion is expressed upon it. The conclusion is that the death of the member by suicide did not, within the meaning of any provision of the policy, render it for that reason void; and therefore the exclusion of the evidence upon that subject was not error. No other question requires the expression of consideration.

The judgment should be affirmed.

All concur, except Haight, J., not sitting.

MICHIGAN SUPREME COURT

Henry HESS, *Appt.*,

v.

Leman L. CULVER.

(....Mich.....)

1. The fact that a transaction is against public policy in law will not prevent a remedy

against one party who is guilty of fraud by means of his persuasive or other influence over the other party in favor of the latter who is not consciously wrong, but who is actually deceived by the fraud and misrepresentations of the former party..

2. The maker of a note given for Bohemian oats, purchased at a price greatly beyond their value and never delivered, who was

NOTE.—Nature of contract determines its validity. It is the nature of the contract which determines its validity. *McNamara v. Gargett*, 12 West. Rep. 6 L. R. A.

680, 66 Mich. 454; *Holladay v. Patterson*, 5 Or. 137-180, *Richardson v. Crandall*, 48 N. Y. 348-362.

Wherever any contract conflicts with the morals

induced to give it by persistent acts and misrepresentations concerning the salable prospects of the oats to be grown, and the responsibility and legal character of a mythical corporation whose bond is given him agreeing to sell for him twice the quantity purchased at the same price per bushel, may recover from the person defrauding him the damages thereby sustained, when he has been compelled to pay the note to a bona fide holder; and he will not be denied relief on the ground that he is *in part delicto*.

3. Fraudulent representations as to an alleged corporation which has no legal existence, and whose pretense of legal existence is a fraud, are not within the statute which requires fraudulent representations as to the character, etc., of another party to be in writing in order to sustain an action for fraud.

(November 8, 1880.)

ERROR to the Circuit Court for Bay County to review a judgment upon a verdict directed for defendant in an action to recover the amount collected from plaintiff upon certain promissory notes alleged to have been obtained from him by the fraud of defendant. *Reversed.*

The facts sufficiently appear in the opinion.

Messrs. T. A. E. & J. C. Wendock, for plaintiff, appellant:

of the time, and contravenes any established interest in society, it is void as being against public policy. Story, Conf. L. § 546; *McNamara v. Gargett, supra*.

In the law of contracts, the first purpose of the courts is to look to the welfare of the public; and if the enforcement of the agreement would be inimical to its interests, no relief could be granted to the party injured, even though it might result beneficially to the party who made and violated the agreement. *McNamara v. Gargett, supra*; Metzger v. Cleveland, 8 Ind. L. Mag. 42.

If any part of a consideration is illegal, the whole consideration is void, because public policy will not permit a party to enforce a promise which he has obtained by an illegal act or promise, although he may have connected with the act or promise another which is legal. 1 Parsons, Cont. 457; Snyder v. Willey, 53 Mich. 488; Lyon v. Waldo, 36 Mich. 358; *McNamara v. Gargett, supra*; Niver v. Best, 10 Barb. 339; Wynne v. Whisenant, 27 Ala. 46; Valentine v. Stewart, 15 Cal. 387; Raguet v. Roll, 7 Ohio, 78.

The whole contract is tainted and avoided by the part of the consideration which is illegal. *McNamara v. Gargett, supra*.

Such contracts in this State have already had the seal of condemnation stamped upon them by the legislative branch of the state government,—Act, No. 21, Pub. Acts 1887, being "An Act to prevent the taking of bonds, promissory notes and other evidences of indebtedness, in whole or part consideration of bonds, contracts and other agreements for the sale of grain, seeds and other cereals at a fictitious price, and to prevent the sale and transfer of such evidences of indebtedness and to provide a punishment therefor." *Ibid.*

Bohemian oats transactions fraudulent and void.

Several instruments made at one and the same time, and having relation to the same subject matter, must be taken to be parts of one transaction, and construed together, for the purpose of showing the true contract between the parties. *Sutton v. Beckwith*, 12 West. Rep. 649, 68 Mich. 308; *Singer Mfg. Co. v. Haines*, 36 Mich. 386; *Smith v. Van Blarcom*, 45 Mich. 371; *Dudgeon v. Haggart*, 17 Mich. 276; 6 L. R. A.

It was for the jury to decide, as a question of fact, whether the plaintiff was deceived by the defendant, whom he had theretofore regarded as an honorable man, into giving him notes to "sharpers" and "swindlers," or whether he was equally guilty with them of a fraud which would prevent recovery.

Wheaton v. Beecher, 9 West. Rep. 890, 66 Mich. 307. See *Sutton v. Beckwith*, 12 West. Rep. 647, 68 Mich. 308; *McNamara v. Gargett*, 12 West. Rep. 650, 68 Mich. 454.

Messrs. Simonson, Gillett & Court-right, for defendant, appellee:

The scheme upon its face was a transparent fraud and a gambling contract and was thoroughly explained to and fully understood by plaintiff. The design to defraud third parties was mutual and was entered into by plaintiff after a full understanding of the scheme. In such cases the court leaves the parties where it finds them.

McNamara v. Gargett, 12 West. Rep. 650, 68 Mich. 454. See *Murphy v. Bedell*, 53 Mich. 487; *Zimmermann v. Bidwell*, 62 Mich. 205; *Davis v. Seeley*, 71 Mich. —, 88 N. W. Rep. 901.

The representations, [not being in writing, come squarely within section 6188, How. Stat., which provides that "no action shall be brought

Eberts v. Selover, 44 Mich. 519; *Chapman v. Colby*, 47 Mich. 43-51; *Bronson v. Green*, Walk. Ch. 56; *Makepeace v. Harvard College*, 10 Pick. 298-308; *Jackson v. McKenny*, 8 Wend. 233.

If at the time the note in question was procured, it was represented to defendant that the party executing the bond and undertaking to effect a sale of oats for him was a corporation, and was thoroughly responsible and had \$150,000 deposited as security for performance of the contract made by it, that the obligor in the bond given was incorporated, and the defendant relied upon such circumstances, and the same were false, then the note was fraudulently procured, and the plaintiff must show that his immediate indorser or himself was a bona fide holder for value. *Mace v. Kennedy*, 12 West. Rep. 655, 68 Mich. 389.

Where the consideration of the note was not the forty bushels of oats at \$10 per bushel, but the agreement or bond, executed and delivered at the same time as the note, the transaction, as a whole, appealed to the cupidity of the maker. He was to receive \$800 for eighty bushels of oats before he was to pay \$400 for the forty bushels delivered to him. This agreement formed the consideration of his note. *Sutton v. Beckwith, supra*.

Nor was this agreement or bond a collateral undertaking. It was executed at the same time as the note, and a part of the same transaction. *Ibid.*

As against parties having notice, the note and contract are void on the ground of public policy. It is upon its face a gambling contract. *McNamara v. Gargett*, 12 West. Rep. 650, 68 Mich. 454.

The holder of a note executed under such a contract, who purchases with knowledge of the consideration and that such a corporation did not and could not exist under the law, cannot recover against the maker. *Ibid.*

The negotiation of the note by the payee to the plaintiff was a fraud upon the maker, and nothing but the negotiable quality of the note, as it appeared standing alone, could deprive the defendant of his right to show the whole contract of which it was only a part. *Sutton v. Beckwith, supra*; *Smith v. Van Blarcom*, 45 Mich. 373. See *Evans v. Stuhberg*, post, 501, note.

(December 12, 1889.)

A PPEAL by defendant, Henry George, from a decree of the Court of Chancery holding the provision of a certain will, favorable to him, to be void upon a bill filed by the executor for a construction of the will. *Reversed.*

Statement by Beasley, Ch. J.:

"*Lastly.* All the rest and residue of my estate, of any and every form, kind and description whatsoever, I hereby give, devise and bequeath, under the name of 'The Hutchins' Fund,' to Henry George, the well-known author of 'Progress and Poverty,' his heirs, executors and administrators, in sacred trust, for the express purpose of 'spreading the light' on social and political liberty and justice in these United States of America, by means of the gratuitous, wise, efficient and economically conducted distribution all over the land of said George's publications on the all-important land question, and cognate subjects, including his 'Progress and Poverty,' his replies to the criticisms thereon, his 'Problems of the Times,' and any other of his books and pamphlets which he may think it wise and proper to gratuitously distribute in this country: provided, *first*, that said George, his heirs, executors and administrators shall regularly furnish true annual reports of the management and disbursement of the said 'Hutchins' Fund' to the paper called 'The Irish World and the American Industrial Liberator,' or its acknowledged successor, and shall also annually mail, or otherwise send, a copy of said paper, containing such annual report, to each of the following persons, to wit: my afore-mentioned wife, Mary Hutchins, now of this place, William S. Wood, now of Parker, County of Randolph, State of Indiana, and James Hutchins, now of Selma, County of Delaware, and State of Indiana: and provided, *second*, that said George, his heirs, executors and administrators, shall cause to be inserted or printed, opposite the title-page of every free copy of his books distributed by means of this fund, this, my solemn request, virtually, to wit, that each recipient shall read it, and then circulate it among such neighbors or other persons as in his best judgment will make the best use of it. In testimony whereof I have hereunto set my hand and seal, and publish and declare this to be my last will and testament, in the presence of the witnesses named below, this eighth day of September, in the year one thousand eight hundred and eighty-three.

"George Hutchins. [L. s.]"

Messrs. John T. Woodhull, Samuel W. Beldon and James F. Minturn for appellant.

Mr. George A. Vroom for respondent, Braddock.

Messrs. S. C. Woodhull and D. J. Pancoast for Mary Hutchins.

Mr. C. V. D. Joline for James Hutchins.

Beasley, Ch. J., delivered the opinion of the court:

This is an executor's bill, seeking a judicial exposition of the last will which he is called upon to execute. The instrument in question was executed by one George Hutchins, whose

domicil at the time of his death was in this State. It is dated the 28th day of February, 1887, and it contains a residuary clause that is set forth at large in the statement of facts prefacing this opinion. In that clause the testator has set apart property to be devoted to the propagation of certain designated works, as will hereafter appear, and the question propounded to this court is whether such testamentary disposition is to be established as a charitable use.

It is familiar learning that, from the enumeration of certain subjects in the Statute of Elizabeth, and from the judicial expositions of that Act, there have been evolved certain defined classes of testamentary gifts that are now universally admitted to be, in the estimation of the law, charitable uses. With regard to such classes, debate and doubt have ceased, and consequently all examination of the grounds upon which such classification has been justified would, at the present time, be profitless, and nothing better than empty pedantry; for it is obvious that the instance now before this court belongs, so far as the testamentary intent is concerned, to one of such established classes. The testator's direction is that the property designated by him shall "constitute a sacred trust, for the express purpose of spreading the light on social and political liberty and justice in these United States of America." That such a purpose is a charitable use, according to the legal import of those terms, is self-evident, in view of the present state of the decisions on that subject. Consequently, if there be any illegality in this testamentary disposition, of necessity it must reside in the methods contrived by the testator for the fulfillment of such legitimate purpose. Those methods are described by the testator in these words, viz.: "The gratuitous, wise, efficient and economically conducted distribution all over the land of said George's publications on the all-important land question, and cognate subjects, including his 'Progress and Poverty,' his replies to criticisms thereon, his 'Problems of the Times,' and any other of his books and pamphlets which he may think it wise and proper to gratuitously distribute in this country."

It is now urged that the doctrines taught in the works thus designated are of such a character that the court will not permit their dissemination. The inquiry thus started should be preceded by a consideration of the rule or test applicable in such affairs. It is plain that such rule has but little to do with the ordinary canons of criticism. For present purposes the scientific or literary value of these works are not to enter into the account. If I should say that I have concluded, which is the truth, that these works of Mr. George have greatly elucidated and enriched, in many ways, the subjects of which they treat, and that they are very valuable contributions to the science of economics, it would not be shown that a step had been taken in the path of present duty.

It is not to be doubted that the public circulation, by virtue of a charitable use, of the works of Sir Robert Filmer, which maintain the divine right of kings, would be entitled to the judicial *imprimature* equally with a treatise on government under the signature of John Locke. It matters not in the least to the judicial inquiry whether the instrumentalities ap-

pointed by the donor to fulfill his purpose be good or bad, fit or unfit; whether they be the best possible or the worst possible. In this particular the largest discretion resides, and properly resides, in the creator of the trust. These public benefactions are properly regarded as matters of great interest to the community; as entitled to the most favorable reception by the courts, and to their amplest protection. It is not surprising therefore, that it has heretofore been understood that the entire restriction imposed by the law on such donations is that comprised in a single sentence: "The writings to be circulated must not be, when considered with respect to their purpose and general tendency, hostile to religion, to law or to morals." The rule, in this definite form, in my opinion, has been by repeated adjudications thoroughly established; and the only difficulty inherent in the subject is to properly select the writings to which it is applicable.

Regarding, then, this principle of proscription as settled, the question arises, Has it been applied by the vice-chancellor in the present instance? It has not been, and could not be, reasonably alleged that the writings now in question are either sacrilegious or immoral; but the argument proceeds exclusively on the theory that the doctrines they teach are antagonistic to the law. It was urged that this was the case, by reason of the hypothesis of this author respecting the title to land. The view on that subject expressed by Mr. George is that the earth belongs to mankind, and is a heritage that is inalienable, and that, consequently, one generation or a series of generations of men cannot, either by act or omission, debar a succeeding generation from claiming its own. The doctrine therefore inculcated is that no private absolute ownership in land can rightfully exist; the consequence being that the public, as the real proprietor, has the right to regain possession of all property of this nature by the use of any legal method. The decree appealed from avoids the charitable use attempted to be created, and the principle of decision is thus stated in the opinion pronounced. The vice-chancellor says: "Clearly, the author, in these passages, not only condemns existing laws, but denounces the fact that the title to land in private individuals is secure, as robbery,—as a crime. It is this aspect of the case which leads me to the conclusion that the court ought to refuse its aid, in enforcing the provisions of this will. Whatever might be the rights of the individual author, in the discussions of such questions in the abstract, it certainly would not become the court to aid in the distribution of literature which denounces as robbery—as a crime—an immense proportion of the judicial determinations of the higher courts. This would not be charitable. Society has constituted courts for the purpose of assisting in the administration of the law, and in the preservation of the rights of citizens, and of the public welfare; but I can conceive of nothing more antagonistic to such purpose than for the courts to encourage, by their decrees, the dissemination of doctrines which may educate the people to the belief that the great body of the laws which such courts administer concerning titles to land have no other principle for their basis than robbery."

—L. R. A.

A single glance at the rule of judgment here propounded will suffice to show that it is one of entire novelty. It does not appear to have been suggested, or even alluded to, in any former consideration of the subject. Stripped of unnecessary terms, in its ultimate analysis it promulgates this far-reaching principle: that a court of law will not, in view of the purposes for which it was instituted, lend its aid by its decree to the agitation of the question whether the laws which it is in the habit of executing have or have not any better foundation than wrong and injustice. In this analysis I have of course disregarded the presence of the term "robbery" in the foregoing quotation that gives the *ratio decidendi* in the court below, because I am well aware that the learned vice-chancellor did not put his judgment, either in whole or in part, upon a mere epithet or turn of phrase. I have also put, in a general form, the judicial proposition, because it would be manifestly absurd to declare that the courts will not assist in providing for a discussion of the existing title to land, but that such refusal does not extend to the discussion, in a similar way, of the title to personalty and personal rights. It seems inevitable that the proposed principle of judgment must be applicable to the whole field of established law, if it be applicable to any part of it. And before leaving this formula, that embraces the ground of decision in the court below, it is important to observe that its expressions convey the idea that all that the court does, or is required to do, in these instances, is to refuse to aid in the circulation of the writings that are impugned; but that in this respect they are misleading, for what the court does is to adjudge that it is not permissible for any person to make provision for such circulation.

The decree in this case frustrated the will of this testator, declared his trust void, and diverted the property invested in it in other directions. It would seem, therefore, that the rule in question should have been, and, if it is to be adopted, must be, thus formulated; that a court of equity will not permit the fulfillment of a testamentary use that is designed to circulate works that call in question any of the fundamental rules and establishments of the law.

The vice-chancellor educes this principle from a consideration of the functions and constitution of judicial tribunals; and if I were to stand on that ground, and indulge in speculation, it must be confessed that my conclusion would be the opposite of that which he has arrived at. I cannot perceive for what reason the testator's scheme was designed to be educational with respect to an important branch of legal and economic science, and in his opinion the circulation of the works of Mr. George would contribute to the accomplishment of that purpose; therefore, viewing the subject from the stand-point suggested, I could not, in the line of judicial duty, have sanctioned a principle that, while it would repress the dissemination of the writings of Mr. George, would undoubtedly lend its aid to the circulation of the reply of the Duke of Argyll, on the ground that the former are aggressive towards the legal establishment in question, while the monograph of the latter tends on that subject

to quietism and public acquiescence. In such a situation, if I had possessed the power, I should not only have sanctioned, but have favored, the propagation of any or all of these works, in the conviction that such discussions advance the cause, not of error, but of truth. If, therefore, I were to accept the principle of judgment adopted by the vice-chancellor, I should have been obliged to dissent from his conclusion.

But, waiving such considerations, let us turn to the question how far the principle of decision under criticism will stand the touch of judicial authority. Is it incompatible with judicial position to aid, if invested with such power, in the circulation of the works of a learned and ingenious man, putting under examination and discussion any part of the legal system? It would not seem to me that, as a judge, I was called upon to discard the use of means in the development of the law, which in every other science are regarded as absolute essentials. With respect to all intellectual creations, embracing, of course, laws and judicial institutions, the most potent of all forces tending to improvement and evolution are those of examination and discussion; and, recognizing them as the motive agents of progress, I should very confidently, have concluded that it was neither proper nor becoming in me, as a judge, to refuse to this testator the right to use them in this instance. According to the theory indicated, and, in some degree, expounded, in the beginning of this opinion, it is attempted to be shown that, on such occasions as the present, the *index expurgatorius* to be applied by the court is formed on the principle that only such works are to be proscribed as manifestly tend to violations of law, or to the corruption of morals or religion. To this catalogue the court below, as has appeared, added a class comprising such writings as a court, from its inherent nature, could not properly or becomingly aid in circulating. It is evident that this extension of the rule will not harmonize with any of the adjudged cases. A reference to two of such authorities will be a sufficient illustration. Both of these decisions are cited in the briefs of counsel, and are referred to in the opinion of the vice-chancellor without hostile comment.

The first to which attention will be called is that of *Thornton v. Howe*, 81 Beav. 14. It was a case embracing a charitable use, and the words of the bequest were, "to propagate the writings of Joanna Southcote." The argument took place before Sir John Romilly, who, upon looking into the works in question, found that their authoress was under the delusion that she was with child by the Holy Ghost; that she had conversations with the devil, and inter-communings with the spiritual world. In view of these things the master of the rolls said: "I have found much that, in my opinion, is very foolish, but nothing which is likely to make persons who read them either immoral or irreligious. I cannot therefore say that this devise of the testatrix is invalid by reason of the tendency of the writings of Joanna Southcote." And afterwards his further declaration is: "But if the tendency were not immoral, and although this court might consider the opinions sought to be propagated

foolish, or even devoid of foundation, it would not on that account declare it void, or take it out of the class of legacies which are included in the general term, 'charitable bequests.'"

It needs no comment to show that this decision is irreconcilable with the rule upon which the present case has been decided. The master of the rolls, concluding that the tendency of the works was not immoral or irreligious, assented to their circulation, although he was satisfied that the doctrines taught by them were foolish and without foundation.

The second authority to which I shall refer is that of *Jackson v. Phillips*, reported in 14 Allen, 589. This controversy also related to a charitable use; the bequest being of a fund, to trustees, to be expended, at their discretion, "in such sums, at such times, and such places as they deem best, for the preparation and circulation of books, newspapers, the delivery of speeches, lectures and such other means as in their judgment will create a public sentiment that will put an end to negro slavery in this country." The decision of the court, in its own language, was: "The bequest itself manifests its immediate purpose to be to educate the whole people upon the sin of a man's holding his fellow-man in bondage; and its ultimate object,—to put an end to negro slavery in the United States,—in either aspect, a lawful charity."

It is conspicuous that this decision is diametrically opposed to the rule under criticism. In the present case the decision was that the court would not help in the circulation of books that strove to show that private ownership in lands, the validity of which had been repeatedly recognized by the courts, had no better foundation than robbery. In the reported case, the court helped the dissemination of writings whose object was to prove that the ownership of human beings, which was a species of property established by the Federal Constitution itself, and sustained as such by repeated judgments both in the national and state courts, had no better foundation than sin. The legal rule imposing limits on charitable uses is one of great importance; and, influenced by that consideration, I have examined with care the principle upon which the present case has been decided, and my conclusion is that such principle does not consist with the authorities, and, if it were adopted by this court, would be productive of serious mischief. If sanctioned, the subject, with respect to the rights of donors in this field, would be involved in clouds and darkness, for instead of a rule we would have a speculation. By force of the prevalence of such a change, it may well be doubted whether it would not be altogether impracticable to disseminate, by means of a charitable use, the works of any of the leading political economists, either of the present or past age; for it is believed that none can be found that do not, in material particulars, make war, more or less aggressive, upon some parts of every legal system as it now subsists. Certain it is that neither the Political Economy, of Mr. Mill, nor the Social Statics, of Mr. Herbert Spencer, could be so circulated, for each of these very distinguished writers denies the lawfulness of private ownership in land. A principle bearing such fruits could not properly

be introduced into our legal system, except upon the compulsion of irresistible authority.

It is obvious that, by the application of the ordinary test, and which, it has been thus insisted, is, and always has been, the legal test, the works now in question do not come under the proscription of the law. It has been heretofore stated that they do not tend to the corruption of morals or religion, and it is equally evident that they are not opposed to any legal rule or ordinance. What these writings are calculated and were intended to effect is to

cause the repeal, in a legitimate mode, of the laws at present regulating the title to land, and the substitution of a different system. It would seem to be quite out of the question for this court to declare that such an endeavor is opposed to the law, for it is simply a proposition to alter the law according to the law.

The charitable use created in this will must be sustained, and the decree appealed from, to that end, must be reversed.

Reversed unanimously

WEST VIRGINIA SUPREME COURT OF APPEALS.

William MILLER *et al.*

Samuel A. McMECHEN, Admr., etc., of
George S. Neff, Deceased, *App't.*

(.... W. Va.)

*1. When there is a decree in the circuit court against an administrator for money to be paid out of the assets in his hands to be administered, and the administrator then dies, and an administrator *de bonis non* is appointed by the proper authority, — *Held:*

(a) Such administrator *de bonis non*, and not the administrator of the deceased administrator, is the proper party to appeal from such decree.

(b) Such administrator *de bonis non* may, within the time prescribed by law, petition for an appeal from such decree, stating therein the death of the former administrator, and exhibiting the order appointing him administrator *de bonis non*; and it is not necessary for him to make himself a formal party to the record by an order of the circuit court before petitioning for such appeal.

*Head notes by SNEYDER, P.

2. The publication of notice to take depositions under section 2, chap. 121, Code, which requires the notice to be published once a week for four successive weeks, is completed on the fourth issue of the newspaper containing it; and if a reasonable time elapses between the date of said fourth issue and the taking of the depositions the notice will be sufficient.

3. To constitute a valid parol gift, there must be an actual delivery of the thing given, but the delivery must be according to the nature of the thing given, and if the property is at the time in the possession of the donee, as agent for the donor or otherwise, it is not necessary that the donee should surrender to the donor his actual possession, in order that the latter may redeliver the same to him in execution of the gift; but if the donor relinquishes all dominion over the thing given, and recognizes the possession of the donee as being in his own right, and the latter accepts the gift, and retains the possession in virtue thereof, the gift is complete.

4. A case in which this court held, under the facts and circumstances disclosed by the record, a gift *inter vivos* by an aunt to her nephew of certain money, which was shortly be-

NOTE.—What constitutes gift *inter vivos*.

To make a valid gift *inter vivos* there must be a delivery with the intention of making the gift. If the circumstances clearly evince the intention, it is sufficient; and if these are equivocal an explicit declaration afterward of that intention is competent. Doty v. Wilson, 47 N. Y. 583.

There must be some act of delivery out of the possession of the donor for the purpose and with the intent that the title shall thereby pass in order to render such a gift complete. Howard v. Windham Co. Sav. Bank, 40 Vt. 597.

The declarations of the donor are regarded as of great weight when there is other evidence from which the making of the gift may be inferred. Trow v. Shannon, 8 Daly, 242.

Whether a gift was alone sufficient to pass the title absolutely to the donee, questioned in Blasdel v. Looka, 52 N. H. 243.

If the act of the transfer be complete on the part of the donor, subsequent acceptance by the donee before revocation will be sufficient. Brabrook v. Boston F. C. Sav. Bank, 104 Mass. 223, 6 Am. Rep. 224. See Minchin v. Merrill, 2 Edw. Ch. 333.

To constitute a valid gift *inter vivos*, there must be a delivery of the thing given, either actual or constructive; but it is not necessary that it be delivered directly to the person intended. It may be delivered to another for him, or to a trustee for the benefit of the donee. Love v. Francis, 5 West. Rep. 753, 63 Mich. 181.

Where the donor records the mortgage which se-

cures the note, and retains the note in his own possession until his death, as his security for the interest payable to him, he makes himself trustee for the beneficiaries; and making them payees of the note was a constructive delivery of the same, which placed the title in them at once. *Ibid.*

Delivery of money by a married woman, accompanied by instructions that after her death the donee shall use it for the support of the donor's husband if he survive her, and by the donee's acceptance, creates a valid trust, not a mere agency revocable by the donor's death. Gilman v. McArde, 1 Cent. Rep. 67, 90 N. Y. 451.

Where the donor delivered several United States bonds to a person, directing him to give the same to his children at his death, it was sufficient delivery. Love v. Francis, *supra*.

Where a mother had loaned her daughter money to buy property, for which the daughter and her husband had given notes, and three weeks before the mother's death she told her daughter she wanted her to have what she had put in the place, and the daughter thereupon removed a trunk containing the notes to another room, and on the night of her death the mother said that what she had let her have she wanted her to have; but the daughter did not have the key of the trunk, and the notes were not removed from the trunk till after the mother's death, — it was held not a good gift for want of delivery. Lamson v. Monroe (Me.) 2 New Eng. Rep. 453. See, generally, Beaver v. Beaver (N. Y.), *ante*, 403.

fore, and, perhaps, at the time of the gift, in the possession of the donee, as the agent of his aunt, was a valid and complete gift.

(November 18, 1888.)

APPPEAL by George S. Neff's administrator *de bonis non* from a decree of the Circuit Court for Berkeley County charging his estate, upon the report of a commissioner, with the payment of a certain claim for money as to which it was alleged his duty was to account. *Reversed.*

The case is fully stated in the opinion.

Messrs. W. H. H. Flick, W. F. Dyer and D. C. Westenhaver, for appellant:

Strong affection of donor for donee is a circumstance favoring a claim of gift.

Rhodes v. Childs, 64 Pa. 18.

The exercise of dominion over property with the plain assent of the donor (*Bland v. Macculloch*, 9 Week. Rep. 65); suffering property to remain a long time in possession of the donee without demanding its return (*McDonald v. Crockett*, 2 McCord, Ch. 130); a previous expression of an intention to give, coupled with a subsequent possession by the donee (*McCluney v. Lockhart*, 1 Bailey, L. 117; *Hackney v. Vrooman*, 62 Barb. 650),—have all been held to be circumstances which strongly favor a gift, and all of which exist in the case under consideration.

When the courts say delivery is necessary, they do not mean "that gifts must be positively proved," or that "they may not be inferred from circumstances."

Hansbrough v. Thom, 3 Leigh, 155.

Conceding that the property was in George's hands as agent, the law requiring actual delivery did not require the useless formality of a return of the property to Bettie in order that she might pass it back again to George.

Tenbrook v. Brown, 17 Ind. 410; *Wing v. Merchant*, 51 Me. 888; *Hackney v. Vrooman* and *McCluney v. Lockhart*, *supra*; *Winter v. Winter*, 9 Week. Rep. 747; *Bland v. Macculloch*, *supra*; *Gillespie v. Burleson*, 28 Ala. 551; *Gill v. Strozier*, 82 Ga. 668; *McGinnis v. Curry*, 18 W. Va. 29. See also *Ewing v. Ewing*, 2 Leigh, 887; *Dickeschied v. Exchange Bank*, 28 W. Va. 840; *Seabright v. Seabright*, 28 W. Va. 412.

Messrs. Robert White and S. L. Flournoy for appellees.

Snyder, P., delivered the opinion of the court:

Suit in equity, commenced November 3, 1877, in the Circuit Court of Hardy County, by John Miller and others, as the heirs and distributees of Elizabeth Neff, deceased, against the administrator of George S. Neff, deceased, and others. The cause was subsequently removed to the Circuit Court of Berkeley County, which latter court, on May 15, 1886, pronounced a decree in favor of the plaintiffs against William Fisher, administrator of George S. Neff, deceased, for the sum of \$24,580.12, with interest and costs, to be paid out of the assets of said George S. Neff in the hands of his administrator, to be administered. Soon after the rendition of this decree the defendant William Fisher, administrator, etc., died, and on July 6 L. R. A.

8, 1886, Samuel A. McMechen was duly appointed administrator *de bonis non* of the estate of George S. Neff, deceased. Afterwards, on May 14, 1888, on the petition of said Samuel A. McMechen as such administrator, an appeal was allowed him from the aforesaid decree by one of the judges of this court. The said McMechen was not by any order of the court below made a party to this suit, but he states in his petition for the appeal the death of said Fisher, and the fact that he had been appointed such administrator *de bonis non*, and exhibits therewith a certified copy of the order so appointing him administrator. On this state of facts the appellees, by their counsel, move this court to dismiss the appeal upon the ground that the same has been improvidently awarded.

This motion, as I understand it, is based upon two grounds: *first*, that the appellant had never been made a party to the cause in the circuit court; and, *second*, that the appeal should have been by the administrator of William Fisher, who had been the administrator of George S. Neff. This latter ground would, no doubt, have been valid, if the decree had been against Fisher in his own right, *de bonis propriis*, for assets of Neff converted by him; but the decree explicitly states that the recovery is against Fisher in his representative character,—that is, for assets of Neff in his hands unadministered; which is equivalent to a decree for assets unconverted. The unadministered or unconverted assets always pass to the administrator *de bonis non*, and must be administered by him, and not by the administrator of the first administrator. Section 8, chap. 85, Code 1887.

This ground is therefore not well taken. In respect to the other ground, I think it is equally untenable. We are referred to a number of authorities to show that only a party or privy to the record in the court below can take an appeal. An administrator is surely a privy to the record, whether he is appointed before or after the decree appealed from. He stands in the place of his intestate, and represents his title and interests. But, as appeals are creatures of the statute law, we can only look to it, and to the decisions under it, for the doctrines in relation to them. 2 Tuck. Bl. Com. 329.

Turning to our Statute (§ 2, chap. 185, Code), we find that "any person who is a party to such controversy . . . may present his petition for an appeal."

The administrator, as soon as he qualified, became a party to the controversy, and was therefore, under our Statute, a person who could present his petition for an appeal.

The only case cited for the appellees having any true bearing on the question is *Taylor v. Savage*, 42 U. S. 1 How. 282 [11 L. ed. 182], 43 U. S. 2 How. 895 [11 L. ed. 818]. This case was decided under the provisions of the statute law of Alabama. The appeal was taken in the name of the deceased administrator, and the only question decided was that the administrator *de bonis non* could not, by simply appearing in the appellate court and filing an appeal-bond, become such a party to the suit as would entitle him to prosecute the appeal. But, whatever may be the purport of this decision, and

of other cases cited by counsel from other jurisdictions, it is not binding authority upon this court; for in *Phares v. Saunders*, 18 W. Va. 336, this court, upon consideration of the direct question, held that "the right to bring a writ of error in case of the death of a party against whom the judgment was rendered will be in the personal representative, without a revival of the judgment, because the personal representative stands in the shoes of the deceased, and has the same rights as his intestate had with reference to the judgment." This conclusion, we think, is altogether reasonable and proper, and we have therefore no hesitation in reaffirming and applying it to this case. The motion to dismiss must therefore be denied.

The counsel for the appellant have assigned and discussed several technical errors in the record; but, in the view this court takes of the cause, it is unnecessary to consider these errors. We will therefore proceed to the determination of the merits of the cause. The bill was filed by the distributees of Elizabeth Neff, deceased, to charge the estate of George S. Neff, deceased, with \$10,000, the proceeds of thirteen negro slaves sold in December, 1868, by said George S. Neff, as the agent of said Elizabeth Neff. The bill avers that at the time of said sale the said Elizabeth Neff was old and infirm, and unacquainted with business matters; and that said money was allowed to remain in the hands of said George S. Neff, in trust, to be invested and used by him as her agent; and that it did so remain until her death, which occurred in June, 1865; that the said Elizabeth was unmarried, and died without children, leaving the plaintiffs and others, her brothers and sisters, and their descendants, as her next of kin and distributees; and in June, 1866, the said George S. Neff qualified as the administrator of the estate of said Elizabeth, and soon thereafter filed in the recorder's office of the county an inventory and appraisal of the estate of said Elizabeth, but no part of said \$10,000 is embraced therein, nor has the said George, or his administrator, ever in any manner accounted for the same, or made any settlement of said estate; that in September, 1866, the plaintiffs instituted their suit in the said Circuit Court of Hardy County against said George S. Neff, as administrator of said Elizabeth, to obtain a settlement of his accounts as such administrator, and to charge him with said money, which suit was, at the September Term, 1877, dismissed without prejudice; that the right to prosecute any suit against said George S. Neff for the recovery of said money was obstructed by war from April 17, 1861, to June, 1865, and from the latter date to May 27, 1866, the courts of Hardy County were closed, and there were no officers in said county by whom process could be lawfully issued.

The administrator of said George S. Neff filed his answer to said bill, in which he averred that after the sale of said slaves the proceeds of the sale were, in January, 1857, deposited in the bank at Moorefield; that respondent's intestate then reported that fact to said Elizabeth, and that she then gave him the said money, and directed him to take it, and do as he pleased with it; that he accepted said gift, took charge of the money, and, with the full knowledge and consent of his aunt, the said Elizabeth, from

that time until her death used and disposed of it as his own; that said money was never any part of the estate of said Elizabeth; and that the appraisal bill referred to in the plaintiff's bill embraced the whole of said estate, and all that ever came, or ought to have come, into his hands as administrator. The parol testimony in the cause relates mainly to the relations existing between the said George S. Neff and his aunt, the said Elizabeth, the acts and declarations of said Elizabeth in respect to said slaves and money, the services rendered to said Elizabeth by said George, and a general history of the said George and his aunt, and their families. Many of the depositions taken on behalf of both the plaintiffs and defendant are incompetent, being the depositions of the distributees of the respective parties as to communications and transactions had personally between the witnesses and the decedent, against whom they claim. The circuit court properly sustained the exceptions to this testimony, and excluded it.

But there is one deposition, that of George Flanagan, an exception to which by the plaintiffs, we think, the circuit court improperly sustained. This deposition was taken at McMinnville, in Warren County, State of Tennessee, on August 8, 1870, in the former suit between the same parties, and, by agreement in this suit made in September, 1878, all the depositions in that suit, subject to all exceptions appearing on the said depositions or otherwise, shall be read as evidence in this cause. No exception was ever indorsed on this deposition for insufficient notice of the taking of it, but the court, in an order entered December 19, 1888, suppressed it, upon the ground that it was taken without reasonable and proper notice. The first publication of the notice was on July 8, 1870, and the fourth on August 5, 1870. The Statute provides that any such notice may be served by publication once a week for four successive weeks. Section 2, chap. 121, Code 1868.

In *Marlin v. Robrecht*, 18 W. Va. 440, this court held that the publication of the notice provided for in section 4, chap. 129, Code, for four successive weeks is completed on the fourth issue of the newspaper containing it, though the four weeks have not actually elapsed between the dates of the first and last publication. The Statute under which that decision was made, and the one now in question, contain the same requirement as to the time of publication. The fourth publication of the notice here was nine days before the deposition was taken. It seems to me, therefore, under this authority and the circumstances above stated, that the circuit court clearly erred in suppressing said deposition.

Excluding the incompetent, and considering only the admissible, evidence, the record shows that Elizabeth Neff was an aged maiden lady, who had lived all her life with her brother Jacob, the father of George S. Neff. Her personal property consisted of a family of about thirteen slaves, which had been raised and supported on the farm, and with the family of her brother Jacob. These slaves, for the want of proper control, were indolent, impudent and insubordinate, and by the winter of 1856 had become so lazy, unprofitable and vicious that

they were a terror and burden to their owner, and an annoyance and subject of complaint by the neighbors. Elizabeth had a number of brothers and sisters, the most of whom removed to the west in early life, where they resided all their lives, and all of them appear to have died, leaving children, most of whom are proceeded against in this suit as unknown parties. George S. Neff was her favorite nephew. She was very fond of him, and he, in turn, was very kind and attentive to her. Even after he married and removed from the home of his father and aunt, to a farm about two miles distant, he looked after his aunt's business, and attended to her wants, whenever she requested him to do so, or required his services and assistance. As early as 1858, she had expressed her purpose to give to George everything she had. She seemed to be reluctant to sell these slaves, but, owing to their insubordination, her fear of them, and the complaints of her neighbors, she, in the fall of 1856, consented to sell them provided they were taken from the State; and she then told George to take them off, and do what he pleased with them. Thereupon George and Robert J. Tilden arrested these slaves, and took them and another slave, belonging to Jacob Neff, to Baltimore, and there sold them on January 8, 1857, giving to the purchaser a bill of sale signed: "Elizabeth Neff, George S. Neff, Agent." The gross price of all the slaves was \$10,000. When George and Tilden returned the proceeds of the sale were first deposited in the bank at Moorefield, to the credit of George, but were shortly afterwards transferred to the credit of Tilden. The date of the credit to Tilden was January 21, 1857, and within less than a month thereafter Tilden checked out the whole of this fund, and all of it, except Tilden's commissions for the sale and expenses, was paid to George S. Neff, or to his order, and he retained, loaned and disposed of it in his own name, and as his own property, ever thereafter.

For the year 1857 the proceeds of these slaves were assessed in the name of Elizabeth Neff, but for the year 1858 they were transferred to, and assessed in the name of, George S. Neff. These facts are fully proven, and the important inquiry, and the only one seriously controverted, in this case is whether or not Elizabeth Neff at any time made a complete gift of the proceeds of said slaves to the said George S. Neff. The plaintiffs have introduced in evidence various declarations of Elizabeth, and circumstances tending more or less to show that she never did in fact make a gift of the slaves to George; but, with the exception of a single witness, they offer virtually no competent evidence to prove, or even tending to prove, that she had not given the proceeds of said slaves to George. This witness was Susan Ellis, a slave of Jacob Neff. She testifies that in December, 1864, Elizabeth Neff was talking about one thing and another, and she said that "she had never covered any money for her negroes; that she was never axed by George Neff if she wanted her money, or should he keep it, or put it out at interest, or in the bank." On cross-examination this witness testified that George had at one time offended her, and that she was not in a very good humor about it yet. It is apparent that this witness was both igno-

rant and prejudiced, and her testimony, even if honest, ought to have but little influence, in the face of the other testimony and undisputed facts in this cause; and, moreover, it is very improbable that the old lady would have had any serious conversation about her business with one of her brother's slaves.

On the other side, in addition to the facts and circumstances above mentioned, three competent witnesses—George Flanagan, Charles A. Heath and James Wolf—testify positively that Elizabeth Neff told each of them that she had given the proceeds of said slaves to George; and another witness, George P. Williams, who cannot recollect the words she used, says it is his impression, from a conversation he had with Elizabeth Neff, that she had either given said slaves or their proceeds to George S. Neff. George Flanagan testifies that after the sale of the slaves Elizabeth Neff knew that George S. Neff had the money, and was loaning and disposing of it as his own; that she approved of these facts; and that he heard her say frequently that she had given said money to George. He also says the other relatives of Elizabeth Neff knew this fact, and that it caused ill feelings on their part.

Heath, in answer to the question, "State, if you know, what Betty Neff did with the money the negroes brought," testifies as follows: "I went over to Uncle Jake Neff's a short time after the sale of those negroes, and told Betty Neff she had so much money I would marry her,—jesting on my part, of course. She said she would marry me, but she had no money, for she had given it to George S. Neff." He further testifies that he had frequently—two or three times—heard Betty Neff say that she had given that money to George. On cross-examination the counsel for the plaintiffs propounded this question: "Did not Betty Neff say, in regard to the money arising from the sale of the negroes, that George S. Neff had the money, or are you willing to swear positively that she said she had given it to him?" And his answer is: "She said she had given it to him. She said: 'George has got the money. I gave it to him; and, if you take me, you must take me without the money.' I remember distinctly that she said she gave it to him."

To contradict this witness, one of the counsel for the plaintiffs testifies that about two years before he had a conversation with Heath, and, without being able to give the words used, he says that he is positive that Heath then said that Betty Neff told him that George Neff had the money arising from the sale of the negroes, and further stated that she did not say whether she had given it to him or not. This difference is not very material, if taken in connection with the further fact testified to by Heath, and which is not disputed, that she told Heath, if he married her, that he would have to take her without the money, as George had the money. This would show that the money was not hers, but George's, and that she must have meant that she had given it to him.

The other witness, James Wolf, in answer to the question, "State, if you know, what Betty Neff did with the money they [the slaves] were sold for," testifies: "I came to Jacob Neff's, I think, in the year 1858. I stopped there. I shook hands with Aunt Betty Neff, and, says

I: 'You are alone.' She said she was alone; that there was nobody there now but her and her brother Jacob Neff. And she says: 'I sold my black ones. They came to be very saucy and cruel.' And says she: 'I gave the money to George Neff. I hadn't any use for it myself.'

There is an attempt to weaken this evidence by the testimony of one of the counsel for the plaintiffs and the husband of one of the distributees, who say that at some former time Wolf stated to them that he had never heard Betty Neff say anything about this case, but that all he ever heard about it he got from George Neff. This testimony is very remote; and, if it discredits the fact testified to by Wolf at all, it does so merely by implication, and in a very limited degree.

Such are the facts and evidence in this cause, and, from the argument of counsel for the plaintiffs, I do not understand that they seriously controvert the fact that the proofs are sufficient to establish the will and purpose of Elizabeth Neff to give said slave money to George S. Neff, and that she had declared that purpose, and acted upon it by her failure to assert any claim to it for more than eight years; but they do claim, and earnestly insist, that there is a want of evidence to prove that there ever was any actual transfer or delivery, so as to make it a complete gift. To show that the facts in this cause do not constitute a gift, the counsel cite and rely upon many cases, among them, the following: *Ewing v. Ewing*, 2 Leigh, 887; *Mahon v. Johnston*, 7 Leigh, 817; *Slaughter v. Tutt*, 12 Leigh, 147; *Miller v. Jeffress*, 4 Gratt. 472; *Martin v. Smith*, 25 W. Va. 579; *Dickeschied v. Exchange Bank*, 28 W. Va. 840.

Several of these cases are concerning gifts *causa mortis*. While the rule as to the requisites of a gift is the same in such cases as it is in respect to gifts *inter vivos*, the evidence of the delivery is necessarily different. In the former case, the gift occurring *in extremis*, and taking effect only upon the death of the donor, the acts, acquiescence and subsequent conduct of the donor can never be relied on as evidence of the delivery; but, in respect to gifts *inter vivos*, the subsequent conduct of the donor is often most potent evidence of the complete execution of the gift, which necessarily includes the transfer or delivery of it. But in gifts of either class there must, unquestionably, be a delivery.

It is the settled law both of this country and England that no parol gift, without actual delivery of the thing given, or some act of the donor which amounts to a complete transfer of the title and possession of the thing given, to the donee, can vest in the donee any right or title in or to it, or divest the right or title of the donor.

This is the substance of the decisions cited and relied on by the appellees, and the correctness of the law as thus stated is not and cannot be questioned. But the material matter here is not that there must be an actual delivery, but what is the character of the evidence necessary to prove the delivery, and whether or not the evidence in this cause is sufficient to prove that the fund in controversy was in fact ever delivered so as to divest the right and title of the donor, and vest the same in the donee.

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In *McDonald v. Crockett*, 2 McCord, Eq. 180, it was held that "permitting personal property to go into possession of a daughter on her marriage, and to remain there a considerable time," raises a presumption of a gift. *Teague v. Griffin*, 2 Nott & McC. 98, 95; *Johnston v. Dilliard*, 1 Bay, 232.

In *Hansbrough v. Thom*, Judge Cabell says: "Sales and gifts need not be positively proved. They may be inferred from circumstances." 8 Leigh, 155; *Hackney v. Vrooman*, 62 Barb. 650.

In *Tenbrook v. Brown*, 17 Ind. 410, the court held as follows: "The delivery of a chattel is necessary to pass the title by gift, but the delivery must be according to the nature of the thing given; and if the property is, at the time of the gift, in the possession of the donee, as agent for the donor, it is not necessary that the donee shall surrender to the donor his actual possession, in order that the latter may redeliver the same to him in execution of the gift; but if the donor relinquishes all dominion over the thing given, and recognizes the possession of the donee as being in his own right, and the latter accepts the gift, and retains the possession in virtue thereof, the gift is complete."

This decision is approved by the court in *Wing v. Merchant*, 57 Me. 888, in which the facts were that the donor, several years before his death, left with his daughter, the donee, for safe keeping, some notes payable to himself. About three years before his death the father gave these notes to his daughter. There was no assignment of the notes, or any writing transferring them. At the time of the gift the notes were in the daughter's possession, in a chest in her sleeping room; and nothing was done, at the time of the gift, further than the declaration of the donor to the donee that he gave her the notes. In its opinion the court says: "No particular ceremony is necessary to constitute a delivery, where there is actual possession by the donee, accompanied by satisfactory evidence that the donor has relinquished all control of and claim to the subject of the gift in her favor. . . . The actual transfer of possession to the donee, whenever and however accomplished, if supplemented by plenary evidence of an intentional release to the donee on the part of the donor, *per verba de presenti*, of any and all right or claim ever to resume the possession, or to deprive the donee of it, will make a complete gift *inter vivos*. It matters not whether the change of possession takes place before, or after, or at the time of the utterance of the words importing the gift, if there is a manifest design on the part of the donor that the donee should thereafter hold such possession absolutely, as of his own property. Thenceforward the possession and the right are concurrent in the same person, and the gift is perfect and irrevocable." *Gill v. Strozier*, 32 Ga. 688; *McCluney v. Lockhart*, 1 Bailey, L. 117.

The doctrine announced in these cases, when there are no suspicious circumstances impeaching the bona fides of the transaction, or evidence of fraud on the part of the donee, seems to me to be reasonable and just, and is approved. In the case at bar the conduct and declarations of Elizabeth Neff, supplemented by the facts and circumstances confirming them, are, it seems to me, ample to establish a complete gift of the

fund in controversy to George S. Neff. In fact, the case made by the proofs is wholly irreconcilable with any other hypothesis or conclusion.

The circumstances and conduct of the donor here would seem to be of themselves sufficient to show a gift. In the early part of the year 1857 we find the money deposited in bank to the credit of Tilden, and that same year it is assessed as the property of the donor. In the next year, 1858, no part of this money is assessed to her, but nearly the whole of it is assessed as the property of George S. Neff, the donee. The Statute then in force required the assessor to call upon every person in his district to make out a list of the property and evidences of debt owned or claimed by him, and to swear such person to the accuracy of such list. Code 1849, chap. 85, §§ 58-61.

The assessor is dead, and his deposition could not be taken; but the law presumes that he did his duty. From this we must conclude that in the year 1857 the title to this fund passed from Elizabeth Neff to George S. Neff, and that it did so, not only with the knowledge, but with the active assent, of Elizabeth Neff; for otherwise both she and George S. Neff would be chargeable with fraud and false swearing, and there is nothing in the record even tending to show that such was the fact. In addition to

this, the donor lived more than eight years thereafter within two miles of the donee, and in almost daily communication with him. He used and disposed of this money as his own, with the knowledge of the donor. He never rendered any account to her, and she never demanded one. The friendly and intimate relations between them was not only not disturbed, but intensified by his care and acts of kindness, and her appreciation and fondness for him. If we add to these and the other attending facts and circumstances hereinbefore detailed the repeated declarations of the donor that she had given the said fund to the donee, we have clear and convincing proof that there was an absolute and complete gift of said fund by her to her nephew.

For the foregoing reasons the decree of the Circuit Court must be reversed, and the exception of the administrator of George S. Neff to the report of Commissioner Sherrard, because it charges the estate of said Neff with the proceeds of the sale of the negroes, is sustained; and the cause is remanded to said court for further proceedings, in accordance with the principles announced in this opinion.

English and Brannon, JJ., concurred; Green, J., absent.

CALIFORNIA SUPREME COURT.

William KOHL *et al.*, *Repts.*,
v.
P. N. LILIENTHAL *et al.*, *Appts.*
(....Cal.....)

1. A division cannot be made among the stockholders of a California corporation prior to dissolution or expiration of the term of corporate existence, of stock issued to it by a new corporation in consideration of the transfer of its corporate property to the latter upon the formation thereof by the former and a foreign corporation, which makes a like transfer of its property for a like consideration, the purpose of the new corporation being to unite the conflicting interests of the two old ones, even if such division is unanimously agreed upon by all the stockholders, and has actually been made among the stockholders of the foreign corporation as to the stock issued to it; as Civil Code, § 809, prohibits payment to the stockholders of any part of the capital stock before dissolution or expiration of the term of corporate existence; and the stock of the new corporation received in exchange for their property is included in the term "capital stock."

2. Evidence as to the distribution by the foreign corporation among its stockholders of the stock issued to it is inadmissible in an action by stockholders of the California corporation to compel a distribution of the stock issued to it,—at least in the absence of any contract between the two corporations as to the disposition of the stock to be issued by the new company.

(McFarland and Thornton, JJ., dissent.)

(November 30, 1890.)

A PPEAL by defendants from a judgment of the Superior Court for the City and County of L. R. A.

ty of San Francisco in favor of plaintiffs, and from an order denying a motion for new trial, in an action to compel the distribution of certain shares of stock alleged to be held by defendants in trust, and to restrain defendants from representing, voting or dealing in any way with such stock. *Reversed.*

A decision was reached in this case in the Second Department, on February 13, 1889, affirming the judgment below. A rehearing in bank was subsequently granted, and after argument the court reached the decision given below.

The facts sufficiently appear in the opinion.

Messrs. Mesick, Maxwell & Phelan, Garber, Thornton & Bishop and F. A. Berlin for appellants.

Mr. J. F. Lewis, with Messrs. Stewart & Herrin and William M. Pierson, for respondents.

Fox, J., delivered the opinion of the court:

In 1882 two mining corporations, the Head Center Consolidated Mining Company, organized under the laws of California, and the Tranquillity Mining Company, organized under the laws of New Jersey, were in possession of adjoining mining claims in the Tombstone mining district, in the Territory of Arizona. Litigation of a vexatious character had arisen between them, and, for the purpose of discontinuing the strife and of promoting the mutual interests of both companies, negotiations were entered into with a view to effecting a consolidation of the interests and properties of the two. Being organized under the laws of different States, they were advised that this could not be done by a consolidation of companies, as pro-

vided by the laws of California. After considerable negotiation on the subject, it was decided to organize a third company, to be known as the "Head Center & Tranquillity Mining Company," with a nominal capital stock consisting of 200,000 shares, and to which each of the old companies should transfer its mining ground, each in consideration of \$5, and of 100,000 shares of the stock of the new company. This new company was incorporated on the 1st of December, 1882, and a board of seven directors selected, three to represent the interests of the stockholders of each of the old companies, and a seventh, who was impartial between them. To this new company, when organized, a proposition was formally made, to convey the grounds known as the "Head Center" and "Yellow Jacket" claims (they being of the property of the Head Center Consolidated Mining Company) to it, in consideration of the sum of \$5, and of 100,000 shares of the stock of the company, and a like proposition on the part of the Tranquillity Mining Company, to convey to it the Tranquillity Mining Claim, with its appurtenances, for a like consideration; and both propositions were accepted by resolution of the board of directors, unanimously passed.

On the 4th of January, 1883, at a meeting of its board of directors, the Head Center Consolidated Company passed the necessary resolutions authorizing its president and secretary to make the necessary conveyances to carry out this proposition, and on the 25th of the same month, at the annual meeting of the stockholders of the same company, at which 160,165 shares of the 164,211 outstanding shares of the stock of the company were represented, this action of the directors was ratified; and on the 27th of February following a deed was executed accordingly. On that day, Mr. Benjamin, to whom the secretary of the new company had been directed to issue the 100,000 shares of stock in the new company for the Head Center Company, directed the secretary to issue 99,980 shares of the stock to him as trustee, and the remaining portion of it, in pieces of five shares each, to several of the directors, and Jewell, to whom it had been ordered that the 100,000 shares paid for the property of the Tranquillity Company should be issued, directed that 99,975 shares of it be issued to Mr. Kohl as trustee, and the rest to the remainder of the directors, which was done.

The stock thus issued was deposited in the Anglo-California Bank, to be held subject to the joint order of Kohl and Foster. Although the question of what disposition was finally made of that part of it which was issued in payment for the property of the Tranquillity Company is not involved in the issues of this cause, it is claimed that it was distributed to the shareholders of the original Tranquillity Company in proportion to their respective number of shares of Tranquillity stock, and that no question was ever made as to the right to make such distribution; and this fact is urged upon us as strongly persuasive of the correctness of the claim of these plaintiffs to have that part of the stock of the new company which was issued in payment for the property of the Head Center Company distributed among its stockholders, in proportion to the number of shares held by them, respectively, in said last-named company.

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But we fail to see the force of that argument, or how evidence of what the stockholders of a New Jersey corporation may have done, or agreed to do, was in any manner relevant or material in this action. The laws of New Jersey may permit such a distribution of the assets which form the capital stock of a corporation organized under its laws. But, whether they do or not, the action of the stockholders of a New Jersey corporation, in the matter of the distribution of the assets of their own company, cannot change the laws of California; and for this reason, as well as because there was no contract between the two companies on the subject of the disposition which should be made of the stock of the new company when received, nor any reason why there should be such a contract, the admission of evidence upon that subject (as to what the Tranquillity people did with their stock) was error, manifestly prejudicial to the defendants in this cause.

The mining ground of the Head Center Consolidated Mining Company so conveyed to the Head Center & Tranquillity Company did not comprise all the property of the former company. It had, and still has, left a mill for the reduction of ores, and is still carrying on corporate business and reducing ores, a part of the time, at least, at said mill, and keeps a general agent and superintendent in Arizona to look after its affairs. It was not free from debt at the time it sold this property, but some six months afterwards levied and collected an assessment, and paid up its then existing indebtedness. Its term of corporate existence has not expired, and it has not attempted to, and does not propose to, disincorporate. Under these circumstances the plaintiffs, Kohl, Moody and Rehflach, bring suit against the defendants, the Head Center Consolidated Mining Company and certain of its officers, alleging that they (the plaintiffs) are the owners and holders of 63,188 shares of the capital stock of the Head Center Consolidated Company, and as such, and by reason thereof, are entitled to have and receive to their own use 89,115 shares out of the 100,000 shares of the capital stock of the Head Center & Tranquillity Mining Company so received for the sale of the property of the Head Center Consolidated Company, and pray a decree compelling the defendants to transfer issue and deliver the same to them, and restraining the defendants from representing, voting or dealing in any way with the shares so claimed by plaintiffs. The defendants claim that these shares are the property and assets of the Head Center Consolidated Company; that the company has no right, under the law, to distribute them to its stockholders, and that its directors are entitled to represent and vote them at all meetings of the Head Center & Tranquillity Company.

The plaintiffs had judgment in the court below, and from this, and an order denying a motion for new trial, the defendants appeal. The grounds of the appeal, briefly stated, are that the judgment is unsupported by the findings and any admissions in the pleadings, and that the findings are unsupported by the evidence.

We have already substantially stated most of the facts as found by the court or admitted by the pleadings, so far as they are necessary

to this opinion. There is, however, one other fact found by the court necessary to the support of its judgment, if, under the law, it could be supported at all, but which finding we do not think is supported by the evidence. That finding is that it was "mutually understood and agreed by and between the stockholders of both the old companies that the stock of the new company should be equally divided between, and belong to, the stockholders of the old companies. We are unable to find competent or satisfactory evidence of any such agreement; especially of such an agreement among the stockholders of the company defendant here, or between any portion of such stockholders. There is plenty of loose and vague talk of an "understanding" of that kind, and we have no doubt that some of the stockholders did suppose, and in some sense understood, that there would be such a distribution of the stock as plaintiffs are here seeking to enforce. But this is an understanding which each of the stockholders who had it at all had with himself, or with such others, part only of the whole, as happened to share it. It was not the basis of any treaty or agreement among the stockholders, or between them and the directors.

But, suppose there had been such an agreement among even a large majority of the stockholders. It would have been an agreement to change the terms of an existing contract which the Statute had made between the whole body of stockholders, and would not have bound the non-concurring minority. If but a single stockholder, owning but a single share of the stock, had objected, the directors would have been bound to regard his protest. There is no pretense that all of the stockholders of this corporation consented to the distribution of this stock. Over 4,000 shares of the stock outstanding were unrepresented at the meeting which ratified the consolidation. A large amount of the stock was represented by proxy, and the proposition to distribute did not, and could not, come before the meeting. The "understanding" that there was to be a distribution must be referred to some other occasion. The witnesses who testify to it leave it in the clouds. Only a minority of the stock, scarcely a third, is represented by the plaintiffs in this action, and the holders of a very large proportion of the stock positively deny that any understanding or agreement to distribute the stock of the consolidated company ever existed. But it would make no difference if the fact were otherwise. Even if a small minority of the stockholders have not consented, this court should not command the directors to do what by the plain language of the Statute they are forbidden to do. Nor is there any force in the suggestion that the minority, if it be a minority, are not here objecting. Naturally, they are not here objecting in their own names, because they have not been made parties to this action. But they are represented here by the directors, who, as in duty bound, are urging the objection in their behalf. Manifestly, the interests of all the absent stockholders are involved in the litigation; and unless the directors are to be heard upon this ground, it results that the rights of the stockholders are to be adjudicated without a hearing.

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The Statute (Civil Code, § 809) which controls the directors, and by which we are also bound in this case, reads as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; *nor must they divide, withdraw or pay to the stockholders, or any of them, any part of the capital stock*; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock except as hereinafter specially provided. For a violation of the provisions of this section the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen, are in their individual and private capacity jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out or reduced, or debt contracted; and no Statute of Limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, *upon its dissolution, or the expiration of the term of its existence.*" (The italics are our own.)

The term "capital stock," as used in this section, has a very different meaning from that of "shares of the capital stock," as representing the interest which the holders thereof have in the business and property of the corporation whose shares they hold. "Capital stock," as used in this section, is frequently otherwise and as well expressed by the simple word "capital," and means the money and property with which the company carries on its corporate business. *Martin v. Zellerbach*, 88 Cal. 309.

It is vested in the corporation as a sacred trust for the protection of its creditors. *Ibid.*, and *San Francisco & N. P. R. Co. v. Bee*, 48 Cal. 398.

This money and property of the corporation constitutes the actual capital of the company, to which all persons having dealings with the corporation, by means whereof they may become its creditors, or become personally liable for its debts (as shareholders do become, under the laws of this State, for their proportionate share of all its debts created while they are stockholders), look and have a right to look, to determine the measure of the company's responsibility, and of their security. The bare fact that a man holds "shares in the capital stock" of a corporation gives him no legal title to the property of the corporation. That remains in the corporation, and not in the shareholders. *Gorham v. Gilson*, 28 Cal. 483; *Gashwiler v. Willis*, 88 Cal. 19; *Miners Ditch Co. v. Zellerbach*, 87 Cal. 591; *Wright v. Oroville, G. S. & O. Min. Co.* 40 Cal. 20; *Clark v. San Francisco*, 53 Cal. 311; *Johnson v. Kirby*, 65 Cal. 488; *McCormick v. Springfield F. & M. Ins. Co.* 66 Cal. 368.

The shares simply represent the proportion to which the respective shareholders, who may be such at the date of distribution, are severally entitled in the distribution of profits arising

from the corporate business which may be made from time to time, and in the final distribution of the estate of the corporation, when from any cause it shall cease to exist, and its estate shall have been fully administered. This event may happen at the expiration of the term of its corporate existence, or it may be accomplished earlier, with the consent of the holders of two thirds of its shares, and upon the judgment of a court of competent jurisdiction. Code Civ. Proc. §§ 1227-1238.

But this event has not happened in this case. The Head Center Company has sold its mine to a new corporation for 100,000 shares of the stock of such new corporation; but it has not ceased to exist as a corporation, and does not propose to do so. It remains a corporation, with full corporate power and capacity, and is also exercising those powers. The mine which it sold constituted the bulk of its capital, or "capital stock." The stock which it received in exchange for its mine stands in the place and stead of the mine, precisely the same as if it had been money, or any other kind of property, instead of stock; and by the plain terms of the section of the Code cited the directors are forbidden to divide it among the stockholders.

But it is said that this section operates only to restrain the directors, and does not prevent the stockholders from doing by agreement what the directors are forbidden to do. As already shown, we do not think the evidence proves any such agreement by the stockholders; but, if it did, we hold that even the unanimous assent or agreement of the stockholders would not authorize such a distribution. The inhibition runs against the directors because they are, under the law, the managers of the business of the corporation. What the directors cannot do—with few exceptions, of which this is not one—the stockholders cannot do, or authorize to be done. The inhibition of the Statute has regard, not only to the rights of existing creditors, but to those of all persons who may deal with the corporation on the faith that its capital has not been divided. Certainly, the effect and operation of the Statute, if unrepealed by judicial construction, would be to afford a large measure of protection to future as well as existing stockholders and creditors; and, having that effect, it ought to be supposed that such was its purpose. It cannot be assumed that the Legislature intended that corporations who have divided up among their stockholders the capital stock with which they were doing business should continue to maintain a corporate existence, with power to contract, incur debts and perpetrate the numberless frauds that would under such circumstances be within their power. A contrary intention is clearly implied in the express provisions of the Code of Civil Procedure relating to the dissolution of corporations (§§ 1227-1238) and of the Civil Code, above quoted, allowing distribution of their remaining capital after payment of their debts, upon dissolution or expiration of their term of existence.

When a method of procedure is prescribed by which a corporation may be dissolved, that method must be followed. When it is provided that the application must be made to the superior court, and must be in writing, ver-

fied, and must show "that at a meeting of the stockholders, called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders, and that all claims and demands against the corporation have been satisfied and discharged," there will be none so bold as to contend that a voluntary dissolution of a corporation can be effected without compliance with these requirements; and it is equally certain that when the Legislature has said, in the same section of the Code in which it has forbidden the directors to divide the capital stock of a corporation among the stockholders, that the remaining capital may be distributed, after the payment of all its debts, upon its dissolution or the expiration of its term of existence, the intention was that there should not be a distribution under any other circumstances. And why, it may be pertinently asked, should any court go out of its way to order a distribution in any other mode, or under any other circumstances, than the Statute prescribes?

If the debts of the Head Center Company are paid and two thirds of its stockholders desire a distribution, nothing could be easier than to accomplish everything that is sought in this action by simply pursuing the Statute. Why, when there is a plain and speedy statutory remedy, should this extraordinary remedy be allowed? The only answer to this question must be that the parties desiring this distribution cannot comply with the Statute,—that two thirds of the company do not desire to dissolve and distribute the capital; therefore this court is called upon to order a distribution without dissolution, and to sanction the continued existence of a corporation with little or no capital,—in other words, to do what the Statute has never authorized the court to do, and has forbidden the directors to do. And this, too, when to do it we must establish a precedent under which less than two thirds of the stockholders of a corporation may at any time compel a distribution of the whole or any part of its capital, upon the most loose, vague and unsatisfactory oral testimony that there was an "understanding" among the stockholders that it should be divided. In other words, stockholders who have heretofore imagined that in entering a corporation they were becoming parties to a contract, the terms of which were written in the statutes of the State, are to be informed that the contract may be changed, and their rights impaired, by an "understanding" among an indefinite number of their fellow stockholders. A wide door would thus be thrown open to frauds, and contract rights would be taken away from contracting parties without their consent.

The Statute upon this subject is too plain to admit of a doubt, or to leave room for construction. It was so held and adjudged by this court more than twenty years ago, in a well-considered and able opinion, which has ever since been accepted as established law, under which rights in property have accrued to an untold amount, which ought not now to be disturbed. Upon the faith of this Statute, as it was found in almost identical terms with the present section 809, Civil Code, in section 18 of the Corporation Act of 1858, and of the decision referred to (*Martin v. Zellerbach supra*),

thousands of people, and, no doubt, among them these plaintiffs, have assumed the liabilities of shareholders in corporations, which, possibly, they would not have assumed had they not been thus assured of the protection resulting from keeping the capital of the corporation intact until its final dissolution. The only difference between that case and this was that there the two corporations uniting to form the third were both domestic corporations, and the consideration for the transfer of the property to the new corporation was not by "understanding," but by actual agreement of both corporations, and of all the shareholders of each, that the stock of the new corporation should be issued and delivered directly to the shareholders of the old ones, in proportion to the number of shares which they respectively held in the old. The court held in the most emphatic terms that the language of the Statute left no room for construction or doubtful interpretation, and that this agreement for the distribution of the shares of the stock of the new corporation, received for the transfer of the property of the old companies, was in direct violation of the Statute; that these shares must remain the property of the old companies in lieu of the property for which they had been received and as constituting the capital of the old companies, not to be distributed until their dissolution, and the payment of their debts.

This has been the written law of this State for more than thirty-five years. Under it all our corporations have come into existence, and their stock has been distributed among its people. It has constituted one of the bulwarks of corporate stability, and one of the chief securities of persons dealing with corporations, either as creditors or shareholders. The Legislature

has not changed it by enactment. The court cannot do it by interpretation.

Judgment and order reversed.

We concur: *Beatty, Ch. J.; Works, J.; Paterson, J.; Sharpstein, J.*

McFarland, J.:

I dissent. The simple project of the two corporations, having adjoining mining claims, consolidating by each conveying to a new corporation created for that express purpose, and the persons who held the stock of the two old ones taking their proportionate shares of stock in the new one, there being no creditors, does not seem to me to be at all within the provisions of section 309 of the Civil Code, against directors making dividends or paying capital stock to stockholders. I cannot conceive how, in the case at bar, the new corporation is to do any business or maintain its existence; for, according to the theory of the appellant, the new corporation has only two, and can only have two, stockholders, each of which is itself a corporation. It would be better to have the whole attempt at consolidation void for impossibility.

Thornton J.:

I dissent. I am of opinion that there was evidence sufficient to sustain the finding of the court that it was agreed among the stockholders that 100,000 shares of stock in the new corporation should be divided among the stockholders in the Head Center Consolidated Mining Company as they held shares in the Head Center Company. I adopt the opinion of the commissioners, formerly rendered in this case, as a correct exposition of the law applicable to it.

NEBRASKA SUPREME COURT.

STATE INSURANCE CO., of Des Moines,
Iowa, *Plff. in Err.*,

v.

John SCHRECK.

(....Neb.....)

***1. A policy of insurance was written upon certain buildings upon the farm of defendant in error, which were fixtures, and constituted a part of the real estate. In addition to the buildings, the policy included personal property on the farm of various classes, but not exceeding a certain amount on each class. No specific personal property was named. The policy also contained a provision to the effect that if any subsequent incumbrance was imposed upon the property insured, or the title changed without the written consent of the secretary of**

the insurance company, the policy should be void. Prior to the loss the insured executed a mortgage upon the real estate. It was held that the execution of the mortgage would not prevent a recovery for the loss occasioned by the destruction of the personal property.

2. In such case, there being no specific personal property insured, the fact that the assured had incumbered his personal property by the execution of chattel mortgages thereon subsequent to the execution of the policy and prior to the fire, but which mortgages were all paid and canceled prior to the destruction of the property, would not prevent the assured from recovering the loss on personal property of the kind insured, the title to which was unimpaired at the time of the loss.

3. Upon the cross-examination of defendant in error he was asked if, subsequent to the execution of the policy, and prior to the loss, he had not executed chattel mortgages upon the

*Head notes by REESE, Ch. J.

NOTE.—For late cases in fire insurance, see *Mo-Queeney v. Phoenix Ins. Co. (Ark.)* 5 L. R. A. 744; *Essex Sav. Bank v. Meriden F. Ins. Co.* 4 L. R. A. 759, 57 Conn. 335; *Russell v. Cedar Rapids Ins. Co. (Iowa)* 4 L. R. A. 538; *Phoenix Ins. Co. v. Copeland*, 4 L. R. A. 848, 36 Ala. 551; *Dwelling House Ins. Co. v. Brodie (Ark.)* 4 L. R. A. 458; *Kyte v. Commercial* 6 L. R. A.

Union Assur. Co. 8 L. R. A. 508, 140 Mass. 116; *Seyk v. Millers Nat. Ins. Co. (Wis.)* 8 L. R. A. 523; *Nussbaum v. Northern Ins. Co.* 1 L. R. A. 704, 37 Fed. Rep. 524.

Waiver of statement of loss. Smith v. Niagara F. Ins. Co. 1 L. R. A. 216, 7 New Eng. Rep. 82, 60 Vt. 682.

property insured. His answer was that he had, but that they had all been paid. The questions of the execution of the mortgages and of their payment before the loss were specially submitted to the jury, and they found that the mortgages had been executed, but that they had been paid and canceled prior to the loss. It was held that the finding of payment was sustained by the evidence.

4. There was no issue of the payment of the mortgages presented by the pleadings, the allegations of the answer of their execution being denied; but, as the proof of the execution and cancellation of the mortgages was made by plaintiff in error on the cross-examination of the defendant in error when upon the witness stand, plaintiff in error could not successfully contend upon proceedings in error that the evidence was incompetent or immaterial under the issues joined.

5. The policy of insurance required notice of loss to be given to the insurer within thirty days after such loss. It was testified by defendant in error that two of the agents of plaintiff in error were at the fire by which the property was destroyed, and that they had notice of the fact, and agreed to give notice to plaintiff in error; that soon thereafter the adjuster for plaintiff in error (giving his name) appeared and adjusted the loss. It was held that this was sufficient proof of notice, the policy not requiring it to be in writing, and of the agency of the parties named as agents and adjuster.

6. The policy described the real estate upon which the insured property was situated as the "N. E. $\frac{1}{4}$ of sec. 2, T. 30, R. 16, County of Holt, State of Nebraska." The proof showed that the property was on the N. W. $\frac{1}{4}$ of the section named at the time of the insurance, and had so remained from that time until the loss. The mistake being in the policy, it was held that the variance was not material, and that it was not necessary that the policy be reformed before the trial.

(October 4, 1889.)

ERROR to the District Court for Holt County to review a judgment in favor of plaintiff in an action to recover upon a fire-insurance policy the value of certain property which had been insured thereby and subsequently destroyed by fire. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. E. W. Adams, J. J. King, M. F. Harrington and Cummins & Wright, for plaintiff in error:

Contracts of insurance are not separable when a gross premium is paid for the entire insurance.

Wood, Ins. p. 884; May, Ins. 277; *Garver v. Hawkeye Ins. Co.* 69 Iowa, 202; *Plath v. Minnesota F. Mut. F. Ins. Assn.* 23 Minn. 479; *Kelly v. Humboldt F. Ins. Co.* (Pa.) 5 Cent. Rep. 484.

If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items.

2 Parsons, Cont. p. 650; *Clark v. Baker*, 5 Met. 452; *Mansfield v. Trigg*, 118 Mass. 850; *Miner v. Bradley*, 23 Pick. 457; *Young v. Wakefield*, 121 Mass. 91.

A breach of the conditions as to one portion of the property will therefore avoid the entire contract.

6 L. R. A.

Gottsmann v. Pennsylvania Ins. Co. 56 Pa. 210; *Trustees of Phila. v. Williamson*, 26 Pa. 196; *Lee v. Howard F. Ins. Co.* 3 Gray, 583; *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. 506, 26 Am. Rep. 873; *Loovejoy v. Augusta Mut. F. Ins. Co.* 45 Me. 473; *Barnes v. Union Mut. F. Ins. Co.* 51 Me. 110; *Kimball v. Howard F. Ins. Co.* 8 Gray, 38; *Bowman v. Franklin F. Ins. Co.* 40 Md. 620; *Schumitch v. American Ins. Co.* 48 Wis. 26; *Herman v. Hartford F. Ins. Co.* 36 Wis. 159; *Clark v. New Eng. Mut. F. Ins. Co.* 6 Cush. 342; *Briggs v. North Carolina Home Ins. Co.* 88 N. C. 141; *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. 503; *Outhbertson v. North Carolina H. Ins. Co.* 96 N. C. 480; *Todd v. State Ins. Co.* 11 Phila. 355; *McGowan v. People's Mut. F. Ins. Co.* 54 Vt. 211; *Friesmuth v. Agawam Mut. F. Ins. Co.* 10 Cush. 587; *Brown v. People's Mut. Ins. Co.* 11 Cush. 280; *Havens v. Home Ins. Co.* 111 Ind. 90; *Barber, Ins.* § 20; *Hartshorne v. Agriculture Ins. Co.* 50 N. J. L. 427, 13 Cent. Rep. 132; *Associated F. Ins. Co. v. Assum*, 5 Md. 165; *Etna Ins. Co. v. Reah*, 44 Mich. 55; *Baldwin v. Hartford F. Ins. Co.* 60 N. H. 422; *Patten v. Merchants & F. Mut. Ins. Co.* 38 N. H. 838; *Bleakley v. Niagara Dist. Mut. Ins. Co.* 16 Grant, Ch. 198; *Russ v. Mutual F. Ins. Co.* 29 U. C. Q. B. 78; *Phillips v. Grand River Mut. F. Ins. Co.* 46 U. C. Q. B. 334; *Samo v. Gore Dist. Mut. F. Ins. Co.* 26 U. C. C. P. 405; *Cushman v. Ins. Co.* 5 Allen (N. B.) 245.

The execution of the several mortgages without notice to or consent of the Insurance Company rendered the policy absolutely void.

Supple v. Iowa State Ins. Co. 58 Iowa, 29.

The furnishing of proofs is a condition precedent to recovery, and the petition must allege a compliance with that condition before evidence thereof is admissible.

Elderly v. Farmers Ins. Co. 43 Iowa, 587; *Blakeley v. Phœnix Ins. Co.* 20 Wis. 207; *Imman v. Western F. Ins. Co.* 12 Wend. 452; *Owen v. Farmers Stock Ins. Co.* 57 Barb. 518; *Wellcome v. People's Rq. Mut. F. Ins. Co.* 2 Gray, 480; *Johnson v. Phœnix Ins. Co.* 112 Mass. 49; *St. Louis Ins. Co. v. Kyle*, 11 Mo. 278; *Flanders, Ins.* 514.

Messrs. Rice Brothers, for defendant in error:

Where articles are insured in separate classes or heads, under separate valuations, the property is separately insured although the premium is one entire or gross sum, and a breach of condition as to one article will not avoid the policy as to the others.

Merrill v. Agricultural Ins. Co. 78 N. Y. 452, and cases cited; *Clark v. New Eng. Mut. F. Ins. Co.* 6 Cush. 342; *Commercial Ins. Co. v. Spankneble*, 52 Ill. 58; *Hartford F. Ins. Co. v. Walsh*, 54 Ill. 164; *Loehner v. Home Mut. Ins. Co.* 17 Mo. 247; *Koontz v. Hannibal Sav. & Ins. Co.* 42 Mo. 126; *Trench v. Chenango Co. Mut. Ins. Co.* 7 Hill, 122; *Moore v. Virginia F. & M. Ins. Co.* 28 Gratt. (Va.) 508; *Phœnix Ins. Co. v. Lawrence*, 4 Met. (Ky.) 9; *Deidericks v. Commercial Ins. Co.* 10 Johns. 233; 8 Kent, Com. p. 830; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 507; *Barber, Ins.* § 20; *Howard F. & M. Ins. Co. v. Cornick*, 24 Ill. 455; *Schuster v. Dutchess Co. Ins. Co.* 3 Cent. Rep. 183, 103 N. Y. 260; *Holmes v. Drew*, 16 Hun, 491; *Woodward v. Republic F. Ins. Co.* 83 Hun, 865,

Perry v. Mechanics Mut. Ins. Co. 11 Fed. Rep. 478; *Goring v. London Mut. F. Ins. Co.* 10 Ont. 286; *Phillips v. Grand River Mut. F. Ins. Co.* 46 U. C. Q. B. 334; *Data v. Gore Dist. Mut. F. Ins. Co.* 14 U. C. C. P. 549; 1 Phillips, Ins. pp. 381, 382; Wood, Ins. p. 730, § 350; Flanders, Ins. p. 425; *Knight v. Eureka F. & M. Ins. Co.* 28 Ohio St. 684; *Koontz v. Hannibal & Sav. Ins. Co.* 42 Mo. 126; *Quarrier v. Peabody Ins. Co.* 10 W. Va. 532.

Reese, Ch. J., delivered the opinion of the court:

This action was instituted in the District Court of Holt County for the purpose of recovering upon an insurance policy the value of certain property which had been insured and destroyed by fire. The petition was in the usual form. A number of defenses were presented by the answer, some of which will be noticed in the order in which they are presented by counsel in argument and briefs. By the policy of insurance it is provided that, "in consideration that John Schreck, of Stuart, Nebraska, having made his note or obligation to the State Insurance Company for \$100, agreeing to pay the same according to the terms thereof, for insurance against loss or damage by fire, lightning, wind storms, cyclones and tornadoes, to the amount of \$2,500 on the property hereinafter described, namely:

On his dwelling-house (value of house \$300).....	\$200
On beds and bedding, while therein.....	50
On wearing apparel, while therein.....	100
On household furniture, while therein.....	150
On sewing-machine, while therein.....	25
On hog-house.....	50
On frame barn (value of barn \$75).....	50
On harness on farm.....	75
On wagons and carriages on premises (\$250).....	180
On farming utensils on premises other than mowing and reaping machines (\$75).....	60
On mowing-machine on premises (\$35).....	40
On hen-house.....	50
On grain in buildings or in stack on premises, and against fire and lightning in buildings or in stack on plowed land on premises, except flax.....	300
On frame granary (value \$125).....	100
On carriage-house.....	50
On work horses or mules (not to exceed \$100 on each) in barns or on farm herein described, and against lightning and tornadoes, while at large or in use (\$500).....	400
On cattle therein, and against lightning and tornadoes, while at large, not to exceed \$25 on any one animal (\$300).....	490
On hogs therein or at large, not to exceed \$8 on a hog (\$200).....	120

—All situated and being on the N. E. $\frac{1}{4}$ of sec. 2, T. 30, R. 16, County of Holt, State of Nebraska. Term five years. Total amount insured \$2,500. Premium \$100."

Among the defenses presented by the answer was one that defendant in error had, by mortgages, incumbered the property insured in violation of the conditions of the policy. This condition was as follows: "Any other insurance or any incumbrance upon any of the property hereby insured, existing at the date of this policy, not made known in the application, or if any subsequent incumbrance is imposed, or title or occupancy changed, or hazard increased, without the written consent of the secretary of the Company, or if the building becomes vacant,—this policy shall be void. Any false statement in the application shall make this policy void. Every renewal of this policy will

be governed and subject to all the provisions of the original application and policy."

The buildings referred to in the policy were destroyed by fire, together with a large amount of the personal property. Subsequent to the execution of the policy, defendant in error had executed a mortgage upon his real estate in violation of the terms of the policy, and upon the trial this part of the case was virtually abandoned by him. The jury allowed nothing for the building. The general verdict was in favor of defendant in error for the sum of \$998.95, the value of the personal property destroyed. Upon the trial the court instructed the jury that if they found from the evidence that defendant in error had mortgaged the land on which the barn, granary and hog-house destroyed were situated, without the knowledge and consent of plaintiff in error, he could not recover for such loss, and that if he had executed any mortgages upon the personal property insured by the policy during its existence, without the knowledge and consent of plaintiff in error, and the mortgages were not proven to have been paid at the time the loss occurred, the policy would be void as to such property, and plaintiff could not recover anything thereon; but that if at the time of the destruction of the property the mortgages had been paid so that the property was not incumbered, the fact of their prior execution would not prevent the recovery.

It is now contended by plaintiff in error that the policy was an entire contract, and that it prohibited the placing of any incumbrance upon any of the property, and provided that if such incumbrance was created the policy would be void, and therefore defendant in error would not be entitled to recover anything, having violated this provision. It is contended on the part of defendant in error that, while the specific buildings referred to in the policy were insured, and that the execution of the mortgage upon the real estate had the effect of avoiding the policy so far as the buildings were concerned, yet there was no specific personal property insured; that, the risk being upon a particular kind of property instead of specific articles to a certain amount, the fact that the property had been mortgaged or sold prior to the fire would make no difference, if there was property of the kind and quality described in the policy which was destroyed, and to which defendant in error had a good title. The briefs presented by counsel upon either side are quite elaborate, and show a commendable research and investigation as to the proper rules to be applied in cases of this kind; and a large number of cases and text-books are cited by both parties, which, to a considerable extent, sustain the views entertained by them.

That there is a wide conflict of authority upon this question cannot be disputed, and, as it is now before the court for the first time, it becomes necessary for us to dispose of it upon principle, and in such a way as to us may seem most consistent with the rules of justice. It would be impossible for us, without extending this opinion to a much greater length than would be desirable, to review all the cases and authorities cited and presented by counsel, and therefore we trust we may be excused from entering upon such an undertaking.

It appears from an examination of the policy that the premium paid was a gross sum, to wit, \$100. The amount of the insurance was \$2,500, or at least was limited to that sum, and to this extent the contract may be said to have been an entirety; but as to the property insured a different course seems to have been pursued by the parties to the contract, and to this extent the contract is severable. And it may also be observed that there is nothing necessarily in the character or quality of the insured property which would seem to make the insurance of one depend upon the insurance of the other. There is nothing either in reason or law which would prevent the insurance of the buildings upon the real estate without the insurance of the personal property upon the farm, the value of which is involved in this action; and also the wagon, farming utensils, mowing-machine, carriages, live stock and grain might have been as well insured without an insurance upon the building as with. Also we think it is fair to say that, according to the language of the policy, it appears to be a species of separate insurance upon the personal property.

We apprehend there can be no doubt but, had there been no incumbrance upon any of the property, but a portion thereof had been destroyed by fire, an action could have been maintained for the damage sustained by the destruction of that particular portion, but not exceeding the amount of insurance placed upon each kind. So far as the execution of the real-estate mortgage is concerned, we do not think it should be held to affect the rights of defendant in error in his action for the loss occasioned by the destruction of the personal property.

In *Merrill v. Agricultural Ins. Co.* 73 N. Y. 452, a case quite similar to this in its facts, it is said by Folger, J., in writing the opinion: "It is plain from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance that they looked upon them as distinct matters of contract. The effect of the separate valuation was to make them so. No matter how much value there might have been in any one of those subjects, even to the whole amount of the policy, had it been totally destroyed the defendants could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was, at the inception of the contract, distinguished from the other subjects of insurance, and the contract so made as to be capable of application to it alone."

The holdings in that case, and others of a like character cited by defendant in error, seem to us to be more in accord with the principles of common justice than those holding to the doctrine that the execution of a mortgage upon the real estate would not only prevent the assured from recovering the value of the real property destroyed, but also would reach the whole contract, and contaminate it with the vice.

As said in *Phœnix Ins. Co. v. Barnard*, 16 Neb. 90: "A contract of insurance must receive a reasonable construction. The insurer receives the premium as the consideration to pay for loss of property by fire to a certain amount, should such loss occur. Such a contract is to be sustained, if possible to do so. The insurer retains the consideration for the contract, and 6 L. R. A.

should be required to perform on its part, and no merely technical objection not materially affecting the risk is available as a defense."

Now it cannot be contended that the fact of mortgaging the real estate could in any degree affect the risk so far as the personal property was concerned. It did not affect the title in the assured, neither did it cause the property to be any more liable to be destroyed by fire; and it seems to us that the most common principles of justice and fair dealing are in the line of the large number of authorities cited by defendant in error holding that the contract of insurance on personal property would not be avoided by the execution of such mortgage.

In the case of *Merrill v. Agricultural Ins. Co.*, *supra*, the opinion is quite exhaustive, and consists of a careful review of a great number of the authorities presented by the counsel for the Insurance Company, and a discussion of the whole question upon principle. It can serve no good purpose to further quote from it here. We are satisfied with its logic and its reasoning, and believe that it states the true doctrine applicable to cases of this kind.

It was shown by defendant in error upon the witness stand, on cross-examination, that some of the personal property which had been destroyed had at some time or other subsequent to the execution of the policy been mortgaged, but that at the time of the fire the mortgages had all been paid, and there was no incumbrance upon the property. It is now contended by plaintiff in error that the fact of the execution of the mortgage referred to avoided the policy as to the personal property. The term of the policy was five years from the date of its execution, which was the 8th day of September, 1884. An examination of the language hereinbefore copied satisfies us that it was not the intention of the parties to the contract to require that the same personal property should remain upon the farm for the whole term of the policy, but that, as hereinbefore indicated, it was upon certain kinds of property upon the premises. The second item in the list given is, "On beds and bedding while therein, \$50;" the third, "On wearing apparel while therein, \$100." It cannot be contended that it was the purpose of the parties to this contract that the same beds and bedding and wearing apparel should necessarily remain in that building for five years, in order to secure the benefit of the insurance, but rather that beds and bedding and wearing apparel while in the building, without reference to any particular kind or quality, should receive the benefit of the insurance. The same may be said as to the household furniture, the sewing-machine, the hay in the building or stack, the harness on the farm, wagon, farming utensils and live stock. The clear intent and purpose of the parties was that such as might be worn out and destroyed might be replaced; that such as it might become necessary to sell might be sold, and other stock purchased in its stead.

The execution of a chattel mortgage is a sale, subject to the condition named in the mortgage. The legal title is vested in the mortgagee, and it is his property subject alone to the conditions contained in the mortgage. Had the property destroyed been sold, and the legal title transferred to the purchaser, defendant in error

could recover nothing for his loss. Had it been mortgaged, and the legal title so transferred, he could still recover nothing. But, under the plain sense of the policy, had the property been replaced by other of the same kind and species, there could be no doubt of plaintiff's liability in case of loss. Had the contract of insurance been upon specific personal property, it is possible that the defense presented would have been available. However, that question is not before us. But we are quite clear that the transfer of the legal title to the insured property, either by mortgage or sale, would avoid the policy so far only as that particular property was concerned during the time of the existence of the title in the purchaser or mortgagee, and to that extent only could the sale or mortgaging of the property under the provisions of this policy be a successful defense.

But it is claimed that there was no competent proof that the mortgages were paid, and the title of the property in the assured, at the time of the fire, and that that burden was upon defendant in error. Upon an examination of the bill of exceptions we find that while defendant in error was upon the witness stand, after having testified to the loss, and during the cross-examination, he was interrogated by counsel for plaintiff in error as to his having executed the mortgages referred to, and in many instances his answers were that he had so executed the mortgages, but that they had been paid. In others he was not certain as to whether the mortgages covered the property lost or not. In view of this evidence the question was submitted specially to the jury as to the execution of the mortgages and the payment thereof, and they found, as returned, that the mortgages had been executed, but that they had been canceled and paid at the time of the loss. Now, had the plaintiff in error only proven the execution of the mortgages, it would, perhaps, have devolved upon defendant in error to have shown that at the time of the loss the title to the property destroyed was not impaired. But that course was not pursued. They inquired of him, particularly, whether or not the mortgages had been canceled by payment, and his answer was that they had. They cannot now object to this evidence as failing to establish the fact.

In this connection it is contended that, under the issues presented by the pleadings, evidence of payment or release was immaterial, and therefore improperly submitted to the jury. This contention cannot be successfully urged here, for the reason, as we have said, that even over the objection of counsel for defendant in error, plaintiff in error, upon the cross-examination of defendant in error, insisted upon making this very proof, and he cannot now be heard to object that it was not within the legal form presented by the pleadings. This contention is also unavailing.

The next contention of plaintiff in error is that there was no proof of loss prior to the commencement of the action. The provisions of the policy upon this subject are as follows: "In case of loss the assured shall notify the Company within thirty days from the time such loss may have occurred." There seems to be no provision requiring proof of loss as is contained in some policies which have been before

us. The provision seems to be that the Company shall have notice of the fact. Nor is it stipulated that the notice shall be given to any particular person or officer; neither is there any requirement that the notice given shall be in writing. Upon this subject defendant in error testified that at the time of the fire two of the agents of plaintiff in error were present, and saw the destruction of the property; that they then informed him that they would notify the Company of his loss, and that a short time thereafter the adjuster for the company came to the residence of defendant in error and adjusted the loss. It is now insisted that there was no competent proof of the agency of the two persons who were present, or of the person who represented himself as the adjuster for plaintiff in error. Upon this subject defendant in error testifies positively to the fact of the agency. He was not cross-examined, and therefore not interrogated by anyone as to his knowledge of the fact testified to by him. It may have been, and probably was, true that he had personal knowledge of the fact of the agency of the two persons referred to, and of the adjuster. At least we must assume the fact to be so in the absence of anything showing the contrary, as there is no presumption that he testified falsely, or upon a subject of which he knew nothing. It is quite probable that, had counsel for plaintiff in error interrogated him as to his knowledge of that fact, they might have succeeded in showing that he, in reality, knew nothing about their agency. But this was not done, and the testimony upon that subject must be taken as true. He does not show that the parties represented themselves to him to be such agents, or that such representations were made by any person; but he testifies positively to the fact of the agency.

The next and last contention of plaintiff in error is that there is a material and fatal variance between the description of the premises as described in the petition and the proof. In the policy the property is described as all being situated upon the N. E. $\frac{1}{4}$ of sec. 2, T. 80, R. 16, and it is so described in this petition, while it is shown in the proof that the correct description of the property would have been the N. W. $\frac{1}{4}$ of sec. 2, and of the same township and range. This seems to have been a mistake on the part of the agent, or of the assured, or perhaps of both, at the time of the execution of the policy.

It is contended by plaintiff in error that before defendant in error could recover he should have instituted his action in equity to reform the policy, and that, having failed to do so, he cannot recover. To this we cannot agree. It was shown upon the trial that, at the time of the execution of the policy, the agent went to the house of defendant in error, examined all the property, and effected the insurance; that, during the time intervening between the execution of the policy and the trial, defendant in error had continually resided upon the premises upon which he then resided, and where the insurance was effected, and that the personal property had been there during the whole of the time.

In *May on Insurance*, p. 873, § 566, it is said: "In most of the States, however, courts of law will apply the doctrines of waiver and estoppel

or allow proof of mistake, so as to enable the plaintiff to maintain his action for indemnity, and not drive him to a court of equity."

This question was before the Supreme Court of Kansas in *American Cent. Ins. Co. v. Molanathan*, 11 Kan. 583. In that case the court says: "In such case the contract is not void for uncertainty, nor is there any need of applying for a reformation of the contract, provided it appear, either from the face of the instrument or extrinsic facts, which is the true and which

is the false description,"—citing 1 Greenl. Ev. §§ 300, 302; *Loomis v. Jackson*, 19 Johns. 449; 2 Hill, Real Prop. 358, 368; *Boardman v. Reed*, 81 U. S. 6 Pet. 840 [8 L. ed. 420]. See also *Manhattan Ins. Co. v. Webster*, 59 Pa. 227.

We find no error requiring a reversal of the judgment.

It is therefore affirmed.

The other Judges concur.

Motion for rehearing overruled December 4, 1889.

PENNSYLVANIA SUPREME COURT.

L. B. D. REESE

v.

PENNSYLVANIA R. CO., *Appt.*

(....Pa....)

1. A regulation of a railroad that a passenger who fails to purchase a ticket must pay ten cents more than the regular fare, for which extra charge a check will be given by the conductor, which will be cashed at any ticket office, is not unreasonable.

2. An extra demand of ten cents from a passenger without a ticket, which will be refunded at any regular ticket office on presenting a check given him by the conductor, is not a part of the fare or "charge for transportation" within the meaning of a statute fixing the maximum rate of fare.

(*Sterrett, J., dissents.*)

(January 20, 1890.)

APPEAL by defendant from a judgment of the Court of Common-Pleas, No. 2, of Allegheny County to review a judgment in favor of plaintiff in an action to recover damages for the alleged unlawful ejection of plaintiff from defendant's train. *Reversed.*

The defendant Company in June, 1887, established a regulation which was embodied in notices posted up in its station-houses, of one of which the following is a copy:

NOTICE TO PASSENGERS.

An excess of 10 cents will be charged on all fares paid on trains. Passengers paying such fares will be furnished by the conductors with a memorandum, upon presentation of which at any ticket office of the Pennsylvania Railroad Division the excess of 10 cents will be refunded.

Passengers are respectfully requested to purchase tickets at the regular ticket offices of the Company, as far as practicable.

It also issued the following rules to its conductors:

"The following rules will, until further notice, govern the issue of duplex tickets on the Pittsburgh Division.

"The collection of excess must be omitted as follows:

NOTE.—Railroad companies may make reasonable rules and regulations for payment of fares by passengers. *McGowen v. Morgan's L. & T. R. & S. Co.* 5 L. R. A. 817, note, 41 La. Ann. —.

6 L. R. A.

"1. When passage is taken from non-ticket stations, whether the destination is a ticket station or a non-ticket station.

"2. When passage is taken from a ticket station, the office of which being closed by authority, regardless of the passenger's destination.

"3. When, on account of a large crowd, it is impossible to issue duplex tickets without losing cash fares, or leaving tickets in the hands of passengers.

"4. In cases of small children traveling alone, and of sick, aged or infirm persons, who have not money enough to pay the excess.

"5. When excursion tickets are issued.

"6. Omit the collection of excess in connection with New York & Chicago Limited Express extra fares; and also when ordered collections are made on second-class and emigrant tickets.

"In all cases, except as above noted, conductors must courteously enforce the collection of excess, . . . and require the persons who refuse to pay it to leave the train; and if necessary, without undue force or violence, eject them at the next station, as provided in the book of rules."

On October 24, 1888, plaintiff went to defendant's station at East Liberty, Pittsburgh, in which was posted one of the above notices, for the purpose of taking a train to go to the Union Depot in said city.

He did not have time after arriving at the station to purchase a ticket before the departure of the train, so he went on board without one.

He tendered to the conductor 14 cents, the regular fare charged by the Company for transporting passengers between the two depots. The conductor, however, demanded 10 cents additional, which he refused to pay, and the conductor thereupon enforced the rule and he was compelled to leave the train, without being at any time informed after entering the train that he would receive a receipt for the extra payment which would entitle him to have the same refunded upon presentation at the proper office, and he did not know that such was the regulation.

At the trial defendant requested the court to charge *inter alia* as follows:

"Under the uncontradicted evidence in this case, the regulation of the defendant was a reasonable one, and the plaintiff, who was insisting on riding in violation thereof, has no cause

of action, and their verdict should be in favor of defendant."

Answer. "Refused." (First assignment of error.)

At the plaintiff's request the court charged: "If the jury find that the amount demanded from plaintiff by the conductor was in excess of the maximum rate of fare per mile fixed by defendant's charter, such demand was illegal; and if, in consequence of plaintiff's refusal to pay the excessive amount so demanded, he was ejected from the train, he is entitled to recover in this action, especially if the jury further find that he was willing to pay, and tendered to the conductor, the regular ticket or cash fare between said points.

A verdict was returned in plaintiff's favor for \$250, and defendant took this appeal.

Messrs. John H. Hampton, William Scott and George B. Gordon, for appellant:

To set aside a by-law its unreasonableness should be demonstrably shown.

Ang. & A. Corp. § 357; *Hibernia Fire Engine Co. v. Harrison*, 98 Pa. 267; *Field, Corp. § 296*; *Com. v. Power*, 7 Met. 600; *Jencks v. Coleman*, 3 Sumn. 224; 1 Rorer, Railroads, p. 227.

A passenger who violates the regulation of the Company, and does not purchase his ticket at the ticket office, may be charged a higher rate of fare upon the train, provided that such excess is reasonable.

Chicago, B. & Q. R. Co. v. Parks, 18 Ill. 465; *Hutchison*, Carr. p. 571; *State v. Hungerford*, 39 Minn. 6, 34 Am. & Eng. R. R. Cas. 266; *Du Laurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49; *Wilsey v. Louisville & N. R. Co.* 88 Ky. 516; *Swan v. Manchester & L. R. Co.* 182 Mass. 117; *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. 378. See also *St. Louis, A. & T. H. R. Co. v. South*, 43 Ill. 181; *Stephen v. Smith*, 29 Vt. 168; *Indianapolis, P. & C. R. Co. v. Richard*, 46 Ind. 298; *Hilliard v. Gould*, 34 N. H. 241; *State v. Chovin*, 7 Iowa, 208.

The term "reasonable," when applied to a regulation of a public company, means, Is it impossible of performance, oppressive in amount, a violation of common rights, or does it impose an amount of trouble upon the passenger which is unnecessary and disproportionate to the good to be obtained by the corporation?

See *Hibbard v. New York & E. R. Co.* 15 N. Y. 455; *State v. Overton*, 24 N. J. L. 441; *Chilton v. London & C. R. Co.* 16 Mees. & W. 212; *Dearden v. Townsend*, L. R. 1 Q. B. 10; *Reg. v. Frere*, 24 L. J. N. S. (Q. B.) 148; *London & B. R. Co. v. Watson*, L. R. 8 C. P. Div. 429.

A railroad company may make a regulation by which it refuses to receive fares upon trains at all, and that passengers will not be allowed to ride unless they have a ticket.

Hutchison, Carr. § 570; *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. 378; *Southern Kansas R. Co. v. Hinsdale*, 88 Kan. 507, 34 Am. & Eng. R. R. Cas. 256; *Evans v. Memphis & O. R. Co.* 56 Ala. 246; *Illinois Cent. R. Co. v. Johnson*, 67 Ill. 812; *Toledo, P. & W. R. Co. v. Patterson*, 63 Ill. 304; *Illinois Cent. R. Co. v. Nelson*, 59 Ill. 110; *Chicago & A. R. Co. v. Flag*, 43 Ill. 364; *Illinois Cent. R. Co. v. Sutton*, 42 Ill. 488; *St. Louis & S. E. R. Co. v. Myrtle*, 51 Ind. 566; *Law v. Ill. Cent. R. Co.* 82 Iowa, 584; *Brown v. 6 L. R. A.*

Kansas City, F. S. & G. R. Co. 88 Kan. 634; *Kansas Pac. R. Co. v. Kessler*, 18 Kan. 523; *Burlington & M. R. R. Co. v. Rose*, 11 Neb. 177; *Cleveland, C. & C. R. Co. v. Bartram*, 11 Ohio St. 457; *Lane v. East Tennessee, V. & G. R. Co.* 5 Lea, 124.

Messrs. Levi Bird Duff and A. C. Johnston, for appellee:

A railroad company cannot exceed the limit of charges permitted by its charter for carrying passengers.

O'Byrne v. Allegheny Valley R. Co. 9 Pittsb. L. J. 117; *Forsee v. Alabama G. S. R. Co.* 63 Miss. 66.

When a conductor of a train demands from a passenger a higher rate of fare than he is entitled to demand, the demand is illegal, and the company is responsible if the conductor ejects the passenger for his refusal to comply.

Wilsey v. Louisville & N. R. Co. 88 Ky. 511; *Smith v. Pittsburg, F. W. & C. R. Co.* 23 Ohio St. 10; *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126; *Cincinnati, S. & C. R. Co. v. Skillman*, 39 Ohio St. 444; *London & B. R. Co. v. Watson*, L. R. 8 C. P. Div. 429; *Saunders v. South Eastern R. Co.* L. R. 5 Q. B. Div. 456.

The burden was on the Company to have made known to the appellee the conditions of this regulation; and the mere posting up of placards in its ticket offices was not sufficient.

Lake Shore & M. S. R. Co. v. Greenwood, 79 Pa. 378; *Pennsylvania R. Co. v. Spicker*, 105 Pa. 142.

Mitchell, J., delivered the opinion of the court:

The right of railroad companies to make reasonable regulations, not only as to the amount of fares, but as to the time, place and mode of payment, is unquestionable. This right includes the right to refuse altogether to carry without the previous procurement of a ticket. *Lake Shore & M. S. R. Co. v. Greenwood*, 79 Pa. 378.

That case arose upon a special regulation as to the carriage of passengers upon freight trains; but there is no appreciable distinction between it and a general regulation as to all passengers. Both rest on the common-law principle that requires payment or tender as an indispensable preliminary to holding a carrier liable for refusal to carry, and on the manifest and necessary convenience of business where the number of passengers is liable to be large and the time for serving them short.

So, too, the authorities are uniform that companies may charge an additional or higher rate of fare to those who do not purchase tickets before entering the cars. *Crocker v. New London, W. & P. R. Co.* 24 Conn. 249; *Swan v. Manchester & L. R. Co.* 182 Mass. 116; *Hilliard v. Gould*, 34 N. H. 241; *Stephen v. Smith*, 29 Vt. 160; *State v. Gould*, 53 Me. 279; *State v. Chovin*, 7 Iowa, 208; *Du Laurans v. First Div. St. Paul & P. R. Co.* 15 Minn. 49; *State v. Hungerford*, 39 Minn. 6, 34 Am. & Eng. R. R. Cas. 265 and note; *Chicago, B. & Q. R. Co. v. Parks*, 18 Ill. 460; *Pullman Palace Car Co. v. Reed*, 75 Ill. 130; *Cincinnati, S. & C. R. Co. v. Skillman*, 39 Ohio St. 451; *Forsee v. Alabama G. S. R. Co.* 63 Miss. 67.

And it may be noted, in response, to one of

the most urgently pressed arguments of the defendant in error, that the reasons almost uniformly given in support of this long line of decisions include the furthering of the honest, orderly and convenient conduct by the Railroad Company of its own business.

The regulation in question in the present case is not in itself unreasonable or oppressive. In regard to the traveler it is scarcely just ground of complaint that he has to present his refunding ticket at the end of his journey instead of getting an ordinary ticket at the start. The inconvenience, if any, is the result of his own default. With reference to the other passengers, and still more to the Railroad Company, the regulation is conducive to the rapid, orderly and convenient dispatch of the conductor's part in the collection of fares, and thus leaving him free for the performance of his other duties in connection with the stops at stations, the entrance and exit of passengers, and the general supervision of the safety and comfort of those under his care.

If, therefore, the Company may refuse to carry at all without a ticket, it may fairly refuse, under the far less inconvenient alternative to the traveler of putting him to the trouble of going to an office to get his excess refunded. If the Company may charge those failing to get a ticket an additional price, and keep it, certainly they may charge such price and refund it. And as the regulation is not in itself unreasonable or oppressive, or needlessly inconvenient to the traveler, its validity, upon general principles and on authority, would seem to be beyond question.

These views were conceded by the learned judge below, and are not seriously questioned by counsel here. But the decision was based upon the view that the extra ten cents imposed by this regulation is a part of the fare, and makes it higher than the rate allowed by the Act of Incorporation of the Company. The language of the Act is: "In the transportation of passengers, no charge shall be made to exceed . . . three and one-half cents per mile for way passengers."

As the distance from East Liberty Station to the Union Depot in Pittsburgh is four and a half miles, and the regular fare fourteen cents, it is admitted that the extra ten cents is in excess of the charter rate, if it is a "charge for transportation" within the meaning of the Act. Should it be so regarded?

"Charge" is a word of very general and varied use. Webster gives it thirteen different meanings, none of which, however, expresses the exact sense in which it is used in this charter. The great dictionary of the Philological Society, now in course of publication, gives it twenty separate principal definitions, besides a nearly equal number of subordinate variations of meaning. Of these definitions one (10 b) is: "The price required or demanded for service rendered, or (less usually) for goods supplied," and this expresses accurately the sense of the word in the present case. The essence of the meaning is that it is something required, exacted or taken from the traveler as compensation for the service rendered, and, of course, something taken permanently, not taken temporarily and returned. The purpose of the restriction in the charter is the regulation of

the amount of fares, not of the mode of collection, the protection of the traveler from excessive demands, not interference with the time, place or mode of payment. These are mere administrative details which depend on varying circumstances, and are therefore left to the ordinary course of business management. We fail to see anything in the present regulation which can properly be treated as an excessive charge within the prohibition of the charter.

Nor is there any force in the objection that this regulation is unreasonable. It is said not to be general, fair and impartial, because it provides that as to passengers getting on the train at stations where there is no ticket office, etc., or on trains where on account of the excessive rush of business it is impossible to issue the refunding check, the collection of the excess shall be omitted. The objection overlooks the necessary qualifications to the validity of such a regulation. All the cases are agreed that the regulation would be unreasonable and therefore void, unless the carrier should give the passenger a convenient place and opportunity to buy his ticket before entering the train. This part of the regulation merely puts in express words a necessary exception which the law would otherwise imply. So as to the excessive rush of business. Reasonableness depends on circumstances. To collect the extra amount and issue return checks to as many passengers as the conductor could reach in time, and let all others go free entirely, would be much more unreasonable than to treat all alike and dispense with the regulation for the time being. Necessity modifies the application of all rules, and there is nothing unreasonable in requiring the conductor to exercise sufficient foresight to see whether he can perform the prescribed duty in the available time, and investing him with the discretion to omit it altogether, if, in his judgment, he cannot perform it fully.

No authorities precisely in point have been found upon either side. The cases cited by the defendant in error, from Kentucky and Ohio, are widely distinguishable, as they were cases of absolute charge beyond the charter limit, without any provision for return of the excess to the traveler. But on well-settled principles we are of opinion that the regulation is reasonable in itself, and not in violation of the restriction in the Act of Incorporation. The defendant's first point should therefore have been affirmed.

Judgment reversed.

Sterrett, J., dissented.

HOME FOR AGED PROTESTANT WOMEN, *App't.*,

v.

BOROUGH OF WILKINSBURG.

(....Pa....)

The obligation of a charitable institution to maintain footwalks in front of its

NOTE.—Exemption from taxation, not to apply to local assessments.

Exemption from taxation under the General Law does not exempt from assessments for street im-

property is not affected by an exemption of all its property from taxation. A charge for laying the walk is not a tax, or a municipal assessment in the nature of a tax.

(January 6, 1890.)

CERTIORARI *sur* appeal from the Court of Common Pleas, No. 2, of Allegheny County to review a judgment in favor of plaintiff in an amicable action to determine defendant's liability for a municipal claim for the repairing of certain footwalks. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. H. & G. O. Burgwin*, for appellant:

A charter exemption from taxation includes municipal assessments.

Oliver Cemetery Co. v. Philadelphia, 98 Pa. 129.

The whole authority of the Borough to construct the new sidewalk now in controversy can be sustained only on the principle that it is local taxation for local benefit.

Borough Act, *Purd. Dig.* p. 208, § 52.

Assessments for city purposes are referable solely to the taxing power.

Re Washington Avenue, 69 Pa. 358; *Erie v. First Universalist Church*, 105 Pa. 278; *Re Center Street*, 6 Cent. Rep. 403, 115 Pa. 247; *Michener v. Philadelphia*, 11 Cent. Rep. 898, 118 Pa. 535; *Appeal of the Protestant Orphan Asylum*, 1 Cent. Rep. 908, 111 Pa. 143; *Wistar v. Philadelphia*, 80 Pa. 505.

A municipal claim for abating a nuisance under the General Borough Law of 1851 is a tax.

Harvey v. South Chester, 99 Pa. 565.

Messrs. R. A. & James Balph, for appellee:

The obligation to lay a footwalk is in no sense a tax; it is a personal duty cast upon the lot-owner, because of the peculiar benefit the construction and repair of a sidewalk is to him.

Greensburg v. Young, 53 Pa. 283; *Bears v. Ambler*, 9 Pa. 198; *Brown v. Beaver*, 17 W. N. C. (Pa.) 280; *Dickson v. Hollister*, 128 Pa. 421; *Appeal of the Protestant Orphan Asylum*, 1 Cent. Rep. 908, 111 Pa. 144.

This obligation imposed upon lot-owners to construct and repair sidewalks is a police regulation, and not the exercise of the taxing power.

Phillips v. Com. 44 Pa. 199; *Pittsburgh & O. R. Co. v. Southwest R. Co.* 77 Pa. 173; *Pennsylvania R. Co. v. Riblet*, 66 Pa. 164; *Kirby v. Pennsylvania R. Co.* 78 Pa. 506; *Boston Beer Co. v. Massachusetts*, 97 U. S. 25 (24 L. ed. 959); *Cooley, Taxm. p.* 396; *Goddard, Petitioner*, 16 Pick. 507.

A tax is generally understood to mean the imposition of a duty or impost for the support of government.

Pray v. Northern Liberties, 81 Pa. 69.

improvements; so exemptions in a corporate charter do not include local assessments. See *Illinois Cent. R. Co. v. Decatur*, 1 L. R. A. 613, *note*, 126 Ill. 233.

An exemption from a state tax will not preclude the levy of a municipal tax. *Lexington v. Aull*, 30 Mo. 480; *Paris v. Farmers Bank*, Id. 576; *St. Joseph v. Hannibal & St. J. R. Co.* 39 Mo. 476; *Pacific R. Co. v. Cass Co.* 53 Mo. 17; 1 *Desty, Taxm.* 146.

Exemption from taxation of every kind does not 6 L. R. A.

Paxson, Ch. J., delivered the opinion of the court:

The fourth section of the charter of the defendant says: "All the estates and properties of the corporation hereby created shall be free from taxation." Act of March 25, 1871, *Pub. Laws*, 452.

It appears from the case stated that the defendant owns certain real estate in the Borough of Wilkinsburg; that the footwalk adjoining said land on Coal Street was in such a state of decay as to be dangerous; that the borough council by resolution directed the defendant to lay a new footwalk in front of its said property in accordance with the ordinances and general regulations of said Borough, of which resolution the defendant had due notice; that the defendant neglected and refused to construct said footwalk, whereupon the Borough proceeded to do so, and within the time required by law filed its claim against said property for the amount of work and material used in its construction, together with 20 per centum advance thereon.

It is conceded that this Home is a charity, and that under the Borough Act of 1851, the burgess and council may require property owners to keep the footwalk or pavement in front of their property in good and safe condition for foot passengers, and in default, after notice, the Borough may cause it to be done, and collect the amount of expense, with 20 per centum penalty, from the owner. The precise question before us is whether the defendant is exempt from this burden by reason of the clause in its charter above referred to. If the charge for laying this footwalk is a tax, or a municipal assessment in the nature of a tax, we are of opinion the Borough cannot recover.

This principle was expressly ruled in *Oliver Cemetery Co. v. Philadelphia*, 98 Pa. 129. In that case the company was exempted by its charter "from taxation except for state purposes;" a sewer was constructed on a street along the line of which were a number of burial lots, and an assessment was charged against said lots to defray, in part, the cost of the sewer. This was held by this court to be a species of local taxation, and within the exemption clause of the charter.

The defendant contends that this footwalk comes within the reason of the case cited, and that the charge for its construction is also a species of local taxation. We think there is a marked distinction between the two cases. In the case of borough footwalks the owners of property are required by law to keep their footways in repair and, if necessary, relay them. This is a duty cast directly upon the property owner, and is in the nature of a police regulation. It is no more a tax, or a municipal assessment in the nature of a tax, than would be the imposition of any other duty by virtue of the police powers of the

exempt from an assessment for street improvements. *Grand Gulf & P. G. R. Co. v. Buck*, 53 *Miss.* 246.

The real estate of a charitable institution exempt from taxation by statute is not thereby exempted from assessments for local improvements. *Roosevelt Hospital v. New York*, 84 N. Y. 108; *Re Mayor of New York*, 11 *Johns.* 80; *Bleecker v. Ballou*, 3 *Wend.* 268.

Borough, with a penalty for its violation. This footway was a public nuisance, dangerous in its character, and the fact that the defendant is a charity, and exempt from taxation, does not authorize it to maintain a nuisance. It could be required to abate it precisely as in the case of any other corporation or individual.

In the *Cemetery Case*, there was no police or other duty cast upon the company. It was not required to build the sewer. It was constructed by the city under its power for that pur-

pose, and the cost thereof charged to the property owners in pursuance of a recognized system of municipal assessments. Such assessments have been repeatedly held to be a species of taxation.

We regret, for the sake of this deserving charity, that we are unable to reach a different conclusion. The law is too plain, however, to admit of even a doubt.

Judgment affirmed.

IOWA SUPREME COURT.

J. P. FARLEY, *Appt.*,

v.

Peter GEISECKER.

(....Iowa....)

1. A statute providing for the allowance of an attorney's fee as part of the costs in a certain class of actions applies to actions of that class pending at the time of its passage, and the refusal to allow such fee therein is error.
2. Actions relating to the existence of a nuisance are not within the provisions of Code, § 8173, making the right of appeal to the supreme court depend upon the amount in controversy or a certificate of the trial judge; and they may therefore be appealed to that court without regard to the amount involved.
3. Where an item of statutory costs is disallowed by the trial court in an action of which the supreme court would have jurisdiction on appeal, the aggrieved party may have such disallowance alone reviewed in the supreme court, notwithstanding the fact that such item alone is not sufficient in amount to give that court jurisdiction of the controversy.
4. The court in fixing an attorney's fee must, in the absence of evidence, be guided in estimating the value of his services by the amount of labor performed as indicated by the record.

(October 14, 1889.)

APPEAL by plaintiff from a judgment of the District Court for Dubuque County disallowing his claim to an attorney's fee in an action for the abatement of a nuisance consisting of the keeping and sale of intoxicating liquors in violation of law. *Reversed.*

The case sufficiently appears in the opinion. *Mr. S. F. Adams* for appellant. *Mcarrs, Fouke & Lyon* and *McKenney & O'Donnell* for appellee.

Robinson, J., delivered the opinion of the court:

1. This action was commenced in October, 1884. After the evidence had been submitted, it was admitted that defendant had quit the saloon business, and moved to Florida. The court thereupon rendered judgment in words as follows: "March 30, 1889. It appearing that this case was brought before the law provided for an attorney fee in cases of this character, and that defendant had quit the business, and moved to Florida, judgment is rendered for costs. Attorney's fee is disallowed."

The action of the court in disallowing an at-

torney's fee was erroneous. *Campbell v. Manderscheid*, 74 Iowa, 708; *Drake v. Kaiser*, 73 Iowa, 707.

2. No evidence was given on the trial in the district court as to what would be a reasonable attorney's fee to be assessed by the court, and no certificate of the trial judge as to the question involved in this appeal is presented for our consideration. Appellee insists that this court has no jurisdiction of the cause, for the reason that appellant's abstract shows that he would not be entitled to an attorney's fee exceeding \$100 in amount. The certificate of the trial judge is required to give this court jurisdiction only when the amount in controversy, as shown by the pleadings, does not exceed \$100. Code, § 8173.

It has been held that, when the plaintiff waives his claim to a part of the amount he sought to recover, the amount in controversy, within the meaning of the Statute, is thereby reduced. *Nevada v. Klum*, 76 Iowa, 428; *Cooper v. Wilson*, 71 Iowa, 205.

In such cases the waiver has the effect to so far modify the pleadings as to prevent a recovery for the amount waived. To defeat the jurisdiction of this court, it must affirmatively appear that the case falls within the limitation fixed by section 8173. *Henkle v. Keota*, 68 Iowa, 837; *Babcock v. Board of Equalization*, 65 Iowa, 111.

The amount in controversy, as shown by the pleadings, constitutes the test of jurisdiction. *Bradenberger v. Rigler*, 68 Iowa, 800.

The controversy in this case, as shown by the pleadings, related to the existence of a nuisance, and is not within the Statute. *Dist. Twp. of Eden v. Independent Dist. of Templeton*, 73 Iowa, 687.

The costs were incidental to the controversy, and should have included an attorney's fee. Laws 1886, § 1, chap. 66.

Costs are not considered in ascertaining the controversy contemplated by the Statute. *Curran v. Excelsior Coal Co.* 63 Iowa, 96.

The appellant, being entitled to an attorney's fee, was aggrieved by the refusal of the court to allow it. As a rule, this court has appellate jurisdiction over all judgments and decisions of other courts of record in the State; and, this cause not having been shown to be an exception to that rule, jurisdiction of it must be assumed to exist. The fact that the evidence does not show that the amount in controversy

*That Statute provided that "if successful in the action the plaintiff shall be entitled to an attorney's fee of not less than \$25." [Rep.]

exceeds \$100 is immaterial. *Ormsby v. Nolan*, 69 Iowa, 183.

8. It was said in *Campbell v. Manderscheid*, *supra*, that, in fixing the amount to be allowed as an attorney's fee, the court was permitted to act upon its own judgment, in connection with the record in the case. In this case, in the absence of evidence, we must be guided in estimating the value of the attorney's services by the amount of labor he performed, as indicated by the record. That discloses the filing

of the petition, and the trial, on which the only evidence offered was a part of an answer filed by defendant, which had been superseded by the filing of an amended answer. A judgment in a contested case could hardly have been obtained with less labor. Therefore the attorney's fee for services rendered in the courts below will be fixed at \$25.

Reversed.

Petition for rehearing denied Feb. 12, 1890.

MICHIGAN SUPREME COURT.

Joseph H. HOLMAN, *Relator*,
v.
TRUSTEES OF SCHOOL DISTRICT No.
5 of Avon Township, *Respondents*.

(.....Mich.)

A child cannot be suspended from a common school under a rule of the school

board for failure to replace or pay for property destroyed or damaged by mere carelessness. Such carelessness does not constitute a "gross misdemeanor" authorizing suspension within the meaning of How. Stat., § 5069.

(November 8, 1890.)

PETITION for a writ of mandamus to compel respondents to reinstate relator's son as

NOTE.—Common schools, rules and regulations for conduct and management of pupils.

The rules necessary for the orderly conduct of a school should be promulgated by the board which has special charge of such schools (*Hodgkins v. Rockport*, 105 Mass. 476; *Russell v. Lynnhfield*, 116 Mass. 386; *Dritt v. Snodgrass*, 66 Mo. 286; *Roberts v. Boston*, 5 Cush. 209; *Spiller v. Woburn*, 12 Allen, 128; *Ferriter v. Tyler*, 43 Vt. 471; *State v. Burton*, 45 Wis. 150); and in the absence of such promulgation by the board, the teacher may adopt such rules as are required for the orderly conduct of the school. (*Sherman v. Charlestown*, 8 Cush. 163; *Kidder v. Chellis*, 59 N. H. 473; *Danenholfer v. State*, 69 Ind. 206. See *McLellan v. St. Louis Public Schools*, 15 Mo. App. 363; *Ellis v. North Carolina Deaf, D. & B. Inst.* 68 N. C. 427.)

A rule which provides that any pupil absent six half days in four consecutive weeks without satisfactory excuse shall be suspended from school is a reasonable rule. (*King v. Jefferson City School Board*, 71 Mo. 628.)

Truancy, though an act committed out of school, yet being subversive of the good order and discipline of the school, may subject the offender to suspension or expulsion. (*Deakins v. Gose*, 55 Mo. 485, 55 Am. Rep. 387.)

A rule prescribed by a board of education, that a pupil failing to come prepared with a required exercise or with a reasonable excuse, shall be suspended, is a reasonable rule, such as the board has authority to adopt; and when a teacher, in a proper case, enforces the rule by suspending a pupil, neither teacher nor board is liable in damages. (*Sewell v. Board of Education*, 29 Ohio St. 89.)

Any rule or regulation which has for its object anything outside of the instruction of the pupil—the order requisite for instruction—is beyond the province of the board of education to adopt. (*State v. Fond Du Lac Board of Education*, 68 Wis. 234, 58 Am. Rep. 284.)

A rule requiring pupils of a public school to pay for school property which they may wantonly and carelessly break or destroy is not a reasonable rule, and its enforcement by chastisement of the pupil is unjustifiable. (*State v. Vanderbilt*, 116 Ind. 11, 15 West. Rep. 549.)

A teacher may make reasonable rules concerning matters not provided for by the director's rules, and so may forbid scholars from quarreling and swearing on the way home, and punish for the in-

fraction of the rule. (*Deakins v. Gose*, 55 Mo. 485, 55 Am. Rep. 387.)

Whether the rules made by a school teacher for the government of his pupils are reasonable is ultimately a matter for the courts. (*State v. Vanderbilt*, 116 Ind. 11.)

Right of teacher to enforce discipline.

A teacher is an executive officer of the school department of the government, and as such must enforce order and decorum in his school. (*Huse v. Lowell*, 10 Allen, 150.)

For acts done in pursuance of his power and authority he is not to be held responsible either civilly or criminally unless he acts maliciously. (*Cooper v. McJunkin*, 4 Ind. 290; *Stevens v. Fassett*, 27 Me. 230; *State v. Stalcup*, 2 Ired. L. 53; *State v. Alford*, 68 N. C. 323; *McCormick v. Burt*, 95 Ill. 266; *Spear v. Cummings*, 23 Pick. 224, 34 Am. Dec. 53; *Jenkins v. Waldron*, 11 Johns. 114; *Schoettgen v. Wilson*, 43 Mo. 253; *Stewart v. Southard*, 17 Ohio, 402; *Roe v. Deming*, 21 Ohio St. 606; *Mills v. Brooklyn*, 32 N. Y. 489; *Hines v. Lockport*, 50 N. Y. 236; *Jordan v. Hanson*, 49 N. H. 199; *Gregory v. Brooks*, 37 Conn. 365; *Morgan v. Dudley*, 18 B. Mon. 603, 68 Am. Dec. 735.)

In the infliction of punishment the school teacher is not liable for errors of opinion or mistakes of judgment, provided he is governed by an honest purpose to promote by the discipline employed the highest welfare of the school and the best interests of the pupils. (*Com. v. Randall*, 4 Gray, 36.)

If public officers err in the discharge of their duty in good faith, they are not liable. (*Doehoe v. Richards*, 38 Me. 376.)

A school master is not relieved from liability in damages for the punishment of a pupil, which is clearly excessive and unnecessary, by the fact that he acted in good faith and without malice, honestly thinking that the punishment was necessary both for the discipline of the school and the welfare of the scholar. (*Lander v. Seaver*, 33 Vt. 114.)

To render a teacher liable to criminal prosecution for chastising a scholar, the circumstances must show strong reason to believe that he had been actuated by bad and malevolent motives, using his legal authority for the gratification of a mind bent on mischief. (*Com. v. Seed*, 5 Pa. L. J. 73.)

Right of teacher to chastise pupil.

A school teacher, in regard to a pupil intrusted to his care by a parent or guardian, stands in loco

a pupil in the public school. On hearing of rule to show cause why writ should not issue. *Judgment for relator.*

The facts appear in the opinion.

Mr. Joseph H. Holman, relator, in propria persona.

Mr. Levi T. Griffin for respondents.

Morse, J., delivered the opinion of the court:

Hearing on order to show cause why Joseph J. Holman, a son of the relator, of the age of ten years, should not be reinstated in the schools of the above-named district, from which he had been suspended. The return of the respondents shows that among the rules adopted for the management and government of the schools in said district is the following: "Pupils who shall, in any way, deface or injure the school building, outhouses, furniture, maps or anything else belonging to the school, shall be suspended from school until full satisfaction is made." The power of suspension is vested in the teachers of the respective departments, but in this particular case the suspension by the teacher was approved and con-

firmed by the school board. The relator in his petition alleged that the boy was suspended for the reason that he had accidentally broken a window, and had not replaced it. That he applied to Julia Mason, the teacher who suspended his son, and requested her to reinstate him, but she refused, and he then applied to the trustees, a majority of whom also refused to receive the boy back into school. The respondents show that on the 1st day of October, 1889, the pupil "negligently and carelessly broke a window pane in said school building, the size of which was fourteen by forty inches, and that the actual cost of replacing it would be the sum of \$1." After the breaking of the window pane, the teacher requested the boy to notify his father that the broken pane must be replaced. That the next day his father, the relator, sent word by his son to the teacher that if she wanted to know about the window pane to call and see him. The teacher again sent word to relator that the glass be replaced or paid for, and received word in return that the pane would be replaced. It was not, however, replaced or paid for, and on the 7th of October, 1889, the

parentis, and can exercise the same authority as the parent, and is responsible in the same manner; and the rules of law which are applicable to the parental control are also to be applied in the school teacher. *Com. v. Seed*, 5 Pa. L. J. 78; *State v. Pendergrass*, 2 Dev. & B. Law, 385, 31 Am. Dec. 416; 4 Bl. Com. 453; 2 Kent, Com. 169; 1 Hale, P. C. 478.

The teacher of a public school has the right moderately to chastise a pupil for refusing to render an excuse for absence from school without leave. *Danenhoffer v. State*, 69 Ind. 295, 35 Am. Rep. 216.

The authority of a teacher to chastise a pupil extends to a pupil who has attained majority. By voluntarily attending school after majority the pupil waives any privilege, and subjects himself to like discipline with those who are within the school age. *State v. Mizner*, 45 Iowa, 248.

A teacher is not authorized to inflict corporal punishment upon the child for the purpose of compelling it to pursue a study forbidden by the father. *Morrow v. Wood*, 25 Wis. 59; *State v. Mizner*, 50 Iowa, 145.

The chastisement of a scholar by a school master must not be excessive or cruel, but it should be reasonably proportioned to the offense, and in the bounds of moderation. *Anderson v. State*, 3 Head, 455.

The reasonable manner of punishment inflicted is a question of fact. *Sheehan v. Sturges*, 53 Conn. 451.

Misconduct out of school.

Though a school master has in general no right to punish a pupil for misconduct committed after the dismissal of school for the day, and the return of the pupil to his home, yet he may, on the pupil's return to school, punish him for any misbehavior, though committed out of school, which has a direct and immediate tendency to injure the school and to subvert the master's authority. *Lander v. Seaver*, 33 Vt. 114.

If acts done out of school by pupils are detrimental to good order and the best interests of the school, such acts may be forbidden and punishment may be inflicted on those who commit them. *Burdick v. Babcock*, 31 Iowa, 562; *Lander v. Seaver*, 33 Vt. 114; *Sherman v. Charlestown*, 8 Cush. 160.

Suspension and dismissal of pupil.

The teacher may be justified in refusing to permit the attendance of a pupil whose parent will not

consent that he shall obey the rules of the school. *State v. Mizner*, 50 Iowa, 145.

The teacher of a public school has the inherent power to suspend a pupil from the privileges of the school in a proper case, unless he has been deprived of the power by the affirmative action of the school board or board of education. *State v. Burton*, 45 Wis. 150.

While the board of directors of a school district has power, under the statute, to dismiss a pupil for gross immorality, or for persistent violation of the regulations of the school, it has not power to dismiss or suspend for conduct short of this,—as for acts done out of school, which, though having a tendency to incite ridicule of the directors, and insubordination in the school, are not immoral, or prohibited by any rule or regulation. *Murphy v. Directors of Independent District*, 30 Iowa, 423. Compare *Hodgkins v. Rockport*, 105 Mass. 475.

A pupil cannot be suspended from a public school for refusing to comply with a regulation that each pupil shall bring into the school room a stick of wood for the fire. *State v. Fond du Lac Education Board*, 63 Wis. 234.

Ejection from the school room is not necessarily an expulsion from the school. *Peck v. Smith*, 41 Conn. 442.

The right to attend school is not a private right, held by the individual separately from the community at large, but a political right held in common. Accordingly the remedy for deprivation thereof is, under Mass. Gen. Stat., chap. 41, § 11, an action against the city or town, and not against the school committee. *Learock v. Putnam*, 111 Mass. 499.

A child who is excluded from a public school in a city by a teacher acting without authority from the school committee, cannot maintain an action against the city, under Mass. Gen. Stat., chap. 41, § 11, without first appealing to the school committee. *Davis v. Boston*, 133 Mass. 103.

The wrongful exclusion of a pupil from the benefits of a common sub-district school by a teacher, under the direction of the local directors, does not defeat the right of such teacher to his wages, duly certified by the local directors. *State v. Blain*, 36 Ohio St. 423.

The parent of a child expelled from a public school cannot maintain an action against the school committee by whose orders it was done. *Donahoe v. Richards*, 38 Me. 373.

teacher again sent word to relator that the glass must be paid for or replaced at once, or she would be obliged to enforce the rules. The same day relator called upon the teacher, and refused to replace or pay for the glass, and threatened to prosecute her if she enforced the rules against his son. Miss Mason thereupon consulted with the director, who directed her to issue an order suspending the boy from school until the glass was replaced or satisfaction made therefor. The order was issued, and notice of the same in writing served upon the relator, and notice also given the board of trustees of such suspension. October 11, 1889, the board met, and ratified and adopted the action of the teacher. Attached to the return of the respondents, and made a part of it, are the affidavits of two boys, one fourteen and the other twelve years of age, eye-witnesses, setting out the circumstances of the breaking of the window pane, and giving their opinion that it was carelessly and negligently done.

We think the writ should be granted. It will be noticed that there is no claim on the part of the respondents that the breaking of the window pane was malicious or willful. It is averred to have been done carelessly and negligently. The rule of the respondents, as it reads, is broad enough to include any accidental injury, and the respondents claim that they have the right to enforce it; that it is a reasonable and proper regulation, and is the same rule, in substance, adopted in other public schools in this State. They also seek to justify their authority to enforce the rule under section 5089, How. Stat., which provides that "the district board shall have the general care of the school, and shall make and enforce suitable rules and regulations for its government and management, and for the preservation of the property of the district. Said board may authorize or order the suspension or expulsion from the school whenever, in its judgment, the interests of the school demand, of any pupil guilty of gross misdemeanor or persistent disobedience," etc.

Granted that "gross misdemeanor," as used in this section, means gross misbehavior or misconduct, and not criminal conduct, and yet the Statute does not confer the authority claimed

by the respondents in this case. We think the definition of "misdemeanor" in this section is as claimed by respondents' counsel. It means gross misconduct or gross misbehavior. It is not necessary that a pupil shall be guilty of a criminal act before he can be suspended or expelled from school. But before he can be thus dealt with, he must be guilty of some willful or malicious act of detriment to the school, and the misconduct must be gross,—something more than a petty or trivial offense against the rules,—or he must be persistent in his disobedience of the proper and reasonable rules and regulations of the school. A boy ten years old, or even older, cannot be expelled or suspended for a careless act, no matter how negligent, if it is not willful or malicious. The action taken in this case might, to a poor boy, mean indefinite suspension. This rule might in a great many cases, if enforced, prevent the further attendance of pupils at the public schools, while we have laws upon our statute-books compelling such attendance. It is not desirable nor permissible that a child may be excluded from the common schools because, by a careless or negligent act, without malice or willfulness, it has injured or damaged school property to such an extent that it is beyond its power, or that of its parent or guardian, to make compensation for it. This would be the effect of the rule, if carried out, in many cases. In the present case, no doubt, the father could have replaced this glass without serious financial detriment, and it would have been much cheaper for him to have done so. But he saw fit to stand upon his rights, as he was privileged to do, and by so doing test the power and authority of school boards in this State to adopt and enforce such rules as the one before us, which, in other instances might deprive poor children who are careless, as all children are careless, of the right to a common-school education, which the laws and policy of our State have guaranteed to them so carefully that the parent is punished if he neglects or refuses to give his children the benefit of the public schools.

The writ will issue as prayed.

Long, J., did not sit; the other Justices concurred.

MISSOURI SUPREME COURT.

Willie WINTER, by His Next Friend, D. R. Stevens, *Resp't.*,

KANSAS CITY CABLE R. CO., *Appt.*

(....Mo.....)

1. It is the duty of those in charge of a grip cable-car running on the streets of a

populous city to be on the lookout and to take all reasonable measures to avoid injuries to persons who may be upon the street; and this duty is not discharged as a matter of law by ringing the bell and seeing that the track before the car is clear, without looking to the right or the left.

2. An objection that there is no evidence that the defendant, in an action to recover damages for personal injuries alleged to have been

NORM.—*Damages for injury by negligence; suit by infant.*

When an infant sues for his own benefit for personal injuries inflicted upon him, the application of the doctrine of contributory negligence depends upon his capability of exercising judgment and discretion. If he is of such tender years that he is conclusively presumed incapable of judgment and

discretion and of owing a duty to another, neither contributory negligence on his part nor on that of his parent can be set up to defeat the recovery. *Pratt Coal & Iron Co. v. Brawley*, 88 Ala. 871.

Infant not chargeable with contributory negligence.

A child of tender years incapable of exercising any judgment or discretion is not chargeable with

inflicted by the negligent management of a grip car on defendant's road, was operating the road at the time of the accident, will not be considered on appeal, when no such question was raised on the trial, and the operation of the road by defendant was admitted in the answer.

3. In an action by a child to recover damages for personal injuries alleged to have been inflicted by the negligent management of a grip-car, the negligence of its mother in allowing it to go upon the public streets unattended by a person of mature years constitutes no defense.

4. Such action brought by a child who was three years old at the time of the accident will not be defeated by the negligence of another child ten years old, who was the only protector for the injured child present, in permitting him to get upon the track in front of a moving car.

(December 21, 1889.)

A PPEAL by defendant from a judgment of the Circuit Court for Jackson County in favor of plaintiff, in an action to recover damages for personal injuries alleged to have resulted from the negligent management of a car on defendant's road. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Johnson & Lucas for appellant.

Messrs. Jewell & Thompson, for respondent:

Mere acts of omission on the part of the pa-

rent, such as permitting the child to go upon the street alone or improperly attended, are no defense to an action by the child for injuries negligently inflicted upon it; negligence of a parent is only imputed to the child when the parent is personally present directing the movements of the child.

Boland v. Missouri R. Co. 86 Mo. 490; *Robinson v. Cone*, 22 Vt. 218; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Erie City Pass. R. Co. v. Schuster*, 4 Cent. Rep. 919, 113 Pa. 412; *Battisill v. Humphreys*, 7 West. Rep. 806, 64 Mich. 494; *Cooley*, Torts, p. 680.

Even if the child's mother and sister had been negligent the jury must still have found for plaintiff, since defendant's servants, by the exercise of ordinary care after plaintiff's situation was discovered, could have avoided the injury and could have seen his danger in time to save him.

Donohue v. St. Louis, I. M. & S. R. Co. 6 West. Rep. 848, 8; West. Rep. 628, 91 Mo. 863; *Sumner v. Rogers*, 7 West. Rep. 289, 90 Mo. 324; *Kelley v. Hannibal & St. J. R. Co.* 75 Mo. 140; *Guenther v. St. Louis, I. M. & S. R. Co.* 14 West. Rep. 785, 95 Mo. 295; *Frick v. St. Louis, K. O. & N. R. Co.* 75 Mo. 612.

Black, J., delivered the opinion of the court:

One of the defendant's cable-cars ran upon the plaintiff, a boy three years of age, at the

contributory negligence (*Chicago City R. Co. v. Robinson* (Ill.) 4 L. R. A. 128, note); but where he has attained such an age as to be capable of exercising judgment and discretion, he is held to such a degree of care as might be reasonably expected of one of his age and mental capacity. *Twist v. Winona & St. P. R. Co.* 30 Minn. 164; *Cleveland Rolling Mill Co. v. Corrigan* (Ohio) 3 L. R. A. 385, note; *Houston & T. C. R. Co. v. Boozer*, 70 Tex. 590; *Pratt Co. & Iron Co. v. Brawley*, 33 Ala. 371; *Western & A. R. Co. v. Young*, 51 Ga. 397; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531; *Illinois Cent. R. Co. v. Slater* (Ill.) 21 N. E. Rep. 575.

The rigid rule in determining what would be a bar to an action, on the ground of contributory negligence, would not be applied to an infant; all that is required is care and prudence equal to its capacity. *Duffy v. Missouri Pac. R. Co.* 3 West. Rep. 201, 19 Mo. App. 390; *Indianapolis, P. & C. R. Co. v. Pitzer*, 4 West. Rep. 253, 109 Ind. 179; *Collins v. South Boston Horse R. Co.* 3 New Eng. Rep. 649, 142 Mass. 301; *Chicago City R. Co. v. Robinson*, *supra*.

A child, although old enough to go about, will, when very young, be held incapable of contributory negligence. *Duffy v. Missouri Pac. R. Co.* *supra*.

A child seven years of age was treated as too young to be guilty of negligence. *Indianapolis, P. & C. R. Co. v. Pitzer*, 7 West. Rep. 401, 109 Ind. 191.

The same general principles govern in determining whether the acts of a child amount, as a matter of law, to contributory negligence, as in the case of adults, although the degrees of care required are different. *Collins v. South Boston Horse R. Co.* 2 New Eng. Rep. 649, 142 Mass. 301; *Cleveland Rolling Mill Co. v. Corrigan* (Ohio) 3 L. R. A. 385, note.

A boy six years old ordered to keep away from a ditch across which he with others was jumping, allowing stuff to fall down, but who has no knowledge, or was not warned, of any danger from gas, is not guilty of contributory negligence by remaining there, such as will prevent his recovery for in-

juries received by an explosion of gas. *Rummele v. Allegheny Heating Co.* (Pa.) 16 Atl. Rep. 73.

The caution required by a boy riding on a railroad train is according to the maturity and capacity of the child, to be determined in each case by the facts and circumstances; and the degree of discretion in avoiding danger depends upon the age and knowledge of the child. *Eoliff v. Wabash, St. L. & P. R. Co.* 7 West. Rep. 422, 64 Mich. 194.

The same degree of prudence cannot be expected of children as of grown persons. Hence, evidence that the intestate, who was a child of seven years, being frightened by cattle, sought refuge upon a railroad trestle to make her escape, may rebut a charge of contributory negligence. *Cassida v. Oregon R. & Nav. Co.* 14 Or. 551.

The facts that a five-year old child was upon a crowded public street about to cross it, and waited for one train to pass the crosswalk on which she was; and that, for the purpose of crossing, she passed to the rear of the train, which was stopping and prevented plaintiff from seeing a train coming behind such cars, and by which she was struck, show no negligence on her part. Whether or not the mother of such child was guilty of negligence in permitting the child to be at large is immaterial, in such action. *Cumming v. Brooklyn City R. Co.* 6 Cent. Rep. 384, 104 N. Y. 600.

In an action for an injury to a child while getting off from a street car, the question whether the child's mother was exercising due care for the safety of the child is immaterial, where the child himself was using all the care which the occasion required. *Chicago City R. Co. v. Robinson*, 4 L. R. A. 128, 127 Ill. 9.

The right of a child to go or to be upon the street is in no way dependent upon the occupation or pecuniary condition of its parents. *Indianapolis v. Emmelman*, 6 West. Rep. 563, 108 Ind. 330.

It is not sufficient to defeat a recovery for an injury to a child *non sui juris*, caused by defendant's negligence, that the act of the child was one which in an adult would be deemed a negligent one, con-

crossing of Ninth Street and Grand Avenue, in the City of Kansas, crushing one of his legs so that amputation became necessary. Hence this suit by his next friend for damages.

The refusal of the court to give defendant's instruction, in the nature of a demurrer to the evidence, makes it necessary to set out the substance of the evidence on the one side and the other. Ninth Street runs east and west, and Grand Avenue north and south. The train of cars was going east on Ninth Street, and thence around the curve, at the crossing of the two streets, and north on Grand Avenue. The accident occurred just as the front or grip car passed around and cleared the curve. The car, in approaching the curve, ascended a grade, but the surface of the streets at the crossing could be seen by the gripman for one hundred or more feet before he reached it. There were no obstructions on the streets. The grip car was open at both ends, but closed at the sides for a space of about two feet from the floor, and above that there were glass windows. The gripman's position placed him in the middle of the car.

The boy and his sister, ten years of age, went

to a building, about a block distant from the crossing, by permission of their mother, to gather kindling wood. She lived close to the same place, and says she let them go because she was not able to buy kindling. The children crossed over the tracks from the south to the north side of Ninth Street, and thence went east on the sidewalk to Grand Avenue, and thence eastward across that street towards their home. The car ran against the boy at a point about thirty-five or thirty-seven feet east of the west curb of Grand Avenue.

Of two witnesses, who were nearly a block distant, one of them testified: "When I first saw the boy he was three or four feet from the lamp-post at the northwest corner of the streets. He ran straight from that point until the car hit him. It did not seem to last longer than the snap of the finger." The other witness says: "The boy was trying to cross the street. There was a little girl ahead of him. The last I saw of her she was going."

Mr. Vincent, who was twenty or thirty feet distant, says he first saw the boy when near the west track; that he heard someone having a child's voice call, but did not see the little girl until af

tributing to the injury. There must be also concurring negligence on the part of the parents or guardian. *Kunz v. Troy*, 6 Cent. Rep. 493, 104 N. Y. 344.

The fact that children were at play on the street will not relieve the city from liability for death caused by its neglect to repair streets. *Chicago v. Keefe*, 1 West. Rep. 364, 114 Ill. 222.

It is not negligence *per se* to permit children to play in the street. *Kunz v. Troy*, 6 Cent. Rep. 493, 104 N. Y. 344.

It is not, as a matter of law, negligence for parents to permit a child four and a half years old to play on a city sidewalk unattended. *Birkett v. Knickerbocker Ice Co.* 13 Cent. Rep. 421, 110 N. Y. 504.

Allowing a child four years old to go upon the streets unaccompanied is not such negligence as will bar a recovery. *Stafford v. Rubens*, 1 West. Rep. 641, 115 Ill. 193.

A parent having no knowledge of the presence or probability of danger is not guilty of negligence in permitting a child five years of age to pass beyond the dooryard into the street without an attendant. *Indianapolis v. Emmelman*, 6 West. Rep. 566, 108 Ind. 530.

Where the deceased child, about three and a half years old, was accompanied by a brother seven or eight years old, it is not such negligence on the part of the parents as will bar a recovery. *Stafford v. Rubens*, 1 West. Rep. 640, 115 Ill. 193.

A mother allowed a child to go out to play on the sidewalk in company with her brother, a child of six years. While attempting to cross the street alone, the child was injured. It was held that it could not be said, as a matter of law, that the mother was negligent by letting the child thus go into the street. *Birkett v. Knickerbocker Ice Co.* 41 Hun, 404.

Proof that a child four or five years old walked into the back room while his mother was busy, and was gone only a minute or two, when she ran to the door and found that he had been injured by a horse in the street, does not show negligence on her part, as a matter of law. *Marsland v. Murray*, 148 Mass. 91.

Infant, when chargeable with negligence.

Conduct of one too young and inexperienced to

6 L. R. A.

appreciate the danger to which he is exposed, which would be negligence in one aware of the danger, may not be negligence in the infant. But if the jury find that he was aware of the danger, any negligence on his part which contributed directly to his own injury will defeat his action. *Dowling v. Allen*, 5 West. Rep. 372, 88 Mo. 293.

A boy twelve years of age living in the immediate vicinity of railroad trains, and accustomed to them, must be presumed to have known the great peril and danger of riding in front of an engine. *Ecliff v. Wabash, St. L. & P. R. Co.* 7 West. Rep. 462, 64 Mich. 196.

A boy eleven years old is not of such tender years as not to be chargeable with negligence in playing and lounging upon the right of way and track of a railroad. *Masser v. Chicago, R. I. & P. R. Co.* 68 Iowa, 602.

A ten-year-old boy of average intelligence, having a general knowledge of the structure and operation of a railway turntable, having been habitually warned by his father not to play upon it as it was dangerous, and knowing that the railway company prohibited children from playing upon it, is guilty of contributory negligence where he engages with other boys in swinging upon it while in motion, whereby he is injured, although he might not have been of sufficient age and discretion to understand the full extent and danger to which his conduct exposed him. *Twist v. Winona & St. P. R. Co.* 39 Minn. 164.

Where a boy seven years of age, considered competent by his parents to go to school and upon errands alone, attempted to run across the track in front of a train approaching a crossing over which he had often gone,—it was held there could be no recovery. *Indianapolis, P. & C. R. Co. v. Pitzer*, 7 West. Rep. 402, 109 Ind. 191.

Where boys climbed into a box-car left with open doors, while a train was being made up, and, being frightened by the starting of the car, one of them was pushed by another out of the car and injured, and the trainmen had no knowledge that the boys were in the car, the company is not liable. *Curley v. Missouri Pac. R. Co. (Mo.)* 10 S. W. Rep. 593.

Where a child suffers injuries through another's negligence, the contributory negligence or wrongful act of his parent is not imputable to him. *Wymore v. Mahaska Co.* post, 545.

ter the car struck the boy. This witness, and another person who was in the car, and saw the boy when within two feet of the car, say he was toddling along, about as a boy of his age would move. Other evidence shows that the gripman was looking to the front; that his attention was called to the presence of the boy, but too late to enable him to stop the car in time to avoid the injury.

Mr. Davis testified for the defendant: "I was on the north side of the grip-car, about three seats from the front. I saw the girl and boy starting over the crossing. Just as we swung up on top of the hill the girl stopped, and turned her head and looked at us. As the grip-car came around the curve, she ran back screaming, and threw up her hands, leaving the child by himself. He went in front of the train. At the time the girl turned and ran back she was three or four feet from the track. The gripman then had no time to stop the car. I first saw the child when about one step from the sidewalk. He had a pail or little bundle in his hand."

The gripman testified: "I saw the child just as I was about to strike it. It was not more than a foot from the car. I stopped the car within about six feet after I saw the child." On cross-examination he says: "When I first saw the child it was at the lamp-post on the sidewalk. There was a young lady close to him,—a rod from him. Saw no children near the boy. I did not see any little girl. I just looked out and noticed everything was clear, and went on. I did not look any more. The first I knew the child got across, and was struck."

Q. These grip-cars have closed windows all around?

A. Yes, sir.

Q. Standing at the grip, you could see this place, between the lamp-post and where the boy was hurt?

A. Yes, sir.

Q. If you had been looking?

A. You could see a part of the way there; you could see it all by stooping down.

If the defendant's liability in this case is limited to want of care on the part of its servants after they saw the boy in a dangerous situation, then the plaintiff failed to make out a prima facie case. The evidence is all to the effect that the gripman used all the means at his command to avoid the calamity after he knew the boy was in danger. But the principle of law just stated does not control this case. The defendant is operating dangerous machinery, at a rapid speed, on and along the public streets of the city, and must know, and in law is bound to know, that men, women and children have an equal right to the use of the highway, and will be upon it. It is the duty of the defendant's servants to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be upon the street. The duty to be on the watch is no more than ordinary care under such circumstances. The care to be used, to be ordinary care, must depend upon the surrounding circumstances. Now the evidence of the gripman tends to show that when he came to the crossing he rang his bell, looked out and saw the way was clear, and then went on around the curve, neither looking to the

right nor left. There is other evidence to the effect that the boy toddled along for a distance of at least thirty-five feet on the street, and in the direction of the approaching car, after the gripman saw him on the sidewalk, and the car must have traveled a much greater distance. Other persons saw the boy and girl when they started across the street in front of the approaching car. Had the gripman cast an eye to the left when he reached the curve, or while passing it, he would doubtless have discovered these children in time to have avoided the injury. He says he stopped the train in a space of six feet after the grip-car had passed the curve; and, if that be so, then there is reason to believe that the evidence of another witness to the effect that it could have been stopped on the curve in a space of four feet is true. But, assuming that both estimates should be doubled to approach accuracy, still the jury might well have found, as they did, by their answers to interrogatories, that the gripman could, by the exercise of ordinary care, have seen the plaintiff in time to have stopped the train before plaintiff was injured.

It was admitted on the trial that this accident happened on one of the principal traveled streets in the city. If we say the jury should have been directed to find for defendant, then we must hold, as a matter of law, that it was sufficient care on the part of the gripman, when approaching the curve, to ring his bell, see that the track before him was clear, and go ahead without thereafter looking to the right or left. This we are not prepared to do. The question of negligence in this case was one of fact, and our duty is performed when we see that there is sufficient evidence to support the verdict, so far as the demurrer to the evidence is concerned. If the child ran in front of the car, and the gripman was free from negligence, then there ought to be no recovery. This proposition was placed before the jury in very clear terms by an instruction, given at the request of the defendant, wherein it is said that before the plaintiff can recover he must prove that he was injured in direct consequence of the negligence or carelessness of the person in charge of the defendant's car.

But it is said there is no evidence that the defendant was operating the road at the time of the accident, and that some of the instructions are bad because they assume that it was the defendant's car which ran over the plaintiff. No such question was mooted in the trial court. Besides, it may be inferred from the evidence of the brakeman and superintendent that defendant was operating the road. But, aside from all this, the answer says the plaintiff's mother contributed to the injury by placing him in charge of a careless person, who allowed plaintiff "to get in front of defendant's cars suddenly, while they were in motion, so that the injury suffered by plaintiff was inevitable."

The ownership of the car and operation of the road by defendant are admitted facts in the case. We fail to discover any merit in either of these objections.

The court, at the request of the plaintiff, gave this instruction: "(8) The court instructs the jury, as a matter of law, that negligence on the part of the little girl who was with the child injured, or near him at the time of said

injury, cannot affect the question of the right of plaintiff to recover in this case," but refused to give the following instruction asked by the defendant: "(2) If the plaintiff's mother and natural guardian permitted plaintiff to go on or near the tracks of defendant, alone, or in charge of a careless or incompetent person, and the carelessness and incompetency of such person contributed directly to plaintiff's injury, then the finding will be for the defendant."

Hartfield v. Roper, 31 Wend. 615, is cited to show that the court erred in its ruling on both of these instructions. The substance of the doctrine there asserted is that where a child of such tender years as not to possess the discretion to avoid danger is permitted by its parents or guardian to be in the public highway, the negligence of the parent or guardian will defeat a recovery in a suit by the child. This doctrine has been followed in some of the States. It is sometimes placed on the ground that the parent is the agent of the child, and other cases place it on the ground of identity between the parent and child. It probably stands as well on no ground at all as it does on either of them. The whole doctrine has been severely criticised by some of our best text-writers and denied by many courts.

This court more than twenty years ago repudiated the doctrine in the case of *Boland v. Missouri R. Co.* 36 Mo. 485. Says Wagner, J., for the court: "Whilst the decision in *Hartfield v. Roper* may be supported by the facts in the case as failing to show such negligence as would fix liability on the defendants, the reasoning of the learned judge on infantile responsibility is certainly harsh and repugnant to justice." The court then gives its adherence to the contrary doctrine, asserted in the leading case of *Robinson v. Cone*, 22 Vt. 213.

This is a suit by the child itself, and the negligence of the mother, if any there was, in allowing it to go upon the public streets, unattended by a person of mature years, constitutes no defense whatever to this action. In support of this conclusion, and the former ruling of this court, it is sufficient to cite 1 Shearm. & Redf. Neg. 4th ed. § 78; Beach, Contrib. Neg. § 43; *Erie City Pass. R. Co. v. Schuster*, 4 Cent. Rep. 919, 118 Pa. 412; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399.

Even in the case of a suit by the parent, all the circumstances are to be taken into account; and if the parent took as much care of the child as reasonably prudent persons of the same class, and in the same situation in life, ordinarily do, then the parent is not to be held guilty of such negligence as will defeat his action. 1 Shearm. & Redf. Neg. 4th ed. § 72; *O'Flaherty v. Union R. Co.* 45 Mo. 70; *Frick v. St. Louis, K. O. & N. R. Co.* 75 Mo. 542.

The negligence of the parent to defeat his or her action must be the proximate cause of the injury. *Isabel v. Hannibal & St. J. R. Co.* 60 Mo. 458.

Unless these principles of law are adhered to, the poor of the land will be deprived of all benefit of the public schools in our cities, which cannot be reached but by passing over and along the public highways. But no more need be said upon this subject, for this is not a suit by the parent or guardian.

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Appellant contends that the court erred, under the modified doctrine stated in *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 673. There the little girl, eight years old, was in the actual presence of the father. She attempted to pass through a small aperture between two cars standing on a track, and at a place which was not a public crossing, and was injured by the cars coming together. It was held that the negligence of the father should be imputed to the child in a suit by the child, inasmuch as the father was present, and pointed out the place for her to go through, and she was attempting to follow out his directions when injured. Of the cases there cited that of *Holly v. Boston Gas-Light Co.*, 8 Gray, 132, was one where the injury seems to have been caused from the negligent act of the father.

In *Waite v. North Eastern R. Co.*, El. Bl. & El. (96 Eng. C. L.) 728, the child was in charge of its grandmother.

The case of *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88, is a case where the boy, ten years old, was traveling with his father. The case concedes that the negligence of the parent or guardian having charge of a child of tender years would not excuse the carrier from using all the means in its power to prevent the injury, but relieves the carrier from liability for the negligence of the parent when the parent's negligence is the proximate cause of the injury. "In that event," says the court, "it is not the negligence of the defendant, but of the party having the control of the child; and, if any liability attaches to either party, it must be to the latter."

The girl in the present case was to some extent the protector of the little boy; but she was a child only herself, and it is both unreasonable and inhuman to say that she filled the position of a parent or guardian. It might as well be said of twin children, out of the sight of the mother, that each is the responsible guardian for the other. If the girl was to some extent negligent, that would not relieve the defendant from the exercise of due care.

The *Stillson Case* does not profess to disturb the former ruling of this court, and it is believed has never been so regarded. It is at most no more than an exception to a general rule, and must stand on its own peculiar circumstances, and is wholly inapplicable to the present case. The facts as in that case stated would indicate that the negligence of the father, and not of the defendant, was the proximate cause of the injury. The court, in a subsequent part of the opinion, after stating that the question of negligence was one for the jury, uses this language: "But there must be some evidence on which to base instructions to a jury. After a careful examination of the testimony in this case, aided by the maps in the record, we have been unable to conjecture in what respect it is claimed that there was negligence on the part of the defendant. There being no negligence on the part of the defendant, it was no more liable to an infant than an adult; so that, after all, the father's negligence was the proximate cause of the injury; and that case should be regarded as standing on this ground and no other."

It follows from what has been said that the court did not err in its ruling upon these two

instructions. In other instructions asked by the defendant the jurors were told, in clear terms, that before they could find for plaintiff he must prove that he was injured in direct consequence of the negligence of the person in charge of defendant's car; that if the gripman was using ordinary care in looking out and attending to his business, but did not see the plaintiff in time to stop the car before running over him, then there was no negligence on his

part; and that ordinary care means that degree of care which an ordinarily prudent and careful person would exercise under like circumstances. The plaintiff's instruction is in accord with those given for defendant, and no substantial objection is made to them.

The judgment is therefore affirmed.

All concur.

Motion for rehearing overruled.

COLORADO SUPREME COURT.

Richard PEARCE

"

CITY OF DENVER, *Appt.*

(... Colo.....)

1. **Fractions of a day will not be recognized** to defeat the manifest intention of the parties to a contract.
2. **Deeds to different purchasers of land** separately sold on the same day, at the same public sale of town-site lots by a probate judge as trustee, must be held to take effect at the same time, and be construed together in determining a conflict of title between the purchasers.
3. **A deed of land naming a creek as one boundary** made by a probate judge as trustee of town-site lots under Act of Congress, conveys only to the bank of the creek, where at the same sale the bed of the creek, which had been separately described in the notice of sale, is separately sold and is conveyed the same day to another purchaser.

(November 8, 1889.)

A PPEAL by defendant from a judgment of the District Court for Arapahoe County in favor of plaintiff in an action to quiet title to a certain tract of land covered by water, and to enjoin defendant from asserting any claim thereto. *Reversed.*

Commissioner's opinion.

NOTE.—Time, computation of.

Courts will always adopt that construction in the computation of time which will uphold and enforce, rather than destroy, bona fide transactions and titles; and whenever it is necessary to prevent a forfeiture or to effectuate the clear intention of the parties, the *dies a quo* will be included; otherwise it will be excluded. *Taylor v. Brown*, 5 Dak. 335.

When an act is to be performed within a given number of days from a day mentioned, the rule is to include one of the two days mentioned, and to exclude the other. *Re Senate Resolution*, 9 Colo. 632.

Dakota Code Civ. Proc., § 6, providing that time shall be computed by excluding the first day and including the last, unless the last is a holiday, only establishes a rule as to matters of practice in the Territory, and has no application to the computation of time during which the title of an Indian under a patent from the United States is inalienable. *Taylor v. Brown*, *supra*.

In the computation of time upon service of notice of trial in the district court, the day of service is excluded and the first day of the term included. *State v. Weld*, 39 Minn. 423.

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Statement by Pattison, C.

The plaintiff alleges in his complaint, which was filed April 2, 1884, that he was then, and for a long time had been, seised in fee of a parcel of land situated in the City of Denver, described as follows: "All that certain piece of land lying between the western line of lot numbered nine (9) and Cherry Creek and the northern line of Lawrence Street, in the block numbered seventy-one (71), in the east division of the City of Denver, excepting a strip adjoining the said lot 9, in said block 71, which is four feet in width, fronting on Lawrence Street, and extending back of equal width to the full depth of said lot 9."

He further alleged peaceable and undisturbed possession of the premises described, and the erection and occupation of valuable improvements thereon; that defendant claimed some interest in the premises, and had advertised to sell the same. He prays that he may be adjudged to be the owner of said premises, and that the western boundary thereof be declared to be "the thread of the stream in Cherry Creek," and that defendant be enjoined from asserting any right, title, interest or claim in the premises, etc. The defendant denied each and every allegation of the complaint specifically, and alleged ownership of the premises in fee simple, and the right to the immediate possession thereof. The case was tried to the court, and resulted in a judgment in favor of

The general rule is that when time is to be computed from a date on which an act is done, that day will be excluded. *Vogel v. State*, 5 West. Rep. 543, 107 Ind. 374.

The day on which an act is done is excluded, when computation is to be made from such an act (*Lester v. Garland*, 15 Ves. Jr. 248; *Dowling v. Fox*, 1 Ball & B. 198; *Homan v. Liswell*, 6 Cow. 669; *Portland Bank v. Maine Bank*, 11 Mass. 204; *Bigelow v. Willson*, 1 Pick. 485; *Wiggin v. Peters*, 1 Met. 127; *Cornell v. Moulton*, 3 Denio, 12; *Lang v. Phillips*, 27 Ala. 311; *Kimm v. Osgood*, 19 Mo. 60; *Sands v. Lyon*, 18 Conn. 12; *Campbell v. Internat. L. Ins. Society*, 4 Boew. 236; including it: *Rex v. Adderley*, Doug. 463; *Norris v. The Hundred of Gawtry*, Hob. 130; *Castle v. Burditt*, 3 T. R. 623; *Glaslington v. Rawlins*, 3 East, 407; *Hampton v. Erenzeller*, 2 Browne, 18; *Presbrey v. Williams*, 15 Mass. 196; *Ryman v. Clark*, 4 Blackf. 329; *Watson v. Pears*, 2 Camp. 204; *Pugh v. Duke of Leeds*, Cowp. 714; *Windsor v. China*, 4 Me. 208.

Time from and after a given day excludes that day (*Bigelow v. Willson*, *supra*; *Pyle v. Maulding*, 7 J. J. Marsh. 202; *Jacobs v. Graham*, 1 Blackf. 362; *Rand v. Rand*, 4 N. H. 267; *Brown v. Chambersburg Bank*, 3 Pa. 200; *Lorent v. South Carolina Ins. Co.*

the appellee, declaring him to be the owner of the premises described, and that the westerly boundary of said tract "is the thread of the stream in Cherry Creek, subject to the perpetual right of the defendant and the public to the use of said stream, for the flowage of its natural waters, and to remove obstructions from the body thereof," etc. From this judgment appellant, the City of Denver, appealed to this court.

Mr. James H. Brown, City Atty., for appellant:

Into all contracts, whether made between States and individuals or between individuals only, there enter conditions superinduced by the pre-existing and higher authority of the laws of nature, of nations or of the community to which the parties belong. They are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force.

Yunker v. Nichols, 1 Colo. 551.

The presumption of title to the center of a highway does not prevail if it appears that the grantor did not own the highway; but the deed will be satisfied by a title extending to the roadside.

Dunham v. Williams, 87 N. Y. 251; *Bliss v. Johnson*, 78 N. Y. 529. See also *Rockwell v. Baldwin*, 53 Ill. 19; *Stolp v. Hoyt*, 44 Ill. 219.

Mr. John L. Jerome, for appellee:

The testimony is conclusive that when plaintiff's grantor purchased, the probate judge still retained the title to the unsold portion of the bed of the stream. Under such circumstances it was perfectly proper to show by parol which land was sold first.

Wharton, Ev. § 977; *Greenl. Ev.* §§ 285, 297; *Barker v. Keete*, 1 Freem. (K. B.) 251; *Montelius v. Atherton*, 6 Colo. 324; *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469 (26 L. ed. 775); *Plunkett v. Dillon*, 4 Del. Ch. 198, 4 Houst. 338.

The City of Denver in bidding upon the bed

of the stream, which was sold last, was charged with notice of what had been previously sold. The party buying last took what was left.

Gould, Waters, § 196.

From 1872 to the publishing of this advertisement in 1884 the appellant and his grantor were in the undisputed possession of their property. This constant possession both before and after the purchase from the probate judge, and the condition of the ground when sold, are strong indications of the intentions of the parties.

Baird v. Fortune, 7 Jur. N. S. 926; *Greenl. Ev.* § 287, note 1; 2 Phill. Ev. p. 731, note, 784; *Gould, Waters*, §§ 28, 87.

We have established our right under the Statute of this State by undisputed possession under claim and color of title made in good faith for more than five years.

Gen. Stat. § 2186.

Pattison, C., delivered the following opinion:

The issue between the parties in this case involves the title to so much of the premises above described as lie between the easterly bank of Cherry Creek and the thread of the stream. No other question is discussed by counsel. The solution of this question requires consideration of the history of the title to the premises, and a construction of the conveyances under which the parties claim. This history must be looked for, not only in the evidence and in the deeds of conveyance set forth in the record, but also in the statutes of the United States and of this State, relating to town sites, which were in force at the time the deeds were executed and delivered. The first enactment of Congress was approved May 28, 1844, and was entitled "An Act for the Relief of the Citizens of Towns upon the Lands of the United States, under Certain Circumstances." This Act provided for entry, under the laws of the United States, by the corporate authorities, or, if not incorporated, by the county judge of the county in which the town was situated, of any portion of the surveyed public lands occupied as a

1 Nott & McC. 506), and includes the last day of the specified period. *Sheets v. Selden*, 69 U. S. 2 Wall. 177 (17 L. ed. 822).

There is no general rule in computing time from an act or event that the day is to be inclusive or exclusive. It depends on the reason of the thing according to the circumstances. *Lester v. Garland*, 15 Ves. Jr. 248.

Fractions of a day not recognized.

Sunday and fractions of a day are not regarded. *McGill v. Bank of U. S.* 25 U. S. 12 Wheat. 511 (6 L. ed. 711); *Columbia T. Co. v. Haywood*, 10 Wend. 422; *Hughes v. Patton*, 12 Wend. 234; *Rusk v. Van Benschoten*, 1 How. Pr. 149.

The doctrine that in law there is no fraction of a day is a mere legal fiction, and is one only *sub modo*, and in a limited sense, whenever it will promote the purposes of substantial justice. *Re Richardson*, 2 Story, 571, 6 Law Rep. 302.

The law does not in general take cognizance of the fractions of a day; but the courts may do so when substantial justice requires it. *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469 (26 L. ed. 775).

Fractions of a day are not regarded except for the purpose of guarding against injustice. *Blydenburgh v. Cotheal*, 4 N. Y. 418, 5 How. Pr. 300, 3 6 L. R. A.

Code Rep. 216; *Jones v. Porter*, 6 How. Pr. 236; *Reg. v. St. Mary*, 1 El. & Bl. 816, 1 C. L. R. 192, 17 Jur. 551, 22 L. J. N. C. 109.

Where a judgment was entered on the same day, but after the death of the defendant debtor, the legal fiction that there are no fractions of a day does not apply; and the judgment is not entitled to priority of payment out of the proceeds of a sale of land over the claims of general creditors. *Collins v. McKee* (Pa.) 5 Cent. Rep. 179.

The law will take notice of fractions of a day when the precise hour becomes material, as in ascertaining the priority of liens. *Haden v. Buddenstick*, 49 How. Pr. 241.

Where it is necessary to show which of two events first took place the court may enter into the question of the fraction of a day; therefore the court will regard the particular hour at which a defendant dies, so as to see whether execution issued previously to his demise. *Chick v. Smith*, 8 Dowl. Pr. Cas. 337.

In the computation of time prescribed by constitutional or statutory provisions for the performance of official acts, the general rule is that fractions of a day are not to be noticed, but each fraction is to be considered in the computation as a full day. *Senate Resolution*, 9 Colo. 682.

town site, in trust, for the use and benefit of the occupants thereof. It was provided that the execution of the trust should be under regulations to be prescribed by the legislative authority of the State or Territory in which the town was located. Laws 1844, p. 12.

May 28, 1864, by an Act entitled "An Act for the Relief of the Citizens of Denver, in the Territory of Colorado," the Act last cited was so extended as to "authorize the probate judge of Arapahoe County, in the Territory of Colorado, to enter at the minimum price, in trust for the several use and benefit of the rightful occupants of said land, and the bona fide owners of the improvements thereon, according to their respective interests," certain legal subdivisions of land, which are particularly described in the Act. Laws 1864, p. 94.

Pursuant to this Act, James Hall, then probate judge of Arapahoe County, entered at the land office in Denver the lands described in the Act. By an Act of the Legislature of Colorado Territory, approved March 11, 1864, the conduct of the trustee, in the execution of the trust, was regulated and prescribed. Sess. Laws 1864, p. 139.

Section 4 of that Act provided "that each and every person or association claiming any portion of said lands should make a statement in writing, within a specified time designated, describing the lands claimed, and their specific right or interest therein." This section further provided that "all persons failing to sign and deliver such statement within the time specified in this section shall be forever barred the right of claiming or recovering such lands, or any interest or estate therein, or in any part, parcel or share thereof, in any court of law or equity."

Under the provisions of these several legislative enactments, James Hall, as probate judge, and his successors in office, undertook the execution of the trust. In 1872 the trust remained unexecuted in respect to many parcels of land, including the premises in controversy in this action.

By an Act of the Legislature approved February 8, 1872, provision was made for the sale of all town lots, or the parcels of land which had not theretofore been sold. Sess. Laws 1872, p. 191. By the provisions of this Act the probate judge was required to make "a list of all town lots or parcels of land . . . to which no person, association of persons, or body corporate, except the City of Denver, filed any claim with the probate judge of said county, on or before the 9th day of August, 1865." By the sixth section of the Act he was further required "to give ten days' previous notice, in a daily newspaper published in said City, of the time when he would commence making such list." By the second section he was required, "immediately upon the preparation of said list, to advertise said lots and lands for sale, in some newspaper published in said City, for sixty days, at public vendue, to the highest bidder, for cash in hand." Section 4 provided for the execution and delivery of deeds to the purchaser or purchasers of the lots or lands sold by virtue of the Act.

Pursuant to the provisions of this Act, Henry A. Clough, probate judge, in the month of October, 1872, sold and conveyed to the grantor of appellee the premises above described, for 6 L. R. A.

the sum of \$21. The several Statutes above mentioned, and the steps taken under them in the execution of the trust, are recited in the deed of conveyance. The deed bears date October, 18, 1872, was acknowledged November 1, and recorded November 7, 1872.

Upon the same day, pursuant to the same Statute, in execution of the same trust, and at the same sale, Clough sold and conveyed to the appellant, for the sum of \$5,050, a parcel of land described as follows: "The whole of the bed of Cherry Creek, as the same is marked and defined on the map of said City, as per survey of F. J. Ebert, from the point where the same intersects the south line of the old bed of the South Platte River, to the point where the same intersects the south line of said section 83, save and except such parts and parcels thereof as may have been heretofore deeded by any probate judge since the entry of said land in trust, as aforesaid, and save and except parcels of land eighty feet in width connecting the following streets in East and West Denver," etc.

The exceptions need not be recited. This deed was dated October 18, 1872, was acknowledged October 30, and recorded October 31, 1872, and contains the same recitals as the deed to appellee's grantor.

It appears from the evidence that the notice of sale in which both of the parcels of land were mentioned was read before the sale. Both deeds designate the lands conveyed as a portion of the land described in the notice. The rights of the parties in the premises depend entirely upon the legal effect to be given to these conveyances. The question in the case is one of construction.

The inference is clear that the probate judge intended to convey, and appellant intended to acquire, all of the bed of Cherry Creek which had not theretofore been conveyed. To acquire control of the bed of Cherry Creek, as defined by the Ebert survey, had long been the settled policy of the municipal authorities. This policy is clearly disclosed by the record, and by the statutes which were in force at the time this sale was had.

By an Act approved February 10, 1865, the City was authorized to "define and fix the boundaries of the channel of Cherry Creek within the corporate limits of the City; to remove obstructions therefrom; and to prevent persons from obstructing the same." Pursuant to this Act, and on June 22, 1865, by formal resolution, the plat of the City made by F. J. Ebert was approved and ordered to be filed for record in the office of the recorder of Arapahoe County. By an ordinance thereafter enacted the channel of the bed of Cherry Creek, within the corporate limits, was declared to be a public place; and it was further declared to be "unlawful to place any wall, building, fence, dike, earth, manure, garbage or other obstruction in or upon the same."

By an Act of the Legislature approved February 9, 1872, it was provided that "the said city council shall have power and authority to condemn, and appropriate in fee to the use of the City, the strip of land within the bed of Cherry Creek as defined by the city council," etc. Sess. Laws 1872, p. 207.

In the light of the Statutes, resolution and ordinance cited, it is clear that appellant in

tended to purchase the bed of Cherry Creek for the benefit of the public. It is equally clear that it was the intention of the trustee, at the time the sale was made, to convey to the City all of the bed of the stream, title to which remained in him. It follows that the trustee must have intended to convey to appellee's grantor a parcel of land bounded, not by the thread of the stream, but by the bank, as defined by the Ebert survey. Can effect be given to this intention by a construction of the deeds which will not violate settled principles of law?

In this connection, the first question suggested is, At what time did these deeds take effect? The deeds bear date the same day. In the absence of evidence to the contrary, it is an elementary principle that deeds and other written instruments shall take effect as of the day of their date. Appellee was permitted to prove that the bed of Cherry Creek was sold last. This evidence was objected to by appellant's counsel; but the objection was overruled, and the evidence admitted in support of the description.

The theory of counsel appears to have been that he could show by parol that the deed to appellant did not convey the portion of Cherry Creek in question, because expressly excepted from its operation by the following language: "Except such parts and portions thereof as may have been heretofore deeded by any probate judge," etc. The theory is clearly a mistaken one. Upon inspection of the deed, it is apparent that this exception had no relation whatever to lands which were deeded pursuant to the sale. The evidence was immaterial, except, perhaps, as it might bear upon a question suggested by some of the authorities cited by appellee's counsel; that is, whether the case is one in which the law should regard fractional parts of a day. The question is not discussed by counsel, and allusion is made to it here in response to the suggestion contained in the authorities cited, as above stated, and for no other reason. If considerations of the relations of the parties to each other and to the premises in controversy could be disregarded, and the construction of the deeds was dependent solely upon the order of the sale of these parcels of land, then, as the deeds bear the same date, the question might become important. Generally speaking, the law regards the day in its entirety, and will not take cognizance of any fractional part thereof. The rule is stated in *Louisville v. Portsmouth Sav. Bank*, 104 U. S. 469 [26 L. ed. 775], as follows: "When necessary to determine conflicting rights, courts of justice will take cognizance of the fractions of a day."

Mr. Justice Lawrence, in *Grosvenor v. McGill*, 87 Ill. 239, says: "It is true that for many purposes the law knows no division of a day; but, whenever it becomes important to the ends of justice, or in order to decide upon conflicting interests, the law will look into fractions of a day as readily as into the fractions of any other unit of time. 2 Bl. Com. 140, notes.

"The rule is purely one of convenience, which must give way whenever the rights of parties require it." *Smith v. Jefferson Co.* 10 Colo. 17.

Assuming this definition to be consonant with sound reasoning, it is certain that the ends of justice can never require that the law depart from the ordinary rule, and recognize a frac-

tion of a day, to defeat the manifest intention of the parties. As has already been said, the intention of the parties is clearly established by the record.

For the purpose, therefore, of construing these deeds, their date may be considered as the time when they went into effect; and, as they were dated the same day, they must be deemed to have taken effect at the same time. Upon the oral argument it was contended that, as appellant's deed was first acknowledged and recorded, it must be deemed to have taken effect first. The time of record is not significant, because appellee's grantor does not appear to have been a subsequent purchaser within the meaning of the Statute. It is undoubtedly true, however, that title does not pass until the deed is actually delivered. The deed to appellant was acknowledged October 31; that to appellee on November 1. It has been held that, in the absence of other evidence, there is no presumption of the delivery of a deed prior to the acknowledgment. *Blanchard v. Tyler*, 12 Mich. 339.

It is not necessary to the decision of this case, however, to pass upon this question. It is sufficient to hold that the deeds took effect at the same time. They must therefore be considered together.

The question of the construction of the deeds will now be considered. "In construing deeds, courts endeavor to place themselves in the position of the parties at the time of the conveyance, in order to ascertain what is intended to be conveyed." *Tiedeman*, Real Prop. § 828.

This is elementary. It is also an elementary principle that "in the case of non-tidal waters, also, a deed which describes the land as bounded by the water conveys, prima facie, as far as the grantor owns." *Gould, Waters*, § 196.

In this case, therefore, as the title to the premises in controversy was vested in Clough, as trustee, the description contained in the deed to appellee's grantor prima facie carried the boundary to the thread of the stream. In descriptions of this nature the stream is the monument, and the thread of the stream the boundary. The language of the description, however, is but prima facie evidence that the grant or deed is intended to convey all that the grantor owns. It is but a presumption. Whether this presumption shall prevail is in all cases to be determined by a consideration of the language used by the parties, and such surrounding circumstances as are proper to be considered in ascertaining their intention. *Buck v. Squiers*, 22 Vt. 484.

In *Dunham v. Williams*, 37 N. Y. 251, it is held that "a deed bounded on a highway prima facie carries the title of the grantee to the center of the road, on the assumption that the grantor owned it; but, if it appear to have been owned by another, the terms of the deed are satisfied by a title extending only to the roadside."

In the course of the opinion in this case, *Porter, J.*, says: "The presumption in favor of an adjacent proprietor, and of his successors in interest, is not a *presumptio juris et de jure*, but yields to other evidence, displacing the grounds upon which it rests. The effect, in this respect, of a given deed depends on the actual state of the title."

Applying the principle above stated to the case at bar, it is clear that the effect to be given to the deed relied on by appellee depends upon the state of the title to the bed of the stream at the time the deed was made. By a deed shown to have taken effect at the same moment of time of which appellee's grantor must be assumed to have had notice, the bed of the stream was conveyed to appellant. Its effect upon the rights of the parties is the same as if it had been made long prior. It cannot be contended that, if the bed of Cherry Creek had been sold and conveyed prior to this time, the description of the deed relied upon by appellant would not, in the language above cited, be "satisfied by a title extending to" the bank of the stream.

In *Chicago v. Rumsey*, 87 Ill. 348, it is held: "Notwithstanding the general presumption that a conveyance of land bounded on a street or highway carries the fee in the street or highway to the center thereof, the owner may convey the adjoining land, without the soil under the street or highway. It is but a presumption that may be rebutted by circumstances inconsistent with it." *Stolp v. Hoyt*, 44 Ill. 219; *Rockwell v. Baldwin*, 58 Ill. 20; *Mott v. Mott*, 68 N. Y. 246.

Again, that it is competent for an owner of land bounded upon an unnavigable stream to divide the bank from the bed of the stream is

well settled. *Smith v. Ford*, 48 Wis. 116-164; *Norcross v. Griffiths*, 65 Wis. 599.

This the probate judge intended to do by the sale made under the Act of 1872. The bed of Cherry Creek was divided from the parcels of land bounded by the stream, and described separately in the notice of sale, sold separately at the sale; and was intended to be separately conveyed. The deeds must be so construed as to give effect to this intention. The presumption, based upon the language of the description, upon which appellee relies, must be deemed to be overcome by the proof of circumstances inconsistent with it, within the meaning of the authorities. The westerly boundary of appellee's land must therefore be held to be the easterly bank of Cherry Creek, as defined by the Ebert survey, and not the thread of the stream.

The judgment is reversed, and the cause remanded, with instructions to enter a decree in conformity with this opinion.

Richmond and Reed, CO., concur.

Per Curiam:

For the reasons stated in the foregoing opinion the judgment of the court below is reversed.

Mr. Justice Elliott, having presided at the trial in the court below, did not participate in this decision.

IOWA SUPREME COURT.

Robert WYMORE, Admr., etc., of Artemus Smith, Deceased, *Appl.*,
v.

MAHASKA COUNTY.

(...Iowa....)

1. Where a child suffers personal injuries through another's negligence, the con-

tributory negligence or wrongful act of 'his parent without volition on his part is not imputable to him.

2. The right of recovery in favor of the estate of a child killed by another's negligence is not affected by the fact that the parents who are entitled to his estate by inheritance contributed to the accident.

(October 10, 1889.)

NOTE.—Doctrine of contributory negligence of parent or guardian imputed to child.

The doctrine of imputed negligence in the case of injury or death of children has been the subject of much controversy and has been somewhat modified in States which have adopted it. So in Illinois, under its doctrine of comparative negligence, the decisions have been both ways. See note to *Chicago City R. Co. v. Robinson*, 4 L. R. A. 126; *Cleveland Rolling Mills Co. v. Corrigan*, 8 L. R. A. 385, note.

If the child be not able to judge for itself whether or not the place is one of danger, it is held to be the duty of its parents, or those having charge of the child, to judge for it; and if they neglect this duty, their blame must be imputed to and suffered by the child. *Hartfield v. Roper*, 21 Wend. 616; *Mangam v. Brooklyn R. Co.* 38 N. Y. 455; *Ihl v. Forty-Second Street & G. Street F. R. Co.* 47 N. Y. 317, 323; *Holly v. Boston Gas-Light Co.* 8 Gray, 123-123; *Wright v. Malden & M. R. Co.* 4 Allen, 238; *Lynch v. Smith*, 104 Mass. 52; *Messenger v. Dennie*, 137 Mass. 197; *Callahan v. Bean*, 9 Allen, 401; *Pittsburgh, Ft. W. & C. R. Co. v. Vining*, 27 Ind. 513; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 237; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; *Shearn & Redf. Neg.* § 48; *Brown v. European & N. A. R. Co.* 58 Me. 334; *Lealie v. Lewiston*, 62 Me. 468; *Ewen v. Chicago & N. W. R. Co.* 38 Wis. 613-633; *Toledo, W. & W. R. Co. v. Grable*, 33 Ill. 441.

6 L. R. A.

The English courts also hold to the same doctrine. *Singleton v. Eastern Counties Railway*, 7 O. B. N. S. 287; *Waite v. North-Eastern R. Co.* 11 L. R. A. 719-723; *Mangan v. Atherton*, L. R. 1 Exch. 239; *Battishill v. Humphreys*, 7 West. Rep. 311, 64 Mich. 494.

In suit by parent for negligent injury to child.

When the father sues for an injury to his minor child, his neglectful conduct proximately contributing to the injury is a bar to the action unless the injury was caused by the wanton, reckless or intentional negligence of the defendant's employees, after having discovered the peril of the child, or when they ought to have discovered the peril. *Pratt Coal & Iron Co. v. Brawley*, 33 Ala. 371.

A parent is chargeable with the negligent and wrongful acts of the person to whom he intrusts the custody and care of his minor child. Hence, the negligence of a grandmother in permitting her grandchild to trespass on a railroad track where trains are constantly passing is a bar to a recovery for injuries to the child, in an action brought by the father, who had placed the child in the care and custody of the grandmother. *Ibid.*

An infant of tender years (here about nine years of age), receiving an injury while being driven in a carriage by its father, and while in its father's actual control, is affected by negligence of the

APPEAL by plaintiff from a judgment of the District Court of Poweshiek County upon a verdict directed for defendant in an action to recover damages for personal injuries resulting in death. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. Bolton & McCoy, George W. Lafferty and G. C. Morgan, for appellant:

Excepting a dictum in *Stafford v. Oskaloosa*, 57 Iowa, 748, there is no Iowa case applying the doctrine of imputed negligence even in the case of an adult; and the contrary has been expressly held in *Tompkins v. Clay Street R. Co.* 66 Cal. 163; *Bennett v. New Jersey R. & T. Co.* 86 N. J. L. 225; *Watson v. Wabash, St. L. & P. R. Co.* 66 Iowa, 164; *Little v. Hackett*, 116 U. S. 366 (29 L. ed. 652); *Dyer v. Erie R. Co.* 71 N. Y. 228; *Transfer Co. v. Kelly*, 36 Ohio St. 86; *Wabash, St. L. & P. R. Co. v. Shacklet*, 105 Ill. 864; *Cuddy v. Horn*, 46 Mich. 596; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 71; *Martin v. Algona*, 40 Iowa, 390.

The negligence of the parent or the person in charge is not imputable to the child.

Daley v. Norwich & W. R. Co. 26 Conn. 591; *Birge v. Gardiner*, 19 Conn. 507; *Beers v. Housatonic R. Co.* 19 Conn. 566; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Moore v. Metropolitan R. Co.* 2 Mackey (D. C.) 487; *Robinson v. Cone*, 22 Vt. 213; *Smith v. O'Connor*, 48 Pa. 218; *Walters v. Chicago, R. I. & P. R.*

Co. 41 Iowa, 71; *St. Clair Street R. Co. v. Eadie*, 1 West. Rep. 88, 48 Ohio St. 91.

Negligence of plaintiff is never a question of law for the court, unless, first, the evidence shows without conflict that the plaintiff was guilty of negligence contributing to the injury; or, second, an entire absence of all testimony, circumstantial or otherwise, tending to show care or the absence of fault.

2 Redfield, Railways, 281; *Quimby v. Vermont C. R. Co.* 28 Vt. 887; *Pfau v. Reynolds*, 58 Ill. 212; *Mangam v. Brooklyn R. Co.* 83 N. Y. 455; *Sioux City & P. R. Co. v. Stout*, 84 U. S. 17 Wall. 665 (21 L. ed. 749).

Even though the parent has been negligent in exposing his child to danger, if the infant has not committed or omitted an act which would constitute negligence in a person of full discretion, an action for an injury by the negligence of another party cannot be defeated on account of the contributory negligence of the parent.

Parish v. Eden, 62 Wis. 272; 2 Thomp. Neg. § 1187; *Lynch v. Smith*, 104 Mass. 53; *Thl v. 42d St. & G. Street F. R. Co.* 47 N. Y. 317; *McGarry v. Loomis*, 63 N. Y. 104; *Fallon v. Central Park, N. & E. R. Co.* 64 N. Y. 13; *Shearm. & Redf. Neg. § 48*; *Wharton, Neg. §§ 313-321.*

Messrs. Blanchard & Preston and John F. & W. R. Lacey, for appellee:

If the parent sues in his own right, his

father contributing to the injury. *Kyne v. Wilmington & N. B. Co.* (Del.) 13 Cent. Rep. 391.

Where an adult having the care of a girl eight years old left the car and went upon an adjoining track without having hold of the child, and the child was run over by a car coming from an opposite direction at a negligent rate of speed, it was held that the guardian was chargeable with contributory negligence sufficient to defeat recovery by the father of the child. *Reed v. Minneapolis Street R. Co.* 34 Minn. 557.

This proposition, that the negligence of the parents or guardian of a child in allowing such child to stray away or go out unattended, has been modified by the courts holding to this rule in a great many instances so as in practice greatly to reduce its mischief,—some holding that the question of such negligence is always for the jury to determine, and that no rule of law can be laid down which interferes with the jury judging each case on its own merits. *Mulligan v. Curtis*, 100 Mass. 512; *Lynch v. Smith*, 104 Mass. 52; *Mangam v. Brooklyn R. Co.* 83 N. Y. 455; *Karr v. Park*, 40 Cal. 183, 188; *Schierhold v. North Beach & M. R. Co.* 40 Cal. 447; *Battis-hill v. Humphreys*, 7 West. Rep. 311, 64 Mich. 494.

Rule as to imputed negligence rejected.

The courts of many States reject the rule laid down in 21 Wend. 615, and followed by the courts of Maine and Massachusetts. It was early questioned by *Chief Justice Redfield* of Vermont, in the case of *Robinson v. Cone*, 22 Vt. 213-224, who said: "We are satisfied that, although a child, or idiot, or lunatic, may to some extent have escaped into the highway, and so be improperly there, yet, if he is hurt by the negligence of the defendant, he is not precluded from his redress." *Battis-hill v. Humphreys*, 7 West. Rep. 311, 64 Mich. 494.

The doctrine which imputes the negligence of the parent to the child in such cases is repulsive to our natural instincts and repugnant to the condition of that class of persons who have to maintain life by daily toil. *Kay v. Pennsylvania R. Co.* 65 Pa. 269; *North Pennsylvania R. Co. v. Mahoney*, 57 Pa. 187; 6 L. R. A.

Philadelphia & R. R. Co. v. Sparen, 47 Pa. 300; *Daley v. Norwich & W. R. Co.* 26 Conn. 598; *Boland v. Missouri R. Co.* 30 Mo. 490; *Whirley v. Whiteman*, 1 Head, 620; *Bellefontaine & I. R. Co. v. Snyder*, 18 Ohio St. 399; *Government St. R. Co. v. Hanlon*, 53 Ala. 70; *Keffe v. Milwaukee & St. P. R. Co.* 21 Minn. 207; *St. Paul v. Kubly*, 8 Minn. 154; *Cleveland, C. C. & I. R. Co. v. Manson*, 30 Ohio St. 451-470; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64-68; *Norfolk & P. R. Co. v. Ormsby*, 37 Gratt. 455; *Huff v. Anea*, 16 Neb. 139; *Wharton, Neg. 2d ed. §§ 313, 314*; *Battis-hill v. Humphreys*, *supra*.

A child of such tender years is not precluded from recovering damages for an injury which might have been avoided by the exercise of ordinary care by defendant, from the fact that his parent or guardian allowed him to place himself in a position of danger without a custodian. *Bisillon v. Blood*, 6 New Eng. Rep. 908, 64 N. H. 565.

The doctrine of imputed negligence does not prevail in Ohio; and a child of tender years, injured by the fault of another, is not deprived of a right of action by reason of contributory negligence on the part of a parent or guardian. *Cleveland, C. C. & I. R. Co. v. Manson*, 30 Ohio St. 451; *St. Clair Street R. Co. v. Eadie*, 1 West. Rep. 88, 48 Ohio St. 91; *Davis v. Guarneri*, 13 West. Rep. 447, 45 Ohio St. 470.

The law having severed the relation for the purposes of such prosecution by her, what reason can be urged for imputing to her the contributory negligence of one who could have had no lawful pecuniary interest in a recovery by her for an injury she has sustained by the negligence of a wrongdoer? The doctrine of contributory negligence, which is invoked, is founded upon considerations which find no application in logic or justice to the case at bar. *Davis v. Guarneri*, *supra*.

In an action by a child to recover for personal injuries inflicted by negligent management of grip cable-cars, the negligence of the mother in allowing it to go upon the public streets unattended constitutes no defense. *Winter v. Kansas City C. R. Co.* ante, 536.

own contributory negligence will defeat a recovery.

Pratt Coal & Iron Co. v. Brawley, 83 Ala. 371; *Bellevontaine R. Co. v. Snyder*, 24 Ohio St. 670.

The parent's contributory negligence bars a recovery when the parent is present and in custody of the infant at the time of the injury.

Waite v. North-Eastern R. Co. El. Bl. & El. 719; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 671; *Ohio & M. R. Co. v. Stratton*, 78 Ill. 88. See also *Bliss v. South Hadley*, 5 New Eng. Rep. 124, 145 Mass. 91; *Parish v. Eden*, 62 Wis. 272; *Mangum v. Brooklyn R. Co.* 38 N. Y. 458; *Pittsburg, A. & M. R. Co. v. Pearson*, 72 Pa. 169; *Hoppe v. Chicago, M. & St. P. R. Co.* 61 Wis. 357; *O'Flaherty v. Union R. Co.* 45 Mo. 70; *Reilly v. Hannibal & St. J. R. Co.* 13 West. Rep. 658, 94 Mo. 600.

When a person is injured through the common negligence of one who, from their relation, is bound to care for and protect him, and another, the negligence of the former will be imputed to him and will defeat a recovery against the other party.

Nesbit v. Garner, 1 L. R. A. 152, 75 Iowa, 814; *Slater v. Burlington, C. R. & N. R. Co.* 71 Iowa, 209.

The contributory negligence of the parent or custodian of the child will preclude a recovery.

Chicago & N. W. R. Co. v. Schumilowsky, 8 Ill. App. 613; *Hartfield v. Roper*, 21 Wend. 615; *Cauley v. Pittsburgh, C. & St. L. R. Co.* 95 Pa. 393; *Smith v. Hestonville, M. & F. P. R. Co.* 93 Pa. 450, 2 Am. & Eng. R. R. Cas. 12; *St. Louis, I. M. & S. R. Co. v. Freeman*, 38 Ark. 41; *Fitzgerald v. St. Paul, M. & M. R. Co.* 29 Minn. 336; *Pittsburgh, Ft. W. & O. R. Co. v. Vining*, 27 Ind. 518; *Lafayette & I. R. Co. v. Huffman*, 28 Ind. 287; *Jeffersonville, M. & I. R. Co. v. Bowen*, 40 Ind. 545; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 25; *Brown v. European & N. A. R. Co.* 58 Me. 384; *Kyne v. Wilmington & N. R. Co.* (Del.) 13 Cent. Rep. 391; *Daley v. Norwich & W. R. Co.* 26 Conn. 591; *Kay v. Pennsylvania R. Co.* 65 Pa. 269; *Lehman v. Brooklyn, 20 Barb.* 236; *Mangum v. Brooklyn R. Co.* 38 N. Y. 455; *Holly v. Boston Gas-Light Co.* 8 Gray, 132; *Wright v. Malden & M. R. Co.* 4 Allen, 233; *Robinson v. Cone*, 22 Vt. 213; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 441; *Steele v. Burkhardt*, 104 Mass. 62; *Lynch v. Smith*, 104 Mass. 52; *Meeks v. Southern P. R. Co.* 52 Cal. 602; *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 79; *Albertson v. Keokuk & D. M. R. Co.* 48 Iowa, 292.

Robinson, J., delivered the opinion of the court:

In August, 1883, Henry Smith, with his family, consisting of his wife, a daughter, and plaintiff's intestate, then about two years of age, attempted to drive over a county bridge of defendant in a wagon drawn by two horses. The bridge fell while the team was on it, and the wagon and its occupants fell to the stream below. The fall resulted in the death of the mother and plaintiff's intestate. The plaintiff claims that at the time in question the bridge was out of repair and in a dangerous condition, and that defendant is chargeable with knowledge of that fact; that it fell in consequence of that condition; and that decedent

did not contribute to the injuries of which plaintiff complains.

1. It seems to be conceded, and the record satisfies us, that the jury were instructed to return a verdict for defendant on the ground that the father and mother of decedent were not shown to be free from negligence which contributed to his death. It is not claimed that he could have been guilty of contributory negligence, but it is insisted that negligence on the part of his parents would be imputable to him; hence that it was necessary for plaintiff, in order that he might recover, to show that the negligence of the parents did not contribute to the injury in controversy. So far as we are advised, the question now presented to us has never been directly determined by this court, although it seems to have been assumed in some cases that the negligence of the parent might be imputed to the child. Of that kind is the case of *Walters v. Chicago, R. I. & P. R. Co.* 41 Iowa, 78; but in that it was held that the negligence of the person in whose charge the parents had placed the child could not be imputed to the parent and through the parent to the child.

In *Slater v. Burlington, C. R. & N. R. Co.* 71 Iowa, 209, the point was expressly reserved from decision. The doctrine of imputable negligence was considered in *Nesbit v. Garner*, 1 L. R. A. 152, 75 Iowa, 815, but the question now under consideration was not involved in that case. That the negligence of the parents is imputable to the child has been affirmed by numerous courts of high standing. See *Hartfield v. Roper*, 21 Wend. 615; *Morrison v. Erie R. Co.* 56 N. Y. 302; *Thurber v. Harlem Bridge, M. & F. R. Co.* 60 N. Y. 327; *Lynch v. Smith*, 104 Mass. 53; *Gibbons v. Williams*, 135 Mass. 335; *Fitzgerald v. St. Paul, M. & M. R. Co.* 29 Minn. 336; *Brown v. European & N. A. R. Co.* 58 Me. 384; *Leslie v. Lewiston*, 63 Me. 468; *Hathaway v. Toledo, W. & W. R. Co.* 46 Ind. 26; *Toledo, W. & W. R. Co. v. Grable*, 88 Ill. 442; *Atchison, T. & S. P. R. Co. v. Smith*, 28 Kan. 542; *Meeks v. Southern P. R. Co.* 52 Cal. 603; *Stillson v. Hannibal & St. J. R. Co.* 67 Mo. 674.

Among the cases holding to the contrary are the following: *Bellevontains & I. R. Co. v. Snyder*, 18 Ohio St. 408; *Huff v. Ames*, 16 Neb. 139; *Galveston, H. & H. R. Co. v. Moore*, 59 Tex. 64; *Erie City Pass. R. Co. v. Schuster*, 4 Cent. Rep. 919, 118 Pa. 412; *Robinson v. Cone*, 22 Vt. 214; *Daley v. Norwich & W. R. Co.* 26 Conn. 591; *Norfolk & P. R. Co. v. Ormsby*, 27 Gratt. 476; *Boland v. Missouri R. Co.* 36 Mo. 489; *Whitely v. Whiteman*, 1 Head, 619; *Beach, Contrib. Neg.* §§41-43. See *Battishill v. Humphreys*, 7 West. Rep. 806, 64 Mich. 494; 1 Shearm. & Redf. Neg. §§ 70-83, and notes.

It seems to us that the authorities last cited announce the better rule. The parent is not in any proper sense the agent of the child. The former is required to give the latter care, protection and support, and in return may exact service and obedience. But these duties are imposed by law and are not the result of any contract between the parties. In this case the child was taken into the wagon, and exposed to the accident which resulted in his death, without volition on his part. He certainly was free from fault. If his parents by their

negligence contributed to his death, that does not seem to us to be a sufficient reason for denying his estate relief. Such negligence would prevent a recovery by the parents in their own right. *Smith v. Hestonville, M. & F. P. R. Co.* 92 Pa. 450; *Huff v. Ames*, 16 Neb. 189; *Bellefontaine & I. R. Co. v. Snyder*, 24 Ohio St. 670; 1 Shearm. & Redf. Neg. § 71; *Erie City Pass. R. Co. v. Schuster*, 4 Cent. Rep. 919, 113 Pa. 412; *Glassey v. Hestonville, M. & F. P. R. Co.* 57 Pa. 172. See also *Albertson v. Keokuk & D. M. R. Co.* 48 Iowa, 294; *Beach, Contrib. Neg.* § 44; *Pratt Coal & Iron Co. v. Brawley*, 88 Ala. 871; *Evansville & C. R. Co. v. Wolf*, 59 Ind. 90.

But it appears to us to be unjust and contrary to reason to hold that the irresponsible child should be responsible for the wrongful acts of his parents or others who may have him in charge. He is incapable by himself of committing any act of negligence, and cannot authorize another to commit one; therefore it seems unreasonable to require him or his estate to suffer loss because of the neglect or unauthorized acts of his parents or others. Some authorities seem to make a distinction between cases where the contributory negligence of the parent occurs while he has the child under his immediate control, and other cases which occur when the child is away from the parent;

but we are of the opinion that there is no sufficient ground for the distinction claimed. The authority of the parent does not depend upon the proximity of the child.

2. It is claimed that appellant ought not to recover, for the reason that it is not shown that the parents of the child were free from contributory negligence; and since they inherited his estate, the rule which would bar a negligent parent from recovering in such a case in his own right ought to apply. But plaintiff seeks to recover in the right of the child, and not for the parents. It may be that a recovery in this case will result in conferring an undeserved benefit upon the father; but that is a matter which we cannot investigate. If the facts are such that the child could have recovered had his injuries not been fatal, his administrator may recover the full amount of damages which the estate of the child sustained.

3. Other questions are discussed by counsel; but as they are of such a nature as not to be likely to arise on another trial they need not be further considered.

The judgment of the District Court is reversed.

Petition for rehearing overruled February 12, 1890.

ILLINOIS SUPREME COURT.

Marie A. YOUNGS, *Appt.*,

v.

Phineas R. YOUNGS.

(....Ill.....)

1. Excessive indulgence in the morphine habit is not a ground for divorce under the provision of Rev. Stat. chap. 40, § 1, which permits a divorce on the ground of habitual drunkenness.

2. Acts of violence committed by a husband

towards his wife provoked by, and consisting mainly of resistance on his part of attempts by her to take morphine from him while he is in a state of total or partial delirium produced by the use of that drug, do not constitute extreme and repeated cruelty within the meaning of Rev. Stat. chap. 40, § 1, making such cruelty a ground for divorce; especially where the divorce was originally sought on the ground of habitual drunkenness, and specific charges of cruelty were added only as an afterthought when it became apparent.

*Rev. Stat. chap. 40, § 1, provides, among other grounds of divorce, the following:

That either party "has been guilty of habitual drunkenness for the space of two years, . . . or has been guilty of extreme and repeated cruelty."

NOTE.—Divorce, on ground of habitual drunkenness.

To constitute ground for divorce for habitual drunkenness, the drunkenness must be the effect of the use of alcoholic liquors, and not of opium, chloroform or other drugs. 1 Bishop, Mar. and Div. 627; *Barber v. Barber*, 14 Law Rep. 375.

It is a ground for divorce in most of the States of the Union. See *Rose v. Rose*, 9 Ark. 507; *Brown v. Brown*, 38 Ark. 324; *Mahone v. Mahone*, 19 Cal. 627; *Burns v. Burns*, 13 Fla. 399; *Harman v. Harman*, 16 Ill. 86; *McKay v. McKay*, 18 B. Mon. 8; *Leake v. Linton*, 6 La. Ann. 262; *Werner v. Kelly*, 9 La. Ann. 60; *Blaney v. Blaney*, 126 Mass. 205; *Magahay v. Magahay*, 85 Mich. 210; *Porritt v. Porritt*, 16 Mich. 140; *Ryan v. Ryan*, 9 Mo. 589; *Kempf v. Kempf*, 34 Mo. 211; *Golding v. Golding*, 6 Mo. App. 602; *Batchelder v. Batchelder*, 14 N. H. 380; *Stevens v. Stevens*, 8 R. I. 557.

Condonation.

Condonation is the complainant's forgiveness of the act complained of. *Quarles v. Quarles*, 19 Ala. 363, 366; *Turnbull v. Turnbull*, 28 Ark. 615, 621; 6 L. R. A.

Johns v. Johns, 29 Ga. 718, 722; *Phillips v. Phillips*, 4 Blackf. 131; *Burns v. Burns*, 60 Ind. 269, 290; *Gardner v. Gardner*, 2 Gray, 424, 440; *Harper v. Harper*, 29 Mo. 301, 303; *Quincy v. Quincy*, 10 N. H. 272, 274; *Stevens v. Stevens*, 14 N. J. Eq. 374, 375; *Marsh v. Marsh*, 13 N. J. Eq. 231, 236; *Pitts v. Pitts*, 53 N. Y. 593, 595; *Barnes v. Barnes*, Wright (Ohio), 475; *Bronson v. Bronson*, 7 Phila. 405, 406; *Phillips v. Phillips*, 27 Wis. 252, 254; *Stewart, Mar. and Div.* 271.

It involves an act on the part of both the complainant and defendant. *Armstrong v. Armstrong*, 27 Ind. 186, 189; *Harrison v. Harrison*, 20 Ala. 623, 646; *Quarles v. Quarles*, *supra*; *Betz v. Betz*, 2 Robt. 694, 696. See *Johns v. Johns*, *supra*.

The conditions may be express or implied. *Beby v. Beby*, 1 Hagg. Eccl. 799, 3 Eng. Eccl. 838, 840; *Quincy v. Quincy*, *supra*; *Rogers v. Rogers*, 122 Mass. 423, 424, 425; *Anonymous*, 6 Mass. 147; *Thomas v. Thomas*, 2 Coldw. 123, 128; *D'Aguliar v. D'Aguliar*, 1 Hagg. Eccl. 773, 3 Eng. Eccl. 829, 834; *Westmeath v. Westmeath*, 2 Hagg. Eccl. Supp. 1, 4 Eng. Eccl. 233, 239, 290; *Threewits v. Threewits*, 4 Desaus. Eq. 560, 572; *Farnham v. Farnham*, 73 Ill. 497, 500; *Warner v. Warner*, 31 N. J. Eq. 225, 226, 227.

If conditions are performed, the forgiveness is condonation and a bar to divorce. *McDwire v. McDwire*, Wright (Ohio), 354, 355; *Sullivan v. Sullivan*, 34 Ind. 333, 370.

that the divorce would not be granted on the ground of drunkenness.

3. A wife who continues to live with her husband after the last act of personal violence condones the offense.

(November 26, 1889.)

APPEAL by complainant from a judgment of the Appellate Court, First District, affirming a decree of the Circuit Court for Cook County dismissing a bill for divorce. *Affirmed.*

The facts are fully stated in the opinion.

Mr. George Driggs, with *Mr. C. F. Loesch*, for appellant:

Defendant was intoxicated and drunk more or less frequently during the period of more than two years prior to March 3, 1887, from the excessive use of morphine, and the appellant is entitled to a divorce under the provisions of the Statute which provides for a divorce from a person guilty of habitual drunkenness for the space of two years.

Starr & Curtis, Rev. Stat. Ill. chap. 40, § 1, 885. See *Bishop*, Mar. and Div. 6th ed. 813; *Barber v. Barber*, 14 Law Rep. 375.

Any adjudication of the question of the use of narcotics in any criminal case for drunkenness is not applicable to the case at bar. Rules of law applicable in criminal practice are different from those in civil cases, and in divorce proceedings the general principles of civil suits, rather than those of criminal proceedings, apply.

Wagoner v. Wagoner (Md.) 9 Cent. Rep. 85.

Those acts which affect the life, the health, or even the comfort, of the party aggrieved, and give a reasonable apprehension of bodily hurt, are called cruelty.

1 Bouvier, L. Dict. 414.

In *Sharp v. Sharp*, 3 West. Rep. 574, 116 Ill. 511, this court held that two acts of physical violence proved to have been inflicted, although seven years apart, and notwithstanding that the bill was not filed until four years after the last act of cruelty complained of, were sufficient ground for divorce when taken in connection with the whole conduct of the guilty party since their marriage. The excessive use of morphine was an aggravation, and not a mitigation, of the acts of cruelty.

Coursey v. Coursey, 60 Ill. 186; *Burlage v. Burlage*, 9 West. Rep. 121, 65 Mich. 624.

Condonation is defined as "the conditional forgiveness or remission, by a husband or wife, of a matrimonial offense, which the other has committed."

1 Bouvier, L. Dict. 315.

"Condonation is defined in the books as forgiveness, upon condition that the injury shall not be repeated, and is dependent upon future good usage and conjugal kindness."

Farnham v. Farnham, 73 Ill. 500.

"Occupying the same house but a different apartment, while getting ready to move out, is not condonation."

Jacobs v. Tobelman, 36 La. Ann. 842. See *Mack v. Handy*, 39 La. Ann. 491; *Beby v. Beby*, 1 Hagg. Eccl. 789, 3 Eng. Eccl. 388.

Messrs. A. J. Hopkins, N. J. Aldrich and F. H. Thatcher, for appellee:

The taking of opium or morphine does not make one an habitual drunkard, and is not a ground for divorce under our Statute.

6 L. R. A.

1 *Bishop*, Mar. and Div. 6th ed. § 813, *Barber v. Barber*, 14 Law Rep. 375; *Bishop*, Stat. Cr. 972.

Divorce can only be granted for causes specified in the Statute; anything short of that requirement will not be sufficient.

Henderson v. Henderson, 88 Ill. 248.

As to what constitutes "extreme and repeated cruelty," see—

Henderson v. Henderson, 88 Ill. 250; *Vignos v. Vignos*, 15 Ill. 186; 2 Kent, Com. *126; *Shorediche v. Shorediche*, 1 West. Rep. 641, 115 Ill. 102; *Ratts v. Ratts*, 11 Ill. App. 386.

Bailey, J., delivered the opinion of the court:

This was a bill in chancery, brought by Marie A. Youngs against Phineas B. Youngs, her husband, in the Circuit Court of Cook County, praying for a divorce. The parties were married at Galva, Ill., February 12, 1879, and shortly thereafter took up their residence at Aurora, Kane County, Ill., where they resided until about the 1st of March, 1887. One child, a daughter, was born as the fruit of their marriage, who at the date last mentioned was about five years of age. On or shortly after March 1, 1887, the complainant left her husband, and went to the City of Chicago, where her father and sister were living. On the 4th day of March, 1887, she filed a bill against her husband for a divorce in the Circuit Court of Cook County, setting up, as her only ground of complaint, that her husband, for more than two years then last passed, had been guilty of habitual drunkenness.

On the 11th of April, 1887, the parties executed an instrument in writing, whereby it was agreed that they should live separate and apart for the period of one year from that date; and that during that period the defendant should pay the complainant at the rate of \$35 per month for the support and maintenance of herself and child; and that the defendant should have the privilege of seeing said child by himself, or in the presence of the complainant, as he might prefer, one day each month during the continuance of said contract; that the complainant should immediately dismiss her bill for a divorce, and refrain from commencing any other proceedings of like character during the same period; that the defendant during that time would wholly refrain from the use of morphine or liquor in any form, except for medical purposes, and under the direction of a skillful and reputable physician. For the period of one year mentioned in said instrument the parties lived separate and apart, the defendant living in Aurora and the complainant remaining in Chicago, the defendant during that time making to the complainant the monthly payments agreed upon. At the end of the year the defendant ceased to make further payments, and the complainant, on the 12th day of April, 1888,—the day following the termination of the year,—filed in the same court a new bill for a divorce. By said bill the complainant alleged, as she had in her former bill, that the defendant, for the period of more than two years prior to the time she left him as aforesaid, was guilty of habitual drunkenness, and also alleged generally that the defendant had been guilty of extreme and repeated cruel-

ty towards the complainant,—that is, that he had on divers days and times since said marriage beaten and abused her, and neglected to furnish her and her child proper and necessary food and clothing, and was harsh, unkind and tyrannical in his treatment of the complainant; but no specific acts of cruelty were set out or charged in said bill. The defendant demurred to the portion of the bill charging cruelty, and answered the residue, denying said charge of drunkenness.

On the 25th day of June, 1888, the complainant filed her petition for alimony *pendente lite*, and for an allowance for her solicitor's fees, which petition was denied; and thereupon on the 9th day of July, 1888, she amended her bill by inserting therein a number of specific charges of cruelty. The defendant answered, denying said charges; and, the cause afterwards coming on to be heard by the court on pleadings and proofs, a jury being waived, the issues were found for the defendant, and a decree was entered upon said finding, dismissing the bill for want of equity. Said decree was affirmed by the appellate court, and by appeal from the judgment of that court the complainant has brought the record here, and assigned errors.

The evidence fails to show that the defendant has ever been in the habit of drinking intoxicating liquors, at least to excess. But it is claimed, and the evidence on behalf of the complainant tends to show, that for several years prior to the time the complainant left him the defendant had been in the habit of using morphine, administered by hypodermic injections in the arm and leg. It appears that the effects of morphine thus administered are very similar and in many respects apparently identical with those produced by the excessive use of intoxicating liquors. This branch of the complainant's case, therefore, must rest upon the proof of the defendant's indulgence in the morphine habit, and must necessarily fail, unless it can be held that the intoxication and stupor, produced by the excessive use of morphine, is "drunkenness," within the meaning of the first section of the Statute in relation to "Divorce." It cannot be doubted, we think, that the word "drunkenness" is used in said Statute in its ordinary and popular sense. The primary signification of the word, as given by Webster, is: "The state of being drunken, or overpowered by alcoholic liquor; intoxication; inebriety." In Bouvier's Law Dictionary it is defined as "the condition of a man whose mind is affected by the immediate use of intoxicating drinks." A similar definition is given by Rapalje & Lawrence in their Law Dictionary, viz.: "Disorder of the mind occasioned by the recent use of intoxicating liquor." The Supreme Judicial Court of Massachusetts, in defining the meaning of the word as used in the statutes of that State, say: "There can be no doubt that drunkenness, as it is commonly understood in the community, is the result of the excessive drinking of intoxicating liquors. Such is also the signification given to it by lexicographers. It is ebriety, inebriation, intoxication; all words nearly synonymous, and all expressive of that state or condition which inevitably follows from taking into the body, by swallowing or drinking, excessive quantities of

such liquors." It was held in that case that evidence of habitual intoxication from the use of chloroform would not sustain a complaint, under the Massachusetts Statute, charging a person with being a common drunkard. *Com. v. Whitney*, 11 Cush. 477.

That the word is used in our Statute in the sense above indicated, and that it cannot be held to include intoxication produced by the hypodermic administration of morphine, seems to be the inevitable conclusion. A further confirmation of this view, if such were necessary, may be derived from the fact that habitual drunkenness for two years was made a ground for divorce by our Statute as early as the year 1827, which was many years before the mode of administering morphine by hypodermic injection was known, as we suppose, even to the medical faculty. As originally used, therefore, these words could not have been intended to include intoxication produced by the administration of morphine in this mode; and, as the same words have been continued, in precisely the same connection, in every subsequent revision of our Statutes, the conclusion is irresistible that the words are to be understood now in the same sense in which they were originally employed. It is beyond the power of the courts to extend the application of said words to a subject not within the legislative intent. To make an excessive indulgence in the morphine habit a ground for divorce will require further legislative action, as it is clearly not made such by the Statute as it now stands.

The complainant's charges of extreme and repeated cruelty remain to be considered. The evidence tending to support those charges is to be found in the testimony of the complainant, corroborated in part by the testimony of her sister and of a domestic in the family. In the defendant's testimony said acts of cruelty are specifically denied. If it be admitted that the preponderance of the evidence is with the complainant, it remains to be seen whether, upon her own showing, she has suffered at the hands of the defendant such extreme and repeated cruelty, within the meaning of the Statute, as should entitle her to a divorce. The testimony of the complainant and her witnesses shows the commission by the defendant of several acts of personal violence to the complainant, which, if unexplained, would, as must probably be conceded, make out a case of cruelty sufficient to entitle the complainant to a decree. But it affirmatively appears that all of said acts of violence were committed while the defendant was under the influence of morphine, and that they were generally brought on by the complainant's attempts to interpose, and prevent the defendant's administering to himself that drug. However praiseworthy may have been her efforts to take the morphine out of her husband's possession, or to prevent his using it, she must be deemed to have known and contemplated the natural and probable results of her action, and to have thus voluntarily encountered the violence which ensued.

We would not be understood as holding that the intoxication or delirium produced by the voluntary use of morphine can be set up as a justification of tortious acts committed by one under the influence of that drug, any more than can intoxication produced by the use of

alcoholic liquors. But if the violence complained of was provoked by the complainant's attempts to take the morphine from her husband while he was in a state of total or partial delirium, and if, as the evidence seems to show, his acts consisted mainly of resistance on his part to such attempts, the complainant cannot set up the treatment received by her under such circumstances as extreme and repeated cruelty, within the meaning of the Statute.

The evidence tends to show, and is, as we think, sufficient to establish, condonation. The last act of personal violence to the complainant, proved, took place some time in December, 1896; but the evidence shows that the complainant continued to live and cohabit with the defendant until she left him, about the first of the following March. No subsequent conduct on the part of the defendant is shown which can be held to be sufficient to do away with such condonation, and we think the chancellor was correct in holding it to be a bar to the complainant's right to relief. As tending to support her charge of cruelty, the complainant gave some evidence to the effect that while she lived and cohabited with the defendant she was compelled by him to submit to excessive sexual intercourse. We have duly considered the evidence on that point, and have only to say that in our opinion it fails to show such state of facts as would amount in law to cruelty.

The conclusion reached by the chancellor, that the complainant is not entitled to relief on the ground of cruelty, is very considerably fortified by considerations drawn from the mode in which her complaint in that behalf has been brought forward. She left her husband, and went to Chicago, about March 1, 1897, and on

the 4th day of that month she filed her bill against him for a divorce. At that time the cruelty which she claims to have suffered must have been fresh in her recollection; and it was but reasonable to expect that if she was entitled to a divorce on that ground she would allege it in her bill. The only ground alleged, however, was habitual drunkenness, no mention whatever of any acts of cruelty being made. In the articles of agreement entered into a few days later, by which they arranged to live separate and apart for a year, it was recited that certain differences had arisen between them; but the only matter of difference in any way hinted at in the instrument related to the use by the defendant of morphine and liquor. At the expiration of the year the complainant filed a new bill for divorce, alleging habitual drunkenness as before, but charging cruelty only in general terms, and not in such form as to be available as a ground for relief. It was not until the sufficiency of that portion of her bill had been challenged by demurrer, and after the weakness of her bill had been developed on her motion for an allowance of alimony *pendente lite*, that her bill was so amended as to charge cruelty in such form as to constitute a ground for a divorce. These circumstances furnish ground for a legitimate inference that the charge of cruelty is a mere afterthought, and that it was brought forward only after it had become apparent that the bill could not otherwise be maintained. We are of the opinion that the decree is in accordance with the evidence, and that no error was committed by the appellate court in affirming it.

The judgment of the Appellate Court will be affirmed.

WISCONSIN SUPREME COURT.

L. HATHAWAY, *Appt.*,

v.

M. H. LYNN, *Resp't.*

(....Wis....)

1. Before any liability to pay liquidated damages can attach to the party

NOTE.—Contract, breach of; liquidated damages.

A contract from the terms of which it can be clearly ascertained that liquidated damages were to be paid in a sum agreed on in case of its breach, will be enforced. *Eakin v. Scott*, 70 Tex. 442.

Under Cal. Civ. Code, §§ 1670, 1671, an agreement for liquidated damages is valid only when it would be, from the nature of the case, impracticable or extremely difficult to fix the actual damages (*Greenleaf v. Stockton C. H. & Agricultural Works*, 78 Cal. 606; *Patent Brick Co. v. Moore*, 75 Cal. 206); especially if such damages would obviously be inconsiderable as compared with the sum stated in the agreement as damages,—the latter should be regarded as a penalty, and not as liquidated damages. *Carter v. Strom* (Minn.) 43 N.W. Rep. 394.

The Code excepts only cases where it would be impossible or extremely difficult to fix the actual damage. *Eva v. McMahon*, 77 Cal. 467.

Where an agreement expresses a penalty for a breach thereof, the damages recoverable can only be assessed by a jury; and it is error for the court

in default he must have been guilty of a substantial breach of his agreement resulting in something more than mere nominal damages to the other party.

2. A release from a contract to run a bus from passenger trains to a hotel is valid without any new and independent consideration to support it.

not to render judgment for the amount of the penalty or default. *McPherson v. Robertson*, 22 Ala. 459.

Plaintiff entitled at least to nominal damages.

In an action for breach of contract the plaintiff is entitled to nominal damages at least for the breach. *Fulkerson v. Bada*, 2 West. Rep. 515, 19 Mo. App. 620.

Juries cannot be allowed to give anything more than nominal damages, where there is no legal evidence of damages before them. *Hennershot v. Gallagher*, 124 Pa. 1; *Hancock v. Hubbell*, 71 Cal. 587.

The right to damages for a breach of contract is unrestricted, in the absence of a qualification in the contract, and may include all injuries sustained, whether foreseen or not. *Allen v. Steers*, 30 La. Ann. 688.

Damages for breach of contract must be capable of certain ascertainment, and not remote, speculative or contingent. *Western U. Teleg. Co. v. Hall*, 124 U. S. 444 (31 L. ed. 479).

(December 3, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Wood County in favor of defendant in an action to recover liquidated damages for an alleged breach of a contract providing therefor. *Affirmed.*

Statement by **Lyon, J.:**

In June, 1887, the plaintiff was, and still is, the proprietor of a hotel in the City of Grand Rapids, known as the "Witter House," and until that time ran an omnibus for the carriage of passengers between his hotel, the residences in the City of Grand Rapids and Centralia, and two railroad depots, one of which is situated in each of said cities. Such cities are separated by the Wisconsin River, and were, at that time, connected by a free bridge across the river. At the same time the defendant was, and still is, the proprietor of another omnibus line, and engaged in the same business in those cities. On June 29, 1887, the plaintiff sold his omnibus, team and outfit to the defendant, who paid the agreed consideration therefor. At the time of such sale the parties entered into an agreement in writing, signed by them, which is as follows: "Memorandum of agreement made and concluded this 29th day of June, 1887, by and between L. Hathaway of the one part, and M. H. Lynn of the other part, witnesseth: The said L. Hathaway having this day sold out his bus line to said M. H. Lynn, now, therefore, in consideration of the premises and of the agreement hereinafter contained, the said M. H. Lynn hereby agrees and binds himself regularly and in proper manner hereafter to run a separate bus between the Witter House and all passenger trains arriving at the Grand Rapids and Centralia depots, for the separate and special accommodation of the traveling public desiring to stop at the Witter House. In other words, to convey Witter-House customers and Centralia-House patrons in separate busses, unusual and temporary accidents excepted and excusing. Also to carry a runner for the Witter House free of charge to and from all such trains. In consideration of the premises, and

of the foregoing agreement, the said L. Hathaway hereby agrees and binds himself that, so long as the said M. H. Lynn faithfully carries out the foregoing agreement, he will not put on, nor encourage anyone to put on, a bus line in said cities. In case of the violation or disregard of the terms of this agreement, the damages recoverable by the other are hereby fixed and adjusted at the sum of \$200, to be paid on demand."

This action was brought to recover \$200, as liquidated damages for alleged breaches by defendant of such agreement. The breaches assigned are (1) that several times between December, 1887, and April, 1888, the defendant failed to run a separate omnibus to and from certain trains; and (2) that since April 11, 1888, the defendant has wholly failed to perform his said agreement. The defendant in his answer alleges full performance of his contract to April 11, 1888, and that he was excused from such performance thereafter by the destruction of the bridge between the two cities, which had not been rebuilt. He further alleges that after that date, and before the action was commenced, the plaintiff released him from the obligation further to perform such contract. The parties were the only witnesses on the trial whose testimony is of any importance. The only material conflict in their testimony relates to the special breaches of the agreement charged in the complaint to have occurred between December, 1887, and April, 1888, and to the release of defendant by plaintiff, as alleged in the answer, from the performance of the agreement. It appears that the bridge was carried away by an ice jam on April 11, 1888, and the river between the two cities could not be crossed with teams until about the middle of May, when a ferry-boat was put in operation, upon which teams and vehicles could be transported across the river. Tolls were charged therefor. Further reference to the testimony will be found in the opinion. The jury returned a verdict for the defendant. A motion for a new trial was denied, and judgment entered for the defendant pursuant to the verdict. The plaintiff appeals from the judgment.

As to the measure of damages for a breach of contract, the general rule of the common law is one of indemnity, intended to give compensation for the loss sustained, and, as far as practicable, to put the plaintiff in the same condition in which he would have been if the contract had been fully performed. *Snodgrass v. Reynolds*, 79 Ala. 462.

Damages for breach of contract to construct house (*Boettler v. Tendick*, 5 L. R. A. 270, *note*); of contract to convey lands (*Johnson v. McMullin* (Wyo.) 4 L. R. A. 670, *note*); generally: *Taylor Mfg. Co. v. Hatcher*, 3 L. R. A. 587, 39 Fed. Rep. 440; *Western U. Teleg. Co. v. Brown*, 2 L. R. A. 768, *note*, 71 Tex. 728; *Osgood v. Bauder*, 1 L. R. A. 656, *note*, 75 Iowa, 550; *Hunt v. Oregon Pac. R. Co.* 1 L. R. A. 842, 36 Fed. Rep. 481.

Parties may modify their agreements.

Parties can agree to change or modify their agreements without any new consideration. *Ruege v. Gates*, 71 Wis. 684; *Isard v. Kimmel* (Neb.) 41 N. W. Rep. 1068.

Parties to a written executory contract under seal may modify it by parol, if they have acted under and executed it as modified. *McClay v. Gluck* (Minn.) 42 N. W. Rep. 875.

Where a valid change in a contract is made, the 6 L. R. A.

old contract is thereby done away with, and a new one substituted. *Smith v. Snyder*, 82 Va. 614.

May waive provision in contract.

A party may waive any provision, either of a contract or of a statute, intended for his benefit. *Shutte v. Thompson*, 82 U. S. 15 Wall. 151 (21 L. ed. 128).

A waiver is the voluntary relinquishment of some known right or advantage. Authorities cited in *Peabody v. Maguire*, 5 New Eng. Rep. 699, 79 Me. 572.

A waiver of a stipulation in an agreement must, to be effectual, not only be made intentionally, but with knowledge of the circumstances. This is the rule, not only when there is a direct and precise agreement to waive the stipulation, but also where it is sought to deduce a waiver from the conduct of the party. *Bennecke v. Connecticut Mut. L. Ins. Co.* 105 U. S. 855 (23 L. ed. 990); *Reynolds v. Douglass*, 87 U. S. 12 Pet. 497 (9 L. ed. 1171).

Acquiescence and waiver are always questions of fact. *Pence v. Langdon*, 99 U. S. 578 (25 L. ed. 430).

A waiver may be proved either directly or circumstantially, like any other fact. Authorities cited in *Peabody v. Maguire*, *supra*.

Mr. George L. Williams, for appellant: The damages in this case being such as were uncertain, conjectural, not easily determined and not unreasonable, the sum fixed by the parties must be considered as liquidated damages.

Lyman v. Babcock, 40 Wis. 508; *Pierce v. Jung*, 10 Wis. 80; *Cushing v. Drew*, 97 Mass. 445.

A release to be effectual must declare with entire distinctness the purpose of the creditor to discharge the debt and the debtor.

2 Parsons, Cont. 713.

A new agreement to release, waive, cancel or annul the original agreement must precede a breach of it.

Brown v. Everhard, 52 Wis. 207.

Mr. J. W. Cochran for respondent.

Lyon, J., delivered the opinion of the court:

The conclusions we have reached relieve us from the necessity of determining whether the stipulation in the agreement of June 29, 1887, to the effect that if either party violate the terms thereof he shall pay to the other party, on demand, the sum of \$200, thereby provides for a mere penalty, as in *Lyman v. Babcock*, 40 Wis. 508, or whether the \$200 is to be regarded as liquidated damages, as in *Berrinkott v. Traphagen*, 39 Wis. 219. Neither are we called upon to decide whether the agreement, which contained no limitation of the time it shall continue, may be rescinded at the option of either party, as in *Irish v. Dean*, Id. 562; nor whether the altered conditions caused by the destruction of the free bridge, and the substitution therefor of a toll ferry, terminated the contract. Under a different state of facts these interesting questions might have arisen, but they are not involved in the case here made by the pleadings and testimony.

I. Assuming it to have been proved on the trial that the defendant failed, at different times, to run a separate omnibus between plaintiff's hotel and certain trains, it does not appear that such failure resulted in any damage to the plaintiff. It seems undisputed that the defendant ran an omnibus between each train arriving at either city and the plaintiff's hotel, except when communication with the Centralia depot was necessarily interrupted by the destruction of the bridge, although on a few occasions before April 11, and constantly afterwards, the same omnibus served other hotels. It is not shown that, at such times, there were any passengers to or from the hotel of plaintiff, and no fact or circumstance appears from which it can be inferred that the plaintiff suffered any damage because of the occasional

failure of defendant to run a separate omnibus between plaintiff's hotel and the depots. Hence the plaintiff would only be entitled to nominal damages for alleged breaches. This action is brought upon the theory that the sum of \$200 specified in the agreement is liquidated damages for any breach of the requirements thereof, and such is the contention of the plaintiff. For the purposes of the case, the correctness of this proposition will be conceded. In such a case, before any liability to pay the liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement,—a breach which has resulted in something more than mere nominal damages to the other contracting party. This rule is so manifestly just that no discussion of it is necessary. Hence we conclude that the plaintiff is not entitled to recover such stipulated damages for any alleged breach occurring before the time the defendant claims to have been released by the plaintiff from the obligations of the agreement of June 29, 1887.

II. Was the defendant so released? He testified on the trial that on May 16, 1888, the day before the ferry-boat commenced running regularly, he told the plaintiff that he considered their contract ended by the destruction of the bridge, and he intended thereafter to run but one omnibus. Plaintiff claimed the contract was still in force. Thereupon the defendant offered to resell the same property to the plaintiff. They negotiated some days, and finally agreed upon the terms of the resale. Thereafter the plaintiff refused to make the purchase, but said to the defendant: "I have concluded not to put any bus on. You may go on and run it as you wish to, or run it as you are a mind to,"—also that defendant need not carry a runner for him, if he did not wish to. The plaintiff denied these statements.

If the plaintiff said to defendant what the latter testified he did, we think the jury were justified in finding that plaintiff thereby released him from his obligation to run a separate omnibus between the hotel and depots. Such a release is valid without any new and independent consideration to support it. The testimony being in conflict on this subject, it was competent for the jury to believe the defendant, and manifestly they did so, and predicated their verdict on his testimony. This court cannot say that they should have disbelieved him, and based their verdict on the testimony of the plaintiff. Our conclusion is that the testimony supports the verdict, and hence that the judgment should not be disturbed.

The judgment of the Circuit Court is affirmed.

NEW YORK COURT OF APPEALS (2d Div.).

Elvira J. BENNETT, *Resp't.*,

v.

Oliver BENNETT, *App't.*

(....N. Y....)

1. A married woman can maintain an

action for the enticement of her husband away from her, and her consequent deprivation of his comfort, aid, protection and society.

2. The repeal by the Act of 1880 of the provisions of the Acts of 1860 and 1862, giving the wife the right to maintain an

NOTE.—*Tort, injury to a right imports damage.*
Every injury to a right imports a damage; for wherever the plaintiff establishes some legal right
6 L. R. A.

in himself which has been invaded, weakened or destroyed by the unlawful or malicious act of the defendant, there is a wrong and damage in law re-

action for injury to her person or character, was not intended to take away any rights of action, but merely to remove sections no longer regarded as operative.

(*Haight and Parker, JJ., dissent.*)

(December 8, 1899.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Broome Circuit in favor of plaintiff, and also an order denying a motion for new trial in an action to recover damages for the alienation from plaintiff of her husband's affections. *Affirmed.*

The case is fully stated in the opinion.

Messrs. Clark & Brown, for appellant:

The novelty of a particular action or defense, where the facts on which it is founded are of common occurrence, is a strong argument that it cannot be upheld.

Costigan v. Mohawk & H. R. Co. 2 Denio, 610; *Duke of Newcastle v. Clark*, 8 Taunt. 602; *Russell v. Devon Co.* 2 T. R. 678.

The action would not lie at common law.

Mehrhoft v. Mehrhoff, 26 Fed. Rep. 14; *Logan v. Logan*, 77 Ind. 558; *Lynch v. Knight*, 9 H. L. Cas. 577; *Clark v. Harlan* (Ohio) 1 Cinn. Super. Ct. Rep. 418; *Westlake v. Westlake*, 34 Ohio St. 621; *Jaynes v. Jaynes*, 39 Hun. 40.

There is no combination of the common law and the Statutes of the State of New York, that enables this action to be maintained. The Statutes of the State of New York have not abolished the common-law unity of husband and wife.

Bertles v. Nunan, 92 N. Y. 159; *Fitzgerald v. Quann*, 12 Cent. Rep. 745, 109 N. Y. 441; *Mangum v. Peck*, 111 N. Y. 404.

The loss of a husband's society is not an injury to the character of the wife, nor is it an injury to her person.

Logan v. Logan, 77 Ind. 564.

Section 450 of the Code leaves the law as it was before its passage.

Fitzgerald v. Quann, 12 Cent. Rep. 745, 109 N. Y. 447.

The cause of action cannot be predicated on the idea that the right which the wife has to the society and aid of her husband is her property.

See *Stief v. Hart*, 1 N. Y. 24; *Morrison v. Semple*, 6 Binn. 94; *Jackson v. Housel*, 17 Johns. 283; *Gillet v. Fairchild*, 4 Denio, 82; *Zabriskie v. Smith*, 18 N. Y. 838.

Mr. Alexander Cummings, with *Messrs. Canniff & Penrie*, for respondent:

There is no wrong without a remedy.

Searles v. Cronk, 88 How. Pr. 324; *Graves v. Briggs*, 6 Abb. N. C. 41.

The depriving plaintiff of the society, companionship, aid and comfort of her husband is a wrongful invasion of the personal rights of the plaintiff. She may maintain her action for its redress under the laws of this State.

Bigelow, Torts, 158; *Westlake v. Westlake*, 34 Ohio St. 621; *Clark v. Harlan* (Ohio) 1 Cinn. Super. Ct. Rep. 418; *Cooley, Torts*, 227; 1 *Adams*, *Torts*, 4th ed. 86; *Breiman v. Paasch*, 7 Abb. N. C. 249.

The decisions of this State upon the meaning of the term "injury" are broad enough to include an action by a married woman for enticing away her husband.

See *Lynch v. Knight*, 9 H. L. Cas. 577; *Baker v. Baker*, 16 Abb. N. C. 298.

Vann, J., delivered the opinion of the court:

The plaintiff, a married woman, brought this action to recover damages from the defendant for enticing away her husband, and depriving her of his comfort, aid, protection and society. The defendant insists that neither at common law, nor under the Act Concerning the Rights and Liabilities of Husband and Wife, can such an action be maintained. It was provided by that Statute that any married woman might, while married, sue and be sued in all matters having relation to her sole and separate property, and that she might maintain

suit therefrom, in respect of which an action is maintainable for pecuniary compensation, though no actual pecuniary loss can be proved. *Rogers v. Macnamara*, 14 C. B. 27, 28 L. J. N. S. C. P. 1; *Bonomi v. Backhouse*, EL BL & EL 657; *Ashby v. White*, 2 Ld. Raym. 954; *Embrey v. Owen*, 6 Exch. 353, 20 L. J. N. S. Exch. 212; *Rochdale Canal Co. v. King*, 14 Q. B. 126; *Webb v. Portland Mfg. Co.* 3 Summ. 197; *Bower v. Hill*, 1 Scott, 526.

Indeed it is held that actions may be sustained for such an act, even though the damage is not susceptible of proof. *Delaware & H. Canal Co. v. Torrey*, 38 Pa. 143; 1 *Addison, Torts*, 16.

For any violation of personal rights an unmarried woman has the same remedy that a man has. She may sue for injury to her character, her person or her property. A right of action to this extent is clearly given to a married woman under the statutes. *Furrow v. Chapin*, 13 Kan. 112; *Townsend v. Nutt*, 19 Kan. 284; *Mehrhoft v. Mehrhoff*, 26 Fed. Rep. 14.

Reciprocal rights of husband and wife regarded as property.

The reciprocal rights of husband and wife may be regarded as the property of the respective parties, in the broad sense of the word "property," which includes things not tangible or visible, and applies to whatever is exclusively one's own. An unbroken 6 L. R. A.

series of decisions, from early times, holds that, for a willful invasion of the husband's right to the society of his wife, he may maintain an action for damages against the wrong-doer. His right of action is not put upon the technical ground of loss of service, as is sometimes suggested, but it rests upon the loss of conjugal affection and society of the wife. *Weedon v. Timbrell*, 5 T. R. 367; *Jaynes v. Jaynes*, 39 Hun. 40; *Bennett v. Smith*, 21 Barb. 436; *Hutcheson v. Peck*, 5 Johns. 196; *Schouler, Husband and Wife*, § 64.

Right of action for alienation of affections and loss of conjugal society.

A wife may maintain an action for the loss of the society and companionship of her husband, against one who wrongfully and maliciously induces and procures her husband to abandon or send her away. *Westlake v. Westlake*, 34 Ohio St. 621; *Jaynes v. Jaynes*, 39 Hun. 40; *Clark v. Harlan* (Ohio) 1 Cinn. Super. Ct. Rep. 418.

A wife may maintain an action against a woman who alienates her husband's affections and entices him away from her, so as to deprive her of his society and adequate support. *Mehrhoft v. Mehrhoff*, 26 Fed. Rep. 13; *Westlake v. Westlake*, *supra*; *Logan v. Logan*, 77 Ind. 558.

Such right is her "separate property" within the meaning of that term as used in the statutes; and if

an action, in her own name, for damages, against any person or body corporate, for any injury to her person or character, the same as if she were sole. Laws 1860, chap. 90, p. 158, § 7, as amended by chapter 172, Laws 1862, p. 343.

An injury to the person, within the meaning of the law, includes certain acts which do not involve physical contact with the person injured. Thus criminal conversation with the wife has long been held to be a personal injury to the husband (*Delamater v. Russell*, 4 How. Pr. 234 (1850); *Strauss v. Schwarzwalden*, 4 Bosw. 627 (1859), and the seduction of a daughter a like injury to the father. *Taylor v. North*, 8 Code Rep. 9; *Steinberg v. Laaker*, 50 How. Pr. 432.

The Code of Civil Procedure, in defining "personal injury," includes, under that head, libel, slander "or other actionable injury to the person." Section 3343, subd. 9.

It is well settled that a husband can maintain an action against a third person for enticing away his wife, and depriving him of her comfort, aid and society *Hutcherson v. Peck*, 5 Johns. 196; *Barnes v. Allen*, 1 Abb. Dec. 111.

The basis of the action is the loss of consortium, or the right of the husband to the conjugal society of his wife. It is not necessary that there should be proof of any pecuniary loss in order to sustain the action. *Hermance v. James*, 32 How. Pr. 142; *Rinehart v. Billa*, 82 Mo. 534.

Loss of services is not essential, but is merely a matter of aggravation, and need not be alleged or proved. *Bigaoutie v. Paulet*, 184 Mass. 125.

According to the following cases, a wife can maintain an action, in her own name and for her own benefit, against one who entices her husband from her, alienates his affection and deprives her of his society. *Jaynes v. Jaynes*, 39 Hun. 40; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 298; *Warner v. Miller*, 17 Abb. N. C. 221;

Churchill v. Lewis, Id. 226; *Simmons v. Simmons*, 4 N. Y. Supp. 221.

There appears to be no reported decision in this State holding that such an action will not lie, except *Van Arnam v. Ayers*, 67 Barb. 544. That case was decided at special term, in 1877, and the learned justice who wrote the opinion therein, as a member of the general term when the case now under consideration was affirmed, concurred in the result, and stated that, owing to recent authorities, he thought the right of action should be upheld. Some of the cases rest mainly upon the Statute already alluded to, and sustain the action upon the theory that enticing away the wife is such an injury to the personal rights of the husband as to amount to an injury to the person, while others proceed upon the ground that the loss of consortium is an injury to property, in the broad sense of that word, "which includes things not tangible or visible, and applies to whatever is exclusively one's own." *Jaynes v. Jaynes*, *supra*, sustains the action upon either ground, although prominence is given to the latter. Several of the cases justify the action generally, without allusion to any statute.

If the wrong in question is an injury to property simply, it would not abate upon the death of the plaintiff, but could be revived in the name of the personal representatives, a consequence which suggests the precarious nature of that basis for the action. *Oregin v. Brooklyn C. R. Co.* 75 N. Y. 192, 83 N. Y. 595.

In other States the rule varies. In Ohio and Kansas recovery by the wife is permitted, while in Indiana the right has thus far been denied, but by a court so evenly divided in opinion as to leave the ultimate rule in that State uncertain. *Clark v. Harlan*, 1 Cinn. Super. Ct. Rep. 418; *Westlake v. Westlake*, 34 Ohio St. 621; *Mehrhoft v. Mehrhoff*, 26 Fed. Rep. 13; *Logan v. Logan*, 77 Ind. 558.

In England the point does not appear to have been directly passed upon, but in one

that be not so, then it is a personal right for an injury to which an action is given by the said Acts. *Van Arnam v. Ayers*, 67 Barb. 544, distinguished and not followed; *Breiman v. Paasch*, 7 Abb. N. C. 249; *Baker v. Baker*, 16 Abb. N. C. 298; *Jaynes v. Jaynes*, 39 Hun. 40.

The loss of conjugal society is not a pecuniary loss; though it may be a loss which the law may recognize to the wife as well as the husband. *Lord Campbell in Lynch v. Knight*, 9 H. L. Cas. 577; *Westlake v. Westlake*, *supra*.

There is no reason why such an action should not be supported, where by statute the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her. *Cooley, Torts*, 227.

Under the Statutes of Kansas, "a woman may, while married, sue and be sued, in the same manner as if she were unmarried." Stat. 1879, chap. 62, § 3; *Mehrhoft v. Mehrhoff*, 26 Fed. Rep. 14.

So it has been held that a husband may maintain an action for alienating the affections of his wife, and inducing her to refuse to live with him as his wife, although she be not physically absent or separate from him, and there be no pecuniary loss, or loss of service by an actual leaving or continuing away from him. *Heermance v. James*, 47 Barb. 120.

There may be desertion though the parties con-

tinue to occupy the same house. 1 Bishop, Mar. and Div. § 779; *Fishli v. Fishli*, 2 Litt. (Ky.) 337; *Moss v. Moss*, 2 Ired. L. 55; *Jaynes v. Jaynes*, 39 Hun. 41.

No such right of action existed under the common law by reason of the legal unity of husband and wife. In *Westlake v. Westlake*, *supra*, this question is discussed at length under the Statute of that State, and the court, by a divided bench (a majority of one), held that the wife could maintain her action. In *Logan v. Logan*, 77 Ind. 558, the court, by a majority of one, decided that under the Statutes of Indiana the wife could not maintain an action, but, the words being slanderous, she could maintain her action of slander. *Mehrhoft v. Mehrhoff*, *supra*.

In an action against a third party for inducing the plaintiff's husband to send her away, the declarations of the husband, made in the absence of the defendant, are not admissible in evidence. *Westlake v. Westlake*, *supra*.

So in an action for enticing away the plaintiff's wife, the declarations of the wife are not admissible in evidence. *Winsmore v. Greenbank*, Willes, 577.

The confessions of the wife, in an action by the husband against her seducer, are not evidence against the defendant. *Bull. N. P. 28; Westlake v. Westlake*, *supra*.

case the judges approached it so nearly and differed so widely in their discussions that it is cited as an authority upon both sides of the question. *Lynch v. Knight*, 9 H. L. Cas. 577.

The Lord Chancellor (Campbell), in delivering the leading opinion, said: "If it can be shown that there is presented to us a concurrence of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium* or conjugal society can give a cause of action to the husband alone." Lord Cranworth was strongly inclined to think that this view was correct, but did not feel called upon to express a decided opinion, as it was agreed that the judgment of the court should be placed upon another ground. Lords Brougham and Wensleydale thought that the action would not lie. In that case, it is to be observed, the husband joined the wife in bringing the action, "for conformity," as there was no enabling statute authorizing her to sue in her own name.

While this action was tried, decided at the general term, and argued in this court upon the theory that the Acts of 1860 and 1862, concerning the rights and liabilities of husband and wife, were still in force, in fact they have no application, because the sections heretofore regarded as applicable were repealed by the General Repealing Act of 1880. Laws 1880, chap. 245, §§ 36, 38.

The judgment in this action, therefore, cannot be affirmed upon the ground that the wrong complained of may be redressed under those Statutes. Can it be sustained upon the theory that the right of action belongs to the wife, according to the general principles of the common law, and that she may now maintain it, being permitted to sue in her own name? The Code of Civil Procedure (§ 450) provides: "In an action or special proceeding a married woman appears, prosecutes or defends, alone or joined with other parties, as if she were single."

The capacity of the plaintiff to sue cannot be questioned under this Statute, but whether she has a cause of action to sue upon is the important inquiry. Can she maintain an action for any personal injury, even for an assault and battery, since the Repealing Act already cited went into effect? Admitting her power to assert her rights in court, what right has she to assert? Has she such a legal right to the conjugal society of her husband as to enable her to recover against one who wrongfully deprives her of that right?

It is urged that the novelty of the action is a strong argument that it cannot be upheld. The same point was urged in almost the first action brought by a husband against one who had enticed away his wife, and the answer made by the court in that case we repeat as applicable to this: "The first general objection is that there is no precedent of any such action as this, and that, therefore, it will not lie. . . . But this general rule is not applicable to the present case. It would be, if there had been no special action on the case before. A special action on the case was introduced for this reason, that the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special

action on the case." *Winsmore v. Greenbank*, Willes, 577, 580.

Moreover, the absence of strictly common-law precedents is not surprising, because the wife could not bring an action alone, owing to the disability caused by coverture, and the husband would not be apt to sue, as by that act he would confess that he had done wrong in leaving his wife. The actual injury to the wife from the loss of *consortium*, which is the basis of the action, is the same as the actual injury to the husband from that cause. His right to the conjugal society of his wife is no greater than her right to the conjugal society of her husband. Marriage gives to each the same rights in that regard. Each is entitled to the comfort, companionship and affection of the other. The rights of the one and the obligations of the other spring from the marriage contract, are mutual in character, and attach to the husband as husband, and to the wife as wife. Any interference with these rights, whether of the husband or of the wife, is a violation, not only of a natural right, but also of a legal right, arising out of the marriage relation. It is a wrongful interference with that which the law both confers and protects. A remedy, not provided by statute, but springing from the flexibility of the common law, and its adaptability to the changing nature of human affairs, has long existed for the redress of the wrongs of the husband. As the wrongs of the wife are the same in principle, and are caused by acts of the same nature as those of the husband, the remedy should be the same. What reason is there for any distinction? Is there not the same concurrence of loss and injury in the one case as in the other? Why should he have a right of action for the loss of her society, unless she also has a right of action for the loss of his society? Does not the principle that "the law will never suffer an injury and a damage without a remedy" apply with equal force to either case? Since her society has a value to him capable of admeasurement in damages, why is his society of no legal value to her? Does not she need the protection of the law in this respect at least as much as he does? Will the law give its aid to him and withhold it from her?

It appears from the cases already cited that, according to the weight of authority, the wife can maintain such an action when there is a statute enabling her to sue. The modern elementary writers take the same position. "To entice away or corrupt the mind and affection of one's consort is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not the loss of assistance, but the loss of *consortium* of the wife or husband, under which term are usually included the person's affection, society or aid." Bigelow, Torts, 158.

"We see no reason why such an action should not be supported, where, by statute, the wife is allowed, for her own benefit, to sue for personal wrongs suffered by her." Cooley, Torts, 228.

The question remains whether a married woman can now maintain an action in this State for an injury to her person. Had a married woman a right of action at common law for a personal injury, but without power to

assert it owing to her coverture, or did the right itself belong to the husband? If the right was his, she seems to have no remedy for such wrongs, since the repeal of the Statutes of 1860 and 1862. If, however, the right was hers, but, owing to the legal fiction of the unity of husband and wife, she could not assert it, she may now have a remedy under section 450 of the Code. At common law the husband and the wife were treated as one person, and marriage operated as a suspension, in most respects, of the legal existence of the latter. From this supposed unity of husband and wife sprang all the disabilities of married women. She could not make a binding contract or commence an action, because either would imply that she had a separate existence. He could not enter into a covenant with her, because it would be only to covenant with himself. They could not give evidence for each other, because no one was then permitted to testify in his own behalf, nor against each other, because no one could be compelled to accuse himself. But marriage only suspended her personal rights: it did not annihilate them, or transfer them all absolutely to her husband. While it was an absolute gift to him of her goods and chattels, it was only a qualified gift to him of her choses in action, depending upon the condition that he reduce them to possession during coverture, as otherwise upon his death they belonged to her. *Bright, Husband and Wife*, § 34, 36; *Clancy, Married Women*, 109; *Reeve, Domestic Relations*, 4th ed. 1 *et seq.*; 2 *Kent, Commentaries*, 11th ed. 116.

"It is common doctrine, upon which the decisions in all the States of our Union and of England are in harmony, that, on the death of the husband, the wife's choses in action, not reduced by him to possession, survive to her. She takes them, not as his heir, personal representative or administratrix, but they revert to her in her own right. And we have seen that this doctrine applies as well to the wife's post-nuptial choses in action as to her antenuptial ones." 1 *Bishop, Married Women*, § 171.

"The husband shall not have them unless he and his wife recover them." *Co. Litt.* 851b.

Under the head of choses in action, torts, committed upon a married woman either before or during coverture, are included. "Although the husband is . . . entitled to all the property which the wife acquires during the coverture, yet, if damages be claimed for an injury to her person or reputation during coverture, those damages belong to her, and she must be joined with the husband in the suit. When damages for such an injury are collected, they belong to the husband, but, in case of his death before they are reduced to possession, they survive to the wife, in the same manner as if the injury had been received before marriage." *Reeve, Domestic Relations*, 87.

"The wife has capacity to be a recipient of wrong, as well as of property, the same as though she were sole. If she is slandered, or an assault or battery is committed on her, or any trespass or other actionable wrong, she may, on becoming discover, sue the wrong-doer, the same as though she had been sole when she received the injury; though if the suit is brought in the lifetime of the husband, he must be made a party plaintiff with her, in

consequence of the general rule of law which places the wife under the protection of the husband. When the result of the wrong becomes money in the form of damages paid by the wrong-doer, the wife, though she can receive, cannot hold, it, and the title glides to the husband, making the money his." 1 *Bishop, Married Women*, § 705.

The authorities are uniform in supporting the position of these writers. *Latourette v. Williams*, 1 Barb. 9; *Klein v. Hentz*, 2 Duer, 633; *Ball v. Bullard*, 52 Barb. 142; *Beach v. Ranney*, 2 Hill, 309; *Smith v. Scudder*, 11 Serg. & R. 325; *Checchi v. Powell*, 6 Barn. & C. 253; *Bond v. Simmons*, 3 Atk. 20.

The cause of action for a personal injury to a married woman, whether committed before or after marriage, belonged to her at common law, or else it would not survive to her upon the death of her husband. If it was his, it would either abate or pass to his personal representatives. On the other hand, if she dies, as *Lord Bacon* said, "the action dies with her." *Bacon, Abridgment, Baron and Feme, K.*

Unless the right was hers, subject only to the disability to sue without her husband joined, why should it cease upon her death? Why should it not survive to the husband, if the right itself was his? So, in the case of an absolute divorce, such rights of action remain the property of the wife. *Legg v. Legg*, 8 Mass. 99; *Lodge v. Hamilton*, 2 Serg. & R. 491.

If the injury was to the wife only, the action was brought in the name of both husband and wife, and was, in effect, her action. If the injury was in part to her and in part to him, for the former both joined, but for the latter he sued alone. *Johnson v. Dickson*, 26 Mo. 580; *Hooper v. Haskell*, 56 Me. 251; *Laughlin v. Eaton*, 54 Me. 156.

It is clear, therefore, that at common law the right of action for a tort committed upon a married woman belonged to her, and it is in the light of this principle that the full significance of section 450 of the Code becomes apparent. This section recognizes the separate existence of the wife to the broad extent of authorizing her to sue generally in her own name. By enabling her to prosecute as if she were single, it removed the only obstacle in the way of a personal assertion of her right in this regard. She had a right of action for any actionable injury before, but she could not set the law in motion unless her husband joined. When the Legislature provided that she could sue in her own name, without this inconvenient formality, it cut off the right of the husband, and permitted her to prosecute and recover for herself.

This view is confirmed by considering the history of legislation in relation to married women since 1848. Did the Legislature suppose that in repealing the sections in question of the Acts of 1860 and 1862, they were restoring the rule of the common law, and were depriving married women of substantial rights? *Endlich, Interpretation of Statutes*, § 475.

Every step in legislation, unless this is an exception, has been in the direction of the complete abrogation of the common-law unity of husband and wife. No step backward has been taken in that regard, unless this must be construed to be such. The bar, the public and the courts have thus far all proceeded upon the

theory that a married woman can still sue in her own name, and for her own benefit, for any injury to her person. It is a matter of common knowledge that since the Repealing Act of 1880, in nearly every county of the State, such actions have repeatedly been brought and tried, recoveries had and paid, and other actions brought that are now pending, upon the theory, adopted by both parties, that the right of a married woman to sue for personal injuries still exists. Even the exhaustive brief of the learned counsel for the appellant contains no suggestion to the contrary. This practical construction by the bar, the public, the Legislature and the courts is of great value because a contemporaneous is generally the best construction of a statute. Sedgw. Stat. and Const. L. 227.

The disastrous consequences that would result from the opposite construction cannot be lost sight of, because for nearly nine years the people have conducted their business, the lawyers have advised their clients, and the courts have administered justice, without exception, as far as known, in unquestioned reliance upon the unchanged rights of married women with reference to torts committed upon them. If such a radical change was effected by the Repealing Act, why was it not sooner discovered? By section 1906 of the Code of Civil Procedure, an action for slander by the use of words imputing unchastity can be maintained by a woman without proof of special damage, and, "if the plaintiff is married, the damages recovered are her separate property." Was this section left simply as a landmark to show how far the tide of legislation had gone in the direction of emancipating married women, before it began to flow back towards the old level of the common law? Is it not rather part of a harmonious system, designed to permit married women to seek redress in their own name and for their own benefit, for any violation of their rights, whether of person or property?

According to the Code of Procedure, when a married woman was a party, her husband was a necessary party with her, unless the action concerned her separate property, or it was between herself and husband. Code Proc. § 114; Laws 1849, chap. 488, § 114.

It was not by virtue of that Code, but owing to the Acts of 1860 and 1862, that a married woman could sue for personal injuries. From 1849 until 1877, section 114 of the old Code remained unchanged in this respect. When section 450 of the new Code was enacted, it was as a substitute for section 114, and the revisers, in reporting the new section, said: "It is believed that no argument is necessary in support of the proposition that what is left of that section by the various Married Women's Acts should be swept away."

The object of the Repealing Act of 1880, as well as that of its precursor of 1877, as is evident from an attentive study of their provisions, was to do away with statutes and parts of statutes regarded as obsolete. Laws 1877, chap. 417; Laws 1880, chap. 245.

Owing to the enactment of the Code of Civil Procedure, and other statutes revising and changing existing laws without repealing or referring to them, the Legislature sought to re-

peal the statutes and sections no longer regarded as operative. It was to formally do away with that which had already been practically done away with, rather than to make further changes. If the Legislature had intended to make a radical alteration in its long-established policy of legislation affecting the rights of married women, it would not ordinarily be buried in the midst of an Act designed to erase useless provisions from the statute-book. One would not expect that such a decided change, affecting nearly every family in the State, would be so obscurely made. These views are not in conflict with *Fitzgerald v. Quann*, 12 Cent. Rep. 745, 109 N. Y. 441, which holds that in an action against the wife for a tort committed by her, as the husband is still liable, he is a proper party defendant. At common law the husband was liable for the torts of his wife, whereas her choses in action, including the right to recover for torts inflicted upon her, never vested in him, although he was entitled to the proceeds when collected. As a party plaintiff, therefore, he was joined "for conformity," but it was "more than a mere necessity to join him as a party defendant." *Fitzgerald v. Quann*, 88 Hun, 657, 658.

His joinder in the one case was a mere formality, while in the other it was on account of his liability. While he had no cause of action in the former, there was a cause of action against him in the latter. We regard the language of section 450, when construed in connection with the common-law rules already alluded to, as strong enough to relieve a married woman of the formality of having her husband unite with her in bringing an action for an injury inflicted upon her, but not strong enough to relieve him of his absolute liability. We think the judgment appealed from should be affirmed, upon the ground that the common law gave the plaintiff a right of action, and that the Code gave her an appropriate remedy.

Bradley, J., concurring:

The embarrassment which seems to attend the disposition of this case arises from the repeal by Laws 1880, chap. 245, § 1, subds. 36, 38, of the amendatory section 3, chap. 172, Laws 1862, and the amended section 7, chap. 90, Laws 1860, which provided that a married woman might maintain an action in her own name to recover damages for injuries to her person or character, and that the proceeds of the recovery should be her property. The remaining Statute, which enables her to prosecute an action in her own name alone, also provides that it shall be neither necessary nor proper to join her husband as a party with her, in any action affecting her separate property. Code, § 450.

This action is founded upon the disregard of the duties of the marital relation by the husband of the plaintiff, induced by the defendant, to the prejudice of the plaintiff. Marriage is a civil contract. 2 Rev. Stat. p. 138, § 1; *Clayton v. Wardell*, 4 N. Y. 230.

From such contract spring reciprocal duties of the parties to it, among which are those assumed by the husband, of her maintenance and his consortium and thus to contribute to her comfort and enjoyment. To these means of her happiness, so far as practicable, she is en-

titled. As appeared by the verdict of the jury, the plaintiff's husband was induced by the defendant to essentially refuse to perform his marital undertaking, or to regard her rights in that respect, and the damages arising from the denial to the plaintiff of such rights result from a breach by the husband, so induced, of the contractual relation of marriage. But such contract is *sui generis*, and differs from all other contracts in so far that the nature of a recovery of damages, in an action founded upon its breach, is as in tort, and the action is deemed as for a personal injury, and consequently does not survive the party injured. *Thorn v. Knapp*, 42 N. Y. 474; *Wade v. Kalbfleisch*, 53 N. Y. 282.

And while a right of action for personal injury may not be within the definition, as frequently given, of a "chose in action," that term, in its broadest sense, does embrace it. *People v. Tioga*, 19 Wend. 73, 74; *Berger v. Jacobs*, 21 Mich. 215; *Chicago, B. & Q. R. Co. v. Dunn*, 53 Ill. 260, 4 Am. Rep. 606; 3 Am. & Eng. Cyclop. Law, title, *Choses in Action*.

I concur in the result of the opinion of Judge Vann, and in his view that a cause of action arises against a party who effectually and wrongfully entices a husband to abandon his wife, and that at common law its availability to her was denied by reason of the disability of the wife to seek redress by action, or take the

benefit of it. The cause involves the misconduct of the husband, and there is no propriety in permitting him to join with his wife in prosecuting an action for such cause, and to realize a pecuniary benefit as the result of his own wrong. The cause of action is the wrongful deprivation of the plaintiff of that to which she is entitled by virtue of the marital relation. It arises from the denial to her of that which the marriage contract gave her, and which she, unmolested, had the right to have and enjoy. The conjugal society of the parties to it is an essential requirement of such a contract and relation. And when that due from the husband is wrongfully taken from her the consequences are her loss, and hers alone. The plaintiff's right to the chose in action, springing from the defendant's act, which produced such loss to her, was derived from the marriage contract. It belonged to her,—was her property; and since she is permitted by statute to have and assert proprietary rights independently of her husband, and, as provided by the section of the Code before mentioned, to alone and for her benefit prosecute actions, there seems to be nothing in the way of the plaintiff's right to maintain this action. The judgment should be affirmed.

All concur, except Haight and Parker, JJ., dissenting, Follett, Ch. J., not sitting.

NEW YORK COURT OF APPEALS.

Mortimer HENDRICKS, *Resp't*,
v.

Montefiore ISAACS, Admr., etc., of Justina
B. Hendricks, Deceased, *Appl't*.

(.....N. Y.....)

1. Contracts between husband and wife are not made valid at law by the Statutes of New York. If any exception exists it is under the Act of 1897.

2. The agreement of a wife living separate from her husband to repay, out of money given her by the will of his deceased father expressly for the support of herself and children, advances made by the husband towards such support, will be enforced in equity if the money thus given by will has not been expended for their support. If she has expended the whole

sum for such support, the husband has no equity for the enforcement of the contract.

(November 26, 1889.)

APPEAL by defendant from a judgment of the General Term of the Supreme Court, First Department, affirming a judgment of the Special Term confirming the report of a referee allowing a claim presented to the administrator of a deceased person for payment out of the estate and by consent referred to a referee for determination. *Reversed*.

Montague M. Hendricks, plaintiff's father, died in 1884 leaving a will by which he provided, among other things, that a certain portion of the income of his estate should be paid to Justina B. Hendricks, plaintiff's wife, during her life and widowhood, for the support of herself and her children, by plaintiff.

NOTE.—Husband and wife, contracts between.

The rule that all transactions of the wife with her husband in regard to her separate property were void at common law is modified by statute, and the wife may contract with the husband by complying with the provisions of Code, §§ 1885, 1836. *Sims v. Ray*, 96 N. C. 87.

Under the Laws of this State in 1864, a husband and wife could not contract with each other, unless respecting the wife's separate property. *Lawrence v. Lawrence*, 14 Or. 77.

A wife may contract with her husband upon the faith and credit of her separate estate. *Brickley v. Walker*, 68 Wis. 563; *McLure v. Lancaster*, 24 S. C. 278.

A wife may loan money to her husband under contract that the debt shall be discharged to her child. *L. R. A.*

dren; and equity will coerce the husband to perform the contract. *Proctor v. Cole*, 3 West. Rep. 623, 104 Ind. 390.

Where money is lent by a wife to her husband, or conversely, there is no remedy, either at law or in equity, against him or against his estate; and a claim based upon a promissory note given by the husband for such a loan cannot be the foundation of an equitable liability. *Woodward v. Spurr*, 9 New Eng. Rep. 232, 141 Mass. 288; *Bailey v. Bailey*, 9 New Eng. Rep. 234 (note), 141 Mass. 237.

A contract by a wife to support her husband for life, in consideration of a conveyance of land by him to her, is void. *Corcoran v. Corcoran*, 4 L. R. A. 782, 119 Ind. 128.

Validity of contract between husband and wife. *Burkett v. Burkett*, 3 L. R. A. 781, 78 Cal. 810; *Cook v. Walling*, 3 L. R. A. 769, 117 Ind. 9.

During that year plaintiff advanced several sums of money for the support of his family, taking in return receipts, of one of which the following is a copy, the others being of like import:

Long Branch, June 7th, 1884.

Received from father an advance of (\$50) fifty dollars, which is to be repaid him from the interest due mother, when received by her, arising out of the estate of M. M. Hendricks, deceased.

\$50.

Rowena Hendricks.

I concur and agree to this.

Justina B. Hendricks.

Mrs. Hendricks died in July, 1885, and defendant was appointed her administrator. Plaintiff presented to defendant for payment out of her estate a claim for the several advances made as evidenced by the receipts mentioned above.

Defendant disputed the justice of the claim and the matter was referred to a referee for determination. He decided in plaintiff's favor, and, his decision having been affirmed by the special and general terms, defendant appealed to this court.

The further facts appear in the opinion.

Messrs. A. P. & W. Man, for appellant:

The plaintiff was bound in law to support his family and to advance for that purpose the very moneys that he did advance.

Beach v. Beach, 2 Hill, 260; *Coleman v. Burr*, 98 N. Y. 17; *Bonner v. Eoch*, 49 Hun. 488.

He could not, while of sufficient ability himself, compel his wife to support the family, even though she had an income expressly given her for that purpose.

Seybolt v. New York, L. E. & W. R. Co. 95 N. Y. 568; *Pollock*, Cont. 161; *Crosby v. Wood*, 6 N. Y. 369; *Deacon v. Gridley*, 15 C. B. 295; *Parsons*, Cont. 427; *Vanderbill v. Schreyer*, 91 N. Y. 392, and cases cited.

Any obligation made by Mrs. Hendricks to her husband is absolutely void by the common law, and the Married Woman's Enabling Statutes do not enable her to contract with her husband.

White v. Wager, 25 N. Y. 328; *Winans v. Peebles*, 32 N. Y. 423; *Savage v. O'Neil*, 44 N. Y. 298.

Mr. Abram Kling, for respondent:

The estate of the decedent was chargeable in equity with the payment of the moneys advanced to her by the plaintiff, and which she agreed should be paid from the moneys bequeathed to her in the will of the father of this plaintiff.

Jacques v. Methodist Episcopal Church, 17 Johns. 548; *Rohrbach v. Germania F. Ins. Co.* 62 N. Y. 47.

When Justina B. Hendricks charged her separate estate with the payment of these moneys advanced to her, the mode in which she applied and disposed of these moneys can have no effect upon the rights of the plaintiff in this action.

See *McVey v. Cantrell*, 70 N. Y. 295.

Where a married woman has a separate income, though her husband is equally under the material obligation to support his family, and fully able to do, he is not liable to account, after the death of his wife, for moneys re-

ceived by him from the trustee of the wife for her maintenance.

Brodie v. Barry, 2 Ves. & B. 86; *Fowler v. Fowler*, 8 P. Wms. 355.

Andrews, J., delivered the opinion of the court:

The advances made by the plaintiff to his wife in the summer of 1884 were made for the support of the family, and upon her written promise to reimburse the plaintiff, from the interest when received by her "out of the estate of M. M. Hendricks, deceased. This was the clear legal import of the writing, interpreted in connection with the circumstances. The money advanced, though received by the daughter, was received for the mother. The daughter entered into no engagement for its repayment. The receipts acknowledged the receipt of the sums advanced, and that they were to be repaid by the mother out of the fund specified. They were signed by the daughter, but the mother undersigned them, and her signature was preceded by the words, "I concur and agree to this." The mother thereby entered into an original obligation to repay the advances. It was her promise, and not a promise of the daughter, guaranteed by her.

The origin and nature of the interest of Mrs. Hendricks in the estate of M. M. Hendricks, deceased, is explained by the evidence. Montague M. Hendricks, the father of the plaintiff, died in May, 1884, leaving a large estate. By his will he devised his real and personal estate to trustees, in trust to receive the rents, income and profits during the life of his wife, with directions to pay a certain sum thereout annually to his wife, and to distribute the remainder in equal parts to five children (other than the plaintiff), and Justina B. Hendricks, the plaintiff's wife; but, in case of her remarriage after the death of the plaintiff, her share was to be paid thereafter to her issue by the plaintiff. The provision in favor of Justina, the wife of the plaintiff, concludes as follows: "It is also my will that whatever moneys may be received by the said Justina under this clause are to be by her applied to the maintenance and support of herself and her issue by her present husband."

The trustees paid to Justina during her life, out of the income to which she was entitled under the will, the sum of \$3,000, the first payment being made November 5, 1884. She died in July, 1885, and the trustees paid to her administrator after her death \$2,743.18, for income which had accrued on her share prior to her death, but which had not been paid over.

It appears that the relations between the plaintiff and his wife were not friendly, and in the fall of 1884 they separated and lived apart until the death of the wife, the children (five in number), with one exception, remaining with the mother, and being supported by her. The nature of the difficulty between the parents is not disclosed, nor does it appear under what circumstances the separation took place. The plaintiff presented to the administrator of the wife a claim against her estate for the advances made, which was refused under the Statute, and judgment therefor has been awarded; and the point on this appeal respects the right of the plaintiff to have the contract made with

his wife enforced against her estate. The contract was void at law.

The common-law doctrine that husband and wife could not contract with each other has not been changed in this State by legislation respecting the rights of married women. The entire and absolute disability of married women to enter into any legal contract, which was a stubborn and inflexible principle of the common law, has, indeed, in some respects been modified. She may now, under our laws, purchase real and personal property, and carry on business on her own account, and as incident to these rights she may enter into contracts with third persons for the purchase and sale of property, or in the prosecution of her separate business, enforceable in a legal action to the same extent as though she was a *feme sole*. But the disability to deal with her husband, or to make a binding contract with him, remains unchanged. Contracts between husband and wife are invalid as contracts, in the eye of a court of law, to the same extent now as before the recent legislation. See *Yale v. Dederer*, 18 N. Y. 265; *White v. Wager*, 25 N. Y. 329; *Freeking v. Rolland*, 53 N. Y. 422; *Cashman v. Henry*, 75 N. Y. 108.

If any exception exists, it has been created by the Act of 1887, not applicable to the transaction in question.

But the unity of husband and wife, by which the legal existence of the wife was merged in that of her husband, preventing them from contracting with each other as if they were two distinct persons, never prevailed in courts of equity. It may be more accurate to say that courts of equity disregard the fiction upon which the common law proceeded, and are accustomed to lay hold of and give effect to transactions or agreements between husband and wife, according to the nature and equity of the case. It does not limit its inquiry to the ascertainment of the fact whether what had taken place would, as between other persons, have constituted a contract, and give relief, as matter of course, if a formal contract be established; but it further inquires whether the contract was just and fair, and equitably ought to be enforced, and administers relief where both the contract and the circumstances require it. The jurisdiction in equity has been frequently exercised to enforce contracts or agreements for settlement, made between husband or wife before or after marriage, in favor of the wife, whether made with or without the intervention of trustees. Reference to the cases will be found in the elementary treatises. It has also been exerted, though less frequently, to enforce agreements in favor of the husband for a settlement out of the property of the wife, or to charge her separate estate in his favor. *Cannel v. Buckle*, 2 P. Wms. 248; *More v. Ellis*, Bunb. 205; *Livingston v. Livingston*, 2 Johns. Ch. 587; *Gardner v. Gardner*, 22 Wend. 526; 2 Kent, Com. 167.

But courts of equity do not entertain jurisdiction to enforce mere voluntary agreements not founded upon any consideration, either in favor of the wife against the husband, or in his favor against the wife; but if they have been consummated, and are fair and just, courts of equity will uphold the transaction,

except as against creditors. *Reade v. Livingston*, 8 Johns. Ch. 481; 2 Story, Eq. Jur. §§ 986, 1377, and cases cited.

It is insisted on the part of the appellant that the agreement of Mrs. Hendricks to contribute out of her estate to the maintenance of herself and the family is not supported by any consideration, since the law casts upon the husband the duty of maintaining his household. There is no doubt that the primary obligation is upon the husband to provide for the support of his wife and their infant children, and, as between the husband and wife, the latter is not bound to maintain her husband and children during his life out of her separate property, even although his means may be inadequate. *Hodgens v. Hodgens*, 4 Clark & F. 323, 11 Bligh, N. R. 62.

But when the income of the wife has been applied, with her consent, to the maintenance of the family, she can make no claim for reimbursement out of the husband's estate. The question was considered in *Jaques v. Methodist Epis. Church*, 17 Johns. 548, where it was held by the court of errors, reviewing the decision of the chancellor, that, where the wife agreed by parol, before marriage, concurrently with the making of a marriage settlement, to defray the expenses of the family establishment out of her separate estate, the husband was not only not accountable for the moneys received by him of his wife, and expended for that purpose, but was entitled also to an allowance for all advances made by him for that object.

In the present case the agreement entered into by the wife was, in substance, to share with the husband in defraying the expenses of herself and the family, and to reimburse him for advances made by him for her under the arrangement. There was a technical consideration for her promise, in the payment by the husband to her of a gross sum of money for expenses, to be applied in her discretion, which he was not bound to do under his common-law obligation to support his wife and children. In considering the equity of the arrangement, it is an important fact that the income which the wife pledged for her husband's reimbursement came from the bounty of her husband's father, and that it was the intention of the testator that she should apply it for the maintenance and support of herself and her children. It is not necessary to decide whether, under the quite peremptory terms of the will, the wife took the income charged with a trust, enforceable in favor of the children to the extent necessary for their support and maintenance, although there are many authorities which at least give color to this contention. *Bonsar v. Kinnear*, 2 Giff. 195; *Pushman v. Fuller*, 3 Ves. Jr. 7; *Leach v. Leach*, 13 Sim. 304; *Raikes v. Ward*, 1 Hare, 445; *Woods v. Woods*, 1 Myl. & C. 401; *Carr v. Living*, 28 Beav. 614; *Cole v. Littlefield*, 35 Me. 439; *Chase v. Chase*, 3 Allen, 101. But see *Clarke v. Leupp*, 88 N. Y. 228, and *Byne v. Blackburn*, 26 Beav. 41.

If there were no other circumstances bearing upon the general equities than those already stated, it seems to us that the contract made by the wife for reimbursement of the advances made by the husband was reasonable and just, and ought to be enforced. There is certainly

no moral reason for forbidding a wife, having a separate estate, to contribute thereout to the support and maintenance of the family, or contract to do so. There was sufficient consideration for her agreement in this case, and the terms of the gift to her in the will of the plaintiff's father imposed on her a moral duty to carry out his intention. She, instead of the son of the testator, received the share of the estate, which, under ordinary circumstances, would have gone to her husband. Why the son was excluded from the bounty of the father does not appear.

But we think facts were offered to be shown on the part of the defendant, which the referee excluded, material to the inquiry whether the contract in question ought in equity to be enforced. The defendant offered to prove that between the time of the separation of the parties in September, 1884, and the death of the wife in July, 1885, the latter expended, in the support of herself and her children, a sum exceeding the entire income to which she was entitled under the will, including both the amount paid to her in her lifetime and that received by her administrator after her death; and, further, that the debts owing by the wife at her decease exceeded the sum collected by her administrator from the estate of the testator on account of income accrued, but unpaid at her decease. If the wife expended for the support of herself and her family an amount equal to or exceeding the whole income which accrued to her under the will, there would seem to be no equity in the claim of her husband for the enforcement of the contract in question. The fact that he made advances for the maintenance of his family, and exacted from his wife a promise of reimbursement, gave him, we think, no equitable claim against his wife's estate, under the circumstances offered to be proved. His advances, under those circumstances, ought to be treated as if made in fulfillment of his general marital obligations. We think both facts were competent, as bearing upon the equity of enforcing the contract. Whether the wife actually applied out of her own means, in support of the family, a sum equal to or greater than the income which accrued to her under the will, or obtained supplies in part on her own credit, contracting debts therefor which were unpaid at her death, and became a charge on her estate, is immaterial. In either case, there would be no equity in the plaintiff's claim.

The fact that this is not a proper proceeding for ascertaining the debts owing by Mrs. Hendricks at her death is unimportant. The creditors will not, it is true, be bound by any adjudication as to their debts in this proceeding. But the plaintiff having presented his claim, and demanded judgment therefor against the estate of his wife, it was competent for the administrator, in answer thereto, to show any facts which tend to prove that it has no legal or equitable foundation.

We think the judgment of the General and Special Terms should be reversed, and the case remitted to the surrogate for further proceedings.

All concur, **Danforth, J.**, in result.
6 L. R. A.

Francis D. BAILEY, Rept.,

v.

COUNTY OF BUCHANAN, in the State of Missouri, App't.

(.....N. Y.....)

The obligor upon bonds, reserving the right of redemption after a certain time, may, upon electing to redeem, demand, as a condition of payment, the surrender of all coupons in the possession of the holder of the bonds, including those past due and detached, as well as of the bonds themselves; and a tender of the amount due on such bonds and coupons with a demand for their surrender will be sufficient to stop the running of interest, although it is not accepted because of an unwillingness to surrender coupons past due.

(October 8, 1890.)

A PPEAL by defendant from an order of the General Term of the Superior Court of the City of New York, reversing a judgment of the Special Term in favor of plaintiff, but for a less amount than claimed, in an action upon certain interest coupons formerly attached to railroad-mortgage bonds issued by defendant.

Reversed.

The facts sufficiently appear in the opinion. **Mr. James W. Perry**, with *Messrs. Knevals & Ransom*, for appellant:

The coupons in suit, detached from the bonds, did not become thereby independent obligations of the defendant, while in the hands of the owner of the bonds. Nor were the coupons negotiable, for every holder was

NOTE.—Coupons as distinct and separate instruments.

In most respects detached coupons are considered to be obligations distinct and separate from the bonds. They are capable of separate ownership and transfer. *Clark v. Iowa City*, 87 U. S. 20 Wall. 589 (22 L. ed. 429); *Stewart v. Lansing*, 104 U. S. 505 (23 L. ed. 896); *Thompson v. Lee County*, 70 U. S. 8 Wall. 327 (18 L. ed. 177); *Aurora City v. West*, 74 U. S. 7 Wall. 105 (19 L. ed. 50); *Beaver County v. Armstrong*, 44 Pa. 63; *National Exch. Bank v. Hartford P. & F. R. Co.* 8 R. I. 375; *Burham v. Brown*, 23 Me. 400; *Tucker v. Randall*, 2 Mass. 283.

A suit can be maintained upon them without the production of the bonds to which they had been attached. *Knox County v. Aspinwall*, 62 U. S. 21 How. 589 (16 L. ed. 206); *Knox County v. Wallace*, 63 U. S. 21 How. 546 (16 L. ed. 211); *Thompson v. Lee County*, 70 U. S. 8 Wall. 327 (18 L. ed. 177); *Mineral Point v. Lee*, 71 U. S., 18 L. ed. 456; *Kenosha v. Lamson*, 76 U. S., 19 L. ed. 730.

(The last two cases cited are not reported in the Official Edition.)

They are entitled to days of grace. *Evertson v. National Bank*, 66 N. Y. 14.

They are subject in general to the same rules as other negotiable instruments in respect to the rights of bona fide holders. *Spooner v. Holmes*, 100 Mass. 508.

For negotiability of and actions upon such coupons, see, further, the note to *Griffin v. Macon County*, 3 L. R. A. 353, 36 Fed. Rep. 335.

The payment of the coupon is not an acknowledgment of the debt represented by the bond, and will not interrupt prescription on the latter. *Conger New Orleans*, 33 La. Ann. 1255.

Under a statute which extends the same limitation

bound with the notice of the contingency as to payment, contained in the bond.

McClelland v. Norfolk Southern R. Co. 1 L. R. A. 299, 110 N. Y. 469; *Kenosha v. Lamson*, 76 U. S. 9 Wall. 477 (19 L. ed. 725); *McClure v. Oxford*, 94 U. S. (24 L. ed. 129).

Such bonds are not negotiable.

Chouteau v. Allen, 70 Mo. 839.

The defendant made a lawful tender of the full amount due for principal and interest on the bonds and coupons, on August 1, 1883, and no interest thereafter accrued.

Where a negotiable instrument was made payable at a particular time and place, and funds were provided by the maker to make the payment at the time and place named, the law is well settled that it is equivalent to a tender of the sum payable, and is a bar to the recovery of interest subsequent to the tender.

Hills v. Place, 43 N. Y. 523; *Locklin v. Moore*, 57 N. Y. 362.

The failure to present the bonds and coupons discharged the obligation to pay interest that accrued subsequently.

Hills v. Place, 43 N. Y. 523; *Caldwell v. Cassidy*, 8 Cow. 271; *Wolcott v. Van Santvoord*, 17 Johns. 248.

Mr. Henry Parsons, for respondent:

Coupons attached to corporation bonds, when payable to bearer, are negotiable promises to pay, and are subject to the same rules as other negotiable instruments. When due they bear interest from maturity, can be sued upon independent of the bonds to which they were attached, and the right of action thereon is barred by the Statute of Limitations, by lapse of time, after such maturity, and not after the maturity of the bond.

Field, Corp. § 256; *Clark v. Iowa City*, 87 U. S. 20 Wall. 583 (22 L. ed. 427); *Murray v.*

Lardner, 69 U. S. 2 Wall. 110 (17 L. ed. 857); *Kenosha v. Lamson*, 76 U. S. 9 Wall. 477 (19 L. ed. 725); *Lexington v. Butler*, 81 U. S. 14 Wall. 283 (20 L. ed. 809); *Spooner v. Holmes*, 102 Mass. 507; *Everton v. National Bank*, 66 N. Y. 14; *National Exch. Bank v. Hartford, P. & F. R. Co.* 8 R. I. 875; *Amy v. Dubuque*, 98 U. S. 470 (25 L. ed. 228).

A matured coupon becomes, by operation of law, a several and independent obligation of the maker, earning interest, and against which the Statute of Limitations begins to run from maturity. While partaking of the nature of the bond, making it equally high as a security and secured by the same lien as the bond, it has ceased to be an incident of the bond, and is no more a part of the same debt as the bond than is another bond of the same issue.

Huey v. Macon County, 35 Fed. Rep. 481; *Griffin v. Macon County*, 2 L. R. A. 353, 86 Fed. Rep. 885.

Payment could not be obtained on the bonds except on arbitrary conditions, in no way provided for by the bond, or by waiving a part of the amount due, and the interest on the bonds did not cease to run prior to January 1, 1884. There must be no condition, except such as may be contained in the contract.

2 Bouv. Law Dict. 575; 2 Greenl. Ev. § 606; 2 Phillips, Ev. 445; *Tuthill v. Morris*, 81 N. Y. 94; 5 Abb. Dig. 706.

Earl, J., delivered the opinion of the court: The defendant, on the 1st day of July, 1889, made and issued a large number of bonds, each for the payment to the St. Louis & St. Joseph Railroad Company, or bearer, of \$1,000, on the 1st day of July, 1889, with interest payable semi-annually at the rate of 10 per cent per annum, on presentation of the cou-

pons to actions on all written contracts sealed or unsealed, and permits an action for interest in advance of the maturity of the principal debt, with the recovery of interest upon such interest, the period of limitation for suit upon coupons begins to run from their respective maturities. *Clark v. Iowa City*, 87 U. S. 20 Wall. 583 (22 L. ed. 427); *Amy v. Dubuque*, 98 U. S. 470 (25 L. ed. 228).

The rule holds good although the coupons have never been severed from the bonds and are held by the owner of the latter. *Amy v. Dubuque, supra*.

Overdue interest on bonds, which is represented by coupons, cannot be included in the recovery in an action on the bonds after an independent suit on the coupons has become barred by the Statute of Limitations. *Griffin v. Macon County*, 2 L. R. A. 353, 86 Fed. Rep. 885.

The pendency of an action of foreclosure, brought by trustees who had no authority to take judgment for a deficiency, or to pursue any other remedy than that against the property itself, is no bar to an action on coupons. *Welsh v. First Div. St. Paul & P. R. Co.* 25 Minn. 314.

Interest may be recovered on overdue coupons payable at a particular time and place. *Aurora City v. West*, 74 U. S. 7 Wall. 82 (19 L. ed. 42); *Genoa v. Woodruff*, 92 U. S. 502 (23 L. ed. 589); *Welsh v. First Div. St. Paul & P. R. Co.* 25 Minn. 314; *Beaver County v. Armstrong*, 44 Pa. 63; *Arents v. Com.* 18 Gratt. 750.

But it was held in an early case that no interest could be allowed on overdue coupons which merely acknowledged that a certain sum was due to bearer as interest, on the ground that it would constitute 6 L. R. A.

compound interest. *Rose v. Bridgeport*, 17 Conn. 242.

The rate of interest on overdue coupons is that of the place where they are payable, although that is different from the rate of interest on the bonds. *Pana v. Bowler*, 107 U. S. 523 (27 L. ed. 424).

Past-due coupons upon bonds will not make the bonds or subsequently maturing coupons dishonored paper. *Indiana & I. C. R. Co. v. Sprague*, 108 U. S. 756 (26 L. ed. 554); *Cromwell v. Sac County*, 96 U. S. 51 (24 L. ed. 681).

There are some particulars, however, in which the coupon is regarded as part of the bond. It partakes of the nature of the bond and is to be regarded as a specialty and not a simple contract, and therefore is not barred by lapse of time short of the period which is allowed for actions on bonds. *Koshkonong v. Burton*, 104 U. S. 668 (26 L. ed. 886); *Kenosha v. Lamson*, 76 U. S. 9 Wall. 477 (19 L. ed. 725); *Lexington v. Butler*, 81 U. S. 14 Wall. 282 (20 L. ed. 809); *National Bank v. Kirby*, 108 Mass. 497; *Boss v. Hewitt*, 15 Wis. 261.

This rule applies whether the coupon is or is not still attached to the bond. *Huey v. Macon County*, 35 Fed. Rep. 481.

Detached coupons, although overdue, are negotiable where the bonds from which they were detached are not yet due. *Thompson v. Perrine*, 106 U. S. 589 (27 L. ed. 298).

Coupons are protected by the mortgage given to secure the bonds from which they were taken. But they have no equity superior to that of the bonds or the subsequently maturing coupons. *Ketchum v. Duncan*, 96 U. S. 659 (24 L. ed. 886); *Haven v. Grand Juno, R. & D. Co.* 109 Mass. 98; *Miller v. Rutland & W. R. Co.* 40 Vt. 399.

pons thereto attached at the Bank of America, in the City of New York, with the right, however, at the option of the defendant, to redeem the bonds at any time after ten years from their date. Some time prior to the 1st day of July, 1888, the plaintiff's assignor became the owner of ten of such bonds with the unmatured coupons thereto attached, and on the 1st day of July, 1888, he detached the coupons falling due on and prior to that day and presented them for payment and they were not paid. Subsequently, on the 7th day of July, 1888, the defendant duly exercised its option to redeem the bonds and in the same month deposited the money in the Bank of America for their payment, and notified him that the money was there for the payment of the bonds, and the interest thereon to August 1, and that it was ready to pay the bonds and all the interest to that date upon the surrender of the bonds and the coupons. The holder was willing to take payment of the bonds and the interest thereon at August 1, and to surrender the bonds and unmatured coupons, but he did not present for payment and was unwilling to surrender the past-due coupons. Subsequently the defendant paid the bonds and the coupons falling due on and prior to July 1, and after January 1, 1884, the holder transferred the coupons falling due January 1 to the plaintiff, who then commenced this action to recover the amount due thereon. At the trial term the court held that the tender of payment made in July, 1888, was sufficient to stop the running of interest upon the bonds, and that the plaintiff could only recover the interest for the month of July. Upon appeal by the plaintiff to the general term the court reversed the judgment, holding that the defendant had not the right, at the time of such tender, as a condition of payment, to demand the surrender of the coupons then past due, and that therefore the tender was not good and that the plaintiff was entitled to recover the full amount of interest falling due January 1, as if no tender had been made.

The plaintiff took the coupons after their maturity and with notice of the facts affecting them in the hands of his assignor, and hence his position for the maintenance of this action is no better than would have been occupied by his assignor if he had brought this action.

The sole question for our determination, then, is whether the defendant could, as a condition of its tender and payment in July, 1888, rightfully demand the surrender of the bonds and all the coupons then held by the assignor of the plaintiff. It was held at the general term that the coupons past due and detached from the bonds at the time of the tender were independent negotiable instruments, and that the defendant therefore had no right to demand their surrender for payment as a condition of the payment of the bonds; and that the tender was not good because it was not an unqualified offer to pay the bonds and the interest thereon for the month of July.

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We are of opinion that the learned general term fell into error. It is true that past-due coupons, payable to bearer, when detached from the bonds, are for many purposes independent, separate instruments. They may be negotiated and may be sued upon by the holder without the production of the bonds. *Murray v. Lardner*, 66 U. S. 2 Wall. 110 [17 L. ed. 857]; *Kenosha v. Lamson*, 76 U. S. 9 Wall. 477 [19 L. ed. 725]; *Lexington v. Butler*, 81 U. S. 14 Wall. 282 [20 L. ed. 809]; *Clark v. Iowa City*, 87 U. S. 20 Wall. 583 [22 L. ed. 427]; *Amy v. Dubuque*, 98 U. S. 470 [25 L. ed. 228]; *Evertson v. National Bank*, 66 N. Y. 14; *McClell and v. Norfolk Southern R. Co.* 1 L. R. A. 299, 110 N. Y. 469.

But the coupons nevertheless always have some relation to the bonds. Their force and effect and character may be determined by reference to the bonds. They are secured by the same mortgage, and although unsealed are specialties like the bonds, and are governed by the same Statute of Limitations which is applicable to the bonds. Until negotiated or used in some way they serve no independent purpose, and while they are in the hands of the holder they remain mere incidents of the bonds and have no greater or other force or effect than the stipulation for the payment of interest contained in the bonds; and while they remain in the ownership and possession of the owner and holder of the bonds it can make no difference whether they are attached to or detached from the bonds, as they are then mere evidence of the indebtedness for the interest stipulated in the bonds.

It is not disputed that one liable to pay money secured by a written instrument has the right, as the condition of tender and payment, to demand the surrender of the instrument which is the evidence of his debt; and thus, if the coupons which had matured on the 1st of July, 1888, had remained attached to the bonds the defendant would have had the undeniable right to demand, as a condition of their payment, the surrender of the bonds and all the coupons. It could not have been obliged to make payment of a part of its debt, leaving a portion thereof unpaid, and to be discharged by an independent transaction. It is a reasonable and consistent rule to hold that the defendant, at the time of its tender, owed the plaintiff's assignor upon each bond but one debt, and that was the amount of the bond with the interest thereon. Its obligation would have been precisely the same if no coupons had been executed. It had the right to tender the payment of the entire debt and to demand the surrender of all the securities by which it was evidenced. The tender was therefore sufficient and stopped the running of interest.

The order of the General Term should be reversed, and judgment of the Trial Term affirmed, with costs.

All concur.

UNITED STATES CIRCUIT COURT, SOUTHERN DISTRICT OF NEW YORK.

Adam W. SPIES

v.

CHICAGO & EASTERN ILLINOIS R.
CO.

(....Fed. Rep....)

1. The words "hereafter to belong to the party of the first part," used in describing lines of railroad between certain specified points, which are included in a mortgage to secure income bonds, do not cover additional lines outside of the specified limits, which are subsequently acquired by the mortgagor.

2. The net earnings due to holders of income bonds secured by a mortgage pledging the net earnings of a certain line of railroad particularly described, which earnings are to be ascertained by deducting the amounts necessary for ordinary expenses, betterments, etc., from the gross earnings, must be determined by the earnings of the particular line mortgaged, and not by the earnings of a larger system of railroads of which the mortgaged line has subsequently become a part; and the bondholders are entitled to have those earnings separately kept and divided.

3. Merely passing a resolution that no income has been earned, without an attempt to ascertain the fact, is not conclusive as to the rights of the holders of income bonds secured by a railroad mortgage pledging the net earnings of the road, which makes it the duty of the board of directors to ascertain, fix and declare the amount of net earnings, and provides that their resolve shall be in the nature of a final and conclusive award on the question as to what, if any, net earnings have been made.

4. The condition in income bonds and a mortgage on a railroad securing them, that no right of action shall exist in favor of the holders until the board of directors shall have adjudged and awarded an ascertained amount as net earnings, does not preclude the bondholders from a remedy when the directors improperly neglect or refuse to take the necessary action.

5. No relief can be granted under a bill based on fraud, where the charge of fraud is not sustained.

(October 11, 1890.)

SUIT for an account by defendant in respect to the net income of its railway line mort-

NOTE.—Corporation, power to mortgage its property.

To carry out its corporate objects, a corporation may borrow money and secure the lender by a mortgage on its property. *Barnes v. Ontario Bank*, 19 N. Y. 152; *Beers v. Phoenix Glass Co.* 14 Barb. 358; *Thompson v. Lambert*, 44 Iowa, 239; *Burr v. McDonald*, 8 Gratt. 308; *Barry v. Merchants Exch. Co.* 1 Sandf. Ch. 280; *Union Min. Co. v. Rocky Mt. Bank*, 2 Colo. 248; *Bridge Co. v. General Ins. Co.* 3 Md. 305; *Richards v. Merrimaok & C. R. R. Co.* 44 N. H. 127; *Burt v. Rattle*, 81 Ohio St. 116; *Detroit v. Mutual Gas Co.* 43 Mich. 594; *Holbrook v. Chamberlain*, 116 Mass. 155; *Fay v. Noble*, 13 Cush. 13; *Miller v. Chance*, 3 Edw. 399; *Coe v. Johnson*, 18 Ind. 218; *Curtis v. Leavitt*, 15 N. Y. 9; *Leavitt v. Blatchford*, 17 N. Y. 551; *Parish v. Wheeler*, 22 N. Y. 494; *Nelson v. Eaton*, 28 N. Y. 410.

Where the statute does not expressly give or deny the power to mortgage, it may be implied from the power to purchase, hold and dispose of real estate. *Booth v. Robinson*, 55 Md. 419; *Gordon v. Preston*, 1 Watts, 385; *McAllister v. Plant*, 54 Miss. 106; *Aurora etc. Society v. Paddock*, 30 Ill. 238; *Watts' App.* 78 Pa. 370; *Jackson v. Brown*, 5 Wend. 590; *Braham v. San José*, 24 Cal. 535; *Taber v. Cincinnati R. Co.* 15 Ind. 459; *Adams v. R. R. Co.* 2 Coldw. 645.

The Legislature may ratify a mortgage made by a corporation not having the power to make it. *Keenebec & P. R. Co. v. Portland & K. R. Co.* 59 Me. 9; *Richards v. Merrimaok & C. R. R. Co.* 44 N. H. 127; *Shaw v. Norfolk R. R. Co.* 5 Gray, 182; *Black River & U. R. Co. v. Barnard*, 81 Barb. 258; *Orville R. Co. v. Plumas Co.* 37 Cal. 354; *Shopley v. Atlantic & St. L. R. Co.* 55 Me. 395.

Express authority is not necessary if the Legislature impliedly recognizes the mortgage as a valid security. *Hall v. Sullivan R. R. Co.* 3 Redf. Am. Ry. Cas. 621.

A corporation cannot mortgage its franchises without positive statutory power to do so. *Pullan v. Cincinnati R. Co.* 4 Bias. 35; *Coe v. Columbus Plaquemine R. Co.* 10 Ohio St. 372; *Steiner's App.* 27 Pa. 313; *Pierce v. Emery*, 23 N. H. 484; *Black v. Delaware & R. Can. Co.* 7 C. E. Green, 99; *Richardson v. Sibley*, 11 Allen, 65; *Hendee v. Pinkerton*, 14 Allen, 331; *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42; 6 L. R. A.

Troy & R. R. Co. v. Kerr, 11 Barb. 601; *Woodruff v. Erie R. Co.* 25 Hun, 246; *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y. 43; *Stewart v. Jones*, 40 Mo. 140; *Daniels v. Hart*, 118 Mass. 543; *Phila. v. W. U. Tel. Co.* 11 Phila. 327; *Randolph v. Wil. etc. R. R. Co.* Id. 503.

The Legislature may give a corporation power to mortgage its franchises. *Atkinson v. Marietta & C. R. Co.* 15 Ohio St. 21; *McAllister v. Plant*, 54 Miss. 106; *State v. Morgan*, 28 La. Ann. 432; *St. Paul R. Co. v. Parcher*, 14 Minn. 297; *Pierce v. St. Paul & M. R. Co.* 24 Wis. 551; *East Boston Freight R. Co. v. Eastern R. Co.* 13 Allen, 422.

A special statutory power to mortgage, conferred by charter, does not limit the general power. *Allen v. Mont. R. R. Co.* 11 Ala. 437; *Mobile R. Co. v. Talman*, 15 Ala. 472; *Wright v. Bundy*, 11 Ind. 368.

Execution of mortgage.

In executing a mortgage, a corporation must comply with the statutory requirements and its own by-laws, and if the mortgage is on real estate it must be under the corporate seal. *Amerman v. Wiles*, 24 N. J. Eq. 13; *Gordon v. Preston*, 1 Watts, 385; *Eagle Woolen Mills Co. v. Monteith*, 2 Or. 277; *Re St. Helen Mill Co.* 2 Sawy. 88; *Hunt v. Bullock*, 23 Ill. 320; *Osborne v. Tunis*, 25 N. J. L. 633; *Koehler v. Black River Falls Iron Co.* 67 U. S. 2 Black, 715 (17 L. ed. 339).

Mortgage by railroad, to secure bondholders.

A mortgage given by a railroad corporation to secure bona fide holders of its bonds will be held valid, although the resolution directing its execution was passed by its directors at a meeting held outside the State. *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459 (20 L. ed. 199).

A corporation may, unless forbidden by law, issue bonds and mortgage its property outside of the State creating it. *Bassett v. M. C. etc. Min. Co.* 15 Nev. 238.

A mortgage by a railroad company upon all its railroad and property, acquired or to be acquired, covers a road purchased, where it was one which might have been built under its charter. *Branch v. Jesup*, 108 U. S. 468 (27 L. ed. 279).

gaged to secure payment of certain bonds. On final hearing on bill and answer. *Bill dismissed.*

The case is fully stated in the opinion.

Mr. John W. Weed, for complainant:

Unless there be in the mortgage language indicating that the parties contemplated all future acquisitions to be subjected to the mortgage, the mortgage will be construed to cover only the property then possessed by the mortgagor.

Pullan v. Cincinnati & C. Air Line R. Co. 4 Biss. 35; *Pullan v. Cincinnati & C. Air Line R. Co.* 5 Biss. 237; *Morgan v. Union P. R. Co.* 11 Fed. Rep. 692.

Separate accounts must be kept of special operations of a railway where there are holders of securities whose interests are not identical.

Mackintosh v. Flint & P. M. R. Co. 34 Fed. Rep. 582. See also *Day v. Ogdenburg & L. C. R. Co.* 9 Cent. Rep. 459, 107 N. Y. 129.

The defendant acting by its agents, the directors, occupied a trust relation with reference to the income bondholders, and in making a declaration of earnings without any ascertainment committed a breach of trust which was a fraud.

Mackintosh v. Flint & P. M. R. Co. supra.

It is not necessary that the court should find

that an actual fraud has been committed if an unperformed duty to account is established. The performance of the duty will be enforced even though the alleged motive for its neglect is not established.

Hoyt v. Sprague, 8 Rep. 616.

Contracts in which any determination by one party or his agent is stated to be conclusive never have that character so far as to prevent an investigation as to the propriety of that determination.

Nolan v. Whitney, 88 N. Y. 648.

The defendant is in the position of a trustee who has practically inextricably mingled and used the trust property with his own, and must pay the full amount of the income interest, inasmuch as it has, in the absence of any separate account, put it out of the complainant's power to test the accuracy of an account which it might render.

Norris' App. 71 Pa. 106.

This bill, moreover, is also a bill for discovery, which alone is sufficient to sustain the jurisdiction of this court over it.

Story, Eq. Jur. 18th ed. § 71.

Mr. Austen G. Fox, for defendant:

The failure to keep separate accounts cannot give the right to maintain this bill for an ac-

A railroad mortgage upon the present and future acquired property of a railroad company and its incomes and profits is a prior lien only upon the net earnings of the road, after the payment of all the operating expenses, while the road is in the possession of the company. *Hale v. Frost*, 90 U. S. 889 (25 L. ed. 419).

Where there is a difference between the terms of railroad bonds and of the mortgage given to secure them, as to the payment of interest, the terms of the bonds will control. *Indiana & L. C. R. Co. v. Sprague*, 108 U. S. 756 (26 L. ed. 554).

Where a third mortgage on a railroad, and the bonds issued under it, were made in express terms subject to the payment of the bonds issued under the second mortgage, all persons taking the third-mortgage bonds took them subject to such prior lien and indebtedness. *Bronson v. La Crosse & M. R. Co.* 60 U. S. 2 Wall. 288 (17 L. ed. 732).

Income, rents and earnings, right to.

A mortgage by a railroad company, of its road and income, does not transfer the income until possession is taken, where by the mortgage the company holds possession and receives the earnings until the mortgagee takes possession or the proper judicial authority interposes. Until then the whole fund belonged to the company, and was subject to its control, and was liable to the creditors of the company as if the mortgage did not exist. *Eyster v. Gaff*, 91 U. S. 621 (23 L. ed. 408); *Frayser v. Richmond & A. R. Co.* 81 Va. 388; *Galveston, H. & H. R. Co. v. Cowdrey*, 78 U. S. 11 Wall. 459 (20 L. ed. 199); *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 608 (23 L. ed. 405).

A mortgagor has the right of absolute control over the income of his property prior to foreclosure proceedings. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* (Mo.) 30 Fed. Rep. 332.

The mortgagor of a railroad, even though the mortgage covers the income, need not account for earnings while the property is in his possession, until a demand has been made therefor or for the surrender of the possession under the mortgage. *Sage v. Memphis & L. R. R. Co.* 126 U. S. 361 (31 L. ed. 694); *Dow v. Memphis & L. R. R. Co.* 124 U. S. 652 (31 L. ed. 565).

Where a mortgage does not provide for the pay-
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ment of rents to the mortgagee during the mortgagor's possession, even where the income is expressly pledged as security for the mortgage debt, with the right in the mortgagee to take possession upon the nonperformance of the conditions of the mortgage, the former is not entitled to rents until he takes actual possession, or possession is taken in his behalf. *Freedman's Saving & T. Co. v. Shepherd*, 127 U. S. 494 (33 L. ed. 163).

Demand for possession may be made by bringing suit for that purpose, and thereafter mortgagor must account for earnings; and it is of no consequence that a receiver was not appointed until subsequently. *Dow v. Memphis & L. R. R. Co.* 124 U. S. 652 (31 L. ed. 565).

Trustees in a railroad mortgage, who have not asked possession or intervened in the suit, are not entitled to have the net earnings of the property, while it is in the hands of a receiver appointed in a suit instituted by a judgment creditor, applied in discharge of mortgage bonds. *Sage v. Memphis & L. R. R. Co.* 126 U. S. 361 (31 L. ed. 694).

Rights of bondholders.

Bondholders, whose bonds are secured by a mortgage, have a clear right to stand upon their contract, and trustees have no power or authority to compel any of them to make a new and different one, by any scheme of reorganization, so as to give a preference to other mortgages or claims. *Holister v. Stewart*, 111 N. Y. 644.

The omission, neglect or refusal of the trustee of a mortgage to certify bonds secured by it cannot, in equity, be permitted to defeat the rights of the bondholders, who were induced to believe, and had the right to believe, that the securities upon the faith of which they parted with their money were in all respects regular and complete. *Atwood v. Shenandoah V. R. Co.* 13 Va. L. J. 388.

Railroad bondholders to whom stock of the corporation has been mortgaged as collateral security cannot maintain a suit in equity to charge the lessor of the mortgaged road with the earnings derived under the lease, when such lease is not alleged to be void or voidable as between the parties to it. *Gibson v. Richmond & D. R. Co.* 2 L. R. A. 467, 5 R. R. & Corp. L. J. 461, 37 Fed. Rep. 743.

count. That right must depend upon the relation of the parties; and if that relation does not of itself give it, there is an end of the case.

Garrett v. May, 19 Md. 177.

The expression "necessary rentals" does not restrict the defendant to such rentals as are absolutely essential to the existence of the railroad, but allows such rentals as in the discretion of the directors are proper.

Buck v. Seymour, 46 Conn. 156, 171.

The bill should be dismissed for want of proof to sustain the allegations of fraud.

Fisher v. Boody, 1 Curt. 206, 211.

The stipulation that a resolution by the directors that there was interest earned should be a condition precedent to any claim for interest, is binding on the complainant.

Byron v. Low, 11 Cent. Rep. 904, 109 N. Y. 291; *New York, L. E. & W. R. Co. v. Nickals*, 119 U. S. 286, 307 (30 L. ed. 363, 368); *United States v. Robeson*, 84 U. S. 9 Pet. 319 (9 L. ed. 142).

When the board of directors actually ascertained that there were no net earnings, and entered a resolution to that effect upon the journal of their proceedings, that determination was binding on the complainant.

Delaware & H. Canal Co. v. Pennsylvania Coal Co. 50 N. Y. 250; *Wyckoff v. Meyers*, 44 N. Y. 143; *Dustan v. McAndrew*, Id. 72.

As the defendant had the right to lease other lines and operate its road as a unit, it was not bound to keep separate accounts of the earnings of different sections of its road.

St. John v. Erie R. Co. 89 U. S. 22 Wall. 186 (22 L. ed. 743); *New York, L. E. & W. R. Co. v. Nickals*, *supra*; *Day v. Ogdensburg & L. O. R. Co.* 9 Cent. Rep. 459, 107 N. Y. 129.

It is only where a defendant has agreed to turn over net profits, as such, that he is liable to a bill for an account.

Pratt v. Tuttle, 186 Mass. 283; *Moxon v. Bright*, L. R. 4 Ch. 292; *Foley v. Hill*, 2 H. L. Cas. 28.

Inasmuch as the agreement provides that the defendant, as mortgagor, shall receive and use the earnings of its road, not as trustee for the plaintiff, but as its own property, for its own purposes, then for such earnings as it had received and expended before demand made, or suit begun, the plaintiff is not entitled to maintain a bill for an account.

Galveston, H. & H. R. Co. v. Cowdrey, 78 U. S. 11 Wall. 459, 483 (20 L. ed. 199, 206, 207); *Gilman v. Illinois & M. Teleg. Co.* 91 U. S. 608, 617 (23 L. ed. 405, 410); *American Bridge Co. v. Heidelberg*, 94 U. S. 799 (24 L. ed. 144); *Fosdick v. Schall*, 99 U. S. 235, 253 (25 L. ed. 889, 842); *Freedman's Savings & T. Co. v. Shepherd*, 127 U. S. 494, 507 (32 L. ed. 163, 166); 1 Jones, Mort. 4th ed. §§ 160, 670, 771; Jones, Railroad Securities, §§ 114, 115, 118, *Teal v. Walker*, 111 U. S. 242 (28 L. ed. 415); *Uhlman v. New York Life Ins. Co.* 12 Cent. Rep. 689, 109 N. Y. 421.

Wallace, J., delivered the following opinion:

The cause has been brought to hearing upon bill and answer, with a stipulation admitting that the complainant's title to the bonds which are the foundation of his claim is to be deemed as established by the pleadings. The com-

plainant is the owner of certain income bonds secured by a mortgage executed in 1877 by the defendant pledging the net earnings of its line of railway as security for the payment of the principal of the bonds and such interest as may "be hereafter from time to time fixed by the board of directors" of the Railway Company. The mortgage includes, "all and singular, the line of railways belonging or hereafter to belong to the party of the first part, and extending from Chicago, Cook County, Illinois, through the Counties of Will, Kankakee, Iroquois and Vermillion to the City of Danville, together with a branch from Bismarck's Junction easterly through Warren and Fountaine Counties, Indiana, to Shoddie's Mills, and its equipments and appendages and the net income thereof." The bonds are conditioned for the payment of such interest on the principal, not to exceed 7 per cent for any one year, as shall be declared and fixed by the board of directors in each year in accordance with the mortgage.

The mortgage provides that in each year during the currency of the bonds, beginning with the year 1878, the board of directors shall, in the month of October, ascertain, fix and declare what amount of net earnings has been made during the preceding fiscal year ending the 1st day of September, and is justly applicable to the payment of interest on such issue of income bonds; and in such ascertainment of net earnings there shall be deducted from the gross income all operating expenses, taxes, insurance, liability for either interest or sinking fund on any of the existing bonds of the Company, necessary rentals and purchase or hire of equipments, together with such expenditures for renewals, repairs and betterments as may be proper and requisite to maintain the line of railroad and its appendages in a first-class condition for effective service; and that after deducting all such payments, expenses and liabilities from the amount of gross income received during the year, the board of directors shall thereupon fix, establish and adjudge whether any, and if so how much, net income exists which is applicable to the payment of interest on the said issue of income bonds. The mortgage further provides that if on such ascertainment the board of directors adjudge that no net income has been realized during the year applicable to such interest payment, they shall thereupon enter a resolve to that effect on the journal of their proceedings, and the adjudication shall be final and conclusive as an award, and shall operate as a perpetual bar against any claim or demand of any holder of such income bonds for the payment of interest for such year, and that if the said board shall on such ascertainment of net earnings adjudge that a specific sum is available out of the net earnings for such interest payment, then a resolve shall be entered in their minute of proceedings in the nature of a final and conclusive award, fixing and declaring what ascertained sum is properly available out of that year's net earnings for the payment of interest on such income bonds, and the payment or rate of interest to be allowed and paid.

The mortgage further provides that no right of action shall exist in favor of any holder of such income bonds for any alleged liability for

interest until the same shall first be adjudged and awarded as aforesaid.

The bill alleges that prior to September 1, 1883, interest on the bonds had been ascertained and declared by the board of directors, and duly paid to the holders of the bonds; but that thereafter the defendant and its officers and board of directors conspired to fraudulently compel the complainant and other holders of said income bonds to surrender the same and exchange them for consol bonds subsequently created, and to fraudulently withhold at first a portion, and then the whole, of the net earnings which were properly payable upon said bonds; and with a view to carrying this evil design into effect they willfully, maliciously and fraudulently failed to make any true ascertainment, in the month of October, 1884, or in the month of October, 1885, of the net earnings for the preceding fiscal year, and willfully made a fictitious, false and fraudulent ascertainment of the same, whereby they sought to make it appear that nothing had been earned on account of such interest; and that the officers and board of directors well knew at the time of each of said pretended ascertainties that the net earnings, if the same had been ascertained in the manner prescribed by the mortgage, were more than sufficient to have paid 7 per cent interest upon the principal of said bonds.

The bill then sets out what devices were resorted to by the board of directors to cover up and defraud the holders of income bonds out of the net earnings properly applicable to interest thereon, among others the mingling of the accounts of the division of the railway covered by the mortgage with the accounts of consolidated constructed and leased lines acquired by the defendant after the execution of the mortgage, including charges for additional equipment for the new lines. The answer fully meets and denies all the averments of fraud and conspiracy; but it admits that separate accounts have not been kept by the defendant of the net earnings of the original lines, that the accounts of the earnings and expenses of these lines and those subsequently acquired have been mingled together, and that the board of directors did not attempt to make any ascertainment, in 1884 or 1885, of the net earnings of the original lines.

It appears by the bill and answer that the new lines built, acquired or leased by the defendant embrace a large mileage and have cost the defendant a large sum of money; and that in June, 1884, the defendant issued consol bonds bearing interest at 6 per cent per annum, secured by a mortgage upon its property, which have been used in part to pay for the new lines and their equipment, and has used part of its earnings to pay interest thereon.

The bill prays for an accounting and a decree for the payment of what is ascertained to be due from the defendant.

When the case was before the court on a former occasion upon a demurrer for want of equity, and alleging that the trustee named in the income mortgage was a necessary party, the demurrer was overruled by Judge Wheeler. The questions then considered and decided adversely to the defendant cannot be appropriately reconsidered now. It must be held, therefore, for present purposes, that the com-

plainant is entitled to the relief sought unless the material averments of the bill are sufficiently met and denied by the answer.

Under the terms of the income mortgage it was the duty of the defendant to keep an account of the earnings, expenses and net income of the lines included in the mortgage as distinct from those subsequently acquired. The granting clause in the mortgage subjecting to the lien the "line of railway belonging or hereafter to belong" to the defendant is qualified by the description of the line which follows it; and the words "hereafter to belong" refer to such lines between the specified termini as the Company did not then own, like the road from Chicago to Dalton then leased by the Company, and constituting the link by which its line of railway extended from Chicago to Danville. If the mortgage provides expressly or by implication that the board of directors are to set apart the income of the railway lines particularly described for the payment of the maturing interest upon the bonds, the bondholders are entitled to that income; and their pledge is not to be transmuted from one upon the earnings of a particular line of railway to one upon the earnings a system of which the line may be a part. This would dilute their security upon a designated fund into a nebulous lien upon the profits of such new enterprises as the corporation might see fit to undertake.

The terms of the mortgage are that in ascertaining net earnings there is to be deducted from gross income, expenditures or liabilities for ordinary expenses, interest or sinking-fund requirements, and for renewals, repairs and betterments requisite to maintain the line of railroad in a first-class condition. All this detail of specification would be unnecessary if the mortgage were not intended to define carefully what expenses and liabilities may be treated as an offset to gross income, and limit the offset to those incurred in the operation and improvement of the particular lines described. Within this limitation the amount may be appropriated for the specified objects, and the manner in which the railway lines may be managed is a matter resting exclusively in the discretion and good faith of the directors.

An income railway mortgage, although it is a pledge of tangible property for the payment of the principal sum, is as a security for the payment of interest but little more than the pledge of the good faith of the company in managing its lines. It necessarily contemplates that such improvements as seem necessary to the efficient use and operation of such property, and such alterations in the *corpus* as appear desirable, are to be made at the discretion of the directors; and unless it contains some limitations upon the powers of the directors, express or implied, the right of the company to conduct its operations as it may see fit, subject only to the conditions of its Organic Law, is unqualified; and consequently the company can lawfully extend its lines, acquire new ones, discontinue old ones, and thus essentially change the earning capacity of the property. It is important, therefore, that any limitations upon the general powers of the directors, intended to define the boundaries of their discretion, should be given due effect if such a mortgage is to afford any substantial security to bondholders.

for the payment of their interest; and if these are found in the instrument they should not be nullified by a latitudinarian interpretation calculated to relegate bondholders to the position of stockholders. They are not stockholders but creditors, who contract upon the assurance that the income fund upon which they rely when they purchase the bonds is to continue to exist during the life of the mortgage. When the mortgage implies that the income fund is to consist of the profit of the future transactions of the company from all sources, as may be the case when the property pledged to the fund includes not only what is owned by the company at the time of the execution of the instrument, but also all that may be thereafter owned or acquired by the company, the bondholders cannot complain if when the interest periods occur it is found that the profits which would have been made by operating the original lines exclusively have been depleted by the losses arising from the operation of new lines in conjunction with the old ones. *Day v. New Lots*, 9 Cent. Rep. 440, 107 N. Y. 148; *Buck v. Seymour*, 46 Conn. 156.

But where, as here, the terms are that specific lines are granted, and that income is to be ascertained by taking the gross earnings of those lines and deducting from them specified expenses and liabilities, the bondholders are entitled to hold the Company to its promise. It is to be inferred that they have invested upon the faith of the earning capacity of the particular property, basing their expectations for the future upon the results of the past, and not intending to trust wholly to the integrity and good judgment of a body of directors whose personnel may change at any time.

The case then presents the question whether the board of directors are justified in deducting the expenditures and expenses, including interest charges, incurred by operating the new lines acquired by the Company from the earnings of the original lines. Clearly they are not unless these new lines are to be deemed "betterments requisite to maintain the line of railway (described) in first-class condition." The mere statement of the proposition is the only answer it requires. If it is said that the successful operation of the old lines may have demanded the acquisition of new ones, the answer is that nevertheless the income fund consists of the earnings of the old lines less the expenses of operation, and the bondholders have the right to look to that fund exclusively.

The mortgage intrusts the directors with a wide discretion in determining what is to be treated as net income. Their conclusions, when embodied in a resolution of the board, are not vitiated by an error of judgment, and can

only be disturbed when the circumstances establish bad faith. But their duty to the bondholder requires them to make an honest effort to ascertain the net earnings of the original lines at the several interest periods; and this they have not done; nor can they do so practically unless a separate account of the earnings and expenses of those lines is kept. *Barry v. Missouri, K. & T. R. Co.* 27 Fed. Rep. 1; *Mackintosh v. Flint & P. M. R. Co.* 34 Fed. Rep. 582.

The perfunctory ceremony of passing a resolution that no income has been earned, without an attempt to ascertain the fact, is not a compliance with the letter or the spirit of the contract.

The condition, in the bonds and mortgage, whereby the interest is payable as and when fixed by the action of the board of directors, does not preclude the bondholders from all remedy whenever the directors improperly neglect or refuse to take the necessary action. No corporation can shelter itself behind a contract that it shall not be liable for its own wrongful acts.

It has seemed proper to consider these questions fully because both parties are anxious for the opinion of the court as to their respective rights and obligations under the bonds, and the argument at the bar has been principally directed to the discussion of them. Nevertheless no relief can be granted to the complainant under the present bill, because having alleged a case of fraud he cannot be permitted to support it on any other ground. *Wilde v. Gibson*, 1 H. L. Cas. 605; *Byrne v. Potter*, 56 U. S. 15 How. 56 [14 L. ed. 598]; *Fisher v. Boody*, 1 Curt. 206; *Price v. Berrington*, 7 Eng. L. & Eq. 254.

The present bill does not even proceed upon the ground of a willful neglect of duty on the part of the directors of the defendant to make the ascertainment and adjudication respecting the income provided for in the mortgage; but it charges them with actual fraud and conspiracy designed to compel the complainant to surrender his bonds and accept consol bonds in lieu, and alleges the failure to make the ascertainment as one of the evidential facts supporting the conspiracy. There is nothing in the facts, as they appear by the admission upon the pleadings, to justify any inference of *mala fides* on the part of the directors; and it would seem that they have acted under an honest misapprehension of their duties to bondholders, supposing that the position contended for by their counsel was correct, and that the income of all the lines, the new as well as the old, was the fund pledged by the mortgage.

The bill is therefore dismissed, with costs.

VIRGINIA SUPREME COURT OF APPEALS.

James D. PATTON, Appt.,

v.
R. M. LEFTWICH *et al.*

(.....Va.....)

An assignment, by the surviving partners of an insolvent firm which has been

dissolved by the death of one of its members, of the partnership effects for the benefit of the social creditors, is valid, in the absence of any statutory provision to the contrary, although it provide that some creditors shall be paid before others.

(December 12, 1899.)

NOTE.—Surviving partner, rights and liabilities.

On the death of a partner, the survivor, for all
6 L. R. A.

practical purposes, takes the legal title to the partnership property and the place of the firm in

A PPEAL by complainant from a decree of the Circuit Court for Bedford County dismissing a bill filed to set aside an assignment for benefit of creditors and for an accounting. *Affirmed.*

The facts and case are fully stated in the opinion.

Messrs. John W. Daniel, E. P. Goggin, W. W. Berry and W. S. McKenny for appellant.

Messrs. Burks & Campbell, R. G. H. Kean, Griffin & Lowry and Calloway Brown for appellees.

Fauntleroy, J., delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of Bedford County, rendered on the 9th day of December, 1887, in a chancery cause pending in said court, in which the appellant, J. D. Patton, is complainant, and R. M. Leftwich and W. H. Stiff, surviving partners of themselves and R. F. Robertson, deceased, doing business under the style of R. F. Robertson & Co., and the Liberty Savings Bank and others are defendants.

R. F. Robertson, R. M. Leftwich and W. H. Stiff, early in the year 1885, entered into partnership under the firm name of R. F. Robertson & Co., in the town of Liberty, Bedford County, Virginia, for the manufacture and sale of chewing and smoking tobacco, etc. In October, 1885, R. F. Robertson died, and the said partnership was dissolved, *ipso facto*, by his death, by operation of law. Said Robertson died intestate and insolvent, and his estate was committed to the sheriff of Bedford County, as administrator *d. b. n.*, after the revocation of the powers of his father, F. W. Robertson, as administrator.

The partnership assets, at the date of dissolution by the death of the partner R. F. Robertson, consisted of a large number and amount of debts due to the said firm, and also a large quantity of unmanufactured tobacco, manufactured tobacco, and machinery and furniture used in the business—all personalty, no realty.

The surviving partners, Leftwich and Stiff,

began to wind up the partnership affairs; but finding, in the course of liquidation, that the partnership liabilities were greater than the assets would pay, the said Leftwich and Stiff, as said surviving partners, on the 6th of February, 1886, made an assignment to P. L. Saunders, trustee, of all the partnership assets of the late firm of R. F. Robertson & Co., in trust to pay, *first*, two negotiable notes of the said firm held by the Liberty Savings Bank, one for \$2,500, payable to and indorsed by McGhee & Hurt, dated ———, ———, and the other for \$2,000, payable to and indorsed by McGhee, Hurt & Co., dated ———, ———; *second*, to pay two other negotiable notes of said firm held by the said Liberty Savings Bank, one for \$2,000, payable to and indorsed by Wesley Peters, dated ———, ———, and the other for \$1,000, payable to and indorsed by Jeter & Newsom, dated ———, ———; *third*, to pay all other indebtedness due the said Liberty Savings Bank by the said late firm; and, *lastly*, to distribute the surplus, if any.

On the 9th of December, 1887, James D. Patton, a creditor of the late firm, instituted this suit—a creditor's suit—in the Circuit Court of Bedford County, against the said Leftwich and the said Stiff, surviving partners, Saunders, trustee, the Liberty Savings Bank and the administrator of R. F. Robertson, deceased. With his said bill, J. D. Patton filed a copy of the said assignment and schedule, and exhibits the evidences of the indebtedness of the insolvent firm to him. He does not waive answers on oath. The Liberty Savings Bank filed its answer by its president; the trustee, Saunders, filed his answer on oath, and Leftwich and Stiff filed their answer on oath.

The complainant, Patton, charges in his bill that the said surviving partners, Leftwich and Stiff, had no rightful power or authority in law to make an assignment of the assets of an insolvent firm, which had been dissolved by the death of a partner, nor to give preference to the bank, or to any one or more of the creditors of the firm, over the other creditors of the firm of equal dignity. And the prayer of the

respect to its assets and liabilities, and is vested with the possession and management of the property for the purpose of closing up its affairs. *Murray v. Fox*, 39 Hun, 110. See *Nehrboss v. Bliss*, 58 N. Y. 600; *Holbrook v. Lackey*, 13 Met. 132, 134; *Adams v. Hackett*, 27 N. H. 239, 59 Am. Dec. 376; *Kinsler v. McCants*, 4 Rich. L. 43, 53 Am. Dec. 711; *Andrews v. Brown*, 21 Ala. 437, 56 Am. Dec. 252; *Wickliffe v. Eys*, 58 U. S. 17 How 469 (15 L. ed. 163); *Shanks v. Klein*, 104 U. S. 18 (26 L. ed. 635).

He becomes the owner of the copartnership property, subject to the duty to settle affairs of the partnership, and their obligations to the estate of their deceased partner to the extent of his interest. The right to transfer property is incident to the possession of the legal title. *Beste v. Burger*, 17 Abb. N. C. 168; *Hutchinson v. Smith*, 7 Paige, 26.

He is sometimes considered as a tenant in common with the representatives of the deceased partner in the goods; at other times, as having the whole legal title, subject to the claims of creditors and to the equitable rights of the personal representatives of the deceased. *Thomson v. Thomson* (N. Y.) 1 Bradf. 24.

The question as to the definition of the precise quality of a surviving partner's interests in the 6 L. R. A.

assets of the firm, cited in *Loeschigk v. Addison*, 19 Abb. Pr. 184, 3 Robt. 345.

Application of assets.

On the dissolution of the partnership by death, the assets are, in the first instance, applicable to the payment of the copartnership debts, and at the instance of any party in interest equity will restrain any attempt to divert them from that object. *Loeschigk v. Addison*, 19 Abb. Pr. 184, 3 Robt. 345.

May make a general assignment.

A sole surviving partner who is himself insolvent may make a general assignment of all the firm's assets for the benefit of all joint creditors, with preferences to some of them, and the representatives of a deceased partner have no right to interfere or prevent such a disposition of the firm property. *Williams v. Whedon*, 12 Cent. Rep. 227, 109 N. Y. 341; *Hoyt v. Sprague*, 103 U. S. 613 (26 L. ed. 585); *Emerson v. Senter*, 118 U. S. 3 (30 L. ed. 49); *Palmer v. Myers*, 43 Barb. 513, 29 How. Pr. 10.

He has the power to assign and transfer the copartnership assets to a creditor of the firm in payment of his debt, although such an assignment operates to give a preference to the assignee over

bill is, that the assignment of Leftwich and Stiff of February 6, 1886, as surviving partners of the late firm of R. F. Robertson & Co., be annulled and set aside, and that accounts be ordered and taken of the partnership assets in the hands of the trustee and assignee, and of all other social assets, if any, not included in the said assignment; of the debts due by the said late partnership; of the notes discounted and held by the Liberty Savings Bank, and of the application made of the proceeds of said discounts, and of the individual property of R. F. Robertson, deceased, and of Leftwich and of Stiff.

On the 9th of December, 1887, the Circuit Court of Bedford County, by its final decree, simply dismissed the bill with costs to the defendants. From this decree Patton obtained this appeal.

The bill charges fraud and collusion of fraud; but the answers are fully and explicitly responsive, and they deny the allegations and specifications of fraud made in the bill; and there is no proof whatever, or even an attempt to prove, the fraud charged. Indeed, the petition for appeal and the briefs of counsel for appellant do not present the question of fraud. There is no dispute as to the facts in the case. The question presented for adjudication, and the one on which the case turns, is purely and simply one of law as to the powers and duties of surviving partners of an insolvent firm dissolved by death; and the counsel for appellant in their brief state the question thus: "whether the surviving partners of an insolvent firm can make a valid assignment to a trustee of all the effects of the partnership, preferring one and postponing all others of the social creditors." The appellant contends that all the social creditors of the same dignity must be paid ratably; that by the death of the partner, Robertson, the surviving partners, Leftwich and Stiff, became, by operation of law, trustees of the partnership property, which, as such trustees, they are bound to apply ratably to the payment of the partnership debts; and that they had no lawful power or capacity to discriminate among the

social creditors so as to give preference, either in payment or security by assignment; and that, in this case, the assets being insufficient to pay or secure all, and the partners being insolvent, it was a breach of trust in the surviving partners, Leftwich and Stiff, to make the assignment of February 6, 1886, which, in equity, is void as to the social creditors who are postponed by the said assignment.

The question submitted is one of very great importance, affecting large interests and rights in the commercial world; and yet, it has never, it is believed, been presented before this court in this definite form. But the Supreme Court of the United States has adjudicated the precise question and the exact point at issue here. *Fitzpatrick v. Flannagan*, 106 U. S. 654, 655 [27 L. ed. 218]; *Emerson v. Senter*, 118 U. S. 8 [30 L. ed. 49].

In this last-mentioned case the Supreme Court of the United States says: "As, with the concurrence of all the partners, the joint property could have been sold or assigned for the benefit of the preferred creditors of the firm, the surviving partner (there being no statute forbidding it) could make the same disposition of it. The right to do so grows out of his duty, from his relation to the property, to administer the affairs of the firm so as to close up its business without unreasonable delay; and his authority to make such a preference—the local law not forbidding it—cannot upon principle be less than that which an individual debtor has in the case of his own creditors." And the language of the syllabus of the case is: "The surviving partners of an insolvent firm, who are themselves insolvent, may make a general assignment of all the firm's assets for the benefit of all joint creditors, with preferences to some of them; and such assignment is not invalidated by the fact that the assignors fraudulently withheld from the schedules certain partnership property for their own benefit, without the knowledge of the assignee or the beneficiaries of the trust." See *Egberts v. Wood*, 3 Paige, 517, re-reported in 24 Am. Dec. 286, and note; *Hutchinson v. Smith*, 7 Paige, 26;

the other creditors of the firm. *Salsbury v. Ellison*, 7 Colo. 167, 49 Am. Rep. 351; *Loeschigk v. Hatfield*, 51 N. Y. 600. See *Mills v. Argall*, 6 Paige, 577; *Fisher v. Murray*, 1 E. D. Smith, 341; *Hitchcock v. St. John*, 1 Hoffm. Ch. 511.

It follows that the exercise of that authority would be sustained in equity if the disposition be for the common benefit of himself and the estate of his deceased partner. *Beste v. Burger*, 13 Daly, 323. See *White v. Union Ins. Co.* 1 Nott & McC. 556.

Assignment with preferences.

The power to prefer one creditor to another is incident to the power to assign. *Brooks v. Marbury*, 24 U. S. 11 Wheat. 78 (6 L. ed. 423); *Clarke v. White*, 37 U. S. 12 Pet. 200 (9 L. ed. 1055); *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 166 (10 L. ed. 908); *Ex parte Conway*, 4 Ark. 302; *Hempstead v. Johnston*, 18 Ark. 123; *Mandel v. Peay*, 20 Ark. 829; *Emerson v. Senter*, 118 U. S. 8 (30 L. ed. 49).

A deed of trust or other conveyance is not necessarily void "because its effect is to hinder and delay the creditors of the grantor in the collection of their claims. It must be a fraudulent contrivance for that purpose; and the grantee, or person to be benefited by the conveyance, must be party privy

to the fraudulent design." *Hempstead v. Johnston*, 18 Ark. 140; *Cornish v. Dews*, 18 Ark. 181; *Mandel v. Peay*, *supra*; *Hunt v. Weiner*, 39 Ark. 70; *Marbury v. Brooks*, 20 U. S. 7 Wheat. 553, 577 (5 L. ed. 522, 528); *Brooks v. Marbury*, 24 U. S. 11 Wheat. 78, 89 (6 L. ed. 423, 428); *Tompkins v. Wheeler*, 41 U. S. 16 Pet. 106, 118 (10 L. ed. 903, 908).

The General Term of the First Department held that an assignment of the firm property in trust for the benefit of firm creditors by the survivor making preferences is a valid disposition of such property, although the representatives of the deceased partner did not assent to the assignment. *Haynes v. Brooks*, 42 Hun, 528; *Beste v. Burger*, 17 Abb. N. C. 162; *Williams v. Whedon*, 12 Cent. Rep. 227, 103 N. Y. 341.

The assent of the representatives of a deceased partner, to the transfer of the firm property by the survivors, is unnecessary. The assignee takes the legal title regardless of the dissent of such representatives (*Daby v. Ericsson*, 45 N. Y. 786; *Sweet v. Taylor*, 36 Hun, 256; *Nehrbos v. Bliss*, 88 N. Y. 600; *Williams v. Whedon*, *supra*), provided it was done in good faith, and that such transfer could not, in the absence of fraud, be disturbed by other creditors of the firm. *Loeschigk v. Hatfield*, 5 Robt. 22, affirmed, 51 N. Y. 600; *Williams v. Whedon*, *supra*.

Wilson v. Soper, 18 B. Mon. 411, re-reported, 56 Am. Dec. 573, and *note*; *Loeschigk v. Hatfield*, 51 N. Y. 660; *Cushman v. Addison*, 52 N. Y. 628; *Williams v. Whedon*, 109 N. Y. 383, 12 Cent. Rep. 227, decided in 1888 and re-reported in 4 Am. S. R. 460; *French v. Lovejoy*, 12 N. H. 458, 85 Am. Dec. 295-303, *note*; *Barry v. Briggs*, 22 Mich. 201.

In the very recent case of *Williams v. Whedon*, *supra*, the New York Court of Appeals reviews many prior cases, and refers to *Emerson v. Senter* as conclusive.

In the case of *French v. Lovejoy*, *supra*, the Court of Appeals of New Hampshire says (p. 459): "The property of the partnership might be lawfully appropriated to the payment of the partnership debts, and F. Lovejoy, as surviving partner, had the right to prefer A. Lovejoy, a creditor of the firm, in that way."

In *Barry v. Briggs*, *supra*, Chief Justice Campbell, speaking for the Michigan court, says: "A sole surviving partner has the entire legal title to all the partnership assets. He has a right, acting honestly and with reasonable discretion and diligence, to dispose of them as he pleases; to settle all debts against the concern, to make any compromise he may deem necessary, and to turn the assets into an available and distributable form."

Bates on Partnership, 2d vol., § 782, says: "As the surviving partner has the entire title and sole control of the property, and represents the power of all the former partners, and they all could have assigned the property for the benefit of creditors, so the surviving partner has, at least in the case of insolvency, in order to wind up, the same power, and can transfer the property to an assignee for the benefit, not of his separate creditors, but of the partnership creditors. . . . And as he (the surviving partner) can pay some creditors in full, to the prejudice of others, so it has been held that, if the local law does not forbid, in case of other assignments for creditors, he can assign with preferences;" and for this last proposition the author cites, among others, the case of *Emerson v. Senter*.

The cases of *Fitzpatrick v. Flannagan*, 106 U. S. 648 [27 L. ed. 211], and *Cass v. Beauregard*, 99 U. S. 119 [25 L. ed. 870], are cited in the recent case decided by this court of *Robinson v. Allen*, 13 Va. L. J. 235. See the case of *Beste v. Burger*, 13 Cent. Rep. 146, 110 N. Y. 644.

Even real estate, bought with partnership funds, the title of which is taken in the name of the deceased partner, is so completely in the control of the surviving partner that where he assigned to a trustee, and the trustee sold, the purchaser of this equitable title can, in equity, compel the heirs of the deceased partner to convey the legal title to him. *Shanks v. Klein*, 104 U. S. 18 [26 L. ed. 835].

The cases referred to in the brief of counsel for appellant, *Salsbury v. Ellison*, 7 Colo. 167 and *Anderson v. Norton*, 15 Lea, 14, are rested on the ground that the surviving partner is a trustee for the benefit of the firm creditors, and is governed by the rules applying to ordinary trustees, and that, as in the case of ordinary trustees, "equality is equity," the surviving partners, being trustees, cannot give any preference among the creditors. But surviving partners are not trustees in the ordinary sense, though

they are loosely so called by some judges and law writers.

Lord Chancellor Westbury, in *Knox v. Gye*, L. R. 5 H. L. 656 and 675, citing 2 Pomeroy, p. 618, *note 2*, says that the trust of a surviving partner is limited by the extent of his obligation, and that it is most important to mark this again and again, for there is not a more fruitful source of error in law than the inaccuracy of language. The application to a man who is, improperly and by metaphor only, called a trustee, of all the consequences which would follow if he were a trustee by express declaration—in other words, a complete trustee, holding the property exclusively for the benefit of the *cæstus que trust*—well illustrates the remark of Lord Maclesfield, that "nothing in law is so apt to mislead as metaphor."

But, conceding that a surviving partner is a trustee in a general sense, what is the extent of his trust? Certainly not beyond his obligation: *first*, to collect all the assets of the firm; *second*, to apply them to the firm debts; *third*, to distribute the surplus, if any, among the surviving partners and the representatives of those who are dead. This is the full extent and duty of his trust, such as it is. In paying the debts of the firm there is no limitation or restriction on his power to pay one social creditor, or to secure one, in preference to another, if he act honestly. In this regard he has the same right and power that any other debtor has. The representative of the deceased partner is not injured by a preference given to one firm creditor over another; and it is quite immaterial to him, if the assets of the firm be insufficient to pay all the social creditors, whether they be applied ratably to all the debts, or be applied to some, to the exclusion of the others. The burden upon the estate of the decedent is precisely the same in either event. The creditor has no other equity than the partners have *inter se*; and the whole extent of a partner's equity is that the partnership assets shall be applied to the payment of the partnership debts, to the exclusion of the separate debts of the several partners; but this right of equity does not extend or operate to the prevention of giving preference among partnership creditors.

The case of *Offutt v. Scott*, 47 Ala. 104, cited in the petition for appeal, is not in conflict with this principle. Nor is the Virginia case of *Lindsey v. Corkery*, 29 Gratt. 650. In that case each of the partners had gone into bankruptcy, and it was, among other things, held that, by the bankruptcy—the going into bankruptcy—of the several partners, the social assets stood appropriated to all the social creditors alike, and the rule of administration of the assets, thus appropriated, was the same, whether the bankrupt assets were administered in the bankrupt court or in a court of equity. The lien or equitable right existing among the partners, by, through and under which the social creditors may only claim, extends no further than to require the social assets to be applied to the social debts, and, until they are paid, that the individual debts of the partners shall be excluded from participation in the social fund; but it does not prohibit preferences from being given in the payment, or securing the payment, of partnership debts out of partnership property. In the absence of a statute to

the contrary—and there is none such in Virginia—every debtor has the right to prefer one of his creditors to another; and the case of a surviving partner, who is a debtor as such, is no exception to the general rule.

We do not think it was error in the Circuit Court of Bedford County to dismiss the bill, when there was no proof of its allegations, nor

to refuse to order the needless costs and delay of accounts, when the trustee had reported that the assets were all in hand, and were insufficient to satisfy even the preferred debts.

The judgment of this court is that the decree appealed from is right, and that it is affirmed.

Decree affirmed.

Richardson, J., dissents.

MINNESOTA SUPREME COURT.

Isaac JORDAN, *Appt.*,

ST. PAUL, MINNEAPOLIS & MANITOBA
R. CO., *Repts.*

(...Minn....)

*1. When there is a general verdict, and also special findings of fact, it is not proper practice to move to set aside one of the findings of fact as contrary to the evidence, without asking for a new trial of the whole issue or of that particular question of fact, especially if setting it aside would require a judgment different from what would be required if it were allowed to stand.

2. The rule that a land owner may improve his own land for the purpose for

*Head notes by GILFILLAN, Ch. J.

NOTE.—Right to use of land, surface water, damnum absque injuria.

Neither *damnum absque injuria* nor *injuria absque damnum* constitutes a good cause of action. Deobold v. Oppermann, 2 L. R. A. 644, 111 N. Y. 542; Hutchins v. Hutchins, 7 Hill, 104; Michigan v. Phoenix Bank, 38 N. Y. 2.

Damage to land from surface water, as an incidental consequence of the lawful and rightful use of its easement by a railroad company, is *damnum absque injuria*. Bell v. Norfolk Southern R. Co. 101 N. C. 21.

A land owner has no right of action against the owner of adjoining higher land, who, in the ordinary course of husbandry, causes surface water to flow on his land with increased velocity or in a more contracted channel, if no damage is caused thereby. Peck v. Goodberlett, 12 Cent. Rep. 190, 109 N. Y. 180.

Every citizen holds his property subject to the implied obligation that he will use it in such a way as not to prevent others from enjoying the use of their property. State v. Yopp, 97 N. C. 477.

A man has a right to cultivate his land in the usual and reasonable way, as well upon a hill as in the plain, and cannot be restrained from doing so because a mill-pond below may be injured by the washing down of the soil. Middlesex Co. v. McCue, 149 Mass. 103.

A land owner has the right in good faith to improve and till his farms, to fill up sag holes, so that water will not accumulate and stay in them, even if the water arising from rainfalls or melting snow should thereby find its way into a ravine and upon the land of another, and incidentally increase the flow thereon. Gregory v. Bush, 7 West. Rep. 172, 64 Mich. 87.

"Surface water" is defined as that which is diffused over the surface of the ground, derived from falling rains and melting snows, and continues to be such until it reaches some well-defined chan-

nel in which it is ordinarily used, and may do what is necessary for that purpose,—as, to build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water that would otherwise remain there, or to shed surface water over land on which it would not otherwise go,—applied to a railroad company constructing its road across a prairie country.

(December 2, 1889.)

APPEAL by plaintiff from a judgment of the District Court for Clay County in favor of defendant in an action to recover damages for injuries to plaintiff's lands and crops by reason of the alleged unlawful draining thereon of certain surface water. *Affirmed.*

The case is sufficiently stated in the opinion.

Mr. Wallace B. Douglas, for appellant:

nel in which it is accustomed to and does flow with other waters, whether derived from surface or springs. Crawford v. Rambo, 4 West. Rep. 446, 44 Ohio St. 279.

The doctrine of the common law, and not of the civil law, in reference to surface water, prevails in Missouri. Martin v. Benoist, 2 West. Rep. 541, 20 Mo. App. 262.

No change in the distribution of surface water from a superior to an inferior tenement is material, unless injury is done. Peck v. Goodberlett, 12 Cent. Rep. 190, 109 N. Y. 180.

Where the normal flow of surface water over the plaintiff's land was but slightly increased by the diversion, which caused no damage, he cannot recover. Jeffers v. Jeffers, 9 Cent. Rep. 845, 107 N. Y. 650.

See generally, as to right to use of one's land, Moellering v. Evans, *ante*, p. 449.

General and special verdicts defined.

General and special verdicts are not consistent in the same case; the one finds both the law and the facts, the other the facts only. Louisville, N. A. & C. R. Co. v. Balch, 2 West. Rep. 286, 106 Ind. 98.

A special verdict should find all the facts essential to a recovery. Indiana, B. & W. R. Co. v. Barnhart, 18 West. Rep. 423, 115 Ind. 399; Kerkhof v. Atlas Paper Co. 68 Wis. 674.

A general verdict is not rendered special by merely designating the ground on which it is based. Shifflet v. Morelle, 68 Tex. 382.

The practice of requiring of the jury a general verdict, and also special findings on issues submitted, is not authorized by statute. Dwyer v. Kaiteyer, 68 Tex. 554.

A general verdict will frequently, and perhaps ordinarily, ascertain and fix the rights and obligations of parties; and when this is manifest general verdicts are proper. Johnson v. Higgins, 1 New Eng. Rep. 179, 68 Conn. 238.

A verdict for plaintiff on the general issue, which

Even with legislative authority a party obstructing a stream is liable for injury resulting from want of due care or skill in arranging works so as to avoid danger reasonably to be expected from habits of the stream and its liability to flood.

Bellinger v. New York Cent. R. Co. 23 N. Y. 52.

A party doing damage must justify his acts by showing that he employed a competent engineer.

Rochester White Lead Co. v. Rochester, 8 N. Y. 468.

One who brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under control, although in so doing he may act without personal willfulness or negligence, will be liable for all damages occasioned.

Fletcher v. Rylands, 8 Hurl. & C. 774; *Lapham v. Curtis*, 5 Vt. 371. See *Shrewsbury v. Smith*, 12 Cush. 177.

A person must take every precaution reasonable in the necessary improvement of his own premises in digging excavations to prevent the water breaking out.

could not have been found if a special plea had been sustained, is in effect a verdict also for plaintiff on the special plea. Authorities cited in *Almy v. Daniels*, 4 New Eng. Rep. 917, 15 R. I. 818.

A jury cannot return two special or general verdicts in the same action. *Baughan v. Baughan*, 12 West. Rep. 925, 114 Ind. 73.

Where the jury respond affirmatively or negatively to the issues submitted to them, it is a general verdict, although there be several issues; when they state the facts and leave the court to apply the law arising upon them, it is a special verdict. *Porter v. Western N. C. R. Co.* 97 N. C. 66.

A general verdict must be regarded in the first instance as affirming the truth of each and every proposition of fact necessary to support the general conclusion arrived at; and every reasonable presumption will be indulged in its favor, while nothing will be inferred or presumed in aid of the special findings (as against the general verdict. *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5.

Verdicts are to receive reasonable construction, and are not to be voided unless from necessity. *Cattell v. Dispatch Pub. Co.* 3 West. Rep. 843, 88 Mo. 358.

All reasonable presumptions must be indulged in favor of the general verdict, while nothing will be presumed in aid of the special findings of facts. *McComas v. Haas*, 5 West. Rep. 689, 107 Ind. 512; *Redelsheimer v. Miller*, 5 West. Rep. 619, 107 Ind. 485; *Baltimore, O. & C. R. Co. v. Rowan*, 1 West. Rep. 914, 104 Ind. 88.

A general verdict finding two thirds of certain property to be separate property of a wife, and one third subject to execution as community; and a special finding that the property was a homestead,—are contrary and unintelligible, and cannot support a judgment upon the special verdict. *Blum v. Rogers*, 71 Tex. 668.

Special verdict, when to control.

Where a special finding of facts is inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly. Rev. Stat. § 547; *Perry v. Makenson*, 1 West. Rep. 271, 108 Ind. 800; *Baltimore, O. & C. R. Co. v. Rowan*, 1 West. Rep. 914, 104 Ind. 88; *Frank v. Grimes*, 2 West. Rep. 643, 105 Ind. 846; *Turner v. 6 L. R. A.*

Bellinger v. New York Cent. R. Co. supra; *Rau v. Minnesota Valley R. Co.* 18 Minn. 442; *Pye v. Mankato*, 86 Minn. 373. See also *Hogenson v. St. Paul, M. & M. R. Co.* 81 Minn. 224.

Messrs. M. D. Grover and W. E. Dodge for respondent.

Gillilan, Ch. J., delivered the opinion of the court:

From the course of the trial in this case, as shown by the settled statement of the case, it is apparent that the parties did not, by consent, enter upon the trial of any other than the issues made by the pleadings. This makes it necessary to refer to the complaint to ascertain what issues it presents, that is, what act of the defendant it alleges as wrongful. It alleges that the defendant wrongfully, unlawfully, wantonly, negligently and maliciously cut, dug and made, and caused to be dug, cut and made, two certain large ditches about six miles in length, one on each side of its roadbed, parallel with and about ten feet from it, and connected them by means of five large culverts, the locations of which are given, the ditches running through large quantities of low and wet land, and which ditches did and do gather

Kansas City, St. J. & C. R. R. Co. 5 West. Rep. 109, 23 Mo. App. 12.

If a special finding can, upon any hypothesis, be reconciled with the general verdict, the former will not control the latter. It is only when the facts specially found, construed together, are, in their legal effect, inconsistent with the general verdict, that they will control. Rev. Stat. 1881. § 547; *Redelsheimer v. Miller*, 5 West. Rep. 619, 107 Ind. 485; *McComas v. Haas*, 5 West. Rep. 689, 107 Ind. 512.

Special findings, when manifestly inconsistent with each other, will not control the general verdict; but the latter must stand and a judgment be rendered thereon. *Rice v. Manford*, 9 West. Rep. 84, 110 Ind. 596; *Greenfield v. State*, 12 West. Rep. 713, 113 Ind. 697.

Where the answers to special questions are so insufficient and evasive that it cannot be determined whether they accord or conflict with the general verdict, they ought not to be allowed to stand. *Flak v. Chicago, M. & St. P. R. Co.* 74 Iowa. 424.

It is only where there is a direct conflict between the general verdict and the answers to interrogatories, and where the facts found by these answers entitle a party to a judgment, that a motion for judgment on them, notwithstanding the general verdict, will be sustained. *Louisville & N. R. Co. v. Crunk*, 119 Ind. 542; *McKinley v. Crawfordville First Nat. Bank*, 118 Ind. 375; *Chicago & E. I. R. Co. v. Hedges*, 118 Ind. 5.

Where facts specially found by the jury are so inconsistent with the general verdict that they cannot be reconciled therewith on any reasonable hypothesis, the facts so found will control the general verdict. *Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234.

In an action to enforce a debt revived by a new promise, a general verdict will be overruled by a special finding of the new promise. *Meech v. Lammon*, 1 West. Rep. 587, 108 Ind. 515.

If there is any reasonable hypothesis whereby a general verdict and the special finding can be reconciled, judgment must follow the general verdict. *Grand Rapids & I. R. Co. v. Ellison*, 117 Ind. 234; *Stringer v. Frost*, 2 L. R. A. 614, 116 Ind. 477; *New York, C. & St. L. R. Co. v. Grand Rapids & I. R. Co.* 15 West. Rep. 543, 116 Ind. 60; *Indianapolis & V. R. Co. v. Lewis*, 119 Ind. 218; *Bevins v. Smith* (Kan.) 21 Pac. Rep. 1064.

and accumulate large quantities of water by draining said low and wet lands, and did and do at certain seasons of the year convey large and enormous quantities of surface water from said culverts and from said two ditches, which water, by reason of and on account of said ditches and culverts, was unnecessarily made and forced to run in large and destructive currents through the ditches and culverts over large quantities of land, including that of plaintiff, whereby plaintiff's land was overflowed and covered with water, damaging his crops. It is not alleged that there was anything wrongful in the mode of constructing the ditches or culverts; that the former were (if properly there) either too large or too small, or were unskillfully or badly constructed; or that the latter were badly constructed, or were insufficient in capacity or number, or improperly located; or that either ditches or culverts as constructed were unnecessary to the proper construction of the railroad. The complaint really calls in question only the right of the defendant to have the ditches and culverts there, even though necessary to the railroad, if their effect would be to accumulate surface water, and cause it to flow on plaintiff's land, where it would not otherwise flow. The jury rendered a general verdict in favor of the plaintiff, and also returned answers to sixteen specific questions of fact, which the court submitted to them to find upon. The plaintiff moved to set aside one of the special findings on the ground that it was contrary to the evidence, which motion was denied; and the defendant moved to set aside the general verdict, because inconsistent with the special findings, and for judgment on the special findings, which motion was granted, and judgment was accordingly entered, and the plaintiff appealed.

Where there is a general verdict, and also special findings, we do not think it proper practice to move to set aside one of the special findings upon an essential fact on the ground that it is contrary to evidence, without asking to have a new trial, either of the whole issue or of the particular question of fact. If such a finding could be set aside on that ground, leaving the general verdict and other special findings to stand, then, if setting it aside would require a judgment different from what would be required if it were retained, the setting it aside on the ground stated would have the effect of a trial by the court without the jury. In this instance, however, within the issues, whether the special finding was set aside or retained would make no difference with the right to judgment. It was only to the effect that the rainfall on the occasion referred to in the complaint was extraordinary and unusual. Whether it was ordinary or extraordinary would make no difference with defendant's liability upon the issues presented by the complaint.

It is conceded that the defendant had a right to construct and maintain its railroad, and that its acts were done upon its right of way, rightfully acquired. It is to be regarded, therefore, as an owner doing the acts complained of on its own premises; and its duty and liability are to be measured by the rule as to the duty and liability in respect to surface waters that attaches in the case of an owner in the use of his own land. The district through

which, so far as involved in this case, the defendant's road runs, is prairie country, with depressions in the surface, such as are found in every prairie district in this State, along which surface waters, especially when subsiding, flow until they find an outlet, or until they are absorbed in the soil, or pass off by evaporation.

Two of the questions submitted to the jury were as follows: "(1) Were the excavations by the railroad made by excavating the earth therefrom for the purpose of constructing the defendant's railroad, and not for the purpose of drainage? (2) [Was the defendant's railroad properly constructed, and in the usual and ordinary manner of constructing railroads in prairie countries], and with culverts so placed as to equalize the ordinary flow of surface water?" The first question, and that part of the second which we have placed in brackets, were answered in the affirmative; that part of the second not in brackets in the negative. As we have seen, no question is presented by the complaint as to the proper location of the culverts. The finding as to them is therefore outside of the issues, and must be disregarded. And it is the same as to the last question submitted, referring to the sufficiency of the ditches to carry off ordinary surface water. No other of the special findings modifies in any degree the finding on the two questions we have quoted.

The case is therefore one where a railroad company, for the purpose of properly constructing its roadbed, takes earth from one part of its premises and uses it upon the roadbed, thus leaving an excavation or ditch along each side of it, which is the usual and ordinary way of constructing railroads in prairie countries. It is evident that in a flat country, if it be desirable to raise the roadbed above the natural surface of the ground, the earth must be taken, as was done in this case, from alongside of the roadbed, and that so taking it will necessarily leave an excavation or ditch from which the earth has been taken.

The right of one land owner to use and improve his own land for the purpose for which similar land is ordinarily used, and that he may do what is necessary for that purpose and that he may build upon it, or raise or lower its surface, even though the effect may be to prevent surface water which before flowed upon it from coming upon it, or to draw from adjoining land surface water which would otherwise remain there, or to shed surface water over land on which it would not otherwise go, is in accordance with the common-law rule as to surface waters, and is fully recognized in this State. *Lee v. Minneapolis*, 22 Minn. 13; *O'Brien v. St. Paul*, 25 Minn. 331; *Henderson v. Minneapolis*, 32 Minn. 319; *Rowe v. St. Paul, M. & M. R. Co.* 43 N. W. Rep. 76.

The right to so use and improve one's own land does not, however, include the right to do so merely by transferring from it surface waters naturally resting upon it to the land of another. It is only where such shifting of the burden follows as an incident to using or improving his land as such land is ordinarily used or improved, that it can be justified. *Kobe v. Minneapolis*, 22 Minn. 159; *O'Brien v. St. Paul, supra*; *Hogenson v. St. Paul, M. & M. R. Co.*

31 Minn. 224; *Blakely Trop. v. Devins*, 86 Minn. 53; *Pye v. Munkato*, 86 Minn. 373; *Olsen v. St. Paul, M. & M. R. Co.* 88 Minn. 419.

This case comes within the rule of the cases first above cited.
Judgment affirmed.

INDIANA SUPREME COURT.

Edward HANCOCK *et al.*, *Appts.*,
v.

William P. YADEN

(....Ind....)

1. A contract by an employe to accept something other than money in payment for his services is valid in the absence of any statutory provisions to the contrary.
2. A statute prohibiting employes from making any contract in advance to accept anything else than lawful money of the United States is not unconstitutional.
3. No special privileges are conferred, nor any unjust discrimination made, by a statute requiring all persons, firms, corporations, etc., engaged in mining or manufacturing, to pay their employes at least once every two weeks, and prohibiting all contracts by such employes to accept anything but lawful money of the United States in payment. The Statute operates alike upon all who enter the classes named, and leaves all citizens free to enter them.

(January 7, 1890.)

APPEAL from a judgment of the Sullivan Circuit Court in favor of the plaintiff in an action to recover wages, including a statutory penalty for delay in payment and attorney's fees for prosecuting the action. *Affirmed.*

The services were performed under a contract by which plaintiff agreed to receive his pay monthly, and to accept it or any part thereof at the option of his employers in goods and merchandise, and expressly waived all rights that he might have under the statutes of the State to payment at any other time or in any other manner.

The Statutes of February 14, 1887, and March 6, 1889, declare that employes of persons, firms, companies, associations or corporations engaged in mining or manufacturing shall be paid at least once in every two weeks in lawful money of the United States, and that any contract to the contrary or to waive the provisions of the Statute shall be null and void. It is also provided by the Act of 1887 that a penalty of \$1 per day, not exceeding double the amount of wages due, may be recovered by the employe for delay in payment, and also a reasonable attorney's fee.

Judgment was rendered for plaintiff for \$48 due for work and labor, with \$10 for penalty and \$20 attorney's fees, making a total of \$78.

Messrs. Beasley & Williams and George A. Knight, for appellants:

Questions of power do not depend upon the degree to which it may be exercised.

Brown v. State, 25 U. S. 12 Wheat. 419 (6 L. ed. 678).

The rights of personal liberty and private property should be held sacred.

Cooley, Const. Lim. 5th ed. pp. 199, *foot-note 1*, p. 486; *Goshen v. Stonington*, 4 Conn. 209.

NOTE.—See *State v. Fire Creek Coal & Coke Co.* ante, p. 359; *State v. Goodwill*, post, 621.

6 L. R. A.

Privileges and immunities include the right by the usual modes to acquire and hold property and to protect and defend the same in law. *Cooley*, Const. Lim. pp. 491, 492.

Depriving an owner of property of one of its attributes is depriving him of his property within the constitutional provision.

People v. Otis, 90 N. Y. 48; *Wynehamer v. People*, 18 N. Y. 378, 398; *Re Jacobs*, 98 N. Y. 98.

Liberty means the right, not only of freedom from actual servitude in all lawful ways, but to live and work where one will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or vocation.

Butcher's Union Co. v. Crescent City Co. 111 U. S. 746 (28 L. ed. 585); *Bertholf v. O'Reilly*, 74 N. Y. 509, 80 Am. Rep. 338; *People v. Marx*, 99 N. Y. 377, 52 Am. Rep. 84.

To place the working classes under special protection against the aggression of capital, beyond the careful and strict enforcement of their rights, is to change the government from a government of freedom to a paternal government, or a despotism, which is the same thing.

Tiedeman, Pol. Powers, 571, §§ 93, 96.

The laborer may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron or coal, and every and any law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void.

Godcharles v. Wigeman, 4 Cent. Rep. 887, 118 Pa. 431.

A statute which provides that all contracts for the mining of coal, in which the weighing of coal, as provided for in that Act, shall be dispensed with, shall be void, is unconstitutional.

Millett v. People, 5 West. Rep. 155, 117 Ill. 294, 57 Am. Rep. 869.

Statutes passed against plain and obvious principles of common right and common reason are absolutely null and void, so far as they are calculated to operate against those principles.

Ham v. McClaugh, 1 Bay, 98. See also what is said by Story, J., in *Terrett v. Taylor*, 13 U. S. 9 Cranch, 43 (3 L. ed. 650); *Wilkinson v. Leland*, 27 U. S. 2 Pet. 637 (7 L. ed. 542).

Messrs. W. S. Maple and Holliday & Byrd for appellee.

Elliott J., delivered the opinion of the court:

It is alleged in the complaint that the appellee was employed by the appellants to render service for them as a miner in a coal mine of which they were the owners; that, under this employment, he did render service for them in mining coal; that his services were reasonably worth \$5 per day; that he demanded payment for his services in lawful money of the United States, and that payment was refused.

The appellants answered the complaint in two paragraphs, but, as the only difference between the paragraphs is that one pleads a verbal contract and the other a written one, it is only necessary to give a summary of one, as the questions which arise are substantially the same as to both of the paragraphs. The answer admits the employment, and admits, also, the allegation that the appellee rendered the services for which he sues, but it sets forth a written contract, alleges that the services were performed under the contract, and avers that the appellants sold and delivered to the plaintiff in payment of his claim, and to the full amount of the wages claimed by him, divers articles of goods, wares and merchandise. The provisions of the contract, in so far as they are material to the questions argued, are these: "The said William P. Yaden further agrees to accept his pay, or any part thereof, at the option of said Hancock and Conkle, in goods and merchandise at their store, near their said coal mine, and the said William P. Yaden hereby expressly waives his right to demand and receive his wages and pay for mining coal every two weeks in lawful money of the United States as now provided by law he shall be paid."

The court sustained a demurrer to the answer; the appellants stood by their answer and judgment was entered against them.

To clear the case from embarrassments and make the way plain to a consideration of the controlling question, we preface our discussion by remarking that the answer is not a plea of accord and satisfaction, nor a plea of set-off, but a plea of payment; and the ultimate conclusion to be reached depends upon the answer to the question whether it is sufficient as such a plea. That it is not a plea of accord and satisfaction is clear, but if it were to be so regarded, it would be bad because it does not aver a delivery and an acceptance of the goods in satisfaction of the debt.

Another prefatory matter deserves passing thought, and that is this: the plea is a plea of payment, founded on a contract made before the performance of the services and professing to bar the action. If, therefore, the plea does not state facts in bar of the action, it is bad. Whether it does state facts in bar of the action depends upon the validity of the antecedent contract, which is the principal support of the plea; and as that contract is indivisible, if part is illegal, the whole must fall. The sufficiency of the answer must, it is clear, depend entirely upon the validity of the contract on which it is founded, since, if that contract is invalid, there is no agreement to accept payment in goods or merchandise; and where there is no such agreement payment cannot be made in property.

Another thing may be added by way of preface, and that is this: We are not here concerned with the question of what parties may do after services have been performed, for here the question is, What contract may they make before the relation of employer and employé begins?

It is sufficiently evident from what we have said that the only question which we can properly consider or decide is whether the antecedent contract was valid in so far as it as-

sumes to waive the right of the appellee to be paid his wages in lawful money of the United States, and to this question we confine our discussion and give judgment upon it and no other. Our judgment is that the antecedent contract is entirely void in so far as it assumes to waive the appellee's right to receive his wages in money. If there were no valid statute prohibiting such a contract, it would be competent for the parties to make it, so that the ultimate judgment of the court hinges upon the question whether there is a valid statute prohibiting such contracts. There is a statute which, in terms, prohibits such contracts, and if it does not violate some provision of the Constitution it totally destroys the contract upon which the defense is founded. *Elliott's Supp.* §§ 1599-1610.

Our judgment is that the provisions of the Statute forbidding the execution of contracts waiving a right to payment in money is one that the Legislature had power to enact.

It is a fundamental principle that every member of society surrenders something of his absolute and natural rights in all organized states. Without some yielding of absolute rights civil government would be impossible. "But every man," says Blackstone, "when he enters into society, gives up a part of his natural liberty." "Property and law," as Bentham says, "are born and must die together." The right to dispose of property or labor is a right not wholly surrendered by the citizen, nor yet entirely beyond control by the Legislature of the State. The right to contract is an incident of this *jus disponendi*. But the right to contract is not and never has been in any country, where, as in ours, the common law prevails and constitutes the source of all civil law, entirely beyond legislative control. The Statute of Frauds enables contracting parties to avoid contracts not in writing. The law declares that payment in part of an ascertained debt shall not extinguish it although the parties agree that it shall do so. *Ogboro v. Hoffman*, 52 Ind. 439; *Smith v. Tyler*, 51 Ind. 512; *Markel v. Spiller*, 28 Ind. 488.

A party will not be allowed to contract to waive the benefit of Homestead or Exemption Laws. *Maloney v. Newton*, 85 Ind. 565; *Kneetle v. Newcomb*, 22 N. Y. 249; *Curtis v. O'Brien*, 20 Iowa 876; *Moxley v. Ragan*, 10 Bush, 156, 19 Am. Rep. 61.

A debtor cannot waive stay of execution by contract. *McLane v. Elmer*, 4 Ind. 289; *Develin v. Wood*, 2 Ind. 102.

By the English law, a seaman cannot by contract waive his right to wages. *Kay, Shipmaster and Seaman*, 626.

Parties cannot by contract bind themselves in advance not to resort to the courts for the redress of wrongs. *Bauer v. Samson Lodge*, 102 Ind. 262; *Dugan v. Thomas*, 4 New Eng. Rep. 281, 79 Me. 221.

A contract providing that a party shall not remove a cause to the federal court is void. *Horne Ins. Co. v. Morse*, 87 U. S. 20 Wall. 455 [22 L. ed. 869]; *Doyle v. Continental Ins. Co.* 94 U. S. 535 [24 L. ed. 148].

A party will not be allowed to contract without limitation that he will not engage in a particular business. *Taylor v. Saurman*, 110 Pa. 8.

A statute may require parties to insert in a promissory note the words "given for a patent." *Herdic v. Roessler*, 12 Cent. Rep. 68, 109 N. Y. 127; *New v. Walker*, 6 West. Rep. 869, 108 Ind. 865.

Priority in the allowance and payment of claims may be regulated by legislation. *United States v. Fisher*, 6 U. S. 2 Cranch, 358 (2 L. ed. 804).

A lien for miners' wages may be made superior to the royalty due to the owners of the mine from the lessees or operators. *Warren v. Sohn*, 11 West. Rep. 861, 112 Ind. 218.

Much beyond the doctrine declared in the cases to which we have referred is the ruling in *Churchman v. Martin*, 54 Ind. 880, wherein it was held that a statute prohibiting parties from contracting to pay attorney's fees is constitutional. The truth is that without law as one of its factors, there is really no such thing as a contract. The law is a silent but a ruling factor in every contract. *Long v. Straus*, 4 West. Rep. 235, 107 Ind. 94; *Delaware & Hudson Canal Co. v. Pennsylvania Coal Co.* 75 U. S. 8 Wall. 276-288 [19 L. ed. 849].

The case before us affords an example; for, where a man upon request performs services for another, the law implies that he shall be paid for them, and paid in money. It needs no positive agreement to pay in money to entitle a creditor to demand money, for the law decrees that the payment shall be in money. The statutory provision under discussion does no more than enforce this legal right by commanding that men shall not make a contract dispensing with the lawful mode and medium of payment.

The authorities to which we have referred, and to which it would be no great task to add others, prove that the law-making power of the State does have authority over the right to contract. That this legislative authority is limited no one doubts, but it is limited only by the Constitution. In that instrument are found the only limitations upon the law-making power of the State. *Hedderich v. State*, 101 Ind. 564; *McComas v. Krug*, 81 Ind. 827; *Beauchamp v. State*, 6 Blackf. 299.

But no limitation in that instrument so operates as to prevent the law-making power from prohibiting classes of citizens from contracting in advance that the wages of miners shall not be paid in lawful money of the United States. It would be not only unnecessary, but improper, to enter upon the work of ascertaining to what extent the Constitution restrains the Legislature from regulating or restricting the right to contract; for, all that can with propriety be here decided is, that it does not restrain the Legislature from enacting laws which operate to maintain or protect the medium of payment established by the sovereign power of the nation.

It cannot be denied, without repudiating all authority, that the Legislature does possess some power over the right to contract, and if it does, then nothing can be clearer than that this power extends far enough to uphold a statute providing that payment of wages shall be made in money where there is no agreement to the contrary, made after the services have been rendered. Whether the Legislature may absolutely declare that nothing shall be paid but money, we need not inquire, for all 6 L. R. A.

that is important here is to decide that it may prohibit a contract from being made in advance waiving the right to payment in what the law says shall be the medium of payment.

We cannot conceive a case in which the assertion of the legislative power to regulate contracts has a sounder foundation than it has in this instance, for here the regulation consists in prohibiting men from contracting in advance to accept payment in something other than the lawful money of the country for the wages they may earn in the future. It is of the deepest and gravest importance to the government that it should unyieldingly maintain the right to protect the money which it makes the standard of value throughout the country. The surrender of this right might put in peril the existence of the nation itself. Suppose that in the years of the war, when gold was worth such an extraordinary premium, the owners of supplies required by the government had, by concerted action, refused to accept anything in payment but coin, would the nation have been powerless to protect what it has decreed should be money? Or, again, suppose that the persons holding the needed supplies had refused to take anything but property in exchange, and that it was impossible to procure the species of property demanded, would the government have been helplessly at their mercy? The protection from such evils is in the right to establish and maintain by coercive measures, if need be, what by the law is made money of the nation.

We do not use these illustrations for more than their worth. We employ them simply to show the imperious necessity that exists for the retention, in its unbroken entirety, of the power to establish and maintain a standard of value. What is necessary to national or state life the government possesses, and it is for the Legislature to judge what measures are essential to the complete and effective exercise of a power which it possesses.

It is not simply the government, as a government, that is interested in the power to establish and maintain a standard of value; for to every citizen engaged in any business of life it is of vital importance that there should be a fixed and unchanging standard. Without it business, except of the most meager kind, would be at an end, and commerce would be practically annihilated.

The decisions of the highest tribunals of the country go very far to sustain our conclusions. It is the law, as that court has declared it in able opinions, that the government has a right to provide a currency for the whole country and to drive out all other circulating mediums, by taxation or otherwise. *Veazie Bank v. Fenno*, 75 U. S. 8 Wall. 538 [19 L. ed. 489].

This was asserted by Chief Justice Chase speaking for the majority of the court, although he, and the majority of the court, as it was then constituted, did not go so far upon other phases of the case as the court did go in the subsequent case which now stands as declarative of the law of the land. *Legal Tender Cases*, 79 U. S. 12 Wall. 457 [20 L. ed. 287].

In *Hepburn v. Griswold*, 75 U. S. 8 Wall. 603 [19 L. ed. 518], a different view was taken upon some phases of the general question from that declared in the *Legal Tender Cases*, *supra*.

but not upon the proposition we have stated. The power to establish necessarily implies the power to maintain. *United States v. Fisher*, 6 U. S. 2 Cranch, 358 [3 L. ed. 304]; *McOullock v. Maryland*, 17 U. S. 4 Wheat. 316 [4 L. ed. 579]; *United States v. Marigold*, 50 U. S. 9 How. 560 [13 L. ed. 357].

It is for the Legislature to judge what means are necessary and appropriate to accomplish an end which the Constitution makes legitimate. It is therefore competent for the legislative branch of the government to devise and establish such rules as in its judgment will best protect the standard of value which its laws have fixed. The rule to which we have referred is a familiar one, but it has been so admirably stated by *Mr. Justice Bradley* that we may be pardoned for quoting his language. Replying to an objection pressed by counsel, he said: "The answer is, the legislative department, being the nation itself, speaking by its representatives, has a choice of methods and is master of its own discretion." *Legal Tender Cases*, *supra*, *vide*, p. 561.

The power exercised by the legislative department in fixing the standard of value closely resembles that by which the standard of weights and measures is established and maintained. In truth, there is no difference in the inherent nature of the powers; the difference is in the subject matter to which they are applied rather than in the powers themselves. The power of the State extends so far as to enable it to declare and enforce penalties against persons who violate the law regulating the standard of weights and measures or the standard of values. It is upon the theory that matters connected with the regulation of the standard of values are within the legislative power that statutes defining and punishing usury are sustained. It is true, we know, that the Federal Congress is the proper authority to regulate the standard of values, but it does not follow from this that a State may not do what it can to prevent the debasement of the standard fixed by Congress. It can, of course, neither lower that standard nor pass laws hostile to those enacted by Congress; but it may support the efforts of the National Legislature, as far, at least, as it is within the power of a State to do so.

The principle which rules this phase of the subject is closely analogous to that established by the decisions assuming the right of the State to proscribe as a felon one who counterfeits the national money. *Dashing v. State*, 78 Ind. 358; *Snoddy v. Howard*, 51 Ind. 411; *Chess v. State*, 1 Blackf. 198; *Fox v. Ohio*, 4 U. S. 5 How. 410 [12 L. ed. 218]; *United States v. Field*, 16 Fed. Rep. 778.

The provision of the Statute to which our decision is directed operates upon all members of the classes it enumerates. It neither confers special privileges nor makes unjust discriminations. All who are members of the classes named are entitled to its benefits or subjected to its burdens. It is open to every citizen to become a member of any of the classes designated and the privileges conferred belong on equal terms to all. *Johns v. State*, 78 Ind. 332; *McAuldch v. Mississippi & Mo. R. Co.* 20 Iowa, 838.

It denies no privileges to anyone, for it leaves it free to every citizen to become a member of 6 L. R. A.

the classes specified, and it operates alike upon all who enter those classes.

The Statute operates upon both the employer and the employé. It may, it is true, in its practical operation, especially benefit the wage-earner, but that is no fault; at all events, the fault is not such a generic one as to compel the courts to strike it down. It fixes no price upon any man's labor; it leaves the parties to do that, but it does require them to refrain from contracting before the relation of employer and employé begins for payment in anything except the lawful money of the United States. It does not preclude parties from making an accord and satisfaction after wages have been earned and services rendered, although it does command that the antecedent contract shall not provide that payment may be made in something other than lawful money of the nation.

Judgment affirmed.

STATE OF INDIANA, *ex rel.* Cornelius
CORWIN, *Appt.*,

INDIANA & OHIO OIL, GAS & MIN-
ING CO.

(....Ind....)

1. Natural gas, when brought to the surface and placed in pipes for transportation, is an article of commerce.

NOTE.—Power of Congress to regulate commerce.

By the Constitution of the United States it is provided that Congress shall have power to regulate commerce with foreign nations and among the several States. U. S. Const. art. 1, § 8, subd. 3; *Ward v. Maryland*, 79 U. S. 12 Wall. 418 (20 L. ed. 449); *Welton v. Missouri*, 91 U. S. 275 (23 L. ed. 847); *Henderson v. New York City*, 92 U. S. 269 (23 L. ed. 543); *Hannibal & St. J. R. Co. v. Huseen*, 95 U. S. 473 (24 L. ed. 531); *State v. Carrigan*, 99 N. J. L. 87; *State Freight Tax Case*, 92 U. S. 15 Wall. 212, 275 (21 L. ed. 146, 161); *Passenger Cases*, 48 U. S. 7 How. 233 (12 L. ed. 702); *Pennsylvania v. Wheeling & E. Bridge Co.* 59 U. S. 18 How. 421 (15 L. ed. 425); *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 (6 L. ed. 673); *Almy v. California*, 65 U. S. 24 How. 169 (18 L. ed. 644).

That portion of commerce with foreign countries and between the States which consists in the transportation and exchange of commodities is of national importance, and admits and requires uniformity of regulation. The very object of investing this power in the general government was to insure this uniformity against discriminating state legislation. *Welton v. Missouri*, *supra*.

For the regulation of commerce as thus defined there can be only one system of rules, applicable alike to the whole country; and the authority which can act for the whole country can alone adopt such a system. *Mobile Co. v. Kimball*, 103 U. S. 691 (26 L. ed. 238); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 574 (30 L. ed. 250).

Interstate commerce must be open and free to all persons unless restricted by congressional legislation. *Webber v. Virginia*, 103 U. S. 344 (26 L. ed. 535); *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 543); *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59 (27 L. ed. 383); *Smith v. Alabama*, 124 U. S. 469 (31 L. ed. 509).

The power of Congress to regulate interstate

2. A State Legislature has no power to prohibit the conducting of natural gas from points within to points without the State.

(November 6, 1889.)

A PPEAL by relator from a judgment of the Circuit Court for Jay County in favor of defendant in an action to have its franchises forfeited for violating the law in piping natural gas out of the State. *Affirmed.*

The case sufficiently appears in the opinion.

Messrs. C. Corwin, John M. Smith and L. T. Michener, Atty-Gen., for appellant:

Whenever the State observes that an act about to be done, or which, if done, would materially affect, injure or deprive the citizens or inhabitants of the State of the full enjoyment of their property, it has the right through its Legislature and law-making power, as a police regulation, to prohibit the act about to be done, and if done, to prescribe the penalties for so doing, in the way of fines if natural persons, and forfeitures if corporations.

Fry v. State, 68 Ind. 552; *Patterson v. Kentucky*, 97 U. S. 501 (24 L. ed. 1115).

Natural gas being a matter of internal commerce, not subject to general use between States; the law in question only seeks to regulate and control the piping of a domestic article out of the State; and under the decision of

Patterson v. Kentucky, *supra*, the State of Indiana has the inherent right to prohibit the act of piping gas out of the State.

See 9 Chicago L. J. Nos. 11 and 12, December, 1888; *Kidd v. Pearson*, 128 U. S. 1 (32 L. ed. 845).

It was the act of one of the citizens of the State which was prohibited—not the sale of the article out of the State.

See *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *Kidd v. Pearson*, *supra*.

Messrs. John B. Cohrs and R. C. Bell, for appellee:

Natural gas is a subject over which Congress has, by express provision of the Constitution, exclusive control, and concerning which the States have no power to legislate. In the absence of any such regulation by Congress such transportation must be without restriction.

Philadelphia & S. Steamship Co. v. Pennsylvania, 122 U. S. 836 (30 L. ed. 1201). See also *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 493 (30 L. ed. 696); *Mobile Co. v. Kimball*, 102 U. S. 697 (26 L. ed. 239).

The only way in which commerce between the States can be legitimately affected by state laws is when, by virtue of its police power, and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health and comfort of persons, and the protection of property.

commerce is exclusive when its subjects are national in character, or admit of only one uniform system or plan of regulation. *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 493 (30 L. ed. 694); *Philadelphia & S. Mail Steamship Co. v. Pennsylvania*, 122 U. S. 836 (30 L. ed. 1200); *Kaiser v. Illinois Cent. R. Co.* 18 Fed. Rep. 151.

Its power is not restricted by state authority. *Pembina Consolidated Silver Min. & Milling Co. v. Pennsylvania*, 126 U. S. 181 (31 L. ed. 650).

Its power to regulate adapts itself to the new developments of time and circumstances. *Pensacola Tele. Co. v. Western U. Tele. Co.* 96 U. S. 1 (24 L. ed. 708); 1 Desty, Taxn. 214.

And it comprehends all those general laws of internal regulation and protection of all property in the State, its power in these respects being supreme. *Ex parte Shrader*, 38 Cal. 279; *Philadelphia, W. & B. R. Co. v. Bowers*, 4 Houst. 506; *Boston Beer Co. v. Massachusetts*, 97 U. S. 26 (24 L. ed. 969); *Munn v. Illinois*, 94 U. S. 147 (24 L. ed. 91); *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37; *Davis v. Central R. & Bkg. Co.* 17 Ga. 823; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Daniels v. Hilgard*, 77 Ill. 640; *Boyd v. Alabama*, 94 U. S. 645 (24 L. ed. 302); *Slaughter-House Cases*, 83 U. S. 16 Wall. 62 (21 L. ed. 404); *Bartemeyer v. Iowa*, 85 U. S. 13 Wall. 138 (21 L. ed. 932); 2 Desty, Taxn. 1877.

Power of Congress exclusive.

The fact that Congress has never regulated commerce does not give to the States the power to do so. *Com. v. Philadelphia & R. R. Co.* 1 Pearson (Pa.) 379; Desty, Fed. Const. 232.

The non-exercise of the power in respect to the regulation of commerce between the States is equivalent to a declaration that such commerce shall be free from any restrictions or impositions. *Welton v. Missouri*, 91 U. S. 275 (23 L. ed. 347); *Brown v. Houston*, 114 U. S. 622 (29 L. ed. 257); *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196 (29 L. ed. 158); *Pickard v. Pullman Southern Car Co.* 117 U. S. 34 (29 L. ed. 735); *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 567 (30 L. ed. 244); *Walling v. Mich-* 6 L. R. A.

igan, 116 U. S. 446 (29 L. ed. 691); *Corson v. Maryland*, 120 U. S. 502 (30 L. ed. 699); *Hall v. DeCuir*, 95 U. S. 485 (24 L. ed. 547); *Hannibal & St. J. R. Co. v. Huse*, 95 U. S. 435 (24 L. ed. 527); *Smith v. Alabama*, 124 U. S. 469 (31 L. ed. 509).

Any regulation of the subject by the States, except in matters of local concern only, is repugnant to such freedom. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1, 232 (6 L. ed. 23, 76); *Passenger Cases*, 48 U. S. 7 How. 283, 462 (12 L. ed. 702, 777); *Hannibal & St. J. R. Co. v. Huse*, 95 U. S. 435, 459 (24 L. ed. 527, 529); *Welton v. Missouri*, 91 U. S. 275, 282 (23 L. ed. 347, 350); *Mobile Co. v. Kimball*, 102 U. S. 691 (26 L. ed. 238); *Brown v. Houston*, 114 U. S. 622, 631 (29 L. ed. 257, 260); *Walling v. Michigan*, 116 U. S. 446, 455 (29 L. ed. 691, 694); *Pickard v. Pullman Southern Car Co. supra*; *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557 (30 L. ed. 244); *Robbins v. Shelby Co. Taxing Dist.* 120 U. S. 493 (30 L. ed. 696); *Com. v. Philadelphia & R. R. Co. supra*; Desty, Fed. Const. 235.

Any legislation of a State, although in pursuance of an acknowledged power reserved to it, which conflicts with the actual exercise of the power of Congress over the subject of commerce, must give way before the supremacy of the national authority. *Smith v. Alabama*, 124 U. S. 465 (31 L. ed. 508).

Where a state statute invades the domain of legislation belonging exclusively to Congress it is void. *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 543). See *Sinnot v. Davenport*, 63 U. S. 22 How. 227 (16 L. ed. 243); *Blanchard v. The Martha Washington*, 1 Cliff. 473; *Re Ah Fong*, 8 Sawy. 145.

So state statutes imposing obstacles or burdens on interstate commerce are in conflict with the Constitution of the United States, and are void. *Hall v. De Cuir*, 95 U. S. 483 (24 L. ed. 545); *Welton v. Missouri*, 91 U. S. 233 (23 L. ed. 350); *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.* 45 Iowa, 338.

Commerce includes transportation and intercourse.

The term "commerce" includes everything relating to the subject of intercommunication. *Gibbons v. Ogden*, 22 U. S. 9 Wheat. 1 (6 L. ed. 23); *Lin Sing v. Washburn*, 20 Cal. 534.

Robbins v. Shelby Co. Taxing Dist. supra.

The police power is generally said to extend to making regulations promotive of domestic order, morals, health and safety.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470, 471 (24 L. ed. 530); *Thorpe v. Rutland & B. R. Co.* 27 Vt. 149; *Salzenstein v. Mavis*, 91 Ill. 391.

Transportation is essential to commerce, or rather it is commerce itself, and every obstacle to it, or burden laid upon it by legislative authority, is regulation. Even this is forbidden. Much less is entire prohibition of transportation allowed.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 470 (24 L. ed. 529); *Case of the State Freight Tax*, 82 U. S. 15 Wall. 232 (21 L. ed. 146); *Ward v. Maryland*, 79 U. S. 12 Wall. 418 (20 L. ed. 449); *Welton v. Missouri*, 91 U. S. 275 (23 L. ed. 347); *Henderson v. New York City*, 92 U. S. 259 (23 L. ed. 548); *Ohj Lung v. Freeman*, 92 U. S. 275 (23 L. ed. 550); *State v. Saunders*, 19 Kan. 127; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 332.

Natural gas is property. Artificial illuminating gas is personal property and the subject of larceny.

Com. v. Shaw, 4 Allen, 308.

Natural gas is freight, and a company mining and piping it is in the same position as a company manufacturing and tubing illuminating gas.

Carothers v. Philadelphia Co. 11 Cent. Rep. 48, 118 Pa. 468.

Whenever a commodity has begun to move as an article of trade from one State to another, commerce in that commodity between the States has begun.

The Daniel Ball, 77 U. S. 10 Wall. 557 (19 L. ed. 999); *Kidd v. Pearson*, 128 U. S. 1-25 (33 L. ed. 346-352).

The transportation of property from one State to another is a branch of interstate commerce.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 469 (24 L. ed. 529).

As the police power of the State in its range comes very near the field committed by the Constitution to Congress, it is the duty of the courts to guard vigilantly against any intrusion.

Hannibal & St. J. R. Co. v. Husen, 95 U. S. 474 (24 L. ed. 531).

Elliott, Ch. J., delivered the opinion of the court:

At the last session of the General Assembly several Acts were passed upon the subject of mining, using and disposing of natural gas. The validity of one of these Acts, that of March 9, 1889, is assailed upon the ground that it contravenes the provisions of the Federal Constitution. The first section of the Act, which is here the direct subject of controversy, read thus:

"Section 1. Be it enacted by the General

Commercial intercourse, as interstate communication by telegraph, is a part of commerce. *Western U. Teleg. Co. v. Texas*, 105 U. S. 466 (26 L. ed. 1068).

Commerce refers to transportation and traffic, intercourse and navigation. *Lord v. Goodall Steamship Co.* 102 U. S. 541 (26 L. ed. 224); *Desty, Fed. Const.* 221.

Transportation is an essential element of commerce, including transportation of freight and passengers between the States, or with foreign countries. *Kaiser v. Illinois Cent. R. Co.* 13 Fed. Rep. 151; *Indiana v. Pullman Palace Car Co.* 11 Bias. 561; *Lord v. Goodall Steamship Co. supra*; *New York v. Compagnie Générale Transatlantique*, 107 U. S. 59 (27 L. ed. 383); 20 Blatchf. 296; *Head Money Cases*, 13 Fed. Rep. 136; *Pacific Coast Steamship Co. v. California R. Comrs.* 13 Fed. Rep. 10; *Sweatt v. Boston, H. & B. R. Co.* 3 Cliff. 339; *Clarke v. Philadelphia, W. & B. R. Co.* 4 Houst. 158.

The transportation of property is a constituent part of commerce, and a tax on property in transit from State to State is a regulation of commerce and cannot constitutionally be imposed under state authority. *State v. Carrigan*, 39 N. J. L. 37; *Erik R. Co. v. State*, 31 N. J. L. 531.

Any regulation of transportation, whether on the high seas, lakes, rivers or railroads, or other artificial channel of interstate commerce, operates as a regulation of commerce within the meaning of the Constitution. *Council Bluffs v. Kansas City, St. J. & C. B. R. Co.* 45 Iowa. 288.

A corporation engaged in the removal of petroleum is a transportation company. *Columbia Conduit Co. v. Com.* 90 Pa. 207.

A statute of a State, intended to regulate or to tax, or to impose any other restriction upon the transmission of persons, or property or telegraphic messages from one State to another, is not within that class of legislation which the States may enact in the absence of legislation by Congress; and such statutes are void even as to that part of such transmission which may be within the State. 6 L. R. A.

Wabash, St. L. & P. R. Co. v. Illinois, 118 U. S. 557 (30 L. ed. 244).

Police power of State, regulation of occupation.

The police power of the State is the power to govern men and things within the limits of its dominion. *License Cases*, 46 U. S. 5 How. 325 (12 L. ed. 256).

So occupations requiring special regulations are subject to the police power. *Cincinnati v. Bryson*, 15 Ohio, 625; *Nightingale's Case*, 11 Pick. 163; *White v. Kent*, 11 Ohio St. 560; *Adams v. Somerville*, 3 Head. 363; *State v. Crawford*, Id. 460; *Buffalo v. Webster*, 10 Wend. 99; *Brooklyn v. Breslin*, 37 N. Y. 591; 2 Desty, Taxn. 1378.

Police laws, though they may disturb the enjoyment of individual rights, are not, therefore, unconstitutional. *Hill v. Thompson*, 13 Jones & S. 431.

The appropriate regulation of the use of property is not a "taking" it, within the meaning of the Constitution. *Richmond, F. & P. R. Co. v. Richmond*, 95 U. S. 521 (24 L. ed. 734).

The Legislature may prohibit a dangerous business, as the sale of opium, or may regulate the sale of any commodity, the use of which would be detrimental to the morals of the people. *Kirby v. Pennsylvania R. Co.* 76 Pa. 506; *People v. Hawley*, 3 Mich. 330; *State v. Ah Chew*, 16 Nev. 50; *State v. Gurney*, 37 Me. 153.

It has a right to adopt a general regulation in reference to its affairs which shall include imported goods equally with those of domestic origin; but it cannot obstruct interstate commerce. *Smith v. People*, 1 Park. Cr. Rep. 533; *Hannibal & St. J. R. Co. v. Husen*, 95 U. S. 473 (24 L. ed. 531), disapproving *Yeazel v. Alexander*, 55 Ill. 264.

All regulations of trade with a view to the public interests may more or less impair the value of property, but they do not come within the constitutional inhibition, unless they virtually take away and destroy those rights in which property consists, and the destruction must be, for all substantial purposes, total. *Munn v. People*, 69 Ill. 80.

Assembly of the State of Indiana, that it shall be unlawful for any person or persons, company, corporation or voluntary association to pipe or conduct natural gas from any point within this State to any point or place without this State. Any person or persons, company, corporation or voluntary organization now or hereafter incorporated under any law of this or any other State, for the purpose of drilling and mining for petroleum or natural gas, or otherwise acquiring gas or petroleum wells, and the products thereof, and to furnish the same to its patrons, or to convert such product into gas for illuminating purposes or fuel, which shall have entered upon and acquired by deed of conveyance, or appropriated or condemned, any real estate under any law of this State, for the purpose of laying its pipe lines, or for any other purpose, which shall permit any gas to be conveyed or carried through its pipes to any place without this State, or for the purpose of being used without this State, shall forfeit all right, title and interest in and to all real estate so appropriated, conveyed or condemned, and the pipes laid thereunder, and the same shall revert to and become the property of the persons or corporations, their heirs, successors or assigns, who owned the same at the time of such appropriation, conveyance or condemnation: provided, that the provisions of this Act shall not be so construed as to prevent towns or cities divided by any of the boundary lines of this State, and having a majority of the population of such cities or towns residing within this State, from being supplied with natural gas." Elliott's Supp. § 1875.

On the 21st day of February, 1889, an Act was passed declaring that the word "mining" should be deemed to include the sinking of gas wells, and that the incorporation of companies and that the subscriptions of stock under former laws are legalized. On the same day an Act was passed authorizing gas companies to extend their pipes beyond the corporate limits of towns and cities. On the 20th day of the same month the General Assembly passed an Act authorizing natural gas companies to appropriate and condemn property. Id. §§ 1016, 1809.

All of these Acts were put in immediate effect by the proper emergency clause.

The appellee's counsel contend that the Act of March 9, 1889, is invalid because it is interstate commerce legislation, and such legislation must be exclusively federal. In order to give any force to this contention, it is necessary to determine at the outset whether natural gas can be considered an article of commerce. With this preliminary question we have but little difficulty. Natural gas is as much an article of commerce as iron ore, coal, petroleum or any other of the like products of the earth. It is a commodity which may be transported, and it is an article which may be bought and sold in the markets of the country. *Citizens Gas & Min. Co. v. Elwood*, 114 Ind. 333, 14 West. Rep. 92; *Carothers v. Philadelphia Co.* 118 Pa. 498, 11 Cent. Rep. 48; *Columbia Conduit Co. v. Com.* 90 Pa. 308; *West Virginia Transp. Co. v. Volcanic Oil & Coal Co.* 5 W. Va. 382; *The Daniel Ball*, 77 U. S. 10 Wall. 557 [19 L. ed. 999]; *Kidd v. Pearson*, 128 U. S. 1 [32 L. ed. 346].

The gas in the earth may not be a commer-

cial commodity; but when brought to the surface, and placed in pipes for transportation, it must assume that character as completely as coal in the cars, or petroleum in the tanks. We suppose it clear that Pennsylvania could not prohibit the transportation of coal or petroleum to another State, and there is no difference in principle between cases where coal is the commodity affected and those in which it is natural gas. It is no doubt true that there is a point at which a natural or manufactured product is not an article of commerce; but when it assumes such a form as fits it for transportation from State to State, it is, so far as the law of interstate commerce is concerned, transformed into a commercial commodity. For the purposes of taxation, an article of property may not be regarded as a commercial commodity until it has started on its way from one State to another; but property that may become an article of commerce cannot be kept in the State where it was produced, by a state law forbidding its transportation. *Coe v. Errol*, 116 U. S. 517 [29 L. ed. 715].

If this were not so, then not only might coal or petroleum be kept within the State in which it was produced, but so might corn and wheat, cotton and fruit, and lead and iron. If such laws could be enacted and enforced, a complete annihilation of interstate commerce might result; and it was to prevent the possibility of such a result that the provision vesting exclusive power in the federal government was written in the National Constitution. *State v. Woodruff S. & P. Coach Co.* 114 Ind. 156, 13 West. Rep. 811.

The question as to the extent of the power of the State to control the business of mining is not necessarily involved in this controversy. Granting, but not asserting, that procuring natural gas from the earth is mining, still, the question of the power of the State over that business is not so involved as to require our judgment upon it. The provisions of the Statute are so firmly interlocked that separation is impossible. Where the provisions of a Statute are so clearly blended that a separation cannot be effected without substituting another law for that intended to be enacted, none can be made by the courts. *Griffin v. State*, 119 Ind. 520.

To authorize the courts to reject part and sustain part of a statute, "the two parts must be capable of separation, so that each can be read by itself. Limitation by construction is not separation." *Baldwin v. Franks*, 130 U. S. 673 [30 L. ed. 766]; *Virginia Coupon Cases*, 114 U. S. 269 [29 L. ed. 185]; *Trade-Mark Cases*, 100 U. S. 82 [25 L. ed. 550]; *United States v. Reese*, 92 U. S. 214 [23 L. ed. 568].

In this instance, there is no attempt to regulate the business of mining, except in so far as that business may be connected with transporting natural gas out of the State. The principal object, and, indeed, it is not too much to say, the sole object, of the Statute is to prevent persons from conveying gas into another State; and the provisions of the Act as to the sinking of wells is so bound up with the provisions designed to effect the principal object that separation cannot be made without completely destroying the Statute, and substituting another for it, by judicial construction.

The power to regulate commerce between the States is exclusively in the Federal Congress. Inaction by Congress will not authorize the States to legislate in matters of interstate commerce. Whatever doubt the earlier decisions may have created, and certainly there was for a time much confusion and conflict, it is completely removed by the recent decisions; and the law now is that all legislation in regulation of commerce between the States must be enacted by the National Legislature. Transportation of commercial commodities from State to State is interstate commerce, and the State Legislatures can neither burden nor restrict it. *Henderson v. New York City*, 92 U. S. 259 [23 L. ed. 543]; *Ohj Lung v. Freeman*, 92 U. S. 275 [23 L. ed. 550]; *Hannibal & St. J. R. Co. v. Huen*, 95 U. S. 470 [24 L. ed. 529]; *Robbins v. Shelby Co. Tazewell Dist.*, 120 U. S. 489 [30 L. ed. 694]; *Bowman v. Chicago & N. W. R. Co.*, 125 U. S. 465 [31 L. ed. 100]; *Western U. Tele. Co. v. Atty-Gen. of Massachusetts*, 125 U. S. 530 [31 L. ed. 790]; *State v. Woodruff S. & B. Coach Co. supra*.

The power of the Federal Congress over all matters of interstate commerce, broad as the modern decisions declare it to be, does not absolutely exclude state legislation touching commerce between the States. Police power not delegated to the general government resides in the States, as an inherent attribute of sovereignty. *United States v. Dewitt*, 76 U. S. 9 Wall. 41 [19 L. ed. 593]; *Slaughter-House Cases*, 83 U. S. 16 Wall. 36 [21 L. ed. 394]; *United States v. Reese*, 92 U. S. 214 [23 L. ed. 563]; *Sherlock v. Alling*, 98 U. S. 99 [23 L. ed. 819]; *Patterson v. Kentucky*, 97 U. S. 501 [24 L. ed. 1115]; *Civil Rights Cases*, 109 U. S. 3 [27 L. ed. 835]; *Smith v. Alabama*, 124 U. S. 465 [31 L. ed. 508]; *Nashville, C. & St. L. R. Co. v. Alabama*, 128 U. S. 96 [32 L. ed. 352].

The States may, so long as they do no more than legitimately exercise the police power, legislate upon matters connected with interstate commerce. *Sherlock v. Alling, supra*; *Mobile Co. v. Kimball*, 102 U. S. 691 [26 L. ed. 238]; *Smith v. Alabama and Nashville, C. & St. L. R. Co. v. Alabama, supra*.

It is almost impossible, however, in view of the conflicting and confused state of the law as declared by the Federal Supreme Court, to determine what that tribunal, with which rests the ultimate decision of the question, will eventually regard as a legitimate exercise of the police power of the States, since the doctrine declared in the case of *Western U. Tele. Co. v. Pendleton*, 122 U. S. 847 [30 L. ed. 1187], is much more restrictive of the rights of the States than that asserted in *Smith v. Alabama*, *Nashville, C. & St. L. R. Co. v. Alabama, supra*, *Munn v. Illinois*, 94 U. S. 113 [24 L. ed. 77], and many earlier cases.

But it is evident that the Act under consideration cannot, under the rule laid down by the court of last resort, be deemed a legislative exercise of the police power. The Act does not assume to provide for the safety, health or comfort of the citizens; but its object is to prevent the sinking of gas wells, and the laying of pipelines, by persons who desire to convey gas out of the State. It is not a regulation of the mode of procuring, transporting or using natural gas designed to secure the health, safety or comfort of

the citizens of Indiana. Neither in the title nor in the body of the Act is it professed to be the legislative purpose to regulate the mode of procuring, transporting or using natural gas. From beginning to end the purpose is plainly and unmistakably manifested; and that purpose is to prohibit the transportation of natural gas beyond the limits of the State. The Act is in effect, as it is in words, a legislative prohibition directed solely against a designated class of persons. It is not the mode of transportation against which prohibition is directed, but the persons who engage in the business. Plainly, too plainly for denial, the object of the Statute is to keep natural gas within our borders. Its object is not to protect our citizens from injury from the mode of procuring and transporting gas adopted by those who engage in the business of procuring or transporting it. The Act cannot be taken out of the operation of the federal decisions upon the theory that it is a valid exercise of the police power resident in every sovereign State, for the theory is without foundation.

The right of eminent domain resides in every State, as one of the great elements of sovereignty. It was at one time held by the Supreme Court of the United States that the general government could not exercise the right within the territorial limits of a State. *Pollard v. Hagan*, 44 U. S. 3 How. 212-223 [11 L. ed. 565]. But this doctrine was denied in *Kohl v. United States*, 91 U. S. 867 [23 L. ed. 449].

Whether the right of a State is or is not exclusive, or how far that of the general government extends, is, however, not material here; for there can be no doubt that the right dwells in the State. But whether the State can, by the exercise of this right, or by the denial of it, interfere with interstate commerce, is a question of no little difficulty and importance. Happily, we are spared the delicate and difficult task of determining whether a State can delegate the right of eminent domain to persons who confine their business exclusively within the territorial limits of the State, and deny it to those engaged in a business extending from State to State. The language of the Act forbids the conclusion, which counsel seek to establish, that the Legislature meant to do no more than deny the right of eminent domain to persons desiring to transport natural gas from Indiana. The language of the section we have quoted leaves no room for construction; for, beyond controversy, its meaning is that no person shall be permitted to transport natural gas to another State. But, if there were doubt, it is entirely banished by other parts of the Act. In the title is written: "An Act to Prohibit any Person, Firm or Corporation, Company or Voluntary Association, Organized under the Laws of this State, or any Other States, from Piping, or Otherwise Conveying, from any Point or Points in this State, to any Point or Points without the State of Indiana, any Natural Gas or Petroleum." The third section of the Act prescribes a penalty for a violation of its provisions; and the provisions of this section apply to persons who acquire rights by purchase as well as those who secure rights by condemnation. The provisions of the Act are therefore firmly interlaced. There is a complete and indivisible unity. The unification is so thorough that no separation can be effected;

and nothing remains but to read the Act as an entirety, and as it is written. Taking the Act as it is written, the only possible conclusion is that it was meant to prohibit the transportation of natural gas from the State by any person, natural or artificial, no matter whether the right to the gas and its transportation is acquired by contract or by condemnation.

We are not unmindful of the rule that statutes upon the same subject should be construed together, and we have given all the statutes relating to natural gas careful study. The only conclusion which can be maintained is, as an investigation has convinced us, that the Act under immediate mention is not affected by any of the other Acts; for it is complete in itself, and has a clearly defined purpose, and that purpose is to prohibit gas from being transported out of the State.

It is not possible to sustain the Act, as counsel endeavor to do, upon the principle that the States may impose restrictions on foreign corporations. We have more than once enforced the rule that the Legislature may regulate or restrict the business of foreign corporations within this State. *Phenix Ins. Co. v. Burdett*, 112 Ind. 204, 11 West. Rep. 239; *Ins. Co. of North America v. Brim*, 111 Ind. 281, 9 West. Rep. 890; *State v. Ins. Co. of North America*, 115 Ind. 257, 15 West. Rep. 93; *Blackmer v. Royal Ins. Co.* 115 Ind. 291, 15 West. Rep. 307.

But we have not adjudged that the rule can be applied where it operates upon matters of interstate commerce, nor can we do so without coming in direct conflict with the law, as declared by the court invested with exclusive appellate jurisdiction of such questions. The decisions of that court utterly demolish the theory of counsel, that under the power to restrict foreign corporations may be placed the right to legislate in matters respecting the commerce between the States. Those decisions are absolutely conclusive.

There may be, and doubtless there are, objections to the Act not argued by counsel nor discussed by us. One objection occurs to us which we believe it proper to notice. That objection is this: It is not in the power of the Legislature to prevent one citizen from buying or another from selling property. The rights of property are not subject to such absolute legislative control. It is unnecessary to determine to what limitations the general rule we have stated is subject, for it is enough to assert the general rule, and affirm that it applies to such property as natural gas, petroleum and coal. We can find no tenable ground upon which the Act can be sustained, and we are compelled to adjudge it invalid.

Judgment affirmed.

James TAYLOR, *Appt.*,

v.

EVANSVILLE & TERRE HAUTE R. CO.

(....Ind....)

1. A master mechanic in a machine shop, having entire control of the shop

and all the work and employes therein, and having full authority to employ and discharge workmen and to select and change machinery, whose duty in fact is to manage a distinct department of the master's business, and who does not work in the shop with the machinists as a foreman ordinarily does, is not the fellow servant of a machinist employed in the shop within the rule which relieves the master from liability for injuries resulting from the negligence of fellow servants.

2. An employe, in entering the service, does not assume a risk created by the negligent act of the master's representative in making unsafe work which he specifically orders the employe to perform, although the work to which the specific order applies is within the general scope of the employe's service.

(November 21, 1890.)

APPEAL by plaintiff from a judgment of the Superior Court for Vanderburgh County sustaining a demurrer to the complaint in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

The opinion sufficiently states the case.

Messrs. Brownlee & Gudgel, for appellant:

The complaint alleges that the master mechanic had the entire control and management of appellee's shops, engines, machinery and the selection and changing thereof, and of appellee's employes; so that in the performance of his duties as master mechanic there certainly can be no question but that his acts were the acts of the master.

See *Ohio & M. R. Co. v. Collarn*, 73 Ind. 261; *Krueger v. Louisville, N. A. & O. R. Co.* 9 West. Rep. 247, 111 Ind. 51; 3 Thomp. Neg. p. 1033; 2 Rorer, Railroads, p. 832; Wood, Mast. and Serv. § 436, p. 852, § 450, p. 887; *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Capper v. Louisville, E. & St. L. R. Co.* 1 West. Rep. 287, 103 Ind. 805, 307.

When the master, or one placed by him in charge of men engaged in his service, personally assists or interferes in the labor being performed under his direction and control, and is, while performing such labor, or interfering with its performance, guilty of negligence resulting in an injury to one employed in such service, there is no sound principle of law that will excuse or exonerate the master from liability.

Berea Stone Co. v. Kraft, 81 Ohio St. 287, 291; *Ormond v. Holland*, El. Bl. & El. 103; *Shearm. & Redf. Neg. § 80*; *Wharton, Neg. § 205*.

Messrs. John E. Iglehart and Edwin Taylor, for appellee:

When it is charged that the master mechanic pulled the equalizer out of place, or interfered in such a way, by moving it out of its place, as to cause it to fall, there is and can be but one conclusion, and that is, that the master mechanic, for the time being, ceased to be foreman or representative of the master, and engaged in the work of a common servant, there-

NOTE.—Duty of servant to use reasonable care.

Where the employment sought and accepted is a dangerous one, it is the duty of the servant to exercise reasonable and ordinary care to avoid injury;

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and if the employment is a hazardous service, he is required to use very great precautions to avoid danger. *Union Pac. R. Co. v. Estes*, 37 Kan. 715.

It is the duty of a servant to use reasonable care

by becoming a co-employé, for whose negligence there can be no recovery.

See *Wood, Mast. and Serv.* pp. 807, 809, 847-849.

If there is a natural or necessary connection between the different classes of service, such as necessarily brings the servants into contact with each other in the prosecution of their work, they are co-servants, however dissimilar their occupation may be.

Wood, Mast. and Serv. 851, 884; *Wigmore v. Jay*, 5 Exch. 854; *Chicago & A. R. Co. v. May*, 108 Ill. 298, 299, 15 Am. & Eng. R. R. Cas. 323, 324; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 598, 599, 21 Am. & Eng. R. R. Cas. 509, 511, *Oriepin v. Babbitt*, 81 N. Y. 516; *Neubauer v. New York, L. E. & W. R. Co.* 3 Cent. Rep. 66, 101 N. Y. 607; *Loughlin v. State*, 7 Cent. Rep. 70, 105 N. Y. 159; *McCosker v. Long Island R. Co.* 84 N. Y. 77; *Abbot v. Agawam Canal Co.* 6 Cush. 75; *Drinkout v. Eagle Mach. Works*, 90 Ind. 423; *Indianapolis & St. L. R. Co. v. Johnson*, 102 Ind. 852; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Capper v. Louisville, E. & St. L. R. Co.* 1 West. Rep. 287, 108 Ind. 305; *Pittsburgh, O. & St. L. R. Co. v. Adams*, 3 West. Rep. 887, 105 Ind. 151; *Lake Shore & M. S. R. Co. v. Stupak*, 6 West. Rep. 244, 108 Ind. 4; *Brazil & O. Coal Co. v. Cain*, 98 Ind. 282; *Columbus & I. O. R. Co. v. Arnold*, 81 Ind. 174; *Indiana, B. & W. R. Co. v. Dailey*, 8 West. Rep. 516, 110 Ind. 75.

Elliott, O. J., delivered the opinion of the court:

The appellant was a machinist in the service of the appellee, engaged in work in its shops in the City of Evansville, under the control of its master mechanic, John Torrence. The master

mechanic had the entire control of the shop, of all the employés therein, and of all work. He had full authority to employ and discharge the machinists and workmen, and he had authority to select and to change machinery. On the 21st day of April, 1884, the appellee desired to inspect the head of the equalizer on one of its locomotives for the purpose of ascertaining whether the key could be changed, and its master mechanic ordered the appellant to disconnect the equalizer, and remove it from its place, in order to enable the master mechanic to examine it. While the appellant was engaged in the work of removing the key of the equalizer, under the master mechanic's direction, the equalizer was negligently pulled out of its place by the master mechanic, and it fell upon the appellant, and very severely injured him. The equalizer was a piece of iron weighing 200 pounds, and it was caused to fall upon the appellant by the negligence of the master mechanic, and without any fault on the appellant's part.

It is established law in this jurisdiction that the common master is not responsible to an employé for an injury caused by the negligence of a co-employé. From this rule, so long settled, we cannot depart. *Indiana, B. & W. R. Co. v. Dailey*, 110 Ind. 75, 8 West. Rep. 516; *Capper v. Louisville, E. & St. L. R. Co.* 108 Ind. 805, 1 West. Rep. 287; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Bogard v. Louisville, E. & St. L. R. Co.* Id. 491; *Atlas Engine Works v. Randall*, Id. 293.

It is also settled that the fact that the one employé is the superior of the other makes no difference, for the question is not one of rank. The question is, Were they fellow-servants? If they were, there can be no recovery against the

to inform himself in respect to the hazards to which he may be exposed; but he is not under the same obligation as a master to know the nature and extent of the risks, unless they are patent. *McDonald v. Chicago, St. P. M. & O. R. Co.* (Minn.) 43 N. W. Rep. 380.

The risks which a servant assumes on entering employment include the careless acts of his fellow servants, although the acts could not have been reasonably foreseen. *Brodeur v. Valley Falls Co.* 16 R. I.—, 17 Atl. Rep. 54. Minn. Gen. Laws 1887, chap. 13, making railroad companies liable to an employé for injuries caused by the negligence of a co-employé, applies only to those employés engaged in operating the railroads, and so exposed to the peculiar dangers attending that business. *Lavallee v. St. Paul, M. & M. R. Co.* 40 Minn. 249.

An established usage on the part of engineers of a railroad, known and acquiesced in by superior officers, to allow firemen to make short moves while the engineer is not on the engine, but near enough to give directions, is sufficient to relieve an engineer from the charge of contributory negligence in following such custom, although a rule of the road provides that engineers must not permit firemen to operate the engines except when themselves present upon them. *Barry v. Hannibal & St. J. R. Co.* 98 Mo. 62.

Employé does not assume risk of negligence of master's representative.

To relieve a principal from responsibility for negligence of a contractor, the latter must have full control of the work. *Washington Natural Gas Co. v. Wilkinson* (Pa.) 1 Cent. Rep. 687.

An employer, not interfering with or directing the

work, but contracting with others to do it, is not responsible for wrongful acts or negligence of the contractor, if the work to be done is lawful. *Edmundson v. Pittsburgh, McK. & Y. R. Co.* 1 Cent. Rep. 899, 111 Pa. 316; *State v. Smith*, 2 New Eng. Rep. 440, 78 Me. 280.

A skilled mechanic, alleging negligence of the master in not having a movable table or platform connected with a circular saw properly secured in place, is chargeable with contributory negligence if he, knowing that the table was movable, paid no attention to the mode in which the same was secured. *Eicheler v. Hanggi*, 40 Minn. 263.

The duty of the master to see to it that the machinery furnished for the use of his servants is reasonably safe does not extend so far as to require him to attend to the proper regulation of those parts which necessarily have to be adjusted in the course of the use and with regard to the particular work to be done, and the adjustment of which is incident to the ordinary use of the machine. *Ibid.* See *Hunter v. N. Y. O. & W. R. Co.* ante, p. 246.

An employé becomes a vice-principal as respects other employés only when he is intrusted with the performance of some absolute and personal duty of the master himself. *Lindvall v. Woods* (Minn.) 4 L. R. A. 794, note.

To hold an employer liable for injury to an employé, resulting from negligence of a superior employé in control of the work, the party must have such control that the court may justly say that he is a vice-principal. *Muhlman v. Union Pac. R. Co.* 2 L. R. A. 192, note, 87 Fed. Rep. 189.

As to assuming risks of employment, see *Pidcock v. Union Pac. R. Co.* (Utah) 1 L. R. A. 121, note. See *Hunter v. N. Y. O. & W. R. Co.* ante, p. 246.

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master, for injuries caused by the negligence of the co-employé. *Drinkout v. Eagle Mach. Works*, 90 Ind. 423; *Brazil & O. Coal Co. v. Cain*, 98 Ind. 282; *Indiana Car Co. v. Parker, supra*; *Pittsburgh, C. & St. L. R. Co. v. Adams*, 105 Ind. 151, 3 West. Rep. 387; *McCooker v. Long Island R. Co.* 84 N. Y. 77; *Crispin v. Babbitt*, 81 N. Y. 518; *Moore v. Wabash, St. L. & P. R. Co.* 85 Mo. 588, 21 Am. & Eng. R. R. Cas. 509.

If Torrence was acting in the capacity of a co-employé at the time his negligence caused the appellant's injury, this action cannot be maintained, although he was the appellant's superior, and had the right to retain or discharge him. An agent of high rank may be, at the time an act is done, the fellow servant of another employé, occupying a subordinate position. *Hussey v. Cogger*, 112 N. Y. 614, 8 L. R. A. 559.

If, for instance, the general superintendent should take hold of one end of an iron rail to assist an employé of the company in loading it on the car, he would be, as to that single act, a fellow employé, although as to other acts he might be the representative of the master. Where, however, the agent whose negligence caused the injury is at the time in the master's place, then he is not a co-employé, but a representative of the employer. His breach of duty is then the employer's wrong, for in such cases the act of the representative is the act of the principal. By whatever name the position which the agent occupies may be called, he is the representative of the master, if his duties are those of the master; but, if his duties are not those of the master, then he is no more than a fellow-employé with those engaged in the common service, no matter what may be his nominal rank. *Indiana Car Co. v. Parker, supra*; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 9 West. Rep. 823; *Krueger v. Louisville, N. A. & C. R. Co.* 111 Ind. 51, 9 West. Rep. 247; *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 12 West. Rep. 285, and 18 West. Rep. 323; *Louisville, N. A. & C. R. Co. v. Sandford*, 117 Ind. 265; *Cincinnati, I. St. L. & C. R. Co. v. Lang*, 118 Ind. 579; *Franklin v. Winona & St. P. R. Co.* 37 Minn. 409; *Anderson v. Bennett*, 16 Or. 515; *Atchison, T. & S. F. R. Co. v. McKee*, 87 Kan. 592; *Gunter v. Graniteville Mfg. Co.* 18 S. C. 262.

Our judgment is that, at the time the appellant was injured, Torrence, the master mechanic, was performing the master's duty, and not merely the duty of a fellow servant. He was in control of the shop where the appellant was working. He was the only representative of the master at that place. Men, machinery and work were under his control. He gave the orders which it was the duty of those under him to obey, and he alone could give orders as the master's representative. He gave the specific order under which the appellant acted. He did not join the appellant as a fellow servant in doing the work, but he commanded it to be done. He was in the position of one exercising authority, and not in that of one engaged, in common with another, in the same line of service. The obligation to make safe the working-place and the materials with which the work is done rests on the master, and he cannot escape it by delegating his authority to an agent. It

is also the master's duty to do no negligent act that will augment the dangers of the service. In this instance Torrence was doing what the master usually and properly does when present in person, for he was commanding, and directing the execution of what he had commanded. By his own act he made it unsafe to do what he had commanded should be done. Acts of the master were therefore done by one having authority to perform them, and the breach of duty was that of one who stood in the master's place. It is not easy to conceive how it can be justly asserted that one who commands an act to be done, and who possesses the authority to command and enforce obedience from all servants employed in a distinct department, by virtue of the power delegated to him by the master, is no more than a fellow servant; for, in the absence of the master, the command, if entitled to obedience, must be that of the master, conveyed through the medium of an agent. Nor can it be held, without infringing the principles of natural justice, that, if he who is authorized to give the command makes its execution unsafe, the employé whose duty it is to obey has no remedy for an injury received while doing what he was commanded to do. Nor do the better reasoned authorities justify such a conclusion. The decisions are conflicting, it is true, but the decided weight of authority is that, where the act is such as the master should perform, he is liable, no matter by whom the duty is performed. "As to such acts," said the court in *Flits v. Boston & A. R. Co.* 58 N. Y. 558, "the agent occupies the place of the corporation, and the latter should be deemed present, and consequently liable for the manner in which they are performed."

In this instance Torrence was not a fellow servant while engaged in commanding work to be done, and directing the execution of the command, although if it had appeared that he was engaged with the appellant in doing the work, within the line of the latter's services, it might perhaps be otherwise. "The true test," said the court in *Gunter v. Graniteville Mfg. Co. supra*, "is whether the person in question is employed to do any of the duties of the master. If so, then he cannot be regarded as a fellow servant, . . . but is the representative of the master, and any negligence on his part in the performance of the duty of the master, thus delegated to him, must be regarded as the negligence of the master."

The rule thus stated goes further than we are required to do in this instance; for we need go no further than to hold that while engaged in ordering the work to be done, and in supervising its performance, the master mechanic represented his principal. If, however, it had appeared that the master mechanic was not the person in charge of the men, and the shop and its equipments, but was, although a superior agent, engaged in doing the same general work as that for which the appellant was employed, it would be different. As the facts appear in the record, the master had invested the master mechanic with full authority over the appellant and all others employed in the shop under his control, thus bringing the case within the decision in the case of *Atlas Engine Works v. Randall*, 100 Ind. 298, where it was said: "If the agent or servant upon whom the power to

command is given exercises the power, and fails to discharge the obligation, to the hurt of the servant, who is without fault, the failure is that of the master, and he must respond."

In the case now at our bar, the agent who had the power to command, and who exercised it, himself violated the duty which rested upon him as the representative of his principal, and by his own act of negligence brought injury upon the employé engaged in doing the work he was ordered to do. Although the case of *Hawkins v. Johnson*, 105 Ind. 29, 2 West. Rep. 290, belongs to a somewhat different class from the one to which this class belongs, still what is there said as to the right of an employé to obey the directions of a superior is applicable here, and strongly tends to support our conclusion. What we have said of *Hawkins v. Johnson* applies also to the case of *Rogers v. Overton*, 87 Ind. 410.

Many of the cases go much further than we do here, for they assert that an employé is justified in obeying the orders of one who has a right to command, unless the danger of obedience is so apparent that a reasonably prudent man would not assume the risk. *Stephens v. Hannibal & St. J. R. Co.* 96 Mo. 207; *Huhn v. Missouri Pac. R. Co.* 92 Mo. 443, 10 West. Rep. 405; *Keegan v. Kavanaugh*, 63 Mo. 280.

Whether these decisions go beyond the true line or not we neither inquire nor decide, but we do affirm that the reasoning, in so far as it covers and is limited to a case such as this, is unanswerable; for here the master mechanic had the right to command, and he was the only person in the shop who could rightfully command, the employés serving under him. The duty of the master mechanic, as it appears from the complaint, was to order what should be done; and this, it has been well decided, is intrinsically the master's act, and not that of a mere fellow servant. *Theleman v. Moeller*, 73 Iowa, 108; *Brann v. Chicago, R. I. & P. R. Co.* 58 Iowa, 595.

We do not affirm that an employé, with authority to command, may not be a fellow servant. On the contrary, we hold that one having authority to command may still be a fellow servant; but we hold, also, that where the position is such as to invest the employé with sole charge of a branch or department of the employer's business, the employé, as to that branch or department, may be deemed a vice-principal, while engaged in giving orders or directing their execution. *Chicago & A. R. Co. v. Hoyt*, 123 Ill. 869, 9 West. Rep. 785; *Wabash, St. L. & P. R. Co. v. Hawk*, 121 Ill. 259, 10 West. Rep. 137.

"Where," it is said in a well-considered case, "a master places the entire charge of his business, or a distinct department of it, in the hands of an agent, exercising no discretion and no oversight of his own, it is manifest that the neglect of the agent of ordinary care, in supervising and maintaining suitable instrumentalities for the work required to be done, is a breach of duty for which the master should be held liable." *Cooper v. Pittsburgh, O. & St. L. R. Co.* 24 W. Va. 37.

Substantially the same statement of the rule is made in *Mullan v. Philadelphia & S. M. Steamship Co.* 78 Pa. 25. This rule applies to

the case made by the complaint before us, and it is that case, and that alone, to which our discussion is directed, and to which our conclusions apply. If it appeared that the master mechanic worked with the machinists in the shop as a foreman or a like agent ordinarily does, we should have a different case. This, however, does not appear; for, on the contrary, it does appear that the master mechanic was invested with sole control of the shop, and that his duties were not those of a mere workman, but those of one whose duty it was to manage a distinct department, and to give orders to the machinists and other employés as to the duties they should perform. We cannot further comment upon the decisions on this branch of the case which we have examined, but refer without comment to some of them. *Hough v. Texas & P. R. Co.* 100 U. S. 213 [25 L. ed. 612]; *Ford v. Fitchburg R. Co.* 110 Mass. 240; *Wilson v. Williamantic Linen Co.* 50 Conn. 438; *Mayhew v. Sullivan Min. Co.* 76 Me. 100; *Atchison, T. & S. F. R. Co. v. McKee*, 37 Kan. 592; *Missouri Pac. R. Co. v. Perego*, 86 Kan. 424; *Central Trust Co. v. Texas & St. L. R. Co.* 32 Fed. Rep. 448.

It is important to bear in mind that the appellant was performing a special duty enjoined upon him by a superior whom it was his duty to obey. Although the work was within the general scope of his service, nevertheless he was performing it under a special order. It was therefore a wrong on the part of the agent, having the right to order him to do the specific work, to increase the peril of the service by his own negligence. The employé, acting under the specific order, had a right to assume, in the absence of warning or notice, that his superior who gave the order would not, by his own negligence, make the work unsafe. *Cincinnati, I. St. L. & O. R. Co. v. Lang*, 118 Ind. 579; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572; *Haley v. Cass*, 142 Mass. 816, 2 New Eng. Rep. 688; *Goodfellow v. Boston, H. & E. R. Co.* 106 Mass. 461; *Crowley v. Burlington, C. R. & N. R. Co.* 65 Iowa, 558; *Abel v. Delaware & H. Canal Co.* 108 N. Y. 581, 5 Cent. Rep. 615; *Reagan v. St. Louis, K. & N. W. R. Co.* 93 Mo. 348, 12 West. Rep. 367; *Lewis v. Seifert*, 116 Pa. 628, 9 Cent. Rep. 751.

We adhere firmly to the rule declared in such cases as *Indianapolis & St. L. R. Co. v. Watson*, 114 Ind. 20, 12 West. Rep. 285 and 18 West. Rep. 832; and *Louisville, N. A. & O. R. Co. v. Sandford*, 117 Ind. 285, that the employé assumes all the risks incident to the service he enters; but we assert that the rule does not apply where a superior agent, representing the master, orders the employé to do a designated act, and, while the employé is engaged in doing what he was specially ordered to do, that superior, by an act of negligence, causes the employé to receive an injury. The employé in entering the service does not assume a risk created by the negligent act of the master's representative in making unsafe work which he specifically orders the employé to perform. If the master mechanic had been no more than a co-employé working with the appellant, or if the appellant had entered the service knowing that the master mechanic was to work with him, then he would be held to have assumed the

risk arising from the master mechanic's negligence while working or acting merely in the capacity of a fellow servant. We hold that the

facts stated in the complaint are sufficient to compel the appellee to answer.
Judgment reversed.

CALIFORNIA SUPREME COURT.

Levi M. KELLOGG *et al.*, *Respts.*,

v.

HOWES *et al.*, *Appts.*

(....Cal....)

1. Failure to file in the recorder's office a contract for the construction of a building at the contract price of more than \$1,000, as required by Code Civ. Proc., § 1183, makes the owner liable to subcontractors and materialmen for the value of their material and labor without regard to the provisions of the contract or the amount remaining unpaid thereon, although they had actual notice of such contract and have not notified him of the amount of their claims.
2. It is within the power of the Legislature to provide that the owner of a building shall be liable to materialmen and laborers for the full value of their material and labor, if he fails to execute his contract in a certain form and file it in the recorder's office, although he has paid the contractor the contract price.
3. A contract wholly void is void as to everybody whose rights would be affected by it if valid.

(November 7, 1896.)

APPEAL by defendants from a judgment of the Superior Court for Los Angeles County in favor of plaintiffs in an action to enforce certain alleged mechanics' liens for material furnished and labor done in the construction of a certain dwelling-house. *Affirmed.*

The facts are sufficiently stated in the opinion.

Messrs. Haynes & Mitchell for appellants.

Messrs. Davis & Taylor and W. H. Thomas for Levi M. Kellogg and Maitre & Hansen, respondents.

Messrs. Adams & Rhodes and Johnston & Borden for California Door Co., respondents.

Messrs. Johnston & Borden for Willamette Steam-Mills Lumbering & Manufacturing Co., respondents.

Messrs. Reymert, Orfila & Reymert for B. A. Breakey, respondent.

Messrs. Barclay, Wilson & Carpenter for E. L. Tower, respondent.

Messrs. Scarborough & Waterman and Barclay, Wilson & Carpenter for A. H. Parsons, respondent.

Works, J., delivered the opinion of the court:

This action was brought by the respondents, as materialmen, laborers and subcontractors, against the appellants, to enforce a lien for material furnished and for labor done in the construction of a dwelling-house. The appellant Howes was the owner of the real estate, and contracted with his co-defendant to construct the building, and the latter contracted with the respondents for the labor and material done and furnished by them. The contract price for constructing the building was more than \$1,000, and the contract was not filed for record as required by section 1183 of the Code of Civil Procedure. The respondents had actual notice that there was a contract between the owner and his contractor, and gave no notice to the owner to withhold payments to such contractor. The owner paid the contractor the greater part of the contract price. The amounts for which the respondents claimed liens exceeded the amount due the contractor, and unpaid, assuming the contract to have been valid, but were less than the full contract price. The court below held the contract to be void, for the reason that it was not filed for record, and that the respondents were entitled to recover the value of the material furnished and labor done by them, without any reference to the amount remaining unpaid to the original contractor by the owner. The only question presented and argued on this appeal is whether or not a materialman or subcontractor can recover, beyond the amount unpaid by the owner to the original contractor, on the contract, where the same has not been recorded, and where no personal notice has been given by such materialman or subcontractor to the owner to withhold the payments due such con-

NOTE.—Contracts wholly void are void as to everybody.

A contract is void when it is without any legal effect. *Zouch v. Parsons*, 3 Burr. 1794, 1805; *Baker v. Painter*, L. R. 2 C. P. 492, 496; *Manning v. Gill*, L. R. 13 Eq. 485, 496; *Bishop*, Cont. 241.

There is a distinction between contracts void between the immediate parties because they will not be enforced on grounds of public policy, and contracts where the statute declares them void. *Davis v. Seeley* (Mich.) 15 West. Rep. 412.

Contracts which are void at common law because they are against public policy, like contracts which are prohibited by statute, are illegal as well as void. *Harvey v. Merrill*, 5 L. R. A. 200, 180 Mass. 1; *Hedges v. Dixon Co.* 37 Fed. Rep. 304.

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Parties to a contract which is void as against public policy cannot be relieved, one against the other, on the ground that the thing contracted for was lawful and beneficial in itself, and that one has received and retained the benefit under it. *Gleason v. Chicago, M. & St. P. R. Co.* (Iowa) 48 N. W. Rep. 517.

An agreement to build a mill-dam for a certain sum in gross, the owner to furnish all materials, is not a contract of employment, but a building contract, for the breach of which, by the owner's failure to furnish the materials, he is liable, not for the agreed price, but for the value of the contract; that is, the difference between the agreed price and the cost of performance. *Singleton v. Wilson*, 35 Tenn. 244.

tractor, the materialman and subcontractor having actual notice that there was such a contract.

Counsel for appellants contend, with much earnestness and ingenuity, and with marked ability, that the right of the materialman and subcontractor to enforce his lien is limited, where he has given no personal notice to the owner to the amount remaining unpaid by the owner to the original contractor. They contend, in substance, that, although the contract is void as between the parties to it, it is not void as to the owner, and the materialmen and subcontractors; and there is a distinction between an original contractor and a materialman or subcontractor, in that the former has a direct lien upon the real estate of the owner to the full extent of the amount due him, based upon the personal liability of the owner to him, while the latter have but a lien in the nature of an attachment against the money in the hands of the owners, and due the contractor, and that the Legislature had no power to make the owner or his property liable to any greater extent.

There is, perhaps, not a single one of these propositions that is not, to some extent, supported by some decision or dictum of this court. The question is therefore whether these decisions or dicta are applicable to the present provisions of the Mechanics' Lien Law, and, if so, whether they are such as should control us in the interpretation of such provisions. The present Code, so far as it affects this question, provides: "In case of a contract for the work between the owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price; and, after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor. All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds \$1,000 and shall be subscribed by the parties thereto, and shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive \$1 for such filing; otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Code Civ. Proc. § 1188.

Again: "No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing or discharging any lien in favor of any person except the contractor; but, as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the owner in any amount, for damages or otherwise, for nonperformance of his contract or otherwise. . . . All such contracts and alterations thereof as do not conform substantially to the provisions of this sec-

tion shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. Any of the persons mentioned in section 1188, except the contractor, may, at any time, give to the owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. . . . Upon such notice being given, it shall be the duty of the owner to, and he shall, withhold from his contractor, or from any other person acting under such owner, and to whom by said notice the said labor or materials, or both, have been furnished or agreed to be furnished, all money due or that may become due to such contractor, or other person, or sufficient of such money to answer such claim, and any lien that may be filed therefor for record, under this chapter, including costs and counsel fees provided for in this chapter, until such notice is by writing withdrawn; and all money paid thereafter by the owner to the contractor, or such other person, while such notice is in force, shall, for the purposes of all liens of all persons, except that of the contractor, be deemed a payment prior to the time the same was due, within the meaning of and subject to the provisions of this section." Id. § 1184.

It has been held in a number of cases under earlier statutes that a subcontractor or materialman could enforce his lien only to the extent of the contract price remaining unpaid, and that, too, under statutes providing that subcontractors should have a lien "regardless of the claim of the contractor against the owner," or that the lien should inure "to the extent of the contract price," and "whether done or furnished at the instance of the owner or his agent;" and "that the contractor should be deemed such agent, and that the lien should not be affected by the fact that no money was due the contractor." Counsel for appellant have industriously gathered up and cited these earlier statutes, and the cases decided under them. We cite them here more as showing the course of legislation and its judicial construction and interpretation on this subject than because of their bearing on the question now presented. Stat. 1850, p. 211; Stat. 1855, p. 156; Stat. 1856, p. 208; Stat. 1858, p. 225; Stat. 1862, p. 884; Stat. 1868, p. 589; Code Civ. Proc. (1880) § 1188; Deering's Code Civ. Proc. § 1188; Stat. 1887, p. 152; *Cahoon v. Levy*, 6 Cal. 295; *Knowles v. Joost*, 13 Cal. 620; *McAlpin v. Duncan*, 16 Cal. 126; *Bowen v. Aubrey*, 22 Cal. 566; *Dore v. Sellers*, 27 Cal. 588; *Renton v. Conley*, 49 Cal. 185; *Latson v. Nelson*, 11 Pac. C. L. J. 589; *Whittier v. Hollister*, 64 Cal. 283; *O'Donnell v. Kramer*, 65 Cal. 853; *Wilson v. Barnard*, 67 Cal. 422; *Wiggins v. Bridge*, 70 Cal. 437.

It will be observed that all of these cases, so far as they hold that the lien of a subcontractor shall only extend to the money unpaid on the original contract, are cases in which the contract between the owner and subcontractor was valid, and each and all of them are based upon the theory, which we fully approve, that, where there is a valid contract between the owner and contractor, such contract is the measure of the owner's liability, and that, in the absence of notice from the subcontractor of his claim, a payment by the owner in conformity to the contract will relieve him to that extent from any claim or lien by the subcontractor. This is so under the present Statute, and thus far the cases cited are applicable to the present Statute, and no further.

Counsel insist that there is but one additional requirement under the present Statute, viz., that the contract shall be filed in the recorder's office, and that such a requirement does not affect the principle laid down in the cases decided under former statutes, especially in this case, where it appears that the subcontractors had actual notice of the existence of the contract, which was in all respects in conformity to the Statute. In this contention counsel overlook what we regard as the most material addition to the statute by the last amendment, viz., that if the contract is not executed as required by the Statute, and filed in the recorder's office, it shall be void, and no recovery shall be had thereon by either party. In our judgment this provision of the Statute takes away entirely the basis upon which it was held under earlier statutes that the subcontractor could not recover, viz., that the owner could not be compelled to pay more than he had contracted to pay, or, in other words, could not be compelled to pay twice for the same thing. This cannot be so under the present Statute, where his contract is not recorded. The contract cannot be the measure of his liability, because there is no contract. He cannot pay the contractor, and thereby relieve himself from liability to the subcontractor, because, the contract being void as between him and the contractor, he is not liable to the latter, and has no right, as between him and the subcontractor, to pay such contractor. The Statute is too plain on this point to need construction. It not only provides that the contract shall be wholly void, and that neither party shall recover thereon, which must have been provided wholly for the protection of subcontractors, laborers, etc., but in order to make this fact doubly plain it further provides that "the labor done and material furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." In other words, the subcontractors, laborers and materialmen shall have their lien precisely as if no contract had ever been made between the owner and contractor, and the material had been furnished and work done for the owner at his special instance and request.

But counsel say the Legislature had no power to provide for any such liability on the part of the owner, and this court has so decided. We do not so understand it. It has been held, as we have said, and very properly, that where

there is a valid contract the owner cannot be compelled to pay more than he has contracted to pay, unless he is notified of the claims of subcontractors before payment to the contractor. But that is not this case. Here there was no contract. If the Legislature had the power to say to the owner, "If you pay the contractor, after notice from the subcontractor of his claim, you shall still be liable to the latter," it has the undoubted right to say to him, "If you do not execute your contract in a certain form, and file it in the recorder's office, you shall be liable to materialmen and laborers for the value of their material and labor." There is no hardship or injustice in this provision. The owner is only compelled to pay once for what he receives and retains the benefit of. He is not bound, and has no right, as between him and subcontractors, to pay the contractor. If the contract is valid, then, under the present Statute, notice must be given of his claim by a materialman or laborer, in order to reach the moneys due the contractor, and, if he fails to give such notice, the owner is protected by the Statute, as held in the cases above cited, decided under former Statutes. But, where there is no valid contract, this notice is unnecessary, because there are no payments to be stopped, and the Statute itself is notice to the owner that he must not pay to the contractor.

It is urged upon us by counsel for appellant that the contract in this case was void only as between the parties to it, and not as between the owner and materialmen and laborers, and that we have so decided in *Giant Powder Co. v. San Diego Flume Co.* 78 Cal. 198. We did not so hold in the case referred to. It was held in that case that the contract between the subcontractor and contractor for material was valid, notwithstanding the original contract was void as between the parties to it. But the opinion in that case was so worded as to mislead in this respect, and it is broadly stated that the contract, though wholly void, was not void except as to the parties to it. This could not be so. A contract wholly void is void as to everybody whose rights would be affected by it if valid; and hence it would be a strange construction of the Statute to hold that the failure to file an instrument for record would render it void as to the parties to it, who necessarily have notice of its contents, and not affect the rights of the only persons sought to be protected by such filing, and who alone could be affected by such failure. The court meant nothing more in that case than to hold that the materialman was entitled to his lien notwithstanding the contract was not filed in the recorder's office.

What was said as to the contract remaining to mark the extent of the recovery of the lienholders, etc., was outside of the real question presented in the case, and should be modified. The extent of the materialman's recovery is not measured by the terms of the contract. On the contrary, the Statute provides in express terms that, where the contract is not recorded, the materialman shall have a lien for the value thereof. In case the contract is not recorded, the Statute, and not the contract, measures the extent of his recovery; and so it was held in *Southern California Lumber Co. v. Schmitt*, 74 Cal. 625.

The case of *Latson v. Nelson*, 11 Pac. C. L.

J. 569, is greatly relied upon by the appellant. The reasoning of the opinion in that case was not concurred in by a majority of the court, and, so far as it may be construed as against the right and power of the Legislature to enact the present Statute, as we have construed it in this opinion, it does not meet with our approval. It is extremely difficult to determine what the views of the learned justice who wrote the opinion were, as announced in the opinion; but, as we construe his language, it amounted to nothing more than has been decided in earlier cases, that, where a valid contract existed between the owner and contractor, the former could not be made liable to subcontractors beyond the amount fixed therein, and that section 16, art. 20, of the present Constitution had not changed that rule. So understood, the opinion is not in conflict with anything we have said in this opinion.

As to the contention that the fact that the respondents had actual notice of the existence of a contract was equivalent to the filing of the same in the recorder's office, this would be so if the question were one of notice. But it is not. The express provision of the Statute is that, if the contract is not filed, it shall be void. This being so, there is in fact no contract of which the subcontractor is bound to take notice, and his knowledge that a contract was attempted to be made, but was not, cannot affect his rights.

The point made that there can be no recovery by a subcontractor as against the owner, independent of some contract between the owner and original contractor, is met by the express language of the Statute, that, for the purposes of his lien, he shall be deemed to have contracted directly with the owner, and shall have a lien for the value of his material. This brings him in direct contact with the owner as a contractor, and removes the distinction made under former statutes between those who contract directly with the owner and subcontractors. By the terms of the Statute they become, for the purpose of their lien, original contractors with the owner, but cannot recover against him personally. *Southern California Lumber Co. v. Schmitt, supra.*

The judgment and order appealed from are affirmed.

I concur: **PATERSON, J.**

FOX, J., concurring:

I concur in the conclusion reached by *Mr. Justice Works* in the foregoing opinion, and generally in the line of reasoning by which that conclusion is reached. I have no doubt that the Legislature has full power to provide that where, as was done in this case, an owner of real estate, without the intervention of a contract fixing the measure of his liability, proceeds personally, or through another acting with his knowledge, to make improvements thereon, he shall be liable to mechanics, laborers and materialmen for the value of their labor and material, and they shall have a lien therefor. In this case there was no contract, for the law itself declares that if not recorded the pretended contract is "wholly void." It is therefore as if it had never been made, and fixes no measure of liability for either party, or for any purpose. But after negotiating the terms of the contract

with Lane, which was never completed, and never became a valid contract, *Howes* permitted him to procure material and erect the building; in other words, permitted Lane to act as his agent in the construction of the building upon which these liens were filed. The Statute expressly declares that in such cases the subcontractor, the laborer and materialman shall be deemed to have contracted directly with the owner, and shall have a lien for the value of his material or labor. There is no constitutional objection to such a provision. The obligation most frequently assumed by all men engaged in business, and most frequently enforced by the courts, is an implied one to do the same thing,—to pay the value of labor done or materials furnished at the request of the party receiving the benefit thereof; and it makes no difference whether the request was made by him in person, or through one whom he had held out to the world, or to the person furnishing the labor and material, as his agent in the premises.

But it seems to me that the opinion of *Mr. Justice Works* is susceptible of a construction which would enable a stranger to go upon the land of an absent or nonresident owner, and, through laborers and materialmen, improve him out of his real estate without his knowledge. The Legislature has no power to authorize such a proceeding, and no precedent should be established which would sanction it. No person should be entitled to a lien or personal judgment against an owner in any case, unless he contracted the liability in person, or it be shown that he had actual notice in some form of the fact that his property was being improved in a manner which might create a liability or lien. A construction of the Statute which would give it the effect of creating a lien where the owner had no knowledge of the improvement, would render it unconstitutional. In this case there is no pretense of want of knowledge, and everything shows that the owner had actual knowledge of the improvement, and the law charges him with knowledge of the fact that there was no contract limiting his liability.

M. J. DONOVAN, Admr., of *Margaret Dalton, Deceased, et al., Repts.*,

Egbert JUDSON, Appt.

(....Cal.....)

1. If a contract fixes the time for a payment agreed upon, but fixes no time for doing

NOTE.—Action by vendor for purchase money, tender of deed.

Whether tender of a deed is a prerequisite to the vendor's maintaining his suit in equity, is a question upon which the American decisions are in direct conflict. That no tender of a deed by the vendor is necessary, see *Freeson v. Bissell*, 63 N. Y. 168; but compare *Thomson v. Smith*, 63 N. Y. 301; *Church v. Smith*, 39 Wis. 422; *De Forest v. Holm*, 38 Wis. 516; *McKenzie v. Baldrige*, 49 Ala. 564; 3 Pom. Eq. Jur. 273.

That such a tender is necessary, see *Cole v. Wright*, 50 Ind. 293; *McCaslin v. State*, 44 Ind. 151; *Turner v. Lassiter*, 27 Ark. 662; *Wakenfield v. Johnson*, 26 Ark. 506; *Klyce v. Brovles*, 37 Miss. 524; 3 Pom. Eq. Jur. 273.

that which is the condition of the payment, performance of the condition is not a condition precedent to an action.

2. The right to bring an action for purchase money of land under a contract by which one party agrees to convey, without fixing any time therefor, while the other agrees to pay the price a certain time after final judgment in his favor in a certain pending suit, accrues when such time has expired, although no conveyance is made.

(November 22, 1889.)

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiffs, and from an order denying defendant's motion for a new trial, in an action to recover the contract price for certain land which defendant had agreed to purchase. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Page & Eells*, for appellant:

Where covenants are mutual and independent, suit can be brought by either party without averring tender or readiness to perform, and the Statute begins to run when the obligation matures.

Bruce v. Tilson, 25 N. Y. 194.

The covenants in this case were independent.

Pordage v. Cole, 1 Saund. 820; *Campbell v. Jones*, 6 T. R. 570; *Mattock v. Kinglake*, 10 Ad. & El. 50; *Sidthorp v. Brunel*, 3 Exch. 826; *Robb v. Montgomery*, 20 Johns. 15; *Champion v. White*, 5 Cow. 509; *Morris v. Sliter*, 1 Denio, 59; *Stone v. Gover*, 1 Ala. 287; *Sayre v. Craig*, 4 Ark. 10; *Perry v. Rice*, 10 Tex. 867; *Bailey v. Clay*, 4 Rand. (Va.) 846; *Bruce v. Carter*, 72 N. Y. 616; *Goldsborough v. Orr*, 21 U. S. 8 Wheat. 223 (5 L. ed. 602); *Philadelphia, W. & B. R. Co. v. Howard*, 54 U. S. 13 How. 306 (14 L. ed. 157); *Hill v. Grigsby*, 85 Cal. 663.

This action is barred by the Statute of Limitations.

Tynan v. Walker, 85 Cal. 684.

Messrs. Edward P. Cole and Roger Johnson, for respondents:

The paramount rule to control courts in determining whether covenants of this kind are dependent or independent, is the intention of the parties.

Roberts v. Brett, 11 H. L. Cas. 353; *Bank of Columbia v. Hagner*, 26 U. S. 1 Pet. 464 (7 L. ed. 222); *Todd v. Summers*, 2 Gratt. 167.

However independent covenants are originally, if nothing is done by the party entitled to performance until after his own obligation becomes due, by his own act he has waived his right, and he cannot demand performance unless he himself is ready to perform; that is, by matter *ex post facto*, the independent have become dependent conditions.

Hill v. Grigsby, 85 Cal. 657; *Bank of Columbia v. Hagner*, 26 U. S. 1 Pet. 455 (7 L. ed. 219); *Folsom v. Bartlett*, 2 Cal. 163; *Bohall v. Diller*, 41 Cal. 532; *Davidson v. Van Pelt*, 15 Wis. 342; *Smith v. McClusky*, 45 Barb. 611; *Irwin v. Lee*, 84 Ind. 321; *Beecher v. Conradt*, 18 N. Y. 108; *Youmans v. Edgerton*, 91 N. Y. 410; *Evans v. Harris*, 19 Barb. 416.

On petition for rehearing.

Conceding that the covenants in this agreement were independent by the terms of the 6 L. R. A.

contract when made, they only continued so up to the instant that the party who might sue before becomes himself bound on his part to perform, but thereafter the two covenants become dependent; and further, if one covenant in an agreement be independent, that this does not make the other so.

Irwin v. Lee, 84 Ind. 321.

If these covenants became mutual and dependent when the time for the payment of the money arrived, then the Statute of Limitations did not apply to the case.

Brennan v. Ford, 46 Cal. 15, 16.

Mrs. Dalton, before she could have recovered her purchase money, would have had to tender a deed to those premises.

Brennan v. Ford, 46 Cal. 16; *Hill v. Grigsby*, 85 Cal. 663; *Bank of Columbia v. Hagner*, 26 U. S. 1 Pet. 455 (7 L. ed. 219); *Grant v. Johnson*, 5 N. Y. 252; *Cuttler v. Powell*, 6 T. R. 820, 2 Smith, Lead. Cas. 7th Am. ed. 17; *Bourke v. McLaughlin*, 88 Cal. 197; *Runkle v. Johnson*, 80 Ill. 832; *Gillum v. Dennis*, 4 Ind. 419; *Oss v. Hazard*, 7 Blackf. 408; *Robinson v. Harbour*, 42 Miss. 795, 97 Am. Dec. 501; *Evans v. Harris*, 19 Barb. 421.

Judson, by his failure to demand the deed until his payment fell due, by his own act made his payment of the money a condition concurrent with his right to demand the deed.

Beecher v. Conradt, 18 N. Y. 108; *Barron v. Frink*, 80 Cal. 489; *Osborn v. Elliott*, 1 Cal. 387.

Courts strongly favor the interpretation of covenants as dependent. The seller ought not to be compelled to part with his property without receiving the consideration.

Bank of Columbia v. Hagner, 26 U. S. 1 Pet. 465 (7 L. ed. 223).

If the purchaser retains possession under the contract, he can do so only on the condition that he pays the purchase price and interest according to the contract.

Gates v. McLean, 70 Cal. 50.

Under the decision in this case the defendant can keep our land without payment. The law will not tolerate such an injustice.

Kirts v. Peck, 113 N. Y. 231.

Sharpstein, J., delivered the opinion of the court:

The plaintiffs, who sue as the administrators with the will annexed and devisees and legatees of Margaret Dalton, deceased, allege that on the 24th day of March, 1878, said Margaret Dalton and defendant entered into an agreement in writing, by which it was mutually covenanted and agreed between them that the said Margaret Dalton should grant, transfer and convey, without incumbrances, all her right, title and interest in and to a certain piece and parcel of land in said agreement described, to the said Judson, upon his demand and payment by him to the said Margaret Dalton of the sum of \$12,000, fifteen months after final judgment should have been entered in the case of *Egbert Judson v. Paul Malloy*, in the District Court of the Fourth Judicial District, in and for the City and County of San Francisco, and that said Judson should pay interest thereon at the rate of 9 per cent per annum until the same should be paid, from and after ninety days from the entry of said final judgment. A copy

of said agreement is attached to and made a part of the complaint.

After reciting in said agreement that Margaret Dalton claimed to be the owner of said premises, and that there was litigation pending in regard to the same, which it was desirable to terminate, and said Margaret Dalton being desirous of disposing of her interest in said premises, said agreement proceeds as follows: "Now therefore, in consideration of the premises hereinafter mentioned, said Margaret Dalton and said Michael Dalton, parties of the first part, hereby agree to and with the said party of the second part to execute a deed of conveyance in due form of law, in favor of the said party of the second part, of all the right, title and interest of said Margaret Dalton, without incumbrances, in and to the premises described. *Second.* In consideration of the premises, said party of the second part agrees to and with said first party to pay the said Margaret Dalton the full sum of \$12,000 in United States gold coin, within fifteen months after final judgment for plaintiff shall have been entered in the case of *Egbert Judson v. Paul Malloy et al.*, in the District Court of the Fourth Judicial District of the State of California, in and for the City and County of San Francisco, and number 12,091; and said party of the second part shall pay interest upon said sum of \$12,000, at the rate of 9 per cent per year, until the same shall be paid, from and after ninety days from the entry of such final judgment. It is understood that judgment is not final while motion for a new trial or appeal is pending."

It is further alleged in the complaint that Margaret Dalton was, long prior to the execution of said agreement, and up to the time of her death, the wife of Michael Dalton; that Margaret Dalton died on the 23d day of June, 1873, without executing to said Judson any conveyance of said land; that final judgment in favor of said Egbert Judson was duly entered in said action of *Judson v. Malloy et al.*, and all litigation therein finally ended, on March 27, 1873.

On the 11th day of June, 1885, the Superior Court of the City and County of San Francisco, sitting as a court of probate, by an order made on the petition of plaintiff Donovan, as administrator, etc., in the matter of the estate of Margaret Dalton, then pending before said court, directed and authorized said plaintiff Donovan to make and execute a deed of said premises to said defendant, pursuant to the terms of said agreement. And thereupon said plaintiffs executed conjointly a good and sufficient deed of said premises to said defendant, who refuses to accept said deed, or any deed, or to pay said sum by him covenanted to be paid to said Margaret Dalton. Defendant, by virtue of said contract, entered into, and has ever since retained, the possession of said premises. Wherefore plaintiffs demand judgment, etc. This action was commenced on July 24, 1886. The complaint was demurred to on the ground, among others, that the cause of action was barred by sections 837, 838 and 843 of the Code of Civil Procedure. The demurrer was overruled, and the defendant answered, pleading several defenses, among which is the plea that the cause of action is barred by the pro-

visions of section 837 and of section 843 of the Code of Civil Procedure. A trial was had, and judgment entered in favor of plaintiffs. Defendant moved for a new trial, which was denied, and from the judgment and order denying his motion for a new trial he appeals.

The only question which we deem it necessary to consider is, Did the cause of action accrue four years before the commencement of this action? If so, it is barred by the provisions of the Code, pleaded by the defendant. Counsel for respondents contended that no cause of action accrued against appellant until a conveyance of the interest of Margaret Dalton in the premises was executed to Judson; that the execution of such a conveyance was a condition precedent to the right to demand the sum which he covenanted to pay. By reference to the agreement, it will be seen that Judson agrees to pay the sum specified "within fifteen months after final judgment for plaintiff shall have been entered in the case of *Egbert Judson v. Paul Malloy et al.*"

The covenants to convey and to pay are independent covenants. No time is fixed for the execution of the conveyance. It might be executed before or after the time fixed for the payment of the sum to be paid by Judson. Had it been executed before that time, no cause of action would have accrued for the recovery of the money before the time fixed for its payment. No time is fixed for the execution of the conveyance and the case is clearly within the rule stated by *Sergeant Williams* in his note to *Pordage v. Cole*, 1 Wms. Saund. 830b, which has been accepted in England and in this country as a correct explication of the law on this question. He says: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act."

In this case no time is fixed for the execution of the conveyance which Margaret Dalton covenanted to execute to Judson. It is therefore clear that he did not intend to make the performance of that covenant a condition precedent to the payment which he covenanted to make at a specified time. In none of the many cases in which covenants have been held to be independent covenants were they more clearly so than in this case. We must ascertain, if possible, the intention of the parties from the written agreement entered into between them. But there is nothing in the conduct of the parties, as disclosed by the record before us, inconsistent with their written agreement.

In *Morris v. Sliter*, 1 Denio, 59, Bronson, Ch. J., said: "I think the defendant has plainly agreed that he would pay the money, and trust to a remedy on the plaintiff's covenant in case the deed should not be duly delivered, and he must abide by his contract."

In *Mattock v. Kinglake*, 10 Ad. & El. 56, Littledale, J., said: "A time being fixed for

payment, and none for doing that which was the consideration for the payment, an action lies for the purchase money, without averring performance of the consideration."

We do not doubt that a cause of action accrued in favor of Margaret Dalton, against the defendant, at the expiration of the time within which he agreed to pay her the stipulated sum specified in his covenant. Such being the case, it is clear that the action was barred by the provisions of the Code, above cited, and that the court erred in its conclusion of law on the findings that it was not so barred. The court also erred in overruling the demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action.

Judgment and order reversed, and cause remanded, with directions to the court below to enter judgment for the defendant.

We concur: **Thornton, J.; McFarland, J.**

Petition for rehearing in bank denied.

Re Gershom P. JESSUP'S ESTATE.

(.....Cal.....)

***Held, reversing the judgment of the court below:**

(a) **That the court had jurisdiction**, in proceedings had under the article of the Code providing for partial distribution, to hear and determine a question of contested heirship; *Justice Fox holding, per contra*, that the court has no jurisdiction to hear and determine such a question, prior to the time when the estate comes up in regular course of administration for final distribution, unless it be under, and in proceedings conducted in accordance with, the provisions of section 1664, Code Civ. Proc.

(b) **That a statement of counsel**, in the course of argument, to the effect that he has no doubt the court will hold, from the rulings already made and the evidence adduced, that the fact of paternity is established, does not amount to an admission, in the cause, of the fact of paternity, binding upon the parties.

(c) **That letters from the mother of an illegitimate child to its nurse may be admitted** in evidence for the purpose of showing her assent to the disposition that is being made of the child, and the manner in which it is being provided for, but are incompetent for the purpose of proving paternity.

(d) **That pictures of the putative father and of the illegitimate child**, taken by photography, are not inadmissible in evidence for the purpose of showing resemblance between the two, but are entitled to but little weight, since great dissimilarity between kindred, and strong resemblance between strangers, are matter of every-day observation.

(e) **That the Statute of 1850 and the Statute of 1870, in reference to the adoption of illegitimate children**, are to be strictly construed, but the provisions of the Code on that subject are to be liberally construed, when applied to acts of the putative father done since the adoption of the Codes.

(f) **That in the absence of written acknowledgment**, attested by competent wit-

nesses, an illegitimate child can be adopted by, and given a right of inheritance in the estate of, the father, only by the father's "publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child." That "public acknowledgment" requires that he should have held the child out to his relatives, friends, acquaintances and the world as his child.

(g) **That secret and clandestine maintenance** of, or contributions to the support of, an illegitimate child, kept outside the circle of his own daily association, never allowed to bear his name, never visited by the father at the place of its abode, never entertained by the father at his own place of abode, the father denying its paternity to his relatives, and concealing it from his business and daily associates, will not constitute adoption, or establish a right of inheritance in the estate of the father, even though the father may have, in the presence and hearing of the child's nurse, and of a few persons with whom he was brought in contact in connection with providing for the wants of the child, spoken of it as "my boy," or "my son."

(Beatty, Ch. J., and Works and Paterson, JJ., dissent.)

(November 30, 1896.)*

APPEAL by defendants from a judgment of the Superior Court for the City and County of San Francisco in favor of petitioner in a proceeding to establish a right to share in the distribution of a decedent's estate. *Reversed.*

The case sufficiently appears in the opinion.

Messrs. John Garber, John H. Dickinson, Thomas J. Bowers and McAllister & Bergin for appellants.

Messrs. Henry I. Kowalsky, W. H. L. Barnes and Morris C. Baum for appellee.

Fox, J., delivered the opinion of the court: Gershom P. Jessup died in this State on the 2d day of November, 1896, leaving a last will and testament, dated August 28, 1867, and being at the time of his death a resident of the City and County of San Francisco. The will was admitted to probate November 23, 1896, and letters testamentary issued to S. O. Putnam and Isaac Jessup, the executors therein named. He was never married, and his entire estate, amounting to nearly \$100,000, was devised to his brother, Isaac Jessup, and his two sisters, Mrs. Ann A. Lindsley and Mrs. Caroline O. Bogart, the two latter of whom were and are nonresidents of this State. On the 11th day of April, 1887, the petitioner, respondent here, describing himself as Richard P. Jessup, but signing as Richard Jessup, and who is subsequently shown to have been usually known as Richard Miller, filed his petition in the said case in probate, in which, after setting out the preliminary facts showing the death and pendency of the probate proceedings, and showing the character and condition and amount of the

*A decision was reached in this case and an opinion handed down on July 1, 1899, affirming the judgment of the court below. Subsequently a petition for rehearing was granted and the court reached the opposite conclusion and reversed the judgment below, handing down the opinion given herewith. The former opinion therefore becomes of no practical importance and is therefore omitted. [Rep.]

*Head notes by Fox, J.

estate, he avers substantially that he is a son of said Gershom P. Jessup, deceased, and of Josie Landis, deceased; that he was born in San Francisco, March 20, 1866; that said Gershom P. Jessup and Josie Landis never intermarried, nor lived together as husband and wife, but that from and after the birth of said petitioner, and for many years subsequent thereto, and up to the time of the death of said Gershom P. Jessup, he, the said Gershom P. Jessup, publicly acknowledged the petitioner as his child, and supported, maintained and educated him as such, and otherwise and in all ways treated the petitioner as if he were a legitimate child; "and did thereby adopt your petitioner as and for his legitimate child, and thereby and thenceforth your petitioner became for all purposes the legitimate child of the said Gershom P. Jessup, from the time of your petitioner's birth."

It further sets out that said Gershom P. Jessup was never married, and never had any family residence; that by an omission not appearing to be intentional he wholly omitted to provide in his will for petitioner, and claims that by reason thereof petitioner is entitled to the same distributive share in the estate of deceased as though said deceased had died intestate; and then proceeds to set out that the estate is but little indubbed, and prays an order of court, after due notice and hearing, distributing the whole of the estate, or such part thereof as the court shall direct, to petitioner, upon his giving bond conditioned for the payment, whenever required, of his proportion of the debts of the estate. Under this petition, citation was issued to the executors of the will only, and served on the same day. Subsequently the executors appeared and demurred to the petition (1) for want of facts to entitle the petitioner to partial distribution; (2) repeating the same ground in another form; (3) for uncertainty, which was duly specified; (4) that the court had no jurisdiction of the subject matters contained in the petition; (5) for defect and misjoinder of parties, in that the devisees under the will were not joined; (6) that the court had no jurisdiction of the person, or any person, interested in and necessary to the determination of the questions presented in the petition; (7) that the petitioner had no legal capacity to petition for partial or any distribution, and setting forth the reasons therefor. This demurrer was afterwards overruled and exception taken, and the ruling is assigned as one of the errors relied upon on this appeal. The executors then answered, putting in issue the question of the paternity of the petitioner and the question of his adoption. On the issue thus framed a trial was had before the court, and a large amount of testimony was taken. The court found in favor of the petitioner, and gave judgment ordering the distribution of the entire estate to him, upon his giving bond in the sum of \$1,000, which was given, conditioned that he would, when required, pay any debts that might be found due from the estate. From this decision and judgment or order an appeal is taken to this court, both on questions of law and on the ground of insufficiency of the evidence to justify the decision, the evidence being brought up in a bill of exceptions.

Twenty-three specifications of errors of law
6 L. R. A.

are assigned, six of which go to the question of jurisdiction. Personally, I am of opinion that the court never acquired jurisdiction to hear and determine the questions involved in this appeal; that, upon petition for partial distribution, jurisdiction to determine the question of contested heirship, or right to inherit, can only be acquired by proceeding as provided in section 1664 of the Code of Civil Procedure. But in this a constitutional number of the justices of the court do not agree with me, and the ruling of the court is in favor of sustaining the ruling of the court below, in so far as relates to the question of jurisdiction.

The remaining specifications of errors of law relate mostly to certain rulings of the court upon the admission and exclusion of evidence. Counsel for respondent contends that these rulings, even if erroneous, were harmless, for the reason that most of such rulings relate to evidence tending to show that the respondent was the son of the deceased, and that this fact was admitted by counsel in the court below. By an amendment of the record, that which is claimed to have been an admission so made by counsel has been brought to this court. We do not agree with counsel that it is an admission which should be held binding upon the parties, as to the existence of the fact. At most, it was a mere expression of opinion of counsel as to what he supposed the court would find, in view of the rulings already made and given, not as an admission of the fact, but as a reason why he need not dwell longer upon that point. The fact of paternity is denied even here, and it is the first of the questions of fact which will have to be determined in any proceeding which the respondent may prosecute for the purpose of asserting his claim to inheritance.

As to the particular question put to the witness Winter and objected to, it may be said: For the avowed purpose for which the question was put, it was, to say the least, harmless to admit it. The witness had already testified to the fact that the deceased had admitted to him the paternity of a boy, and shown him the boy. The point of inquiry at the moment of the question objected to was the identity of the young man to whom his attention was then called in court with the boy so shown to him some years before, and the witness had himself spoken of marks of resemblance between the person so before him in court and the deceased, and which marks of resemblance had attracted his attention on the former occasion, and it was in reference to these marks of resemblance and reminder that the question was put, the counsel declaring that the question was not put for the purpose of proving paternity, but simply of identity.

We cannot see that it was prejudicial error to allow the question put to Mrs. Hatton as to the conversations had between herself and the deceased at any time during the last six or seven years in regard to the intentions of the deceased towards Richard's mother. The question was entirely irrelevant and incompetent for the purpose of showing adoption, but it was undoubtedly put in the hope of eliciting further evidence tending to show paternity. It was a dangerous question for the respondent to put, for paternity alone, even if admitted, would not give a

right of inheritance, and, if the response proved an intention to make any other arrangement than that of marriage (an arrangement which counsel evidently did not expect and did not prove), its tendency was, and evidently must have been, to show that whatever the deceased had done for the boy was done for some reason other than that of an intent to adopt.

We do not perceive that it was prejudicial error to admit petitioner's Exhibits A, B, C, D, E, F, G and H, the letters of Mrs. Landis to Mrs. Nugent. They were incompetent and inadmissible for the purpose of proving paternity, but they were not offered for such a purpose. The sole object of introducing them was to show that at that time the child's mother acquiesced in the disposition that was being made of, and the provision that was being made for, the child. For that purpose the letters were admissible, although perhaps not very material,—it being borne in mind that this was prior to the passage of the Act of 1870.

Exhibit K, the photograph of the deceased, taken ten or twelve years ago, was entirely irrelevant and immaterial to any issue in the cause, and the objection to its introduction should have been sustained. Its admission was, however, probably a harmless error.

Exhibit L was a photograph showing the deceased and the petitioner in the same picture. It was made shortly before the trial, by bringing two negatives in juxtaposition, and from them making a third. One of them, that of the petitioner, was made from life at the time; the other was an old negative made several years before. The admitted purpose of the introduction of this picture was to show the resemblance of the two persons, as a fact tending to prove paternity.

Mere opinion as to resemblance between a child and its putative father is not admissible in evidence, but the fact of resemblance is held to be some evidence tending to prove paternity; and so, when the child and the alleged father have both been present, it has been held permissible to place them side by side before the jury for the purpose of letting them draw their own deductions as to the fact of resemblance. *Gilmanton v. Ham*, 88 N. H. 108.

We are not prepared to say that pictures taken by the improved processes of photography may not be admissible for such a purpose; but they would be entitled to much less weight as evidence than profert of the persons themselves; and even the latter would not go far towards establishing relationship, since a marked similarity between strangers, and great dissimilarity between kindred, are matters of almost daily observation. See 1 Wharton, Ev. § 846.

We do not think the exception taken to the admission of the deposition of the clergyman Ward, as a whole, was well taken. Taken by itself, that deposition would not have been admissible as proving, or tending to prove, anything binding upon the deceased; but, taken in connection with the testimony of Mrs. Hatton, it was admissible, as corroboratory of her testimony in relation to the fact of the christening.

Errors are also assigned as to some other rulings of the court in the admission and exclusion of evidence, but we do not deem them of

sufficient importance to merit special consideration here.

The only remaining point upon this appeal which it is necessary for us now to consider is that "the evidence is insufficient to justify the decision." The evidence is voluminous, and at the first reading seems conflicting. But when we have first examined the law, and ascertained and determined what facts are necessary to be established by proof in order to determine that an illegitimate child has been legitimized and given the capacity of inheritance in the estate of the father, the apparent conflict is removed; and upon some at least of the points so necessary to be established by proof we find that there is not only no conflict, but no evidence whatever, to bring the case within the requirements of the law. All the rights which are given to the petitioner in the premises are given by statute, passed in derogation of the common law. It is claimed by the respondent that in determining those rights the rule established in section 4, Code Civil Proc., is to be applied, and the statutes are to be liberally construed, with a view to effect the object and to promote justice. That is true, so far as applies to the provisions of the Code, when applied to the acts of the deceased done since the passage of the Codes. But the converse of the proposition is the rule, so far as reliance is placed upon statutes passed prior to the Codes and acts done under them. *Pina v. Peck*, 81 Cal. 359.

And, even as to the Code, "liberal construction" does not mean enlargement or restriction of a plain provision of a written law. If a provision of the Code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its apparent object, and promote justice. The law in force at the time of the birth of the respondent reads as follows: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child." Stat. 1850, p. 220, § 2. This Statute must be strictly construed. *Pina v. Peck*, *supra*.

There is no pretense that any such written acknowledgment was ever made. It follows that under this Statute neither oral admission nor proof (otherwise than by such written acknowledgment) of the fact of paternity will constitute the illegitimate child an heir. This Statute continued in force until March 31, 1870, when it was repealed, and the Legislature passed "An Act Providing for the Adoption of Minors, and the Legitimizing of Children Born out of Wedlock." Stat. 1869-70, p. 530. The third section of this Act provides, among other things, that an illegitimate child cannot be adopted without the consent of the mother, and that the consent of the minor, if over twelve years, shall always be necessary. If this section is construed to apply to the adoption provided for in section 9 of the same Act, it requires things which there has been no attempt to prove in this case; but we think that it cannot be fairly construed to have any application to adoptions

under said section 9. The first seven sections of the Act provide for the adoption of children by strangers, and, while the language of section 3, referred to, seems to be general, we think it was intended to be limited to the cases provided for in that part of the Act embraced in the first seven sections. Sections 8 and 9 read as follows: "Sec. 8. A child born before wedlock shall, to all intents and purposes, become legitimate by the subsequent marriage of its parents. Sec. 9. Either or both parents of an illegitimate child, or the father with the consent of his wife, or the mother with the consent of her husband, may acknowledge such child as his or their own, by a document in writing, executed by either if single, or both if married, or by treating, receiving or acknowledging him publicly as his or their own legitimate child; and such child and the one mentioned in the foregoing section shall, to all intents and purposes, be deemed legitimate from the time of its birth, and entitled to all the rights and privileges of legitimate offspring."

This Statute must also be strictly construed, for it was not until the adoption of the Codes, and is only as to the Codes, that the rule that statutes in derogation of the common law must be strictly construed was changed. This was the first Statute which authorized legitimizing of an illegitimate child by any mode other than the written acknowledgment provided for in the Statute of 1860; and at the time of the adoption of this Statute the respondent in this case was a little over four years of age. This Statute remained in force until January 1, 1878, when section 230 of the Civil Code took its place. That section, so far as relates to the legitimizing of an illegitimate child, provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." This provision, being a part of the Code, is to be liberally construed, but it is not retroactive, and relates only to minor children. *Re Estate of Pico*, 53 Cal. 84, and 56 Cal. 418.

Section 1387 of the same Code is a part of the chapter on succession, and provides: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock."

It is contended that this provision of section 1387 is a limitation upon section 230, but we do not think that the Code should be so construed. The whole chapter on adoptions relates to the adoption of minors; and by the express provision of this section 230 an illegitimate minor, acknowledged and adopted as therein provided, "is deemed to be legitimate for all purposes." One of the objects of adoption, and of legitimizing by adoption, is to give the capacity of inheritance. It has been already determined in *Re Estate of Pico*, *supra*, that this section relates only to minors, who alone are subjects of adoption, and that section 6 L. R. A.

1387 provides for giving to illegitimate adults the capacity of inheritance. It follows from these Statutes, and the rules of law applicable to the construction thereof, that prior to 1870, when this respondent was four years of age, he, the respondent, could not have been adopted by the deceased, or given the capacity of inheritance from him, except by acknowledgment in writing, in the presence of a competent witness; that from March 31, 1870, to January 1, 1878, he could have been so adopted and given such capacity, either by acknowledgment in writing, as before, or by the deceased having "treated, received, or acknowledged him publicly as his own legitimate child." Both these Statutes must be strictly construed. *Pina v. Peck*, *supra*.

It is conceded there was no written acknowledgment, such as prescribed by either Statute. The Act of 1870 cannot be construed as retroactive, so as to give force or effect to acts done or performed before its passage, which they would not have had at the time they were so done or performed. Since the 1st of January, 1878, he could have been so adopted and given such capacity of inheritance by the deceased having "publicly acknowledged him as his own, receiving him as such . . . into his family, and otherwise treating him as if he were a legitimate child;" and this provision is to be liberally construed. But liberal construction does not mean that even this provision is to be construed to be retroactive. Nothing that was said or done by the deceased prior to January 1, 1878, can be construed as proving, or tending to prove, such adoption, unless it had that effect at the time it was said or done, and under the law then in force. Liberal construction does not require or authorize the frittering away of the written law, nor are we authorized to consider the apparent justice or hardship of particular cases, for we are not appointed to decide cases alone, but to settle principles first, and, second, to decide cases according to those settled principles, as applied to the facts presented in the cases. The decision of a single case according to its apparent justice or hardship might establish a principle that would cause greater injustice or greater hardship in numerous other cases. While it is true that illegitimate children are themselves innocent of wrong, and are for that reason entitled to the sympathies of mankind, and to such reparation as the laws can give, it is equally true that courts ought not, by any extraordinary liberality in the construction of those laws, to enable wantons in silk, having children without names, to prey upon the estates of dead men, however much they may have thrived through the fears of living ones. While in this particular case no adventurers is seeking to recoup for her own wrong, it is important to see that a rule of law is not established by construction which would place a premium upon perjury in other cases, though none may be manifest here. Of the women who are mothers of nameless children there are few indeed who would hesitate at any fraud, or to whom perjury would seem a crime, if by means of it a dead father, who had left a goodly estate, could be secured for the nameless one, and this even while continuing in illicit intercourse with the actual father still living. And human nature is so

weak that even men are not wanting who would aid their mistresses in palming off their own children upon the estates of dead men, if thereby a competence could be secured upon which both, with their illegitimate offspring, could continue to live in luxury and in crime. On the other hand, the court ought never, by a strained construction in the other direction, to relieve a licentious man, or his estate, of any of the obligations or burdens which the Legislature has imposed as a restraint upon vice, as a reparation to those who actually suffer from his vices, or as a protection to the Commonwealth from the burden of supporting the nameless offspring of his crimes. Between these two dangers, the duty of the court is fairly to interpret the laws as the Legislature has framed them, without regard to how its action may affect individual cases. If, thus interpreted, they are found to be too stringent or too liberal, the remedy is through the Legislature, and not the courts.

Acting upon these rules of interpretation and construction, the inquiry is whether the acts and declarations of the deceased amounted to a public acknowledgment by him of this child as his own; receiving it as such into his family, and otherwise treating it as if it were a legitimate child. As he had no home and no family, in the strict sense of "a collective body of persons who live in one house, and under one head or manager,—a household including parents, children and servants,"—it would not be a fair or liberal construction to say that the child had not been adopted or acknowledged because he had not been received in such a home or made a member of such a family. On the other hand, since it is a fact that the deceased did have a family, in the sense of having "brothers and sisters, kindred, descendants of one common progenitor," with some of whom he was brought into frequent contact, and also business associates and friends with whom he was in daily intercourse, from all of whom he not only studiously concealed, and to his brother in express terms denied, the relationship, it would require a liberality of construction destructive of the language of the Statute itself to hold that there had been an adoption within the meaning of the Code, or of the Statute of 1870. And it is conceded that there was none under the Statute of 1850. An analogous question was recently considered by this court at great length in the case of *Sharon v. Sharon*, 79 Cal. 633, and the sum of the conclusion there reached was that the parties must have held themselves out to their relatives, friends, acquaintances and the world as occupying towards each other the relations claimed for them in the action. Speaking generally, the laws applicable to this case seem to require something like the same kind of public acknowledgment and recognition as was required in that case. Was there such acknowledgment and recognition? Let us consider briefly what is and what is not shown by the evidence. We assume for the purposes of this opinion that the paternity was sufficiently established. That alone, unless established by written acknowledgment, in the presence of a competent witness,—which was not done in this case,—does not establish adoption, or give a right of inheritance. It is also in evidence

that when the mother of this child was about to be confined the deceased brought her to this city, and procured for her care and maintenance at the house of a reputable negro nurse during the period of her confinement and illness. One witness, a dentist, with whom the deceased had some acquaintance, and to whom he applied for some professional service for the mother before her confinement, says that at that time the deceased acknowledged to him that the child about to be born of that woman was his; that he said he would not marry the girl, but would be just with her, and pay all the expenses of her care, and would care for the child. Another, a colored woman, who had the care of the boy after the first few years of his existence, and daughter of the nurse where the child was born, testifies that, at about the time the mother was brought to the house of her mother, she overheard a conversation between the deceased and her mother, in which deceased acknowledged that he was the father of the child about to be born, and intended to provide for it. She also says that deceased then also promised that he would marry the girl.

This is the only direct testimony tending to show a promise on the part of the deceased to marry the child's mother. It is given by one who was herself a child at the time when she says the promise was made. This is in direct conflict with the statement made about the same time to the dentist. The conflict, however, is of little moment, except as it shows a conflict between the two witnesses, without whose testimony the respondent has no case whatever, and tends to show that the recollection of the colored woman as to events happening and declarations made during the period of her own childhood may not in all cases be reliable. It is sufficiently shown that the mother of the child remained at the house of the nurse about seven weeks, during which the deceased called there frequently, the witness says, and Jessup paid all the expenses. After the mother left, the child was kept and cared for by the nurse, at the expense of Jessup, who called frequently to see it, and, as it got old enough to observe things, would play with it, calling it his boy, and calling himself "daddy," and at a still later period would take the child and the witness, who appears at that time to have acted the part of nurse girl to the child, to North Beach, and let it see the animals there, and buy nuts and cakes for it to feed to them. The girl says that he was very fond of the child, and that it was called "Richard" at his request. Her testimony is very full, as tending to show his interest in and apparent affection for the child while it remained at the house of the original nurse and in the City of San Francisco, she saying, among other things, that he said "he wanted to make a man of him," and "if Richard behaves himself, and does what I want him, he will not be sorry for it," and many other expressions of this kind.

All this might have gone far towards proof of acknowledgment and adoption, if it had been public, and at a time when the law authorized adoption by such kind of acknowledgment. But it was never public. It was made and done only to and in the presence and hearing of the negro family in whose care he

placed and continued to keep it. When he took it out it was with the negro girl, and then not to a place where he would be likely to meet members of his own family and friends. And it all occurred during the period of the child's residence in San Francisco. During all that time the Law of 1850 was in force, and no kind of acknowledgment or recognition would amount to adoption, unless it was in writing, and duly witnessed. According to the testimony of this witness, she was herself about thirteen years of age when the respondent was born. In May, 1868, she married and removed to Petaluma, and two months afterwards, when the respondent was less than two years old, he was removed to her residence in Petaluma, and that continued to be his residence until 1876, when he was sent away to school. It will be observed that this removal to Petaluma occurred prior to the passage of the Act of 1870, and it is a significant fact that it is not shown that the deceased ever visited the boy after such removal, either in sickness or in health, and is affirmatively proved that he never did visit him while living at Petaluma. Nor is it shown that the two ever lodged, even for a single night, in the same house, or sat down at the same table, or even in the same dining-room in their lives. It is shown, however, that deceased continued to provide for the boy's maintenance while at Petaluma, and subsequently had the colored woman take him to Washington College, where he had arranged for his board and schooling, and where he was entered and known, as he had been known at Petaluma, by the name of "Richard Miller," the latter being the family name of the colored people with whom he had been living. The witness testifies that, when she had her own children christened by a colored clergyman at Petaluma, she, at the request of Jessup, had Richard christened by the name of "Richard Page Jessup;" and the deposition of the clergyman shows that he had some recollection of such an occurrence, but no public or church record was made of the fact, and the private record kept by the clergyman had been lost. It is not shown that Jessup had any knowledge of this fact, except that the witness says she had it done at his request, and that afterwards she informed him of the fact, and he gave her \$5 to give to the preacher. The boy was never known anywhere by the name of "Jessup," but always and everywhere by the name of "Miller." He was placed at school as a ward of Jessup, and the accounts were kept against Jessup, as guardian of "Richard Miller." Two or three witnesses testify that while at school, when he was sixteen or seventeen years of age, the young man himself declared that he did not know who his father was; and it is fairly deducible from the whole evidence that he never did know Jessup as his father, or call him such, although he knew that, sometimes directly and sometimes indirectly, Jessup was contributing to his support.

Jessup's diary, and all the accounts and memoranda kept by him relating to the boy, that could be found among his effects, were brought into court, and nowhere among them is there an entry of any kind indicating an acknowledgment of the boy as being his son. Every reference that is made to him is as

"Richard" or "Dick Miller." It is patent, however, from the evidence that for fourteen or fifteen years he secretly provided for the maintenance of that boy; that is to say, as secretly as such a thing could reasonably be done, without sending the boy entirely out of the country; and the evidence discloses abundant reason why he was not sent away. This could not have been done without causing a *denouement* which he was constantly seeking to avoid. Necessarily, the maintenance was not entirely secret. He was compelled to act through and to deal with others in providing for the care and education of the boy. But he always acted through channels that were not within the circles of his ordinary dealing or his ordinary association, and, as far as possible, without the knowledge of his family. The fact of the boy's existence, and that Jessup was supporting him, was communicated to his brother, while yet the child remained in San Francisco, by the nurse in whose charge he was. A few days afterwards, the brother asked Jessup about it, and asked him if it was his boy, to which Jessup replied: "No, it ain't my boy." Neither of the brothers was at that time occupying such social relations that either would have been likely to deny paternity through either fear or shame. During the last year or two of his life, Jessup was in feeble health, and it is apparent that both he and his brother felt that his end was approaching. During that period the brother again asked him about the boy, and asked him: "Gus, what ever became of that boy you were taking care of?" To which Jessup replied: "The boy,— I tried to make something of him. I have taken care of him, and have tried to make something out of him; but he didn't amount to anything, and I let him go." And the brother swears that Jessup never did acknowledge to him that the boy was his.

Some six or seven witnesses are called, besides the dentist and colored woman above referred to, who testify to conversations with the deceased at different times, in which he spoke of the boy as "his boy," and among them we notice that four, besides the dentist and colored woman, sometimes used the words "my son" instead of "my boy" as having been spoken by the deceased; but with all the witnesses who are examined on the subject "my son" is the exception to the rule, the more common form being "my boy," and the still more common form being "the boy." These witnesses may all be perfectly honest, and still by mistake may have used the words "my son" in the isolated cases where they have used them, when in fact they should have used the form of expression most commonly adopted by them, "my boy," or "the boy." But it makes no difference whether they were mistaken or not. None of these witnesses were members of Jessup's family, and, with a single exception, they were not persons likely to come in contact with his family. None of them were his business associates, and such of them as could in any sense be called his companions were only so during such portions of his time as he was in hiding from society. They were not persons likely to make public what he had said to them on such a subject, but rather to accept it as a matter of confidence, to be kept secret.

Most of them were persons with whom he was brought in contact in the business of providing for the wants of the boy, and to only a few of those persons did he ever make any such revelations, and in no case were they so made as to amount to public acknowledgment. To the clothier from whom he always purchased the boy's clothing, he always spoke of him as "the boy," never using any expression to indicate that it was his son for whom he was providing. To an artist, to whom he paid \$100 for painting a portrait of the child when an infant, he never used any form of expression to indicate a relationship to him, or why he had the portrait painted. But the fact that he procured this portrait is urged as strong evidence tending to show his affection for, and his intentions towards, the boy. It does not so strike us. It was procured prior to 1870, and consequently proves nothing in the way of adoption. It was retained by him for some ten or twelve years, and during a portion of the time was seen by some few persons in his room. He then had it varnished, and this fact is dwelt upon as another evidence in support of the theory of adoption, and one occurring after the adoption of the Code. But the evidence discloses other facts which, to our minds, militate directly against this theory. It shows that although the mother, for the protection of her own good name, had left the boy to be provided for entirely by Jessup, her heart was constantly crying out for her baby boy, and she was seeking some memento of him. Just about the time this picture was finished she was married. When afterwards it was retouched and freshened up, she had become a widow, and had removed from the neighborhood in which her kindred resided. It is not shown that she ever received the picture, but, on the other hand, it is not shown that it was retained in Jessup's possession after it had been retouched, and it is not found among his effects. It does not appear that any effort was made to find it among the effects of the mother, who had died some time before Jessup did.

S. O. Putnam is one of Jessup's executors. He was the executor of a brother of Jessup, who died about 1865, and through whom Jessup received most of his fortune. Putnam and Jessup were always on very intimate relations, ever since the distribution of the former estate; and much of the time Putnam had funds of Jessup's in his hands. He knew that Jessup was providing for a boy, and during a portion of the time such provision was sometimes made through Putnam; but Jessup never told Putnam that the boy was his. In 1881 Jessup sent the boy to San Diego to go upon a ranch. That was the only time Putnam ever saw the boy. In 1882 the boy returned of his own accord, but, instead of going to Jessup, he went direct to Mrs. Hatton (formerly Mrs. Miller), the colored woman, then residing at Napa, and from there communicated with Mr. Putnam, writing to him several times for money. These letters were shown to Jessup, and once Jessup authorized some money to be sent to him; but after that, for the balance of his life, Jessup refused to have anything to do with the boy.

Without dwelling further upon the details of the evidence, it may be summed up as follows: It is shown that, before and at the time of the

birth of this respondent, Jessup had promised the mother that he would protect her good name by providing for the care and maintenance of this child. So long as the mother lived, he was in fear of personal difficulty from her kindred if he failed to keep this promise. This is shown by the evidence of Mrs. Hatton as to the earlier years, and of Mr. Jackson, and perhaps some others, as to the later years. While the mother lived, and until the boy had reached an age when Jessup seemed to think that he ought to be self-sustaining, he kept that promise. But in keeping it he kept the boy out of the circle of his own association. To a very limited number of persons, with whom he was brought in contact in providing for the boy, he spoke of him as "my boy," and possibly to a less number he may have used the words "my son;" but he never used these expressions either to or where they were likely to come to the knowledge of his own family or kindred or to his most intimate and confidential business acquaintances and friends. He never visited the boy after he was two years old, or after the passage of any law under which adoption could result from any line of conduct other than written acknowledgment, duly witnessed; and when the boy was brought, or in later years came, to him, as he sometimes was and did, he did not entertain him, or keep him with him, for any length of time, but made his interviews brief, provided for his wants, and sent him away. And it does not appear that he ever but once made the boy a present, and then only of a five-dollar watch. Instead of providing for him among people of his own race, he reared him, and had him brought up, in a colored family, respectable, it is true, but still a family of another race, commonly considered inferior, and to be brought up among whom is regarded by most people of the race of the putative father as degrading; sent to the public school with the colored children, forbidden to bear his name, and allowed him all his life to be known by the name of the colored family in which he was reared; when sent to college, taken there by his colored nurse, and entered there by her name; at last placed upon a farm in San Diego, and, when he returns from there, going to the only home he ever knew, the home of his colored friends, and there becoming a bootblack and waiter in a colored barber shop; and finally left to start from such surroundings and associations to make his own way in life. And, as further evidence in negation of the idea of adoption, it appears that within a year after the boy was born, and at the time when Jessup was, according to the testimony of the colored nurse, showing more evidences of affection for the boy, and of desire to provide for his future, than he ever afterwards did, he (Jessup) makes a will in which he wholly omits all mention of the child, or any provision for him, and never afterwards changed it. It is true the colored woman says he frequently told her he was going to provide for the boy, and another woman, whose relations with Jessup were, to say the least, not above suspicion, testifies that towards the close of his life Jessup told her that he had made a will in which he had provided for both herself and the boy; but no such will has ever been found, and it is not only fair to presume, but,

for the purpose of this case as it stands, must be presumed, that none such was ever made. In his intercourse with his own family, he denied his relationship to the boy; and with those most intimately connected with him in his business relations, and who, by reason of such connection, acquired some knowledge of what he was doing, he never admitted or communicated that he was doing anything more than "putting up" for the boy.

It is said that as Jessup was never married he was not bound to receive this child into his family, for he had none in which to receive it. But we do not so read the law. The language is: "Publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child." If he has a wife, he can only receive it into the family with her consent, but if he has no wife he must still receive it into his family; that is to say, in such family as he has the child must be acknowledged and treated as his. At least, he must not deny to the members of such family that it is his. Under this evidence, we are forced to conclude that Gershon P. Jessup never did "publicly acknowledge this child [the respondent] as his own," or "receive it into his family," or "otherwise treat it as if it were a legitimate child."

It follows that the judgment or order appealed from must be reversed, on the ground that the evidence is insufficient to justify the decision.

So ordered.

We concur: **Sharpstein, J., Thornton, J.; McFarland, J.**

I dissent. **Paterson, J.**

Works, J.:

I dissent, for the reasons stated in the opinion filed on the former hearing of this case, written by me, and concurred in by a majority of the court. No new point was made on the second hearing, and nothing additional, either of law or fact, was developed. The second hearing strengthened my views as expressed in the former opinion, and the manner in which the evidence is treated in the prevailing opinion of *Mr. Justice Fox* has served to confirm my first convictions.

Beatty, Ch. J.:

I dissent. Reargument and re-examination of this case have convinced me that our former decision was correct, and have not materially changed my views as to the validity of the particular grounds upon which it was based. It is conceded—it would have been impossible to deny—that the proof of respondent's paternity is complete. The only argument that can be made against his claim to inherit his father's estate rests upon a strict construction of the Statutes, remedial in their nature, designed to secure to innocent unfortunates in his situation a just share of the rights to which they are by nature as fully entitled as are legitimate offspring. No doubt a strong argument can be built on this basis of strict construction against the decision of the superior court. But I adhere to the view so strongly put and so satisfactorily maintained by *Justice Works* in his opinion, that in cases of this kind the only strictness required is in proof of paternity. That being satisfactorily established by plenary proof, I think courts should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest and humane man should be not only willing but eager to do, and what a just law would compel the unwilling to do. I also think it a wholly unauthorized construction of the Statute to hold that the acts of recognition, acknowledgment, etc., necessary to legitimize a natural child, should be performed with the express intention on the part of the father of accomplishing that object. If the acts are in themselves such as the Statute prescribes, I think they confer legitimacy, without any reference to the intent with which they are performed. There is no danger to morality in recognizing the natural rights of illegitimate children, as against their fathers, or other claimants of their estates. And there is no danger of encouraging the fabrication of spurious claims, so long as strict proof of paternity is insisted upon. From this point of view, the evidence here is amply sufficient to sustain the decision of the superior court. Between the passage of the Act of March, 1870, and the adoption of the Code, Gershon P. Jessup, if the witnesses told the truth, did enough to legitimize the respondent, and no subsequent neglect could deprive him of the status so acquired.

WISCONSIN SUPREME COURT.

CHIPPEWA VALLEY & SUPERIOR R. CO., *Resp't.*,

v.

CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA R. CO., *Impleaded, etc., App't*

(....Wis.....)

A contract by railroad companies to refrain from any effort to obtain a grant

of public lands from the Legislature, and to aid another company to procure it by all reasonable and proper assistance in consideration of a share of the grant obtained by the latter, is void as against public policy.

(December 8, 1889.)

APPEAL by defendant, the Chicago, St. Paul, Minneapolis & Omaha Railway Com-

NOTE.—Contracts void as against public policy.

All contracts prejudicial to the interests of the public, such as a contract tending to prevent free competition, are void. *Hilton v. Eckersley*, 6 El. & Bl. 64.

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Money paid in furtherance of a contract which by statute is void but not illegal, as distinguished from an illegal contract, may be recovered back. *Leake*, Cont. 2d ed. 763; *Jessopp v. Lutwyche*, 10 Exch. 614; *Rosewarne v. Billing*, 15 C. B. N. S. 316.

pany, from an order of the Circuit Court for Dane County, overruling its demurrer to the complaint in a suit to enforce specific performance of a contract. *Reversed.*

Statement by Cassoday, J.:

The amended complaint, in effect, alleges the incorporation and organization of the plaintiff, usually called the "Chippewa Company," on June 15, 1881. That thereupon the work of locating and constructing its railway was commenced and prosecuted until the fall of 1882, when the same was completed from the Mississippi to Eau Claire, with a branch from near the mouth of the Red Cedar River by way of Menominee to Cedar Falls, and from that time the same has been operated as a railway company engaged in the business of a common carrier. That the defendant, The Chicago, St. Paul, Minneapolis & Omaha Railway Company, usually known as the "Omaha Company," was organized during all the times hereinafter mentioned. That June 15, 1881, it was the owner, among other things, of a railway extending from Elroy, through Eau Claire, to Hudson, and thence to St. Paul. That it was also the owner of a railway from Hudson, in a northeasterly direction, a distance of about 120 miles, known as the "North Wisconsin Railway." That June 15, 1881, the defendant, The Chicago, Milwaukee & St. Paul Railway Company, usually known as the "St. Paul Company," was engaged in operating railways in the States of Wisconsin, Illinois, Minnesota and Iowa, and the Territory of Dakota. That one of its lines extended from La Crosse, by way of Wabasha, in Minnesota, to St. Paul. That about 3,000 miles thereof was in the States of Minnesota and Iowa, and the Territory of Dakota, constructed over prairie lands almost entirely destitute of timber and lumber. That said Chippewa Company was organized by parties interested in and friendly to the St. Paul Company, with a view of connecting the lines of said last-named Company with the extensive prairies and timber lands in northwestern Wisconsin, and of reaching the ports of Lake Superior, and connecting them with said system of railways, and operating the same in connection with the St. Paul Company, and eventually transferring the same to the St. Paul Company, to be made a part of and be operated with it as a part of its system. That with that view it determined to and did construct said Chippewa Railway. That arrangements were made by said Company, for the extension of said railway from Cedar Falls, on this route, to Lake Superior, passing over the line of that part of the land grant hereinafter mentioned, more particularly from Superior to the point of intersection at or near Veazie with the North Wisconsin Railway.

That, at or about the time of the organization of the plaintiff Company there was organized a railway company, by the name of the "Chippewa Falls & Northern Railway Company," with the object of constructing a railway from Chippewa Falls in a northerly direc-

tion, by way of Chetek, Rice Lake and said land-grant intersection at or near Veazie, and thence, either by its own line or a branch of said Omaha Company, to Superior. That the Company was organized in the interest of said Omaha Company, and by the officers thereof, and controlled and substantially owned by that Company. That it proceeded, with the assistance of said Omaha Company, to construct its road from Chippewa Falls, on the route indicated, towards Superior. That the Omaha Company subsequently and prior to January 10, 1882, acquired the ownership in form of said road so commenced and partially constructed by said Company, and is now the owner thereof. That the lines of railway proposed to be constructed by the plaintiff and by the Chippewa Falls & Northern Railway Company and said Omaha Company were identical from Chetek northerly to Superior, a distance of about 125 miles.

That by the Act of Congress of June 8, 1856, and May 5, 1864, grants of land, described, were made to Wisconsin, among other things, for the construction of a railway from Madison or Columbus, by way of Portage City, to St. Croix, at a point described, and from thence to the west end of Lake Superior, and to Bayfield, upon the conditions named. That March 4, 1874, the Legislature of the State accepted said grants, and thereupon granted to the Chicago & Northern Pacific Air-Line Railway Company all the right, title and interest which the State then had, or might thereafter acquire, in or to that portion of the lands granted by said Acts of Congress as was or could be made applicable to the construction of that part of the railway lying between the points of intersection mentioned and the west end of Lake Superior, upon the express condition that said last-named company should construct, complete and put in operation that part of its said railway above mentioned as soon as a railway should be constructed and put in operation from Hudson to said point of intersection, and within five years from said last-mentioned date, and should also construct and put in operation a railway from Genoa northerly at the rate of twenty miles per year; which said grant was duly accepted by said last-named company, May 1, 1874. That the name of said last-named company was afterwards, and about 1874, changed to the Chicago, Portage & Superior Railway Company, commonly known as the "Portage & Superior Company."

That by an Act of the Legislature of the State approved March 16, 1878, the time limited for the construction and completion of said last-named railway was extended for the term of three years, or to about May 1, 1882. That for more than two years prior to January 10, 1882, a railway had been completed and put in operation from Hudson to said point of intersection, as stated, but that said Portage & Superior Company had not, on or prior to said last-mentioned date, completed or constructed any portion of said land-grant road from said point of intersection to Superior, and had not

An agreement between two gas companies of the same city, for the abandonment by one of the companies of the discharge of its duties to the public, and that the price of gas as fixed thereby should not be changed below a certain specified rate within 6 L. R. A.

out the consent of the other, where one of the companies is prohibited by statute from entering into such a contract, is an illegal contract. *Gibbs v. Consolidated Gas Co.* 120 U. S. 386 (32 L. ed. 979). See *Adams Co. v. Hunter*, post, 615.

constructed or put in operation any part or portion of any railway, and was not the owner of any railway whatever. That said last-named company was then wholly insolvent, and unable to complete or build any portion of said land-grant road, or put the same in operation, and that it had no means or ability to complete, construct or operate a railway, and no property of any kind or description.

That one Barnes, of New York, was the owner of nine tenths of the bona fide stock thereof, and was, January 10, 1882, and for several weeks prior thereto had been, offering to sell his stock entire, with the control of said company, and all the franchises thereof, to different parties, especially to the plaintiff and the St. Paul Company and the Omaha Company. That it was well understood by all parties that the said land grant would lapse to the State on May 1, 1882. That the plaintiff, in its own behalf and in the interest of the St. Paul Company, and the Omaha Company were both proposing to apply to the Legislature for said grant, and were both proposing to construct their line of road over the line of said land-grant road; and, in view of the facts stated, the plaintiff and the Omaha Company, respectively, were proposing to ask the Legislature to confer said land grant upon them, and thus prevent the grant from lapsing and reverting to the United States, and thereby being lost to the State. That it was apparent to both parties that in case the plaintiff, aided and assisted by the St. Paul Company, and the Omaha Company, should enter into a contest before the Legislature for that grant, they might defeat each other, and that no disposition of said land grant would be made, and that said road would not be constructed, and that said land grant would probably fail of its object and become forfeited. That it was manifest that only one road from the Chippewa Valley, on the line indicated, to Lake Superior, was needed by the public for the transaction of business, and that, if an arrangement could be made by which both the Companies interested could have traffic arrangements over the road to be constructed, all parties would be better accommodated, and all interests subserved, than by the construction of two parallel and competing lines. That in view of the situation, and on January 10, 1882, said Companies met, by their respective representatives and officers, and entered into a contract in due form of law, in the words and figures, omitting signatures, following:

"This agreement, made this 10th day of January, in the year A. D. 1882, between the Chicago, St. Paul, Minneapolis & Omaha Railway Company, party of the first part, and the Chicago, Milwaukee & St. Paul Railway Company, party of the second part, witnesseth, the party of the first part, in consideration of the agreements of the party of the second part hereinafter expressed, agrees: (1) That in case the party of the first part shall obtain the land grant heretofore granted to the Chicago, Portage & Superior Railway Company in the State of Wisconsin, either by grant of the Legislature or negotiation with the said Chicago, Portage & Superior Railway Company, or by both such grant and negotiation, the said party of the first part will give to the said party of the

second part one equal fourth-part of the lands received under said grant. (2) That it will grant to said party of the second part all rights, franchises and property which it may obtain from the said Chicago, Portage & Superior Railway Company south of the junction of said road with the main line of the North Wisconsin Railway, including all grade and right of way of said company between said junction and the City of Chicago, which the party of the first part may acquire. (3) That it will make a contract of lease with the said party of the second part, giving said party of the second part an equal right with the party of the first part to run its trains from Chippewa Falls (or, if the party of the first part shall construct a road from Eau Claire to Chippewa Falls, then from Eau Claire by way of Chippewa Falls) to Superior City, upon the following terms: The party of the second part shall pay to the party of the first part 6 per cent interest per annum upon one half of the actual cost, upon a cash basis, of said railroad, and shall also pay for repairs of the same upon the same, upon the basis of wheelage. The option to take this agreement of lease shall remain to the party of the second part for the term of six months from the time the road is completed so as to admit of the running of trains through from Chippewa Falls to Superior City. The party of the first part further agrees that it will not extend its Neillsville line, and both of the parties hereto agree that they will not extend their lines into the territory between Beaver, on the Wisconsin Valley Railroad; Neillsville, on the Chicago, St. Paul, Minneapolis & Omaha Railroad; Abbotsford, on the Wisconsin Central Railroad,—without a further agreement between them. In consideration of the above agreement, the said party of the second part hereby agrees that it will not make any efforts to procure said lands to be granted to it, or aid or assist any other party to procure the same, except the said party of the first part, and that it will render to said party of the first part all reasonable and proper assistance which it may be able to give in procuring said land grant to be given to the said party of the first part by the Legislature, and will aid said party of the first part in any negotiation that it may set on foot with the said Chicago, Portage & Superior Railroad Company for the purpose of acquiring the same. It is further agreed and understood that in case it shall become necessary to pay the said Chicago, Portage & Superior Railway Company any sum of money in order to procure an assignment of its interest in said grant, that the party of the second part shall pay its proportion of said amount, being as one to three, or relinquish all right to any portion of said grant. It is further understood and agreed that the question of the amount of land pertaining to said grant, and the division thereof between said companies as above provided, shall be left to the determination of Philletus Sawyer and Alexander Mitchell, and that their decision upon that subject shall be final and conclusive between the parties. In testimony whereof the parties to these presents have caused the same to be executed by their respective presidents, and their corporate seals to be affixed hereto, attested by their respective secretaries, the day and year first above written."

That said contract was in fact executed by the St. Paul Company in its own behalf, and as representing the plaintiff. That the plaintiff and the St. Paul Company, in good faith, relying upon the agreements of said Omaha Company in said contract contained, made no application to the Legislature, then just convening, to have said land grant conferred upon the plaintiff, and ceased all negotiations then pending between the plaintiff and said Portage & Superior Company, and between the St. Paul Company and said Portage & Superior Company, for the purchase of the stock and property of said Company, and rendered to said Omaha Company all such reasonable and proper assistance as they were able to give in the negotiations between it and said Portage & Superior Company for the purchase of said grant. That, immediately after the making of said contract, the Omaha Company renewed its negotiations with the Portage & Superior Company, or the agents of said Barnes, for the purchase of said stock, property and rights thereof. That said negotiations soon thereafter resulted in such purchase. That the actual transfer of said stock, after said negotiations were completed, was, by the direction of the Omaha Company, made to one Cable, a friend of said Company, who took the transfer thereof to himself, in his own name, but for the benefit of the Omaha Company. That the whole consideration therefor was paid to Barnes by the Omaha Company. That subsequently Cable transferred all of said stock to the Omaha Company, or to some other person for its benefit. That, as such owner, the Omaha Company consented to the legislation thereafter prosecuted, resuming said land grant to the State, and conferring the same upon the Omaha Company. That, in consequence thereof, no objection was made by the Portage & Superior Company, or to parties entitled to represent the same, but in fact consented thereto. That, immediately after said purchase, the Omaha Company applied to the Legislature to resume said grant from said Portage & Superior Company, and to confer the same upon the said Omaha Company, and prepared a bill for that purpose, which was introduced in the Legislature and passed, the same being chapter 10 of the Laws of 1882, approved February 18, 1882. That in and by said Act the Legislature revoked and annulled the said land grant theretofore held by the Portage & Superior Company, and conferred the same upon and granted it to the Omaha Company, with all the right, title and interest which the State then had or might thereafter acquire in and to the lands granted to said State by said Acts of Congress to aid in the construction of such railway, which were applicable under said Acts to the construction of that portion thereof which lay between the west end of Lake Superior and said point of intersection. That said grant was upon the express condition that the Omaha Company should continuously proceed with the construction of the railway then in part constructed by it between said point of intersection and the west end of Lake Superior, and should complete the same so as to admit of the running of trains thereover on or before December 1, 1882; and upon such completion the Omaha Company became entitled to patents for all lands applicable under said Acts to the

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land-grant road so constructed. That in making such purchase and the passage of said Act the St. Paul Company and the plaintiff, in pursuance of the contract above set forth, rendered to the Omaha Company all such reasonable and proper assistance as they were able to give in the premises, and the St. Paul Company and said plaintiff in good faith in all respects observed, performed and to their utmost ability carried out the terms and provisions of said contract. That thereby said grant was conferred upon the Omaha Company.

That June 10, 1882, and while the Omaha Company was engaged in constructing said railway, the St. Paul Company and the plaintiff applied to the Omaha Company and requested that said contract so executed January 10, 1882, should be so changed as to make the plaintiff a party thereto, to which said Omaha Company consented; and thereupon a tripartite contract was prepared between them, and executed making the Omaha Company party of the first part, and the St. Paul Company party of the second part, and the plaintiff party of the third part, and dated as of January 10, 1882. That by the contract so modified the Chippewa Company was thereby entitled to the benefits of the first, third and part of the fourth subdivisions of the contract, and the St. Paul Company the benefits of the second and part of the fourth subdivisions. That otherwise said second contract was a copy of the first. That at the same time and in consequence thereof, the contract so made January 10, 1882, was surrendered and canceled. That prior to December 31, 1882, the Omaha Company constructed such railway between said point of intersection and the west end of Lake Superior, a distance of about sixty-two miles, and completed the same so as to admit of the running of trains over the same, on or before December 1, 1882, and thereby became entitled to the land so granted to it by chapter 10, Laws 1882, and entitled to receive patents therefor. That said lands amounted to about 400,000 acres, which were so granted to the Omaha Company, and the same were mostly covered with a heavy growth of pine and other valuable timber, and were at the time of said last-named grant of the value of \$2,000,000 and over. That, during 1882, the Omaha Company also constructed a line of railway, formerly known as the "Chippewa Falls & Northern," but now as a part of the Omaha Company's lines, from said Chippewa Falls to within about ten miles from the said point of intersection, and prior to June 1, 1883, the Omaha Company completed such line or road to Veazie, the said point of intersection. That on June 1, 1883, the said railway was completed from Chippewa Falls to Superior, so as to admit of the running of trains through thereon.

That, on or about May 1, 1883, the Omaha Company commenced the construction of a line from Chippewa Falls to Eau Claire, and has nearly completed the same, and the same will be ready for the running of trains thereon, on or before September 1, 1884. That when completed it will form a continuous line of railway from Eau Claire, by way of Chippewa Falls, to Superior, completing the Omaha Road. That the Omaha Company has received such patents, or claims the right to the same.

and has sold and disposed of a large amount of the lands so patented, and parted with the title thereof to third parties, unknown to the plaintiff. That it has also sold and disposed of a large quantity of the timber on said lands to various parties, who have taken and converted the same to their own use. That the plaintiff has in all respects kept and performed, or offered to perform, each and all the conditions and terms of said last-named contract to be kept and performed by it. That the plaintiff had notified the Omaha Company that it had elected to take the contract or lease mentioned in the contract, but that the Omaha Company has hitherto refused, and still refuses, to inform the plaintiff of such amounts, or any of them, and does refuse to convey to the plaintiff any part of said lands, and does refuse to grant unto the plaintiff any contract or agreement giving to the plaintiff an equal right with the Omaha Company to run its trains as specified in the contract, and has utterly refused to carry out or comply with the terms of said contract on its part. The complaint prays the specific performance of said second contract, and for an accounting and injunction.

To that complaint the Omaha Company demurred, on the ground that it did not state facts sufficient to constitute a cause of action, and from the order overruling such demurrer the Omaha Company brings this appeal.

Messrs. S. U. Pinney and C. M. Osborne, for appellant:

Contracts contravening public policy are void and not enforceable.

Collins v. Blanton, 2 Wils. 841, 1 Smith, Lead. Cas. 7th Am. ed. 667, and *notes*, 676-704.

This contract is against public policy because it is attended with temptations to fraud or misconduct.

Fuller v. Dame, 18 Pick. 472; *Clippinger v. Hephaugh*, 5 Watts & S. 815; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 314 (14 L. ed. 953); *Bryan v. Reynolds*, 5 Wis. 200.

Where an agreement is *prima facie* illegal, it lies on the party seeking to enforce it to show that the intention was not illegal.

Pollock, Cont. 881; *Holland v. Hall*, 1 Barn. & Ald. 53; *Alkins v. Jupe*, L. R. 2 C. P. Div. 875.

If the necessary tendency of the contract is to corrupt or improper practices, no amount of proof of honest intention will save it from condemnation, as a matter of law.

Richardson v. Randall, 49 N. Y. 862; *Atcheson v. Mallon*, 43 N. Y. 147.

Public policy requires courts to pronounce void every contract, the probable tendency of which would be to sully the purity or mislead the judgment of those to whom the high trust of legislation is committed.

Lyon v. Mitchell, 86 N. Y. 288, 240. See also *Marshall v. Baltimore & O. R. Co. supra*; *Mills v. Mills*, 40 N. Y. 543, 546; *Richardson v. Randall*, 49 N. Y. 848, 862; *Providence Tool Co. v. Norris*, 69 U. S. 4 Wall. 45 (17 L. ed. 868); *Trist v. Child*, 88 U. S. 21 Wall. 441 (22 L. ed. 623); *Filson v. Himes*, 5 Pa. 456; *Bowers v. Bowers*, 26 Pa. 74; *Noel v. Drake*, 28 Kan. 265; *Lucas v. Allen*, 80 Ky. 681; *Gulick v. Ward*, 10 N. J. L. 102; *Bolman v. Loomis*, 41 Conn. 581; *Harrington v. Victoria Graving* 6 L. R. A.

Dock Co. L. R. 3 Q. B. Div. 549; *Fuller v. Dame, supra*; *Oscanyan v. Winchester Repeating Arms Co.* 108 U. S. 261, 269 (26 L. ed. 539, 543); *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643, 662 (32 L. ed. 819, 826); *Egerton v. Brownlow*, 4 H. L. Cas. 1.

Illegality from public policy cannot be waived.

Cardozo v. Swift, 118 Mass. 250.

Mr. John W. Cary, for respondent:

The court cannot presume that the agreement here entered into was to use improper means or influences to accomplish the desired end, but only such as were legal, proper and right.

All inferences that the parties intended to contract for illegal and improper services are expressly excluded by the terms of the contract, which provides only that "reasonable and proper assistance which it may be able to give," should be afforded.

See *Lorillard v. Clyde*, 86 N. Y. 884; *Ormes v. Dauchy*, 82 N. Y. 448; *Curtis v. Gokey*, 68 N. Y. 800; *Kling v. Fries*, 83 Mich. 275, 279; *Beal v. Polhemus*, 10 West. Rep. 885, 67 Mich. 180; *Norton v. Kearney*, 10 Wis. 444.

Cases holding contracts for lobby services to be void have no application to the case at bar for the reason that the contract in question was not for lobby services, but for proper and legitimate purposes.

Denson v. Crawford Co. 48 Iowa, 211.

When the illegal transaction has been consummated, when no court has been called upon to give aid to it, when the proceeds of the sale or business have been actually received in that which the law recognizes as having had value, a court of equity will compel the party receiving such fund to account for it.

Planters Bank v. Union Bank, 88 U. S. 16 Wall. 483, 499, 500 (21 L. ed. 473, 479, 480); *Brooks v. Martin*, 69 U. S. 2 Wall. 70 (17 L. ed. 732); *Heckman v. Swartz*, 50 Wis. 267, 270; *Armstrong v. Toler*, 24 U. S. 11 Wheat. 258 (6 L. ed. 468); *McBlair v. Gibbs*, 58 U. S. 17 How. 286 (15 L. ed. 184); *Sharp v. Taylor*, 2 Phill. Ch. 801; *Anderson v. Moncrieff*, 7 Deausa, Eq. (S. C.) 126; *Bousfield v. Wilson*, 16 Mees. & W. 185; *Owen v. Davis*, 1 Bailey, L. 815; *Gilliam v. Brown*, 43 Miss. 641; *De Leon v. Trevino*, 49 Tex. 88.

Cassoday, J., delivered the opinion of the court:

This action is brought to enforce the specific performance of the contract or contracts set forth in the foregoing statement. By virtue of those contracts the plaintiff claims the right to the equal undivided one fourth of all the lands and the avails thereof granted to the State for the purpose of aiding in the construction of a railroad from Superior to the junction near Veazie,—a distance of about sixty-two miles,—and said to contain 400,000 acres of land, of the value of \$2,000,000. The State granted all of those lands to the Portage & Superior Company in 1874, for the purpose named and upon the conditions set forth in said statement; and that company continued to hold the same down to the time of executing the first of said contracts, January 10, 1882. It had failed, however, to construct any portion of the sixty-two miles of road between Superior and the junc-

tion, as required by such grant, and it had also failed to construct any portion of the road from the state line at Genoa to said junction, as required by such grant. It was, moreover, then insolvent and wholly unable to complete any part of either of such roads, and the owner of nine tenths of the bona fide stock of that company was then offering to sell the same to different parties, and particularly to the Chippewa, St. Paul and Omaha Companies, respectively. The fact of such insolvency and default on the part of the Portage & Superior Company, and the further fact that the time limited in the grant for its completion of the entire road would expire about May 1, 1882, had, prior to the execution of the contract, January 10, 1882, induced the Chippewa Company in its own behalf, and in the interest of the St. Paul Company and the Omaha Company, respectively, to apply to the Legislature, then about to convene, for said grant, and to ask that the same be conferred upon its Company; but in view of the fact that should these Companies, respectively, enter into a contest before the Legislature for such grant, they might thereby defeat each other, and prevent any disposition of the same, it was deemed advisable by them to enter into an arrangement whereby such conflicting interests should be harmonized, and but one road constructed over the proposed route, with running arrangements for both, as set forth in the statement made. To secure such objects, the written contract of January 10, 1882, was made, and executed as stated; and thereupon, and in pursuance of said contract, the Chippewa and St. Paul Companies ceased all negotiations for the purchase of said stock, and made no application to the Legislature for said grant, and rendered to the Omaha Company "all such reasonable and proper assistance as they were able to give in the premises," and "in good faith in all respects observed, performed and to their utmost ability carried out, the terms and provisions of said contract;" that the Omaha Company was thereby enabled to purchase said stock and obtain said grant from the Legislature by virtue of chapter 10, Laws 1882. The contract executed June 10, 1882, was a substantial copy of the one executed January 10, 1882, including dates, except as set forth in the foregoing statement.

The validity of chapter 10, Laws 1882, has recently been challenged on the ground that the grant to the Portage & Superior Company in 1874 gave to that Company the right to earn the land therein granted, and was in the nature of a contract, which the State Legislature could not impair, and also upon the ground that the Legislature passing the Act had been influenced or misled by false representations made to its members respecting the intentions, financial condition, etc., of the Portage & Superior Company. The conclusions reached by *Mr. Justice Harlan*, in an elaborate and well-fortified opinion, were to the effect that the question of such undue influence and misrepresentation was not one to be determined by courts or juries upon evidence, and that assuming the Act to have been unconstitutional and void, as impairing the obligations of contracts, yet that, after the time for constructing the road by the Portage & Superior Company

had fully transpired, the Legislature had confirmed such revocation and resumption of the grant, and the conferring of the same upon the Omaha Company by chapter 29, Laws 1883. *Farmers L. & T. Co. v. Chicago, P. & S. R. Co.* 6 R. R. & Corp. L. J. 184, 89 Fed. Rep. 143.

In this case, however, we must assume, what counsel on both sides have assumed, that chapter 10, Laws 1882, was a valid grant to the Omaha Company. The right of the Portage & Superior Company was, at most, nothing more than to earn the lands granted, upon the terms specified therein. The important question here presented for consideration is whether the agreements contained in the second contract, and here sought to be specifically enforced, are valid. We are all agreed that the validity of that contract stands upon the same basis as the first, since it was made without any other consideration and is substantially the same as the first, so modified as to include the Chippewa Company as a third party, as it was understood in the negotiations, and at the time of making the original contract, that the St. Paul Company in fact represented the Chippewa Company as well as itself. Especially would this be so if the Omaha Company is forced to rely for its title upon the Act of 1882 instead of the Act of 1882, as suggested in the case cited. The only considerations for the agreements here sought to be enforced are such as are specified in the fourth subdivision of each of the contracts. The mere option given in the third subdivision cannot be regarded as a consideration, much less a separate and independent consideration. The clause therein to which the arguments have mainly been directed, as found in the second contract, reads as follows: "In consideration of the above agreements, the said parties of the second and third parts hereby agree that they will not make any effort to procure said lands to be granted to them, or either of them, or aid or assist any other party to procure the same, except the party of the first part, and that they will render to said party of the first part all reasonable and proper assistance which they may be able to give in procuring said land grant to be given to the party of the first part by the Legislature, and will aid said party of the first part in any negotiations which it may set on foot with the said Chicago, Portage & Superior Railroad Company for the purpose of acquiring the same."

The able and learned counsel for the plaintiff insists that the presumption is always in favor of the legality of contracts, and hence that the "effort," "aid," "assistance" and services thus agreed to be made, rendered and performed must be regarded as such only as were not illegal, improper or vicious; and then it is assumed that if such effort, aid, assistance and services were lawful in themselves, then it was competent for the Chippewa and St. Paul Companies, respectively, to contract with the Omaha Company to make, render and perform the same. In support of this contention, the same counsel suggests numerous things which the Chippewa and St. Paul Companies, respectively, might innocently have done under the contract. Among these, it is claimed that such Company, "or, what is the same thing, its managing officers," might

legally and properly have refrained from negotiating for the purchase of said stock or the property of the Portage & Superior Company, and advised the parties in charge thereof to negotiate with the Omaha Company; that it was competent for such Company or its managing officers to have stated, "either publicly or privately, to its friends, either in or out of the Legislature, that its interests would be advanced by granting the Omaha Company's application for said grant;" or have stated "to any of its friends, or any member of the Legislature, that if the grant was made to the Omaha Company, it would have the effect of extending" its "lines or the right to run on the Omaha Road to Lake Superior;" or expressed "its opinion and desire and wish that this grant should be made to the Omaha Company."

The fallacy of this contention, if fallacy it be, consists in assuming that, if these several things were not in themselves a violation of law or good morals, then it was competent for the Omaha Company, in consideration thereof, to legally bind itself by the agreement in question to the effect that, in case of its obtaining the land grant, it would give "one equal fourth-part" thereof, also the "right, franchises and property" of the Portage & Superior Company and the "contract of lease" therein mentioned, as therein specified. In an action on a contract not to prosecute a criminal, the most eminent English judge who never reached a higher position than chief justice of the common pleas, unless by declining to be made Lord Chancellor, approvingly quotes a text-writer, to the effect that a person could not bind himself legally by a "promise to pay money to a man not to do a crime." *Collins v. Blantern*, 2 Wils. 850.

A few years later, Lord Mansfield, *Ch. J.*, in behalf of the King's Bench, said: "Many contracts which are not against morality are still void, as being against the maxims of sound policy."

A third of a century ago this court, while conceding that an agreement for compensation for certain services in securing the passage of an Act, as, for instance, making a public argument before a committee of the Legislature, or before the Legislature itself, if permitted to do so, might be enforced, nevertheless held that an "agreement to prosecute and superintend, in the capacity of agent and attorney, a private claim before the Legislature, is against public policy and void, and no action can be maintained thereon, or for services thus rendered." *Bryan v. Reynolds*, 5 Wis. 200. "To prosecute and superintend my claim for certain services, as contractor to the State, for the construction of the Portage Canal," were the words of the written contract. It contained, however, the provision that "such claim to be brought before the Legislature in such mode and manner as my said agent and attorney may choose to have the same presented;" and the compensation therein agreed upon was ten per cent on the whole amount which the State might allow. In deciding the case, Whiton, *Ch. J.*, speaking for the whole court, including the present chief justice, said: "We know of no way by which a person who is not a member of the Legislature can prosecute or super-

intend a claim before that body, except by means of the members themselves, or some of them. He could not, therefore, comply with the contract on his part without resorting to personal solicitation with the members of the legislative body. We therefore think that the contract was, by its terms, an agreement to pay money for a consideration which is inconsistent with public policy, and that the agreement is for that reason void." The learned counsel for the plaintiff insists that the case was wrongly decided, and we are asked to reconsider and overrule it, or, at least, distinguish it from the case at bar. It is certainly inconsistent with counsel's theory of the presumptive legality of such contracts. Upon that theory, the "mode and manner" of presentation, prosecution and superintendence might have been confined to such services as might have been legally contracted for.

It is true, the learned chief justice writing that opinion only cited two adjudications in support of the conclusions reached; but these cases have frequently been sanctioned by other courts, and he certainly might have cited others which had been previously made, sanctioning the same principles. *Fuller v. Dame*, 18 Pick. 472; *Hatzfield v. Guider*, 7 Watts, 152; *Clippinger v. Hepbaugh*, 5 Watts & S. 315; *Filson v. Himes*, 5 Pa. 452; *Harris v. Roof*, 10 Barb. 489; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 314 [14 L. ed. 958]; *Wilsey v. Collier*, 7 Md. 278; *Ross v. Truax*, 21 Barb. 361.

Besides, the case of *Bryan v. Reynolds*, *supra*, has been expressly sanctioned in well-considered opinions by at least three courts of high authority: *Powers v. Skinner*, 34 Vt. 274; *Elkhart Co. Lodge v. Crary*, 98 Ind. 238; *Sweeney v. McLeod*, 15 Or. 880.

The case of *Bryan v. Reynolds*, *supra*, has also been cited approvingly in *Melchoir v. McCarty*, 31 Wis. 254.

In the leading case of *Fuller v. Dame*, *supra*, the acts to be done, and for which the owner of certain lands was to pay a compensation, were the getting up of a joint-stock company, the purchase of such lands, and the procuring of a terminal depot to be located and constructed thereon by a railroad company. Such cases are undoubtedly regarded as analogous, in principle, to an agreement to pay compensation for procuring legislation. In that case there was no stipulation for secrecy, much less for publicity, and counsel invoked the same presumption of innocence which is here contended for. In considering it, Shaw, *Ch. J.*, said: "It was strongly pressed by the counsel for the plaintiffs that when a contract is made in general terms, broad enough to include things lawful and unlawful, it shall be presumed that they intended those only which were lawful. . . . The law goes further than merely to annul contracts, where the obvious and avowed purpose is to do or cause the doing of unlawful acts. It avoids contracts and promises made with a view to place one under wrong influences,—those which offer him a temptation to do that which may injuriously affect the rights and interests of third persons." He then illustrates how a person might lawfully solicit a bequest or devise in favor of a friend, or lawfully propose a marriage, but

that "any promise of reward made to him to induce him to do this, or any promise made afterwards in consideration of such service, would be void. This is founded upon the general consideration of fitness and expediency. Such advice and solicitation, in whatever form the agency may be exerted, are understood to be disinterested, and to flow from a single regard to the interests of the parties. They are lawful only so far as they are free and disinterested. If such advice and solicitation, thus understood to be pure and disinterested, may be justly offered from mercenary motives, they would produce all the consequences of absolute misrepresentation and falsehood."

In *Trist v. Child*, 88 U. S. 21 Wall. 441 [22 L. ed. 628], similar illustrations were made, and it was held that "a contract to take charge of a claim before Congress, and prosecute it as an agent and attorney for the claimant, . . . is void." Then, after distinguishing such a contract from one for purely professional services, the court held: "Though compensation can be recovered for these [professional services] when they stand by themselves, yet, when they are blended and confused with those which are forbidden, the whole is a unit and indivisible, and that which is bad destroys the good;" and hence "compensation can be recovered for no part." To the same effect is *Meyers v. Corvins*, 101 U. S. 108 [25 L. ed. 899].

In *Willey v. Collier*, *supra*, the agreement for compensation, sought to be enforced, was for procuring favorable action of the governor; but it was held void, as against public policy. The court said: "The reasons are obvious. They are designed to protect the exercise of this power from abuse through the intervention of designing persons, and, although in the particular instance no improper influences may have been resorted to, the public interest in such questions requires that the principle should be enforced in all cases. . . . The same reason applies with equal force in support of claims for obtaining the passage of laws by the Legislature."

In the case of *Clippinger v. Hepbaugh*, 5 Watts & S. 815, it was said by the court: "It matters not that nothing improper was done or was expected to be done by the plaintiff. It is enough that such is the tendency of the contract; that it is contrary to sound morality and public policy, leading necessarily, in the hands of designing and corrupt men, to improper tampering with members, and the use of an extraneous secret influence over an important branch of the government. It may not corrupt all; but if it corrupts or tends to corrupt some, or if it deceives or tends to deceive or mislead some, that is sufficient to stamp its character with the seal of reprobation before a judicial tribunal."

In *Rose v. Truax*, 21 Barb. 361, the contract under which compensation was sought was merely "to use his influence, efforts and labor in procuring the passage of a law by the Legislature;" but it was held to be void as against public policy, and as the contract was entire, it was wholly void, and hence no recovery could be had either upon the contract or *quantum meruit*, even for legitimate services. To the same effect as the above cases are *Mills v. Mills*,

40 N. Y. 548; *Frost v. Belmont*, 6 Allen, 152; *McKee v. Cheney*, 52 How. Pr. 144; *Gil v. Williams*, 12 La. Ann. 219; *Usher v. McBratney*, 8 Dill. 385; *Providence Tool Co. v. Norris*, 69 U. S. 2 Wall. 45 [17 L. ed. 868]; *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261 [26 L. ed. 539, 541]; *Woodstock Iron Co. v. Richmond & D. Extension Co.* 129 U. S. 643 [32 L. ed. 819].

In speaking of the principle applicable to an agreement for compensation for procuring a contract from the government, in *Providence Tool Co. v. Norris*, *supra*, Mr. Justice Field tersely observed: "It [such principle] has been asserted in cases relating to agreements for compensation to procure legislation. These have been uniformly declared invalid, and the decisions have not turned upon the question whether improper influences were contemplated or used, but upon the corrupting tendency of the agreements." 69 U. S. 2 Wall. 54 [17 L. ed. 870]. On another page he states: "It is sufficient to observe, generally, that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void, as against public policy, without reference to the question whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation by refusing them recognition in any of the courts of the country." 69 U. S. 2 Wall. 56 [17 L. ed. 871]. These principles are reasserted by the same learned justice in *Oscanyan v. Winchester Repeating Arms Co.* 103 U. S. 261, 264 [26 L. ed. 539, 541].

In the case at bar it is urged that the efforts to be made, the aid and assistance to be given and the services to be rendered were expressly limited by the contract to such as were "reasonable and proper."

In *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 314 [14 L. ed. 953], the proposed plan of Marshall, which was the basis of the contract under which he claimed compensation for the services rendered, contained this clause: "I contemplate the use of no improper means or appliances in the attainment of your purpose. My scheme is to surround the Legislature with respectable and influential agents, whose persuasive arguments may influence the members to do you a naked act of justice. This is all." He then illustrates by mentioning an ex-state senator and ex-presiding officer of that body. 57 U. S. 16 How. 318 [14 L. ed. 954].

So in *Elkhart Co. Lodge v. Orary*, 96 Ind. 238, the stipulation was only for the use of "all proper persuasion."

So in *Sweeney v. McLeod*, 15 Or. 830, the stipulation was merely that the plaintiff would "by means of all legitimate importunity and submission of evidence, to prevent the passage of any law," etc.

But none of these stipulations were sufficient to save either of such contracts from the condemnation of the respective courts. Where the principal object and purpose of an agreement is to secure, by a promise of compensation contingent upon success, influence upon or with members of a Legislature, or executive or

other public official, it is none the less vicious in its tendencies because it is therein stipulated that such influence shall be "reasonable and proper." The precise point is that such agreement, for such purchase of influence, is against public policy, and therefore improper.

There is another consideration which has generally made courts more emphatic in condemnation of such contracts, and that is that the agreement for compensation is made contingent upon the success of the legislation or other object sought. This is illustrated and held in several of the cases cited. Since it is established that such contingent reward makes such contracts more vicious, it certainly follows that the vice becomes more enormous as the amount of the reward is increased. In the case at bar the share of the land grant contracted for is alleged to be half a million dollars, to say nothing of the lease and other rights contracted for. If such contract for one fourth of the grant is valid, then upon the same principle, we assume, it would be claimed to be valid if it had been for three fourths or even nine tenths of the grant. In bestowing the grant the Legislature were executing a trust imposed upon the State by Congress. The Legislature had no power to pervert that trust, nor any part of it, even for the benefit of the State, much less for the benefit of a railway corporation upon which no part of the grant had ever been conferred, and which owed no duty in the construction or operation of the road in aid of which it was granted. The object of such grant was not only to aid in such construction, but to insure its continued operation. But to sanction such a contract so perverting one fourth of the grant might, in a supposed case, leave the constructing company insolvent, and without any ability to successfully operate the road. Since the intention of the Legislature is only ascertainable from the grant itself, it necessarily follows that they intended to bestow the grant on the Omaha Company alone. To sanction the contract, therefore, would be to defeat the expressed intention of the Legislature, and to allow the parties to the contract, in advance of the construction of any portion of the road, to parcel out the grant to suit themselves, when, as a matter of fact and law, the trust could only be executed by the Legislature itself in the name of the State, as a naked trustee acquiring all its power to act at all directly from Congress. Of course it was competent for either of these corporations to refrain from applying to the Legislature for the grant, but the reasons already given, as well as the authorities here cited, preclude any binding contract for such compensation for so refraining. It has frequently been held that such a contract is against public policy, and therefore void. *Pingry v. Washburn*, 1 Aik. (Vt.) 264; *Gutick v. Ward*, 10 N. J. L. 102; *Gibbs v. Smith*, 115 Mass. 592; *Gray v. Hook*, 4 N. Y. 449; *Atcheson v. Mallon*, 48 N. Y. 147.

Some of the cases cited in this opinion lay stress on the fact that the claimant for compensation was or was not a member of the legal profession. A lawyer, engaged in the business of drawing petitions and bills, collecting and presenting evidence and facts by argument or otherwise, before committees or the Legisla-

ture itself, may undoubtedly contract for compensation for such services. In such cases the attorney openly appears to all as the representative of the interested party, and no one is likely to be deceived as to his motives or representative character. But a non-professional, incapable of rendering such services, stands in a different attitude. If such a person engages to procure or aid in the procuring of the passage of a bill, he necessarily contracts for lobby services. "A person who frequents the lobby of a house of legislation, for the purpose of influencing measures" therein pending, is a "lobby member." *Webst. Dict.* To "lobby" is for a person, not belonging to the Legislature, "to address or solicit members of a legislative body, in the lobby or elsewhere, away from the house, with a view to influence their votes." *Ibid.*

Of course, the Chippewa Company, and especially the St. Paul Company, as common carriers, have been of immense service in developing the resources and increasing the value of property in our State. As such common carriers, they were necessarily interested in the creation and successful operation of a new railway like the one in question. They, and their respective officers and employes, as citizens of the State, had the same interest in the enterprise that citizens in general had, and probably more than part of them. Still we are to remember that, at the time of making the first contract, neither of those Companies, nor the Omaha Company, had any legal right, title or interest in or to the portion of the land grant in question, and were as strangers to the then proposed legislation. True, either or any other railway company was at liberty to apply for the grant, but the Legislature, in its wisdom, was perfectly free to refuse or grant such application. The grant was to the Omaha Company alone. Neither of the other Companies is in any way connected with it, unless it be by virtue of the contract in question. If, then, they are entitled to any portion of that grant, it is by reason of the agreement therein to make the efforts, give the aid and assistance and render the services stipulated in procuring said land grant to be given to the Omaha Company. But what efforts could they make, what aid or assistance could they give, what services could they render, except such as are justly characterized as "lobbying?"

If one railway company may thus legally contract with another railway company for contingent compensation in consideration of such efforts, aid, assistance and services, then it may make similar contracts with private individuals, or municipal or other corporations, asking legislative action. If corporations could so legally contract, then it would be competent for individuals to do the same. We are not stating what is likely to occur, but what would be the probable tendency of sanctioning the validity of such a contract. Besides, the powers of every corporation are limited to such as are expressed in its charter or named in the statutes, and such implied powers as are necessary or convenient to carry into execution those which are thus expressed. It is enough to know that these do not include the making of lobbying contracts for contingent compensation for

procuring legislation respecting matters in which such corporation has no more concern than the people generally. In the matter of disposing of land grants, as in all other matters of legislation, it is important to the continued welfare of the State and all its citizens that all improper avenues of approach should be effectually closed.

In two of the cases cited, *Mr. Justice Field*, speaking of the duties of members of legislative bodies and public officers, asserts what ought to go without saying, that "all such positions are trusts, to be exercised from considerations of duty and for the public good. Whenever other considerations are allowed to intervene and control their exercise, the trust is perverted and the community suffers." He then declares, in effect, that personal influence in such matters is "not the subject of bargain and sale," that it "is not a vendible article in our system of laws and morals, and the courts of the United States will not lend their aid to the vendor to collect the price of the article." 103 U. S. 273, 274 [26 L. ed. 544, 545]; 69 U. S. 2 Wall. 56 [17 L. ed. 871].

These maxims of legislative and official propriety and duty, it is believed, are as old as our government, and it may be safely assumed that they will never be brought into disrepute by the American courts. To properly aid in wielding the sovereign power of a great people, under the sanction of an oath, presupposes freedom from any and all extraneous bias and purchased influence. They imply continued vigilance for the public weal and the faithful performance of every public duty. In the execution of such official trusts, no favors can be secured and no obligations incurred. For the reasons given we must hold the contract void.

The order of the Circuit Court is reversed, and

*the cause is remanded for further proceedings according to law.**

*NOTE BY CASSODAY, J.:

Since filing the foregoing opinion, section 448, Rev. Stat., which seems to have escaped the vigilance of the learned counsel on both sides, as well as the several members of the court, has come to our notice. It provides, in effect, that any person who shall, directly or indirectly, give or receive, or agree to give or receive, or offer to give, "any money or property, or valuable thing, or any security therefor, to any person," for his services, or the services of another, "in procuring the passage or defeat of any measure before the Legislature, or before either House or any committee thereof, upon the contingency or condition of the passage or defeat of such measure," or who, having any interest as principal, agent, attorney or otherwise, "in procuring or attempting to procure the passage or defeat" of such measure, "shall attempt in any manner to influence any member of such Legislature for or against such measure, without first making known to such member the real and true interest he has in such measure, either personally, or as such agent or attorney, shall be punished" as therein prescribed. This section was, manifestly, for the more effectual suppression of such acts and agreements, coming, as they do, under the condemnation of the common law, as indicated in the foregoing opinion. It is true, this section does not expressly name corporations, but only "any person." These words, however, must be construed as extending to and including any corporation. Subdivision 12, § 4971, and subdivision 2, § 4972, Rev. Stat.

If it be claimed that the section does not include corporations, and that they are to enjoy the exclusive privilege of giving or receiving, or agreeing to give or receive, or offering to give, money or property for such lobbying services, then such privilege should be limited to such corporations as may be chartered specifically for that purpose; for in that event they would, in the spirit of the latter clause of the section cited, appear in their true character, and thus enable unwary members of the Legislature, as well as the public, the better to guard against their approach, or to escape their allurements altogether. Since the making of the agreement in question was punishable under the Statute cited, it is, of course, idle to contend that it may be specifically enforced in equity notwithstanding.

NEW YORK COURT OF APPEALS.

Silas D. GIFFORD, Receiver, etc., *Reept.*,
v.
Michael Augustine CORRIGAN, Exr., etc., of
John McClosky, Deceased, Impleaded,
etc., *Appl.*

(.....N. Y.)

1. A finding that a deed from a parish priest to a cardinal of the Roman Catholic

Church, containing an express assumption by the grantee of a mortgage, was delivered and accepted, is sustained by evidence that the cardinal, having knowledge of the deed, when a demand was made upon him for the debt, simply referred the creditor to the parish priest in possession of the property, and that the latter insured the property in the cardinal's name and regularly collected the rents and paid them over to the chancery office, which managed the cardinal's business affairs relating to the church.

NOTE.—Sale of mortgaged premises; remedies of mortgagee; action on covenant.

Mortgagee could maintain an action upon the implied covenant in defendant's deed, without first foreclosing the mortgage, and could recover the whole amount unpaid. *King v. Whitely*, 10 Paige, 465; *Trotter v. Hughes*, 12 N. Y. 74.

It must be deemed settled law in this State that where a party accepts a deed of land subject to a mortgage, and assumes to pay such mortgage as part of the purchase price of said premises, that the holder of such mortgage may maintain an action at law upon such covenant against such grantee for the amount remaining unpaid upon such mortgage according to its terms or those of the bond accompanying the same. *Burr v. Beers*, 24 N. Y. 178; *Ricard v. Sanderson*, 41 N. Y. 179; *Thorpe v. Keokuk Coal Co.* 48 N. Y. 253.

6 L. R. A.

In accordance with the principle which entitles the chief creditor to receive the benefit of a security, the mortgage creditor is entitled to the benefit of the agreement made by the purchaser of the equity of redemption. *Higman v. Stewart*, 38 Mich. 523.

The chief creditor is entitled to its benefit to pay off the mortgage, and to a decree over against the grantees for the deficiency. *Vrooman v. Turner*, 69 N. Y. 282, 25 Am. Rep. 195; *Gilbert v. Averil*, 15 Barb. 22. See *Bigelow v. Bush*, 6 Paige, 343.

Right to resort to security.

Where the mortgage was not one of indemnity merely, but was a security as well, against all liabilities, it was not essential to a recovery to show that damages had been sustained; the right of the mortgagees to resort to the security arose when

2. A release of the grantee by the grantor from a covenant in the deed assuming an outstanding mortgage on the premises, cannot prejudice the mortgagee's right to hold the grantee as his debtor, at least where the creditor has already learned of the grantee's promise and has assented to and adopted it.

(*Danforth and Peckham, JJ., dissent.*)

(November 26, 1889.)

APPEAL by defendant, Corrigan, from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Westchester Special Term in favor of plaintiff in an action for the foreclosure of a mortgage and to recover a personal judgment for the deficiency arising thereon. *Affirmed.*

The mortgage sought to be foreclosed was executed by the Father Mathew Total Abstinence Benefit Society, No. 1, of Tuckahoe, N. Y., to John M. Masterton, who subsequently made a general assignment to Silas D. Gifford, and he, by proper proceedings, became the owner of the mortgage, as receiver of said Masterton.

The society subsequently conveyed the property to John McEvoy, who by the terms of the deed assumed payment of the mortgage. Thereafter McEvoy executed and recorded a deed of the property to John McCloskey, which deed assumed the payment of the mortgage on the part of the grantee. McCloskey was made a party to the foreclosure suit, and after his death, which occurred during its pendency, Corrigan, his executor, was substituted. A judgment for deficiency having been rendered

against Corrigan as such executor, he took this appeal.

The other material facts appear in the opinion.

Mr. William Bradford, with Messrs. Boardman & Boardman, for appellant:

The release, by the executor of McEvoy, of McCloskey from the covenant of assumption contained in the deed from McEvoy to McCloskey, discharged the latter from all liability thereunder.

Garnsey v. Rogers, 47 N. Y. 242; *Whiting v. Gearty*, 14 Hun, 500; *Kelly v. Roberts*, 40 N. Y. 432; *Douglass v. Wells*, 18 Hun, 88.

The grantor becomes the surety and the grantee the principal debtor only as between themselves, and a release of the latter would simply operate to extinguish the claim of the former for reimbursement in case he shall be called on to pay a deficiency. This could in no way lessen the original rights or security of the mortgagee.

See *Pardee v. Treat*, 83 N. Y. 389; *Burr v. Beers*, 24 N. Y. 179; *Douglass v. Wells* and *Whiting v. Gearty*, *supra*; *Kelly v. Roberts*, 40 N. Y. 440.

An examination of the cases will show that the courts, in their endeavor to find a ground on which to base the liability of the assuming grantee to the mortgagee, have at different times upheld it as coming within one or the other of the following principles: that it is a contract of indemnity; that it is a case of principal and surety; that it is a case of subrogation; that it is enforced to prevent circuitry of action; that it comes within the principle of—
Lawrence v. Fox, 20 N. Y. 268; *Cumberland*

their liability, as indorsers, was fixed. *Newburgh Bank v. Bigler*, 83 N. Y. 60, 18 Hun, 402. See *Moore v. Paine*, 12 Wend. 123; *Pond v. Clarke*, 14 Conn. 384; *Chapman v. Jenkins*, 81 Barb. 164; *Nightingale v. Chafee*, 11 B. L. 603.

The ground of equitable subrogation of the creditor to all securities held by the surety of the principal debtor was, in all cases upon the subject, recognized as the sole ground for liability, until the case of *Burr v. Beers*, 24 N. Y. 179, which was an action at common law, in which the mortgagee had recovered a personal judgment for the mortgage debt against a grantee who had accepted a deed containing the usual clause whereby he assumed the payment of a mortgage which was a lien upon the premises, held that the judgment under review could not be sustained on the doctrine of those cases, the action not being for a foreclosure of the mortgage, and the mortgagor not being a party. But upon the authority of *Lawrence v. Fox*, 20 N. Y. 268, the judgment was sustained on the broad principle that if one person make a promise to another for the benefit of a third person, that third person may maintain an action upon the promise. *Garnsey v. Rogers*, 47 N. Y. 237.

Assumption of payment creates personal liability.

When a deed executed by the grantor contains a clause sufficiently showing an intent on the part of the grantee to assume the liability of paying the mortgage, the acceptance thereof consummates a personal liability on his part which inures to the benefit of the mortgagee. *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 86; *Ricard v. Sanderson*, 41 N. Y. 179; *Spaulding v. Hallenbeck*, 85 N. Y. 204; *Trotter v. Hughes*, 12 N. Y. 74; *Converse v. Cook*, 8 Vt. 164; *Halsey v. Reed*, 9 Paige, 446.
G. L. R. A.

Mortgagee may pursue his remedy against grantee.

A mortgagee may maintain a personal action against a grantee of the mortgaged premises who has assumed to pay the incumbrance. He may pursue this remedy without foreclosing the mortgage and without joining the mortgagor as defendant. *Burr v. Beers*, 24 N. Y. 179; *Marsh v. Pike*, 10 Paige, 586; *Biyer v. Monholland*, 3 Sandf. Ch. 478; *Vail v. Foster*, 3 N. Y. 312; *Belmont v. Coman*, 22 N. Y. 438; *King v. Whitely*, 10 Paige, 469.

The case presents the simple question of a promise from one person to another to pay a debt to a third person. The right of the third person to recover of the promisor for such debt is unquestioned. *Knowles v. Erwin*, 48 Hun, 152, 153. See *Lawrence v. Fox*, 20 N. Y. 268; *Rogers L. & M. Works v. Kelley*, 83 N. Y. 234.

It has been held that even a verbal promise creates such a liability. *Strohauer v. Voitz*, 42 Mich. 444; *Drury v. Tremont Imp. Co.* 18 Allen, 168; *Bowen v. Kurtz*, 37 Iowa, 289; *Bolles v. Beach*, 22 N. J. L. 680.

In general "a conveyance subject to a mortgage" is held to mean "subject to the payment of such mortgage" unless there be something to indicate a different intention. *Minor v. Terry*, 6 How. Pr. 212; *Jumel v. Jumel*, 7 Paige, 591, 594, 595; *Halsey v. Reed*, 9 Paige, 446.

An absolute and irrevocable obligation is thereby created in favor of the mortgagee, which cannot be released or affected by any act or agreement of the mortgagor (grantor), to which the mortgagee does not assent. *Douglass v. Wells*, 18 Hun, 91, 97 How. Pr. 380.

Personal action by mortgagee.

A mortgagee may maintain a personal action against such grantee, without foreclosing the mort-

v. Cochrington, 8 Johns. Ch. 229; *Bleeker v. Bingham*, 3 Paige, 246; *Curtis v. Tyler*, 9 Paige, 432; *Halsey v. Reed*, Id. 446; *Torrey v. Bank of Orleans*, Id. 649; *King v. Whitely*, 10 Paige, 465; *Marsh v. Pike*, Id. 595; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Cornell v. Prescott*, 2 Barb. 16; *Vail v. Foster*, 4 N. Y. 812; *Flagg v. Munger*, 9 N. Y. 483; *Trotter v. Hughes*, 12 N. Y. 74; *Hartley v. Harrison*, 24 N. Y. 170; *Burr v. Beers*, Id. 178; *Bentley v. Vanderheyden*, 85 N. Y. 877; *Ricard v. Sanderson*, 41 N. Y. 179; *Garnsey v. Rogers*, 47 N. Y. 233; *Thorp v. Kookuk Coal Co.* 48 N. Y. 253; *Vrooman v. Turner*, 69 N. Y. 280; *Campbell v. Smith*, 71 N. Y. 26; *Comstock v. Drohen*, Id. 9; *Calvo v. Davies*, 73 N. Y. 211; *Paine v. Jones*, 76 N. Y. 274; *Marshall v. Davies*, 78 N. Y. 414; *Pardee v. Treat*, 82 N. Y. 385; *Hand v. Kennedy*, 88 N. Y. 149; *Slauson v. Watkins*, 86 N. Y. 597; *Carter v. Holahan*, 92 N. Y. 498; *Bennett v. Bates*, 94 N. Y. 354; *Crowe v. Lewin*, 95 N. Y. 423; *Fairchild v. Lynch*, 99 N. Y. 859; *Wilbur v. Warren*, 6 Cent. Rep. 214, 104 N. Y. 192; *Wilcox v. Campbell*, 8 Cent. Rep. 687, 106 N. Y. 325, and *Cole v. Cole*, 12 Cent. Rep. 924, 110 N. Y. 630.

An attempt to apply any one of those principles to the facts under consideration will show that there is some element lacking in the case at bar which is essential to the existence of liability under the principle applied. The liability cannot be supported on the doctrine of subrogation. The right of subrogation was an equitable device whereby one who had paid a debt as surety, or under other circumstances which made it equitable that he should be reimbursed by others primarily liable, was upon

such payment substituted in the place of the person to whom the payment had been made, so as to be in a position to enforce the obligation then discharged against those primarily liable for its payment.

Cole v. Malcolm, 66 N. Y. 363; *Acer v. Hotchkiss*, 97 N. Y. 395; *Thomby v. Cassidy*, 83 N. Y. 155.

The liability cannot be upheld under the doctrine of *Lawrence v. Fox*, 30 N. Y. 268, for the reason that the most essential element for the application of that principle is lacking; and that is that the promise must be for the benefit of the person seeking to enforce it, and must have been intended by the parties for his benefit. That the covenant of assumption may incidentally be of advantage to the mortgagee is not sufficient.

Roe v. Barker, 82 N. Y. 435; *Simson v. Brown*, 68 N. Y. 855; *Garnsey v. Rogers*, 47 N. Y. 240; *Johnson v. Morgan*, 68 N. Y. 496; *Merrill v. Green*, 55 N. Y. 270; *Vrooman v. Turner*, 69 N. Y. 283; *Pardee v. Treat*, 82 N. Y. 385; *Wheat v. Rice*, 97 N. Y. 302; *Mellen v. Whipple*, 1 Gray, 817.

This court has, in several cases, relieved the assuming grantee from liability under the covenant of assumption. An examination of these cases will show that they contain nothing adverse to the position that the covenant may be released by the parties to it, but are in favor of that contention.

Flagg v. Munger, 9 N. Y. 483; *Külmer v. Smith*, 77 N. Y. 227; *Judson v. Dada*, 79 N. Y. 373; *Dunning v. Leavitt*, 85 N. Y. 30; *Albany Sav. Inst. v. Burdick*, 87 N. Y. 40.

Mr. Ralph E. Prime, for respondent:

gage, and without joining the mortgagor as defendant. *Burr v. Beers*, 24 N. Y. 178; *Marsh v. Pike*, 10 Paige, 595; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Vail v. Foster*, 4 N. Y. 312; *Belmont v. Co-man*, 22 N. Y. 438.

He may treat both the vendor and his grantee as principal debtors to him and have a personal decree against either or both. *Crawford v. Edwards*, 33 Mich. 200.

It is a principle of law, long recognized and clearly established, that when one person for a valuable consideration engages with another by simple contract to do some act for the benefit of a third, the latter, who would enjoy the benefit of the act, may maintain an action for the breach of the engagement although not privy thereto. *Brewer v. Dyer*, 7 Cush. 337; *Sohemerhorn v. Vanderheyden*, 1 Johns. 140; *Barker v. Bucklin*, 2 Denio, 45; *Dela-ware & H. Canal Co. v. Westchester Co. Bank*, 4 Denio, 97; *Ely v. McNight*, 30 How. Pr. 102; *Phillips v. Gray*, 3 E. D. Smith, 69; *Stern v. Drinker*, 3 E. D. Smith, 404; *Arnold v. Lyman*, 17 Mass. 400; *Hall v. Marston*, 17 Mass. 575; *Brewer v. Dyer*, 7 Cush. 337; *Coster v. Albany*, 43 N. Y. 412; *Todd v. Weber*, 96 N. Y. 181.

To give the mortgagee a right of action the promise must have been intended for his benefit; it is not enough that it may accrue to his benefit. *Meech v. Ensign*, 49 Conn. 207; *Curtis v. Tyler*, 9 Paige, 432; *Blyer v. Monholland*, 2 Sandf. Ch. 478; *Crowell v. Currier*, 27 N. J. Eq. 152; *Doolittle v. Naylor*, 2 Bosw. 206.

In the case of *O'Connor v. O'Connor*, post, —, it is held that a purchaser of land who expressly assumes the payment of purchase-money notes, given by his vendor, and secured by a vendor's lien, becomes personally responsible to the creditor 6 L. R. A.

holding the original lien, as well as for the balance of the purchase price due to his vendor.

Purchaser of mortgaged land liable for mortgage debt. See *Boone v. Clark* (Ill.) 5 L. R. A. 276, note.

Remedies of mortgagee. *Knoll v. New York, C. & St. L. R. Co.* 1 L. R. A. 305, 121 Pa. 487.

Release of grantee by mortgagor.

It has been questioned as to whether, after a conveyance has been executed and delivered, in which the grantee assumes payment of the mortgage debt, the grantor may release the grantee from the personal obligation which he thus takes upon himself. *Thomas*, Mort. 194.

It is only under certain circumstances that a release of the grantee from the assumption of the mortgage debt, and his personal liability therefor, will defeat the mortgagee's claim in equity for a deficiency on the foreclosure sale. See *Stephens v. Casbacher*, 8 Hun, 119.

The grantor may, before suit brought against his grantee by the mortgagee to obtain the benefit of such a covenant of assumption, release or discharge it, and so prevent the mortgagee from obtaining any benefit of it. *Crowell v. Hospital of St. Barnabas*, 27 N. J. Eq. 650; *Thomas*, Mort. 195.

But the act of release or discharge, to be effectual, must be done bona fide, and not merely for the purpose of thwarting the mortgagee and depriving him of an equity to which he is entitled. *Trustees of Public Schools v. Anderson*, 30 N. J. Eq. 366.

If given by an insolvent grantor after notice of foreclosure, without consideration, and for the sole and admitted purpose of defeating the mortgagee's claim in equity for deficiency, it is void in equity. *Ibid*.

On principles of ratification and estoppel the defendant is to be held to the covenant as having accepted the deed.

Brooks v. Am. Exp. Co. 14 Hun, 368; *Dunlap's Paley*, Agency, 172.

The release was not bona fide. It was given solely to defeat the mortgagee's claim for deficiency, and the release is void in equity.

Trustees of Public Schools v. Anderson, 30 N. J. Eq. 366; *Thomas*, Mort. 2d ed. 402, § 604.

The assumption clause and its obligations were inviolable, and the release was ineffectual.

Ranney v. McMullen, 5 Abb. N. C. 246, 250; *Hartley v. Harrison*, 24 N. Y. 170; *Garnsey v. Rogers*, 47 N. Y. 242; *Douglass v. Wells*, 18 Hun, 88; *Simson v. Brown*, 6 Hun, 251; *Ban v. Williams*, 112 Ill. 91.

In States where the covenant of the purchaser to assume the mortgage is regarded as a promise for the benefit of the mortgagee the promise is regarded as irrevocable.

1 *Thomas*, Mort. § 763, par. 4.

Those cases that hint at the revocability or release of an assumption clause expressly repudiate any such claim of power to revoke or release after acceptance and adoption of the assumption clause by mortgagee.

Whiting v. Gearty, 14 Hun, 501; *Berkshire L. Ins. Co. v. Hutchings*, 100 Ind. 496; *Davis v. Galloway*, 30 Ind. 112; *Gilbert v. Sanderson*, 56 Iowa, 349; *Durham v. Bischof*, 47 Ind. 211; *Carnahan v. Tousey*, 93 Ind. 561; *Kelly v. Roberts*, 40 N. Y. 433; *Jones*, Mort. §§ 763, 764.

Finch, J., delivered the opinion of the court:

On a previous appeal we determined in this case that the record of the deed to the defendant's testator, McCloskey, by which the grantee assumed the payment of plaintiff's mortgage, was not, under the circumstances, sufficient proof of the delivery and acceptance of the deed. 7 Cent. Rep. 277, 105 N. Y. 228.

As the case now stands, the effect of that record is fortified by direct proof of the delivery and strong circumstantial evidence of the acceptance. Both facts are now explicitly found by the trial court, but the appellant again denies the sufficiency of the proof. The mortgage was executed in 1869. The land which it covered was sold and conveyed to McEvoy in 1870. McEvoy was a parish priest, and held the title until 1878, when he conveyed to McCloskey, the defendant's testator, who in and by the deed assumed the payment of the outstanding mortgage. Two things occurred the next year. McCloskey was informed by letter that upon the premises owned by him, describing those conveyed by McEvoy, there was a mortgage to Masterton, payment of which was requested; and a few days after, in a personal interview with the attorney acting for the mortgagee, was told of the deed and its record, and the assumption clause was read to him, and his liability under it asserted. McCloskey answered that he would communicate with Father Keogh; that he had referred the matter to him; and that the witness would hear from Keogh. The latter was the successor to McEvoy, as parish priest, and owed his appointment to the cardinal. The second thing was that the account for the rents of the property collected by Keogh were by him returned once

a year to the chancery office which managed the cardinal's business affairs relating to the church. Within one year, therefore, after the record of the deed, McCloskey knew all about it, and, instead of repudiating it and refusing acceptance, simply referred the creditor to the parish priest, who began a uniform system of collecting the rents of the property and returning the facts to the cardinal's business office, which was their proper repository. Keogh not only remained in possession under McCloskey, but insured the premises in the name of the cardinal. For some time after its record the deed remained in the custody of McEvoy, but as early as 1862 he delivered it to O'Connor, who was a clerk in the chancery office. The superintendent of that office was Preston. He is called in the record "vicar general," and "chancellor," and "monseigneur." Whatever his ecclesiastical title, his own evidence shows that he was merely a subordinate or secretary of the cardinal, with no authority of his own, and dependent wholly upon the directions of his superior, either general or specific. His attention was called to the deed after its delivery at the chancery office by O'Connor, who delivered it. Preston says that the next time he saw Keogh he "positively forbade him to have anything to do with that hall, or to accept any rent for it." This is said to have occurred in 1862. It does not appear that Preston had any authority from the cardinal to issue this order to Keogh, or any general direction which covered it. It is certain that Keogh did not obey it, for he continued to collect the rents and report them, as part of his parish accounts, to the chancery office. Preston was either ignorant of the current transactions, which it was his duty to supervise, or he had withdrawn his command, or the parish priest was deliberately defying his superiors, and they were patiently submitting to it. At all events, the deed rested in the chancery office; the priest kept possession of the property, and accounted for its rents to McCloskey; no offer of a reconveyance was made, and the record is searched in vain for any word or act of refusal or repudiation by McCloskey. On such a state of facts, the finding of the special term that there was a delivery and acceptance may easily stand, and must conclude us on this appeal.

But another circumstance introduces an additional defense, and raises a further question. Just after the issue of a summons in this action, and the filing of a *lis pendens*, the executor of McEvoy formally released McCloskey from his covenant; and the latter pleads that release. It asserts that the deed was never delivered, which is found to be an untruth; that the assumption clause was inserted by mistake and inadvertence, of which there is not a particle of proof; and then, in further consideration of one dollar, formally releases the cardinal from his covenant. This release was executed after knowledge of the deed to McCloskey, and the covenant contained in it, had reached the mortgagee; after the latter had accepted and adopted it as made for his benefit, and communicated that fact to the debtor by a formal demand of payment; after the mortgagee had for three years permitted the grantee to absorb and appropriate the rents and profits in reliance upon the covenant; and after he had commenced an

action of foreclosure by the issue of a summons and filing of a *lis pendens*,—at a moment when the executor who released was aware that trouble was approaching, but before McCloskey was actually served, or had appeared in the action.

Is this release, thus executed, a defense to this action? I shall not undertake to decide, if, indeed, the question is open (*Knickerbocker Ins. Co. v. Nelson*, 78 N. Y. 187; *Comley v. Dazian*, 114 N. Y. 167), whether in the interval between the making of the contract and the acceptance and adoption of it by the mortgagee, it was or was not revocable, without his assent. However that may be, the only inquiry now presented is whether it is so revocable after it has come to the knowledge of the creditor, and he has assented to it, and adopted it as a security, for his own benefit. My judgment leads me to answer that question in the negative. Of course it is difficult, if not impossible, to reason about it without recurring to *Lawrence v. Fox*, 20 N. Y. 268, and ascertaining the principle upon which its doctrine is founded. That is a difficult task, especially for one whose doubts are only dissipated by its authority, and becomes more difficult when the number and variety of its alleged foundations are considered. But whichever of them may ultimately prevail, I am convinced that they all involve, as a logical consequence, the irrevocable character of the contract after the creditor has accepted and adopted it, and in some manner acted upon it. The prevailing opinion in that case rested the creditor's right upon the broad proposition that the promise was made for his benefit, and therefore he might sue upon it, although privy neither to the contract nor its consideration. That view of it necessarily involves an acquisition at some moment of time of the right of action which he is permitted to enforce. If it be possible to say that he does not acquire it at the moment when the promise for his benefit is made, it must be that he obtains it when it has come to his knowledge, and he has assented to and acted upon it; for he may sue. That is decided, and is conceded. If he may sue, he must at that moment have a vested right of action. If it was not obtained earlier, it must have vested in him at the moment when his action was commenced; so that the right and the remedy were born at the same instant. But there is no especial magic in a lawsuit. If it serves for the first time to originate the right which it seeks to enforce, it can only be because the act of bringing it shows unequivocally that the promise of the grantee has come to the knowledge of the plaintiff; that the latter has accepted and adopted it; that he intends to enforce it for his own benefit, and gives notice of that intention to the adversary. From that moment he must be assumed to act or omit to act, in reliance upon it. But, if all these things occur before a suit commenced, why do they not equally vest the right of action in the assignee? What more does the mere lawsuit accomplish? And so the contract between grantor and grantee, if revocable earlier, ceases to be so when by his assent to it and adoption of it the creditor brings himself into privity with it, and elects to avail himself of it, and must be assumed to have

governed his conduct accordingly. I see no escape from that conclusion.

But two of the judges who concurred in the decision of *Lawrence v. Fox* stood upon a different proposition. They held that the mortgagor granting the land accepted the grantee's covenant as agent of the mortgagee, who might ratify the act with the same effect as if he had originally authorized it. While I think the idea of such an agency is a legal fiction, having no warrant in the facts, yet the same result as to the power of revocation follows. While the agency remained unauthorized it might be possible to change the transaction, but after the ratification the promise necessarily becomes one made to the mortgagee through his agent, the mortgagor, acting lawfully in his behalf, and from that moment cannot be altered or released without his sanction and consent.

But another basis for the action has been asserted, applicable, however, only to cases like the present, where, on foreclosure of the mortgage, its owner seeks a judgment for a deficiency against the new covenantor.

In *Burr v. Beers*, 24 N. Y. 179, and again in *Garnsey v. Rogers*, 47 N. Y. 242, it was pointed out that the liability of the grantee to the mortgagee rested upon the equitable right of subrogation, and had been recognized and enforced long before *Lawrence v. Fox* made its appearance. It was held that where the mortgagor acquired a new security for his indemnity against the debt which he owed to the mortgagee, the latter might in equity be subrogated to the right of his debtor, and, under the Statute permitting any person liable for the mortgage debt to be made defendant, and charged with a deficiency in the foreclosure, the new covenant became available to the mortgagee. It was so held in *Halsey v. Reed*, 9 Paige, 416, and the right of the mortgagee was put upon the equity of the Statute. That, if a sound proposition, was all very well, so long as there was supposed to be no equivalent remedy at law; but after the decision of *Lawrence v. Fox*, that remedy existed.

And so, in *Thorp v. Kookuk Coal Co.* 48 N. Y. 258, the court said that it saw no reason for invoking the doctrine of equitable subrogation, or resting upon it, in such a case. When the law has absorbed in a broader equity the narrow one enforced in chancery, the form and measure of the latter ceases to be of consequence. One does not seek to trace the river after it has lost itself in the lake. And so, I think, the suggestion is well founded. But if I am wrong about that, as perhaps I may prove to be, and the right of the present plaintiff against the cardinal's estate does stand upon the doctrine of equitable subrogation, still I think the same result follows. When does that equitable right arise, and become vested in the creditor? It would seem that it must be when the situation is created out of which the equity is born. If it be possible to adjourn it to a later period, it must certainly attach when the creditor asserts his right to it, and notifies the other party of his intention to rely upon it. As a right founded upon the equity of the Statute, it must have come into being before the foreclosure suit was commenced; for the permission reads: "Any person who is liable to the plaintiff for

the payment of the debt secured by the mortgage may be made a defendant in the action." His liability must precede the commencement of the action. It must exist as a condition of his being sued at all. And so, assuming that this action can be maintained against him upon his promise, the right of action must have arisen at once upon the delivery of the deed, or, at the latest, when the promise came to the knowledge of the creditor, and he assented to and adopted it.

I have been quite favorably impressed with a fourth suggestion respecting the basis of these rights of action, which appears in the opinion of Andrews, J., rendered when this case was before us on a previous appeal. "After all," he says, "does not the direct right of action rest upon the equity of the transaction?" If we discard the fictitious theory of an agency, what remains is the equitable right of subrogation, swallowed up in the greater equity of the legal right founded on the theory of a promise made for the benefit of the creditor.

It is no new thing for the law to borrow weapons from the arsenal of equity. The action for money had and received is a familiar illustration. May we not deem this another? If we do, and the door is thus opened wide to equitable considerations, I am quite sure it will follow that, while no right of the mortgagee is invaded by a change of the contract before it is brought to his knowledge, and he has assented to it and acted upon it, yet, to permit a change thereafter, while the creditor is relying upon it, would be grossly inequitable, and practically destroy the right which has maintained itself after so long a struggle.

It seems to me, therefore, that, however we may reasonably differ as to the doctrine underlying the plaintiff's right of action, yet all the roads lead to the one result,—that upon the facts of this case the release to McCloskey was wholly ineffectual.

The judgment should be affirmed, with costs.

All concur, except Danforth and Peckham, JJ., dissenting.

IOWA SUPREME COURT.

ADAMS COUNTY

Edward H. HUNTER et al., Appts.

(....Iowa....)

1. Although new matter alleged in a replication must not be inconsistent with the petition under Code, § 2886, yet if a cause in which the reply contains inconsistent matter is, upon plaintiff's motion, tried upon the merits as an equitable action, and no objection is made in the trial court to the reply or to the motion, the defect in the reply will not be available upon appeal.

2. A contract by a board of supervisors with the person holding the office of county treasurer, that in consideration of his collecting the delinquent personal-property taxes they will allow him a percentage upon the amount collected as compensation therefor, is against public policy and void.

(October 7, 1889.)

A PPEAL by defendants from a judgment of the District Court for Adams County in favor of plaintiff in an action upon the official bond of an ex-county treasurer to recover money which it was alleged he had failed to account for and pay over to his successor in office, and had converted to his own use. *Affirmed.*

NOTE.—Contracts against public policy, void.

A contract by county commissioners to pay a county solicitor a percentage compensation in addition to his regular salary, for services which it is his duty to perform as such solicitor, is against public policy and void. *Lancaster Co. v. Fulton* (Pa.) 5 L. R. A. 436.

The commissioners have no power to bind the county by such a contract (*Chester County v. Barber*, 97 Pa. 455); nor is it capable of ratification. *Lancaster Co. v. Fulton* (Pa.) 5 L. R. A. 438.

There can be no confirmation of a void contract. *Perkins*, § 154; *Zouch v. Parsons*, 3 Burr. 1794, 1806; 6 L. R. A.

Statement by Rothrock, J.:

The defendant E. H. Hunter was treasurer of the County of Adams for two successive terms, commencing in January, 1884, and ending in January, 1888. This action was brought upon his last official bond, and it is set forth in the petition that said Hunter, at the end of his term in January, 1888, failed to account for and pay over to his successor in office the sum of \$4,858.80 of county funds, but converted the sum to his own use. Judgment was demanded against said Hunter and the sureties on his official bond for that amount. The defendants, by their answer, alleged that at a full settlement and accounting had with the board of supervisors of said County in January, 1888, the said Hunter accounted for and paid over to his successor in office all of the moneys in his hands due to the said County, and that upon such settlement the said board of supervisors executed and delivered to said Hunter a writing in which a full settlement was acknowledged, and the said treasurer and his bondsmen were released and discharged from further liability. The plaintiff, by reply, admitted the execution of said instrument, but averred, in substance, that the said settlement was procured to be made by said Hunter by fraud in concealing from said board an item amounting to \$4,858.80, purporting to be a credit in favor of

Pearson v. Chapin, 44 Pa. 9, 15; *McIntosh v. Lee*, 57 Iowa, 364.

Nor will it constitute an adequate consideration for a new one. *Murphy v. Jones*, 7 Ind. 529; *Ehle v. Judson*, 24 Wend. 97; *Jarvis v. Sutton*, 3 Ind. 289; *Bishop Cont.* 242.

Contracts growing out of illegal or immoral acts are not enforceable. *Cobbs v. Hixon* (Mich.) 4 L. R. A. 682; *Leonard v. Poole*, 4 L. R. A. 723, 114 N. Y. 371.

Contracts against public policy are void. *Bowman v. Phillips* 41 Kan. 864, 3 L. R. A. 681, note; *McClintock v. Loiseau*, 2 L. R. A. 816, note, 81 W. Va. 885; *Chippewa V. & S. R. Co. v. Chicago*, 84 P. M. & O.R. Co. ante, 601.

said Hunter against the County, and that by reason of said Hunter's fraudulent concealment thereof the same was allowed as a valid credit, when in truth and in fact it was invalid and fraudulent, and, if founded upon any contract made with the board of supervisors, the contract was illegal, unauthorized and void. And the plaintiff in the reply asked that the cause be transferred to the equity side of the court for trial, and for a decree setting aside or correcting said settlement, and canceling the discharge of the bond, and for judgment as prayed in the petition. A formal motion for the transfer of the cause and for a trial in equity was made and sustained. A full trial was had upon evidence introduced by the parties, and a decree entered for the plaintiff. Defendants appeal.

Messrs. H. F. Dale, H. M. Towner and W. W. Morsman for appellants.

Messrs. Burg, Brown, W. O. Mitchell and F. M. Davis, for appellee.

Rothrock, J., delivered the opinion of the court:

1. It will be observed from the foregoing statement of facts that the plaintiff brought the action upon the bond without regard to the settlement and discharge of Hunter. When the settlement and release were pleaded, the plaintiff replied by setting up fraud in the settlement, and a want of power in the board to enter into the alleged contract upon which the amount in dispute was founded. Counsel for appellant insist in argument that the plaintiff is not entitled to any relief, because the averments of the reply are inconsistent with the averments of the petition. It is true that under section 2666 of the Code new matter alleged in a reply must not be inconsistent with the petition. It is questionable whether the reply in this case is vulnerable to the objection raised by counsel. It may be that the plaintiff should in strictness have been required to impeach the settlement by an amendment to the petition. But we do not determine that question. In the answer and reply an equitable issue was presented to the court. The plaintiff filed a motion to try the cause as an equitable action, and the motion was sustained. No objection was made by the defendants, and the cause was tried upon its merits in the court below. The objection is made for the first time in this court. It comes too late. See *Willson v. Harris*, 68 Iowa, 443.

The failure to make any objection in the court below to the reply, or to the motion to transfer the cause, must be regarded as consent to the form of the pleadings.

2. The claim of the defendant Hunter for the amount in controversy is based upon an alleged contract made with the board of supervisors on the 22d day of April, 1884, of which the following is a copy:

Memorandum in relation to collection of personal-property delinquent taxes due Adams County, Iowa, made between said Adams County and Ed. H. Hunter, as follows: Ed. H. Hunter is hereby appointed by the board of supervisors of Adams County, with power to appoint a deputy-collector, to collect any or all Adams County, Iowa, delinquent personal taxes; and the said Ed. H. Hunter is hereby authorized to remit any part or all of

the accrued penalties and interest, whenever in his judgment it is for the best interests of the County so to do; and said Hunter is to agree to make an equal effort to collect said taxes prior to 1880; and in full compensation for the services and expenses of said Hunter, including compensation for the deputy-collector, the said Hunter is to receive seventy-five per cent of all penalties and interest collected by him that have accrued upon said personal-property taxes. This arrangement is made with the said Hunter by instruction of the board of supervisors, as per resolution adopted by them April 11, 1884. Further, the board of supervisors retain the right to annul this contract should the said Hunter make any unnecessary expenses to the taxpayer in collecting the said tax, or if the amount allowed as compensation is in excess of just compensation; and said Hunter shall be allowed to withdraw from the contract should the compensation prove insufficient, upon giving the board of supervisors sixty days' notice.

[Signed]
[Do.]

F. M. Thompson,
G. W. Iden,
Committee Board of Sup'rs.
Ed. H. Hunter.

[Do.]
Dated Corning, Iowa, April 22, 1884.

This instrument was founded upon a resolution of the board of supervisors, passed on the 11th day of April, 1884, which is as follows: Whereas, a large amount of personal taxes—about \$15,000—are now remaining unpaid, and are considered uncollectible, at the treasurer's office; and whereas, it is considered desirable to save the taxpayers as much of this tax as possible: Therefore, be it resolved, that Ed. H. Hunter, county treasurer, be and is instructed to collect all delinquent personal taxes; the said Hunter to report to the board of supervisors at their regular meeting in June and January the amount of such taxes collected. Therefore, be it further resolved, that the chairman appoint a special committee of two members of the board of supervisors to make the necessary arrangements with the said Hunter for the collection of the said tax."

The chairman appointed F. M. Thompson and G. W. Iden as the committee contemplated in the foregoing resolution. It will be observed that the committee appointed by the board were not authorized to make a contract that Hunter, who was then the treasurer of the County, should receive the sum of 75 per cent of all penalties and interest collected by him upon delinquent personal-property tax; and this alleged contract was never reported to the board, and no reference is anywhere made to it in any of the proceedings of the board. It was purposely and intentionally kept a secret. No statement of the amount of collections made under it was ever at any time during the whole of Hunter's administration reported to the board. A subsequent arrangement was made, by which Hunter was paid \$600 a year for assistance in the office to enable him to collect delinquent taxes.

The first knowledge which the board could by any possibility have acquired of any claim made under the contract in question was that contained in a writing, which was among the vouchers at the final settlement, and which was

taken into the account as a credit in favor of Hunter. The following is a copy of said paper: Corning, Iowa, Jan'y 19, 1886.

Received of Ed. H. Hunter, treasurer of Adams County, Iowa, the sum of four thousand three hundred and fifty-three dollars and thirty cents, in full settlement of the compensation due the undersigned under the contract dated April 23, 1884, in relation to the special collection of delinquent personal-property taxes, entered into between the undersigned and the board of supervisors of Adams County, Iowa, by its committee, F. M. Thompson and G. W. Iden.

[Signed]

Ed. H. Hunter.

This paper, with the alleged contract, was brought into the room where the final settlement was made, and through the connivance of Hunter and one Lee, who claimed to be an expert accountant, it was passed as a proper voucher, without the knowledge of any member of the board. It is useless to discuss whether this was a fraud upon the members of the board, or whether, in the exercise of proper diligence in the discharge of their duties, they should have discovered that the receipt of Edward H. Hunter to Edward H. Hunter, treasurer of Adams County, was in no sense such a voucher as should have been received in the settlement. That it was invalid and void there can be no question. It was not made in pursuance of any valid contract upon the part of the board, and no attempt was made by Hunter on the trial to show by any account, report of his collections, or otherwise, that there was any real merit in the claim. It was a contract which the board of supervisors had no power to make. This court has repeatedly held that the allowance or payment of other or greater compensation to a public officer than that fixed by law

for his services is unauthorized and void. *Fawcett v. Woodbury County*, 55 Iowa, 154; *Fawcett v. Eberly*, 58 Iowa, 544; *Moore v. Mahaska County*, 61 Iowa, 177; *Griffin v. Clay County*, 68 Iowa, 418.

The last-cited case is especially in point in the case at bar. The plaintiff therein was county treasurer, and claimed more than the salary fixed by law.

It is conceded by counsel for appellant that the board of supervisors had no authority to allow the county treasurer a greater compensation than that allowed by law. But they contend that the alleged contract was not made with Hunter as county treasurer.

We are cited to the case of *Wilhelm v. Cedar County*, 50 Iowa, 254, as authority for the employment of the county treasurer to collect delinquent taxes. In that case the person employed was neither treasurer nor a deputy-treasurer. He was a special agent, employed to take promissory notes of persons for delinquent taxes. This court held that such an employment was valid, and that the agent was entitled to reasonable compensation therefor. But in the case at bar Hunter was the treasurer of the County, and the alleged contract under which he claims this large compensation was, upon its face, a premium for negligence in the discharge of his duty. We do not say that the evidence shows that he was negligent. But under the alleged contract it was to his interest to allow personal-property tax to become delinquent. It is quite plain that such an arrangement should be regarded as against public policy, and void.

The decree of the District Court will be affirmed.

Petition for rehearing overruled February 10, 1890.

ALABAMA SUPREME COURT.

R. K. CARLISLE, *Appt.*,

v.

John C. KILLEBREW.

(...Ala....)

1. Crops growing on the premises at the time of a recovery in ejectment are, by the general rule of the common law, regarded as

part and parcel of the realty belonging to the party recovering the land.

2. Where no bond is given in accordance with the provisions of Code 1886, §§ 2712, 2713, crops growing on the land recovered in ejectment belong to the party recovering the land.

3. The title to land cannot be questioned collaterally in a personal action to recover crops.

NOTE.—Real property; emblements, what constitute.

Where the estate is terminated in any other way than by his death, either by act of God or act of law, the tenant himself has the emblements; but not if he terminates it by his own act. 1 Cruise, Dig. 80; *Debow v. Colfax*, 10 N. J. L. 123; *Kittredge v. Woods*, 3 N. H. 504; 1 Hill, Real Prop. 13.

Emblements include only such vegetables as yield an annual profit, and are raised by annual expense and labor, or "great manurance and industry"—such as grain, but not trees, or fruits, clover, grass, etc., though annual, because they are spontaneous; and even though grass be improved by labor, as by trenching or sowing hay-seed, it is not a subject of emblements. Co. Litt. 55b, and note 2; Com. Dig. Biens, G 1; *Latham v. Atwood*, Cro. Car. 515, 1 Rolle, Abr. 726; *Grantham v. Hawley*, 6 L. R. A.

Hob. 132; Evans v. Iglehart, 6 Gill & J. 188; *Kittredge v. Woods*, 3 N. H. 504; *Craddock v. Riddlebarger*, 3 Dana, 206; *Ladd v. Abel*, 18 Conn. 513.

Prima facie they belong to the soil, and pass by a conveyance thereof, though it is said not under a judicial sale, but may be separated from it by some special transfer. *Calhoun v. Curtis*, 4 Met. 415. See *Foote v. Colvin*, 3 Johns. 222; *Bank of Pennsylvania v. Wise*, 8 Watts, 394; Com. Dig. Biens, H 3.

Under the term "land," are included the buildings, made so under the doctrine of accession, and the trees and other things growing upon the land, under the doctrine of acquisition by production, as well as the minerals which may be imbedded in the earth. 2 Bl. Com. 17-19; Co. Litt. 4g; 1 Washb. Real Prop. 3, 4; *Williams*, Real Prop. 14.

Growing grass, fruit and trees are parcel of the land, and go to the heir rather than the executor.

4. A judgment in ejectment is conclusive on collateral attack as to the title of the lands, and therefore the growing crops which were a part of the freehold at the time of the recovery, although it would not be a bar to a further suit in ejectment.

5. A verdict and judgment in a criminal prosecution for removing crops cannot be admitted in evidence in a civil action for the crops; nor can the result of an action for malicious prosecution based on such criminal prosecution be shown in such civil action.

(November 26, 1889.)

APPEAL by plaintiff from a judgment of the Circuit Court for Dale County in favor of defendant in an action to recover certain crops, raised upon premises recovered by defendant from plaintiff in ejectment and appropriated by defendant to his own use. *Affirmed.*

At the trial in the court below defendant offered in evidence, for the purpose of identifying as his own the land upon which the crops sued for were raised, a patent from the Governor of Alabama to one Smith, of a certain tract of land, and a deed from Smith to one Killebrew of the same tract; defendant also offered a certified plat of land containing said tract for the purpose of locating it.

Plaintiff duly objected to the introduction of all this evidence, and his objections were all overruled, and he duly excepted.

Further facts appear in the opinion.

Messrs. A. L. Millegan, M. E. Millegan and H. L. Martin for appellant.

Mr. H. H. Blackman for appellee.

Somerville, J., delivered the opinion of the court:

One, **M. N. Killebrew**, under whom appellee

Bank of Lansingburgh v. Crary, 1 Barb. 542; *Warren v. Leland*, 2 Barb. 613.

On the foreclosure of a mortgage, they pass to the purchaser as against the lessee of the mortgagor, whose lease was subsequent to the mortgage. *Lane v. King*, 8 Wend. 584; *Willard, Real Estate and Conv.* 89.

The personal representatives of the life tenant are entitled to the growing crops. *Bradley v. Bailey*, 1 L. R. A. 427 and note, 56 Conn. 374.

Growing crops.

It seems to be accepted as a general rule of the common law that when the tenant sows or plants his crop, if it is not possible for him to know that his estate will terminate before the crop can ripen, and it does terminate before, he shall have the right to harvest and secure the crop at its maturity. *Bingham, Real Prop.* 539.

On the contrary, when the determination of an estate is certain in its time, as, for example, a term of years, the tenant is not entitled to emblements. *Litt. § 68; Co. Litt. 55a; 2 Bl. Com. 122; Penton v. Robart*, 2 East, 88; 1 Cruise, Dig. 109, 110; *Whitmarsh v. Cutting*, 10 Johns. 361; *Bain v. Clark*, 10 Johns. 423.

The act of a landlord in taking sole possession of a crop after it has been gathered does not amount to a conversion, where the crop is destroyed by fire while in his possession; and hence the tenant cannot maintain trover against him, the parties being tenants in common of the crop. *Shearin v. Riggsbee*, 97 N. C. 216.

A landlord in *Hartford County, Maryland*, has no lien on the whole crop for a part thereof reserved
6 L. R. A.

claims, had, prior to the present suit, recovered certain premises from the plaintiff, *Carlisle*, in a real action in the nature of ejectment. He was formally put in possession by the sheriff under a writ of possession, and under such claim of right gathered and appropriated the crops of cotton, corn and fodder growing on the land. *Carlisle* afterwards took possession of the land without resort to the courts, and brought the present action in detinue to recover the crops taken away by *Killebrew*. The general rule of the common law is that one who recovers land in ejectment is entitled to the crops then growing on the premises, they being regarded as part and parcel of the realty. *McClean v. Boyle*, 24 Wis. 295; *Page v. Fowler*, 39 Cal. 412; *Thweat v. Stamps*, 67 Ala. 96.

In other words, "as between the successful plaintiff in an action of ejectment and the evicted defendant, growing crops are a part of the realty." *Van Alen v. Rogers*, 1 Johns. Cas. 281, 1 Am. Dec. 113, note, 116.

The Statutes of Alabama modify this principle only by providing that, if the defendant in ejectment has a crop planted or growing on the premises recovered from him by the plaintiff, he may stay the writ of possession until the expiration of the year, by giving bond and sureties to the plaintiff to secure the rent to him, which is declared to have the force and effect of a judgment upon the defendant's failure to pay the rent at the expiration of the year. Code 1886, §§ 2712, 2713.

No such bond having been given in this case, this Statute can have no bearing on the rights of the parties litigant.

The main question in the present suit is whether the defendant, *Killebrew*, can be permitted to introduce in evidence, in this action for the crops, severed from the freehold, the

as rent; and therefore trover will lie by a purchaser of a portion of the crop against a landlord taking such portion for rent due. *Hopper v. Haines (Md.)*, 18 Atl. Rep. 29.

A man who takes and converts to his own use crops made by a person in the adverse possession of land does not thereby become liable to the owners of the land who are out of possession. *Faulcon v. Johnston*, 102 N. C. 264.

If one in possession of land, under a judgment recovered upon a writ of entry, being sued in a writ of right, pending this suit sow the land, and the demandant recover judgment and obtain seisin and possession before the crops are gathered, the demandant is entitled to the crops. *Thomes v. Moody*, 11 Me. 139. See *Tyson v. Hollingsworth*, 2 Bland, Ch. 327, note; 1 Hill. Real Prop. 22.

A standing crop fully matured at the time of the foreclosure sale belongs to the tenant growing it, as against the purchaser at the sale. *Richards v. Knight (Iowa)* 4 L. R. A. 453, and note.

Where the purchaser of mortgaged premises sold pursuant to a statute foreclosure in New York entered, harvested and carried away the crop; in an action of trover against him, by one who had purchased the crop before the foreclosure, on execution against the mortgagor, it was held the defendant was entitled to the crop. *Shepard v. Philbrick*, 2 Denio, 174.

Right to crops and emblements on foreclosure. *Richards v. Knight*, *supra*.

Chattel mortgage, description of crops and emblements. *Johnson v. Grissard*, 3 L. R. A. 795, note, 51 Ark. 410.

judgment of recovery in ejectment, and, if so, what force as evidence this judgment will exert. It is insisted by the appellant that the court below erred in admitting this judgment, and the writ of possession issued on it, because the question of title to the land cannot be litigated in a personal action, and for the further reason that, at common law, a prior judgment in ejectment was not admissible in a subsequent suit between the same parties. The former principle, applied to this case, operates to preclude the plaintiff, Carlisle, from challenging the defendant's right of possession and title acquired under his judgment in ejectment. *Beatty v. Brown*, 76 Ala. 287, *Stringfellow v. Curry*, Id. 894.

The latter rule is so stated by some of the old writers, and is based upon the use of fictitious names in the action of ejectment proper, which is still tolerated in our form of practice. But this is not a second action of ejectment in which it is sought to use as evidence a judgment recovered in a former action. The present is a personal action, and the rule applies, as against the plaintiff himself, that he cannot collaterally raise the question of title to the land by way of showing incidentally his right to the crops severed from the freehold. *Martin v. Thompson*, 120 U. S. 376 [80 L. ed. 679].

In our practice, under the Statute, it requires two verdicts and judgments for the defendant to bar further suit by the plaintiff in ejectment, or the real action in the nature of ejectment. Code 1886, § 2714.

But where the question of title arises collaterally, as in an action for mesne profits, or otherwise, the record of a recovery in ejectment is not only admissible in evidence in favor of the party put in possession under it, but is conclusive between the same parties, and their privies, on the same title, as to the question of possession and title. *Shumake v. Nelms*, 25 Ala. 126; *Howard v. Kennedy*, 4 Ala. 592; *Van*

Allen v. Rogers, 1 Johns. Cas. 281, 1 Am. Dec. 113, note, 116; 2 Greenl. Ev. § 883; *Camp v. Forrest*, 13 Ala. 114; 6 Am. & Eng. Cyclop. Law, 245 g; *Chirac v. Reinecker*, 27 U. S. 2 Pet. 618, 622 [7 L. ed. 538]; *Equator Min. & S. Co. v. Hall*, 106 U. S. 86 [27 L. ed. 114]; *Caperton v. Schmidt*, 85 Am. Dec. 187, note, 208.

The judgment recovered in the ejectment suit involved the title and right of possession of the parties to the present suit to the same lands, upon which the crops in dispute were at the time growing, and was conclusive on collateral attack as to the title of the lands, and therefore of the growing crops which were a part of the freehold at the time of recovery.

The other evidence to which objection was taken by appellant was admissible to explain the extent of defendant's possession, and to identify the lands on which the crops in dispute were grown.

The court did not err in refusing to admit in evidence the verdict and judgment in the criminal prosecution instituted by Killebrew against the plaintiff, Carlisle, for removing the crops, in which the latter was acquitted by the presiding magistrate. A verdict and judgment in a criminal case is not generally evidence of the fact upon which the judgment was founded in a civil proceeding. 1 Starkie, Ev. (Sharswood) *863-865.

So the judgment of the magistrate showing a recovery of damages by Carlisle against Killebrew in the action for malicious prosecution, based on the prosecution last referred to, is not shown to involve the determination of any fact relevant to the present issues. The judgment of acquittal, moreover, in the criminal case, upon which the case of malicious prosecution was based, being inadmissible as above stated, the latter proceeding must also be excluded.

We find no error in the record, and the judgment is affirmed.

INDIANA SUPREME COURT.

Charles P. STAUB, *Appt.*,

v.

John L. KENDRICK.

(.....Ind.)

1. One engaged in the business of transporting baggage is liable for the value of articles necessary for use in travel, contained in a valise which has been delivered to his agent for

transportation and has been lost solely through such agent's negligence, notwithstanding he had posted notices that he would not be responsible for valises, and had instructed his agents not to receive them, where the owner of the valise was ignorant of those facts.

2. A catalogue prepared by a traveling salesman at his own expense, and which was his own individual property and carried with him as an article convenient and necessary for use in

NOTE.—Bailment by letting to hire; carriers as bailees.

Letting for hire, or, as the phrase is commonly used, "letting to hire," is a bailment, where compensation is given for the use of a thing or for labor and services about it. 2 Kent, Com. 698; Jones, Bailm. 65, 66; Edwards, Bailm. 274.

The contract embraces the hire of carriage or transportation. Jones, Bailm. 90, 97; 2 Kent, Com. 698; 1 Cowen, Treatise, 2d ed. 68; Edwards, Bailm. 274.

The hire of a carriage, or transportation of goods by a common carrier, is such a bailment of goods as renders the bailee liable for them without any neglect. The policy of the law holds him to a strict

accountability, and makes him in effect an insurer of the goods. Lane v. Cotton, 12 Mod. 432; Jones, Bailm. 108; Forward v. Pittard, 1 T. R. 27; Hyde v. Trent & Mersey Nav. Co. 5 T. R. 289; Edwards, Bailm. 38.

To constitute a person a common carrier, he must be one who, as a regular business, undertakes for hire or reward to transport the goods of such as choose to employ him, from place to place. Blanchard v. Isaacs, 3 Barb. 388; Edwards, Bailm. 425.

Everyone who pursues the business of transporting goods for hire, or for the public generally, is a common carrier. Robertson v. Kennedy, 2 Dana, 431; Edwards, Bailm. 429.

Draymen, cartmen and porters clearly enough

his business while traveling, is an article of personal baggage for which he may recover when lost with other articles in a valise by a baggage transfer carrier.

(December 12, 1889.)

APPEAL by defendant from a judgment of the Circuit Court for Vigo County in favor of plaintiff in an action to recover the value of a valise and contents which had been lost while in defendant's possession for purposes of transportation. *Affirmed upon condition.*

The facts are fully stated in the opinion.

Messrs. L. D. Leveque, T. A. Foley and T. W. Harper for appellant.

Messrs. Donham & Huston for appellee.

Olds, J., delivered the opinion of the court:

This is an action by the appellee against the appellant, for the value of a valise and contents, and damages resulting from the loss of the same. The appellant was engaged in the transportation of trunks and baggage, in the City of Terre Haute, to and from the various hotels and railway stations, and, in conducting such business, he had men and teams employed. The appellee is a traveling salesman for the firm of Howell, Gano & Co., wholesale hardware dealers, at Cincinnati, Ohio. The appellant arrived at the Union Depot, in the City of Terre Haute, on the train due there at 5:30 P. M., on the afternoon of September 26, 1883. Immediately on his arrival he engaged one of the employes of the appellant to convey his two trunks and a valise to the Indianapolis & St. Louis Depot, in said city, and paid him the price asked for transferring the same, and the baggageman, the employe of the appellant, took possession of the trunks and valise, and delivered to the appellee three checks for the trunks and valise. The appellee took supper at the Union Depot, and walked to the Indianapolis & St. Louis Depot, to take a train leaving at 6:50 P. M., same day, for Paris, Ill. On his arrival at the Indianapolis & St. Louis Depot he was informed by the person to whom he had delivered the goods that he could not find the valise. The valise was lost; and this suit is brought for the value of it, and of its contents.

The plaintiff not only seeks to recover for the value of the valise and its contents, but also for his loss of time and expense. There was a trial had, resulting in a finding and judgment for the appellee for \$85.10. The court made a special finding of facts, and stated its conclusions of law thereon. The appellant excepted to the conclusions of law; also moved for a new trial, which was overruled, and to which ruling exceptions were reserved by the appel-

lant, and error assigned both as to the conclusions of law stated and the ruling on the motion for a new trial.

The facts found by the court, in brief, are as follows: That on the afternoon of the 26th day of September, 1883, at 5:30 o'clock, P. M., the plaintiff arrived at the Union Depot in the City of Terre Haute, from the Town of Clinton, Ind. Immediately after arriving he contracted with one Rogers, then in the employ of the defendant and employed in driving a baggage wagon for the defendant, to transfer from the Union Depot to the Indianapolis & St. Louis Depot two traveling salesmen's trunks and one valise, for the transfer of which plaintiff paid Rogers fifty cents; and Rogers gave the plaintiff three checks,—one for each trunk and one for the valise,—the check for the valise bearing the inscription "Buss Check 10. I. & St. L. Depot." That Rogers took the two trunks and valise from the Union Depot to the Terre Haute House, when he unloaded the trunks on the sidewalk, and put the valise on top of the trunks, and went away and left the trunks and valise, with no person in charge of them, until he returned to take them to the Indianapolis & St. Louis Depot just before the time for the arrival of the 6:50 P. M. train. That plaintiff, after eating his supper at the Union Depot, walked to the Indianapolis & St. Louis Depot, to take the 6:50 P. M. train west. Arriving at the Indianapolis & St. Louis Depot a few moments before train-time, he presented his three checks to Rogers for the trunks and valise, and was informed by Rogers that he could not find the valise. Plaintiff was going to Paris, Ill., and was told by defendant to go on that train, and he would send the valise to him. Plaintiff went to Paris, Ill., as directed, and on the following morning received word by telephone that the valise was lost, and asked him to return to Terre Haute. That plaintiff came to Terre Haute as requested, paying his railroad fare, amounting to sixty cents, and remained at Terre Haute three days, endeavoring to recover his valise, stopping at the National House,—paying \$2.50 per day. That the valise was lost without any fault of plaintiff, and through and by the negligence of defendant's agent. That the valise contained property consisting of necessary wearing apparel, brushes and necessary articles for use in travel, to the amount of \$21.50; also, a traveling salesman's illustrated catalogue, of the value of \$50. That plaintiff was in the employ of Messrs. Howell, Gano & Co., hardware merchants of Cincinnati, Ohio, as a traveling salesman. That said catalogue was prepared by himself, at his own expense, and was his

come within the terms of this definition. *Dwight v. Brewster*, 1 Pick. 50; *Story*, Ballm. § 495; *Shelden v. Robinson*, 7 N. H. 157; *Blanchard v. Isaacs*, 8 Barb. 383; *Citizens Bank v. Nantucket Steamboat Co.*, 2 Story, 16; 2 Kent, Com. 699; *Gisbourn v. Hurst*, 1 Salk. 249.

If he undertake for hire or reward to transport the goods of all persons, indifferently,—that is, of all such persons as choose to employ him,—from place to place, he is a common carrier. *Gisbourn v. Hurst*, *supra*; *Dwight v. Brewster*, 1 Pick. 50; *Alexander v. Greene*, 3 Hill, 20.

He is not a common carrier, unless his employment be to carry goods generally for anyone, so as 6 L. R. A.

to imply a public engagement to serve all persons alike on being tendered a suitable reward. *Trent Nav. Co. v. Wood*, 8 Esp. 127; *Story*, Ballm. § 495.

A delivery to his agent or servant of such goods as it is the custom of the carrier to receive for carriage, is a delivery to himself. *Esp. Dig.* 622; *Halsey v. Brown*, 8 Day (Conn.) 345; *Renner v. Bank of Columbia*, 22 U. S. 9 Wheat. 590 (6 L. ed. 168); *Sewall v. Allen*, 6 Wend. 350, 361. See *Pullman Pal. Car Co. v. Lowe*, *post*, —.

Conversion by bailee. *Reizenstein v. Marquardt*, 1 L. R. A. 318, *note*, 75 Iowa, 294.

Innkeepers as bailees. *Cookery v. Nagle*, *ante*, 483.

individual property; and that it was necessary for his convenience and use as such traveling salesman. That the defendant had caused notices to be posted up in his stable, and in the waiting-rooms of the depots, that he would not convey valises, and be responsible for the same, and had instructed his agents not to receive valises; but plaintiff had no knowledge of such instructions or notices.

On the foregoing facts, there is stated what purport to be conclusions of law, mingled with which are additional findings of fact, finally terminating with the conclusion that plaintiff should recover the sum of \$85.10; and judgment is rendered for that amount. The motion for new trial is on the grounds that the finding of the court is contrary to the evidence, and not supported thereby.

The findings of fact do not support the conclusion of law that the plaintiff is entitled to recover the amount stated. The defendant is liable, under the facts found, for the value of the contents of the valise; and the evidence supports the finding, even if the grounds stated in the motion are such as can be construed to question the sufficiency of the evidence to support the finding, which, it may be said, is very doubtful. There is no finding as to the value of the valise; and the value of the goods found amount, in the total, to the sum of \$71.50. It is contended that the defendant is not liable for the value of the catalogue, but we think differently. It is a book used by him in the business in which he was engaged. He carried it with him, for his personal use and convenience; and it is found to be a necessary article for him to carry, to properly discharge the duties of the business in which he was engaged, and the object for which he was traveling.

The case of *Gleason v. Goodrich Transp. Co.* 32 Wis. 85, is a case directly in point; and it was held that the transfer company was liable for the value of a book of this same character. In that case the court, after quoting and citing other authorities, says: "It must, on the whole,

be held, we think, that the book in question was an article of personal baggage, within the definition above given, and the decisions upon the subject. It was a thing of personal use and convenience to the plaintiff, according to the wants of the particular class of travelers to which he belonged, and was taken with him as well with reference to the immediate necessities of his journey as to the ultimate purposes of it. It was not an article of merchandise, or the like, or anything designed for use ulterior to the purposes of his journey, but a book of memoranda, convenient and necessary for him, personally, in accomplishing the object of his travel. It was personal baggage, within the definition and rule of law upon that subject." See also *Doyle v. Kiser*, 6 Ind. 242; *Hannibal & St. J. R. Co. v. Swift*, 79 U. S. 12 Wall. 262 [20 L. ed. 423].

No doubt the court reached the conclusion that the plaintiff was entitled to recover the amount stated on the theory that the plaintiff was entitled to recover for all the incidental damages arising from the loss, such as railroad fare, time and hotel expenses. This we do not deem it necessary to pass upon, as no such facts are found as would entitle the plaintiff to recover any definite sum therefor. There is no finding as to the value of plaintiff's time, nor as to the time necessarily occupied in looking after the valise, nor as to his necessary expenses while so engaged. Clearly, under the findings of fact, the plaintiff was only entitled to recover \$71.50, and the court erred in its conclusion of law that the plaintiff was entitled to recover \$85.10; and the conclusion of law should have been that the plaintiff is entitled to recover \$71.50.

In case the appellee remits the amount of the judgment in excess of \$71.50 within twenty days from this date, the judgment will be affirmed, at his costs. Otherwise the judgment will be reversed, at his costs, with instructions to the court below to restate its conclusions of law, and render judgment in favor of appellee in accordance with this opinion.

WEST VIRGINIA SUPREME COURT OF APPEALS.

STATE OF WEST VIRGINIA

v.

Robert GOODWILL *et al.*, *Piffs. in Err.*,

STATE OF WEST VIRGINIA.

v.

MINOR, *Piff. in Err.*

(....W. Va....)

*1. It is not competent for the legislature, under the Constitution, to single

Head notes by SNYDER, P.

out owners and operators of mines, and manufacturers of every kind, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power.

2. The third section of chapter 63, Acts 1887 (Code 1887, p. 988), which prohibits persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper, except such as is specified in the said Act, is unconstitutional and void.

NOTE.—Class legislation unconstitutional and void. The constitutional rights of the citizen to life, liberty and property are wholly unlimited and unrestricted, except by considerations of the public good; and no abridgment or deprivation of the rights by the Legislature will be upheld or enforced, except as a regulation of police, operating to the benefit of all individuals of the community 6 L. R. A.

equally. *Corfield v. Coryell*, 4 Wash. C. C. 380; *Cooley*, Const. Lim. 4th ed. 719; *Potter's Dwarries*, Stat. 458; *Austin v. Murray*, 16 Pick. 121, 126; *Watertown v. Mayo*, 109 Mass. 815, 819; *Re Cheesebrough*, 78 N. Y. 232.

The words "the law of the land," mean general public law, binding upon all the members of the community, under all circumstances, and not par-

(November 18, 1889.)

WRITS of error to the Circuit Courts for Mercer and Fayette Counties to review judgments convicting defendants of violating the provisions of Acts 1887, chap. 63, § 3, prohibiting the payment of employes in any paper not redeemable in lawful money of the United States, etc. *Reversed.*

The case is sufficiently stated in the opinion.

Messrs. Henritze & Haythe, C. W. Smith, J. W. St. Clair and Brown & Jackson for plaintiffs in error.

Mr. Alfred Caldwell, Atty-Gen., for the State.

Snyder, P., delivered the opinion of the court:

These two cases present the same questions, and may therefore be considered together. The first is a writ of error to a judgment of the Circuit Court of Mercer County, pronounced on April 3, 1889; and the second is a writ of error to a judgment of the Circuit Court of Fayette County, pronounced September 29, 1887. Both are indictments and convictions for the violation of section 3 of chapter 63, Acts 1887. See Code 1887, p. 983.

The title of said Act is as follows: "An Act to Secure to Operatives and Laborers Engaged in and about Mines, Manufactories of Iron and Steel, and all Other Manufactories, the Payment of Their Wages at Regular Intervals, and in Lawful Money of the United States." And the first and third sections are in these words: "(1) That all persons, firms, corporations or associations in this State, engaged in mining coal, ore or other minerals, or mining and manufacturing them, or either of them, or manufacturing iron or steel, or both or any other kind of manufacturing, shall pay their employes as provided in this Act." "(3) That

it shall not be lawful for any person, firm, company, corporation or association engaged in the business aforesaid, their clerk, agent, officer or servant, in this State, to issue for the payment of labor any order or other paper whatsoever unless the same purports to be redeemable, for its face value, in lawful money of the United States, bearing interest at the legal rate, made payable to employe or bearer, and redeemable within a period of thirty days by the person, firm, company, corporation or association giving, making or issuing the same."

The residue of the section makes its violation a misdemeanor, and fixes the penalty at not less than \$25, or more than \$100. There was a demurrer to each of the indictments, which was overruled by the court; and the plaintiffs in error assign this as ground for the reversal of the judgments.

The main question argued before this court is whether or not the said Statute is constitutional, the counsel for the plaintiffs in error contending that it is unconstitutional and void, and the Attorney-General insisting that it is a proper exercise of the police power, and therefore not unconstitutional and void. It will be observed that this Statute applies to certain specified classes of persons, firms, companies, corporations and associations, and none others. It is by its terms limited to persons, corporations, etc., engaged in mining coal or other minerals, or any kind of manufacturing. While these terms include not only all persons engaged in mining coal and other minerals, and all persons engaged in manufacturing iron and steel, but all persons engaged in any kind of manufacturing, such as the shoe-maker, the cigar-maker, the undertaker, the distiller, the brick-maker, the jeweler, the weaver, the milliner, the dairyman and the miller, it does not include the wholesale merchant, with his hundreds of clerks and agents; the railroad con-

tial or private laws, affecting the rights of private individuals or classes of individuals. *James v. Reynolds*, 2 Tex. 251. See also *Wynehamer v. People*, 13 N. Y. 432; *Vanzant v. Waddell*, 2 Yerg. 269; *Cooley*, Const. Lim. 362.

The law will not allow the rights of property to be invaded under the guise of a police regulation for the promotion of health, when it is manifest that such are not the object and purpose of the regulation. *Austin v. Murray and Watertown v. Mayo*, *supra*; *Re Jacobs*, 98 N. Y. 109.

The Legislature cannot, under the pretense of exercising the police power, or under any other claim or pretense, enact a law prohibiting harmless acts not concerning the health, safety or welfare of society; and the courts may examine into and annul such illegal legislation. *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 37; *Coe v. Schultz*, 47 Barb. 69; *Quintini v. Bay St. Louis*, 64 Miss. 489; *Lake View v. Rose Hill Cemetery Co.* 70 Ill. 191; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Cooley*, Const. Lim. 5th ed. 446; *Lowry v. Rainwater*, 70 Mo. 152; *Jeok v. Anderson*, 67 Cal. 251; *Stuart v. Palmer*, 74 N. Y. 183, 190; *Calder v. Bull*, 3 U. S. 3 Dall. 386 (1 L. ed. 648); *Re Ryers*, 72 N. Y. 1; *Weismar v. Douglas*, 64 N. Y. 91; *People v. Equitable Trust Co.* 96 N. Y. 387; *Rockwell v. Nearing*, 35 N. Y. 302; *Re Townsend*, 39 N. Y. 171; *Re Deansville Cemetery Assn.* 66 N. Y. 599; *Re Eureka B. W. & Mfg. Co.* 96 N. Y. 42; *People v. Gillson*, 12 Cent. Rep. 616, 109 N. Y. 390; *Com. v. Pennsylvania Canal Co.* 66 Pa. 50; *Crenshaw v. Slate River Co.* 6 Rand. 264; *Miller v. New York & E. R. Co.* 21 Barb. 518; *People v. Jackson & M. Pl. Road* 6 L. R. A.

Co. 9 Mich. 307; Millett v. People, 5 West. Rep. 155, 117 Ill. 296.

It is not within the power of the Legislature, under the pretense of exercising the police power of the State, to enact laws, not necessary to the preservation of the health and safety of the community, that will be oppressive and burdensome upon the citizen. *Toledo, W. & W. R. Co. v. Jacksonville*, 67 Ill. 40; *King v. Davenport*, 98 Ill. 314.

To forbid an individual or a class the right to the acquisition or use or enjoyment of property in such a manner as should be permitted to the community at large, would be to deprive them of liberty in particulars of primary importance to their pursuit of happiness. *Cooley*, Const. Lim. 485-487; *Wynehamer v. People*, 13 N. Y. 433.

Such legislation is invalid, as subversive of rights of citizens guaranteed by the State and Federal Constitutions. Fifth and Fourteenth Amendments U. S. Const.; State Const. art. 1, § 1; *Wynehamer v. People*, 13 N. Y. 398; *Boyd v. United States*, 116 U. S. 635 (23 L. ed. 752); *Barbier v. Connolly*, 113 U. S. 31 (23 L. ed. 924); *Intoxicating Liquor Cases*, 26 Kan. 735; *Bertholf v. O'Reilly*, 74 N. Y. 509, 515.

The rights of every individual must stand or fall by the same rule or law that governs every other member of the body politic, under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. *People v. Marx*, 99 N. Y. 377; *Hancock v. Yaden*, *ante*, 578.

struction companies, or railroad companies, with their thousands of employes. The propriety or the necessity, if such exists, of applying the provisions of the Statute to these latter is equally as great, if not more so, as it is to any of the former. The rights and privileges of certain specified employers are abridged, while others of the same class are left free.

By the first section of the Fourteenth Amendment of the Constitution of the United States, all persons born or naturalized in the United States are made citizens thereof; and it there declares that no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." And the "Bill of Rights" of this State declares that "all men are, by nature, equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and of pursuing and obtaining happiness and safety." Const. art. 3, § 1.

Can the Legislature, in view of these constitutional guaranties, limit or forbid the right of contract between parties under no mental, corporal or other disability, when the subject of contract is lawful, not public in its character, and the exercise of it is purely private and personal to the parties themselves? The court, in *People v. Gillean*, says: "The term 'liberty,' as used in the Constitution, is not dwarfed into mere freedom from physical restraint of the person of the citizen, as by incarceration; but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. Liberty, in its broad sense, as understood in this country, means the right, not only of freedom from servitude, imprisonment or restraint, but the right of one to use his faculties in all lawful ways, to live and work where he will, to earn his livelihood in any lawful calling, and to pursue any lawful trade or avocation." 109 N. Y. 398, 12 Cent. Rep. 616.

Field, J., in *Butchers' Union, S. H. & L. S. L. Co. v. Crescent City, L. S. L. & S. H. Co.* 111 U. S. 755 [28 L. ed. 590]; *Live Stock, D. & B. Assn. v. Crescent City, L. S. L. & S. H. Co.* 1 Abb. U. S. 398.

The court, in *Civil Rights Cases*, says: "Under the Fourteenth Amendment, it [Congress] has power to counteract and render nugatory all state laws and proceedings which have the effect to abridge any of the privileges or immunities of citizens of the United States, or to deprive them of life, liberty or property without due process of law, or to deny to any of them the equal protection of the laws. . . . Many wrongs may be obnoxious to the prohibitions of the Fourteenth Amendment which are not, in any just sense, incidents or elements of slavery. Such, for example, would be the taking of private property without due process of law; or allowing persons who have committed certain crimes (horse-stealing, for example) to be seized and hung by the *poase comitatus*, without regular trial; or denying to any person, or class of persons, the right to pursue any peace-

ful avocation allowed to others. What is called 'class legislation' would belong to this category, and would be obnoxious to the prohibitions of the Fourteenth Amendment." 109 U. S. 28 [27 L. ed. 848].

The rights of every individual must stand or fall by the same rule of law that governs every other member of the body politic under similar circumstances; and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by restricting the privileges of certain classes of citizens and not of others, when there is no public necessity for such discrimination, is unconstitutional and void. Were it otherwise, odious individuals or corporate bodies would be governed by one law, and the mass of the community, and those who make the law, by another; whereas, a like general law, affecting the whole community equally, could not have been enacted. *Wally v. Kennedy*, 2 Yerg. 554.

The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands; and to hinder him from employing these in what manner he may think proper, without injury to his neighbor, is a plain violation of this most sacred property. It is equally an encroachment both upon the just liberty and rights of the workman and his employer, or those who might be disposed to employ him, for the Legislature to interfere with the freedom of contract between them, as such interference hinders the one from working at what he thinks proper, and at the same time prevents the other from employing whom he chooses.

A person living under the protection of this government has the right to adopt and follow any lawful industrial pursuit, not injurious to the community, which he may see fit. And, as incident to this, is the right to labor or employ labor, make contracts in respect thereto, upon such terms as may be agreed upon by the parties; to enforce all lawful contracts; to sue and give evidence, and to inherit, purchase, lease, sell and convey property of every kind. The enjoyment or deprivation of these rights and privileges constitutes the essential distinction between freedom and slavery, between liberty and oppression. These principles have been fully recognized and announced in many decisions of the Supreme Court of the United States and other courts. *Pick Wo v. Hopkins*, 118 U. S. 356 [30 L. ed. 220]; *Slaughter-House Cases*, 88 U. S. 16 Wall. 86 [21 L. ed. 394]; *Butchers' Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746 [28 L. ed. 585]; *Re Jacobs*, 98 N. Y. 98; *People v. Marx*, 99 N. Y. 377; *Ex parte Westersfield*, 55 Cal. 550; *Raggio v. State*, 86 Tenn. (3 Pickle) 272; *State v. Divine*, 98 N. C. 778.

The vocation of an employer, as well as that of his employe, is his property. Depriving the owner of property of one of its attributes is depriving him of his property under the provisions of the Constitution. *People v. Otis*, 90 N. Y. 48.

The right to use, buy and sell property, and contract in respect thereto, including contracts for labor,—which is, as we have seen, prop-

erty,—is protected by the Constitution. If the Legislature, without any public necessity, has the power to prohibit or restrict the right of contract between private persons in respect to one lawful trade or business, then it may prevent the prosecution of all trades, and regulate all contracts. "Questions of power," says Marshall, *Ch. J.*, in *Brown v. Maryland*, 25 U. S. 12 Wheat. 419 [6 L. ed. 678], "do not depend on the degree to which it may be exercised. If it may be exercised at all, it must be exercised at the will of those in whose hands it is placed."

No one questions the position that, unless the government intervened to protect property and regulate trade, property would cease to exist, and trade would exist only as an engine of fraud; but this does not authorize the government to do for its people what they can do for themselves. The natural law of supply and demand is the best law of trade.

In *Munn v. Illinois*, 94 U. S. 113 [24 L. ed. 77], and other cases involving the same questions, the Supreme Court of the United States has held that persons or corporations engaged in occupations in which the public have an interest or use may be regulated by statute. But the reasons assigned for these decisions are that the public has a use in these occupations, and that the persons engaged in them are in the exercise of a public franchise, or special privileges, not enjoyed by others not so engaged; that their business implies a trust and public duty; and that the government has, therefore, the power to see that this trust is not abused, and that the duty imposed by it is properly performed. On this principle, statutes have been upheld which regulate the charges of railroad companies and other common carriers; elevator, telephone, telegraph and other companies, hackmen, warehousemen, owners of water-mills, etc. But we are aware of no well-considered case in which a statute has been upheld that undertook to regulate the dealings between employer and employé, even in this class of occupations, much less in cases that are not impressed with a public trust or duty.

But the claim is made that the Legislature should pass the Act now in question in the exercise of the police power which every sovereign State possesses. That power is very broad and comprehensive, and is exercised to promote the health, safety and welfare of society. Its exercise in extreme cases is frequently justified by the maxim *salus populi suprema lex est*. It is used to regulate the use of property by enforcing the rule, *sic utere tuo ut alienum non ledas*. Under it the conduct of an individual and the use of the property may be regulated so as to interfere, to some extent, with the freedom of the one and the enjoyment of the other; and in cases of great emergency, engendering overruling necessity, property may be taken or destroyed without compensation. The limit of the power cannot be accurately defined; and the courts have not been willing definitely to circumscribe it. But this power, however broad and extensive, is not above the Constitution, which is the supreme law; and, so far as it imposes restraints, the police power must be exercised in subordination to it. *Re Jacobs*, 98 N. Y. 98; *Cooley*,

Const. Lim. 719; *Mugler v. Kansas*, 123 U. S. 628 [31 L. ed. 205].

Generally it is for the Legislature to determine what laws and regulations are proper, in the exercise of the police power; but if it passes an Act ostensibly for the public health or safety, and thereby destroys or takes away the property of a citizen, or interferes with his rights or personal liberty, then it is for the courts to determine whether it is a proper and reasonable exercise of the power, and if it is not, to declare it void. *Austin v. Murray*, 16 Pick. 121; *State v. Gilman* (W. Va.) 10 S. E. Rep. 283 (decided at the present term).

The right to regulate the rate of interest existed at the time the Constitution was adopted, and cannot, therefore, be considered as either an abridgment or restraint upon the rights of the citizen guaranteed by the Constitution. The power to pass Usury Laws exists by immemorial usage, but such is not the case with such Acts as we are now considering. *Munn v. Illinois*, 94 U. S. 113, 153 [24 L. ed. 77, 94].

Our Act is almost a literal copy of an Act passed by the Legislature of Pennsylvania on June 29, 1881, Pa. Laws 1881, p. 147.

In *Gocharles v. Wigeman*, 113 Pa. 431, 4 Cent. Rep. 887, the Supreme Court of that State declared the first four sections of that Act unconstitutional and void. The court in its opinion says: "The first, second, third and fourth sections of the Act of June 29, 1881, are utterly unconstitutional and void, inasmuch as by them an attempt has been made by the Legislature to do what, in this country, cannot be done; that is, prevent persons who are *sui juris* from making their own contracts. The Act is an infringement alike of the rights of the employer and the employé. More than this, it is an insulting attempt to put the laborer under a legislative tutelage, which is not only degrading to his manhood, but subversive to his rights as a citizen of the United States. He may sell his labor for what he thinks best, whether money or goods, just as his employer may sell his iron, or coal, and any and every law that proposes to prevent him from so doing is an infringement of his constitutional privileges, and consequently vicious and void."

In *Millett v. People*, 117 Ill. 294, 5 West. Rep. 155, the Supreme Court of Illinois, in a well-considered opinion, held unconstitutional and void an Act of the Legislature of that State which required the owners or operators of mines to provide scales for weighing their coal, and make the weight of coal the basis of the wages of miners. A part of the syllabus is as follows: "It is not competent for the Legislature, under the Constitution, to single out owners and operators of coal mines, and provide that they shall bear burdens not imposed on other owners of property or employers of labor, and prohibit them from making contracts which it is competent for other owners of property or employers of labor to make. Such legislation cannot be sustained as an exercise of the police power."

In view of what the courts have uniformly held in respect to this class of legislation, it is needless to prolong this discussion. It is a species of sumptuary legislation which has been universally condemned, as an attempt to degrade the intelligence, virtue and manhood

of the American laborer, and foist upon the people a paternal government of the most objectionable character, because it assumes that the employer is a tyrant, and the laborer is an imbecile. "Such legislation," as is well said by the court in *Re Jacobs*, 98 N. Y. 114, "may invade one class of rights to-day and another to-morrow; and, if it can be sanctioned under the Constitution, while far removed in time, we will not be far away in practical statesmanship from those ages when governmental precepts supervised the building of houses, the rearing of cattle, the sowing of seed and the reaping of grain, and governmental ordinances regulated the movements and labor of artisans, the rate of wages, the price of food, the diet and clothing of the people and a large range of other affairs long since, in all civilized lands, regarded as outside of governmental functions. Such governmental interferences disturb the normal adjustments of the social fabric, and usually derange the delicate and complicated machinery of industry, and cause a score of ills while attempting the removal of one."

For the reasons aforesaid, I am clearly of opin-

ion that the said third section of the Act aforesaid is unconstitutional and void. In arriving at this conclusion, we have not been unmindful that the power of the courts to condemn legislative Acts as unconstitutional is one of great delicacy, and to be exercised with extreme caution, and even with reluctance. But, as said by *Chancellor Kent* (1 Kent, Com. 450), "it is only by the free exercise of this power that courts of justice are enabled to repel assaults and protect every part of the government, and every member of the community, from undue and destructive innovations upon their charter rights."

The Statute itself being, as we have seen, unconstitutional and void, there could be no valid indictment founded upon it; and consequently the circuit court erred in overruling the demurrer to the indictment in each of these cases, and for that reason the judgments of the *Circuit Court* are reversed, and the defendants discharged.

English and Brannon, JJ., concurred; **Green, J.**, absent.

OHIO SUPREME COURT.

Kate S. D. ARMSTRONG, *Plff. in Err.*,

POMEROY NATIONAL BANK.

(46 Ohio St.)

*1. The rule that a negotiable instru-

*Head notes by the COURT.

NOTE.—*Negotiable paper; use of fictitious names.*

The policy of the law in reference to negotiable paper requires that it shall tell its own story, and have effect in the hands of innocent holders for value according to what appears upon it. *Schneider v. Schiffman*, 20 Mo. 571. See also *Seymour v. Farrell*, 51 Mo. 95; 1 *Daniel*, Neg. Inst. 527.

Where the payee's name is fictitious, it may be indorsed on the paper by the person to whom the bill or note is delivered. *Blodgett v. Jackson*, 40 N. H. 21; 1 *Randolph*, Com. Paper, 248.

But a fraudulent indorsement of a fictitious payee's name will constitute a forgery. *Chitty, Bills and Notes*, 182; *Rex v. Taft*, 1 *Leach*, C. C. 172; *Tatlock v. Harris*, 3 T. R. 174; *Vere v. Lewis*, Id. 182; *Minet v. Gibson*, id. 482; *Gibson v. Minet*, 1 H. Bl. 569; *Collis v. Emmett*, 1 H. Bl. 813.

A note payable to the order of a fictitious person is, however, valid as a note payable to the bearer in the hands of all parties against the maker and against all parties with notice by force of statute in many States. *Maniort v. Roberts*, 4 E. D. Smith, 88; 1 *Randolph*, Com. Paper, 249.

But the burden is on the holder to prove that the payee named is a fictitious person. *Maniort v. Roberts*, 4 E. D. Smith, 88.

And where there is neither drawee named nor recital of "value received," the holder of an order must prove that he paid value for it. *Ball v. Allen*, 15 Mass. 433; 1 *Randolph*, Com. Paper, 248.

If the instrument be payable to an assumed name, the holder may aver himself to be the person intended, and parol evidence will be admitted to prove this. *Chenot v. Lefevre*, 8 Ill. 637.

6 L. R. A.

ment made payable to a fictitious person or order, is, in effect, an instrument payable to bearer, applies only where it is so made with the knowledge of the party making it, and does not apply where the maker, supposing the payee to be a real person and intending payment to be made to such person or his order, is induced by the fraud of another to so draw it.

2. Where, by the fraud of a third per-

Paper invalid as to all but innocent purchaser.

As fraud always vitiates a contract, the use of fictitious names on commercial paper will make it invalid for all purposes, except in the hands of an innocent purchaser. *Hunter v. Jeffery, Peake*, N. P. Add. Cas. 146; *Chitty, Jr. Bills of Exch.* 587; *Minet v. Gibson*, 3 T. R. 481; *Gibson v. Minet*, 1 H. Bl. 569.

But a bona fide holder for value may sue the maker or drawer on it as if it were payable to bearer. *Collis v. Emmett*, 1 H. Bl. 813; *Vere v. Lewis*, 3 T. R. 182; *Phillips v. Im Thurn*, 18 C. B. N. S. 604; *Blodgett v. Jackson*, 40 N. H. 28; *Plets v. Johnson*, 3 Hill, 115; *Forbes v. Espy*, 21 Ohio St. 483; *Lane v. Krekle*, 22 Iowa, 404; *Stevens v. Strang*, 2 Sandf. 139; *Farnsworth v. Drake*, 11 Ind. 108; *Irving Nat. Bk. v. Alley*, 79 N. Y. 536.

In New York the same rule is laid down by statute. 1 N. Y. Rev. Stat. 768; *Rogers v. Ware*, 2 Neb. 29.

When a negotiable instrument constitutes, in itself, the only obligation existing against its maker, all remedies thereon are lost by its fraudulent alteration and the law refuses to create a new contract to supply the place of the one destroyed. *Booth v. Powers*, 56 N. Y. 31; *Pars. Notes and Bills*, 572; *Meyer v. Huneke*, 55 N. Y. 412; *Crawford v. West Side Bank*, 100 N. Y. 58, 1 Cent. Rep. 257.

Whenever the legal rights and liabilities of a maker of commercial paper are changed in a material respect by a fraudulent alteration of the obligation, such alteration vitiates the instrument and the question whether it is material or not is one of law for the court. 2 *Pars. Notes and Bills*, 582; 2 *Pars. Cont.* 721; *Dan. Neg. Inst.* 1373, 1658; *Booth v.*

son, a depositor of a bank is induced to draw his check payable to a non-existing person, or order, the drawer being in ignorance of the fact and intending no fraud, the bank on which the check is so drawn is not authorized to pay it and charge the amount to the account of its customer, on the indorsement of the party presenting it, although it appears to have been previously indorsed by the party named as payee. Such indorsement is, in effect, a forgery, and the payment thereon by the bank confers no right on it as against the drawer of the check.

3. In the absence of a course of dealing or understanding to the contrary between the parties, the duty of a banker is, in all cases, to pay to the person named, or his order, where the terms of the check are such; and he may and should withhold payment until fully satisfied as to the genuineness of the indorsement.

(October 29, 1889.)

ERROR to the Circuit Court of Meigs County to review a judgment reversing a judgment of the Court of Common Pleas in favor of plaintiff in an action to recover a sum of money deposited with defendant bank. *Reversed.*

The facts are fully stated in the opinion.

Mr. E. A. Guthrie, for plaintiff in error:

The check made by the plaintiff was drawn on a deposit she had in the bank. She thus set apart and appropriated to William Brown's use so much of her deposit as would be necessary to satisfy it.

Morrison v. Bailey, 5 Ohio St. 13-17; *Andrew v. Blachly*, 11 Ohio St. 89; *Dodge v. Nat. Exchange Bank*, 30 Ohio St. 1-5; *Merchants*

Bank v. State Bank, 77 U. S. 10 Wall. 647 (19 L. ed. 1019); *Blair v. Wilson*, 28 Gratt. 170.

But in the case at bar there was no "William Brown." There being, then, no payee of the check, the right to use it, as such, was not assigned to anyone. The paper was not in fact a check, a payee being a necessary party to that instrument.

Daniel, Neg. Inst. 528, and notes, 582.

Now, as there was no "Brown," and the check was handed to Grimes as "Brown's" agent, it could only become his as such agent, and in no other sense. Therefore the instrument never became a valid check for any purpose. It never was delivered.

Crawford v. West Side Bank, 1 Cent. Rep. 253, 100 N. Y. 50.

Under the law the Bank could not be justified in paying it otherwise than "to Brown or his order."

Ellis v. Ohio L. Ins. & T. Co. 4 Ohio St. 667; *Hall v. Fuller*, 5 Barn. & C. 750; *Johnson v. Windle*, 3 Bing. N. C. 225; *Roberts v. Tucker*, 16 Q. B. 560; *Dodge v. Nat. Exch. Bank*, 20 Ohio St. 234, 30 Ohio St. 1.

In the case at bar, Mrs. Armstrong knew nothing, and did nothing, concerning the check or its payment after she passed it to Grimes, and cannot be charged with his crime.

Morgan v. Bank of State of New York, 11 N. Y. 404; *Graves v. American Exchange Bank*, 17 N. Y. 205; *Welsh v. German-American Bank*, 73 N. Y. 421; *Indiana Nat. Bank v. Holtsclaw*, 98 Ind. 85; *Canal Bank v. Bank of Albany*, 1 Hill, 287; 2 Daniel, Neg. Inst. 611; 2 Parsons, Notes and Bills, 81; *Wheeler v. Guild*, 20 Pick.

Powers, 56 N. Y. 29; *Crawford v. West Side Bank* 100 N. Y. 50, 1 Cent. Rep. 253.

Alteration of instrument avoids it. *Ruby v. Talbott* (N. M.) 3 L. R. A. 724, note.

Liability of parties with knowledge of fictitious character of paper.

As a general rule all parties having knowledge of the fictitious character of the payee's name are liable on the paper at suit of a bona fide holder for value. *Byles*, Bills, 84; *Chitty*, Bills and Notes, 181; 1 *Edwards*, Notes and Bills, § 136; *Ex parte Royal Bank of Scotland*, 19 Ves. 311; *Hunter v. Jeffery*, Peake, N. P. Add. Cas. 146; *Ex parte Clarke*, 3 Bro. Ch. 2-8.

This was first held in *Stone v. Freeland*, 1 H. Bl. 816, note, and at bar in *Tatlock v. Harris*, 3 T. R. 174. See, too, *Vere v. Lewis*, 3 T. R. 182; *Minet v. Gibson*, Id. 481; *Gibson v. Minet*, 1 H. Bl. 569; *Collis v. Emett*, 1 H. Bl. 313; *Gibson v. Hunter*, 2 H. Bl. 187, 238; *Ex parte Clarke*, 3 Bro. Ch. 238; *Thicknesse v. Bromilow*, 2 Crompt. & J. 425; *Forbes v. Espy*, 21 Ohio St. 474; *McCall v. Corning*, 3 La. Ann. 409; *Farnsworth v. Drake*, 11 Ind. 101.

Where the holder himself at the time he received a bill knew that the payee was fictitious, and discounted the bill for the drawer's accommodation, he cannot recover against the acceptor, although the acceptance was made with like knowledge of the facts. *Chitty*, Bills and Notes, 181; 1 *Edwards*, Notes and Bills, 136; *Hunter v. Jeffery*, Peake, N. P. Add. Cas. 146; 1 *Randolph*, Com. Paper, 249.

Duty and obligation of bankers.

Although a bank cannot be expected to know the signature of any random member of the community in whose favor a depositor may have occasion to draw a check payable to order (*Woods v.* 6 L. R. A.

Thiedemann, 1 Hurl. & C. 478; *Morse*, Banks and Banking, 352), yet whenever a check is made payable to order, the bank has an unquestionable right to assure itself of the genuineness of the order before making the payment. It is the universal custom for the bank to require the holder of such a check to bring satisfactory evidence upon this point. *Roberts v. Tucker*, 16 Q. B. 578.

If a check be made payable to a person, and another person of precisely the same name, or initials, so far as these are written out in the check, comes wrongfully or accidentally into possession of the same, indorses it and obtains the money on it from the bank, still the bank is liable to make good the amount to the drawer. The indorsement is a forgery. See remark in *Foster v. Shattuck*, 3 N. H. 446; *Mead v. Young*, 4 T. R. 23.

It is the banker's duty to see that the check is genuine in all respects. *Smith v. Mercer*, 6 Taunt. 76; *Crawford v. West Side Bank*, 100 N. Y. 54, 1 Cent. Rep. 255.

If the banker unfortunately pays money belonging to the customer, upon an order not genuine, he must suffer, and to justify the payment he must show that the order was genuine, not in signature only, but in every respect. *Hall v. Fuller*, 5 Barn. & C. 750; *Crawford v. West Side Bank*, 100 N. Y. 50, 1 Cent. Rep. 254.

The question of negligence cannot arise, unless the depositor has, in drawing his check, left blanks unfilled, or, by some affirmative act of negligence, has facilitated the commission of a fraud by those into whose hands the check may come. *Young v. Grote*, 4 Bing. 253; *Dan. Neg. Inst.* § 1666; *Crawford v. West Side Bank*, 100 N. Y. 53, 1 Cent. Rep. 253.

Duty of bank as to altered or forged check. *Atlanta Nat. Bank v. Burke*, 81 Ga. 597, 3 L. R. A. 93.

545; *Crawford v. West Side Bank*, 100 N. Y. 50; *Star F. Ins. Co. v. New Hampshire Nat. Bank*, 60 N. H. 442.

Although the check was made to an imaginary person, it is not the case of a check to a "fictitious person," as mentioned in the books. The latter are cases where the maker of the instrument purposely draws it to a fictitious person; these are considered as made to order, and are transferable by mere delivery.

Forbes v. Espy, 21 Ohio St. 433; 1 Daniel, Neg. Inst. 116-120.

Mr. F. C. Russell for defendant in error.

Minshall, Ch. J., delivered the opinion of the court:

The original action was a suit by Kate S. D. Armstrong against the Pomeroy National Bank to recover of the Bank the sum of \$450, due her upon a deposit she had made with the Bank. She averred that she had given a check payable to one William Brown or order, that had been procured from her by the fraudulent practices of one Grimes, who represented himself as acting for the said Brown in the negotiation of a note; that there was no such person as Brown, and that the note was fraudulent, of all which she was ignorant at the time; that Grimes afterward indorsed the check "William Brown," and, adding his own indorsement, presented it to the Bank, which paid it.

The principal ground of defense was that plaintiff was negligent in delivering the check to Grimes, and that it used ordinary care in paying it to Grimes, indorsed as it was. The case was tried to the court, which, upon the request of the parties, found its conclusions of law and facts separately, as follows:

FINDINGS OF FACTS.

1. That the defendant is a banking corporation organized under the Laws of the United States.

2. That on August 31, A. D. 1882, plaintiff had on deposit with defendant, subject to be drawn out by her check, a sum of money greater than the amount of the check hereinafter to be described.

3. That on said 31st day of August, A. D. 1882, one J. S. Grimes, by a fraud practiced upon plaintiff, by negotiating to her as the pretended agent of one William Brown, a fictitious person, a forged promissory note negotiable in form, induced her to draw and deliver to him, as pretended agent of said Brown, the following check:

Pomeroy, O., August 31, 1882.

Pomeroy National Bank, pay to William Brown or order, four hundred and fifty dollars, (\$450).

(Signed)

K. S. D. Armstrong.

4. That there was no such person as the above-named William Brown; that plaintiff supposed (at the time) there was, and believed she delivered the check to said Brown, through his agent, said Grimes.

5. That she was not careless or negligent respecting the transaction, but instead was ordinarily careful and prudent in respect thereof.

6. That said Grimes on the same day (August 31, 1882) wrote the name William Brown across the back of said check and presented it to

defendant for payment; that defendant having no knowledge respecting the way Grimes had obtained it, or that the name "William Brown" was the name of a fictitious person, paid the same and charged the amount thereof against the account of the plaintiff.

7. That defendant in paying the check to Grimes made the usual inquiries respecting his identity, and in other respects was ordinarily careful and prudent in relation to the transaction.

8. That plaintiff before the commencement of this action demanded of defendant the payment of said sum by it paid to said Grimes, which defendant then refused, and has not, either before or since said demand, paid the same or any part thereof."

CONCLUSION OF LAW.

That the payment of the check by defendant to said Grimes was not (by the facts above found) authorized by said plaintiff, and could not legally be made a charge against her in the account between her and the defendant respecting the money she had on deposit with it, and that the amount named in the check, together with interest thereon, at the rate of six per cent from the day she made the demand, above found to have been made, for its payment to her, is due and payable from defendant to her.

A motion for a new trial having been made and overruled, judgment was entered for the plaintiff upon the findings.

The judgment of the common pleas was reversed on error by the circuit court; and this proceeding is prosecuted to obtain a reversal of the circuit court and an affirmance of the common pleas.

This case is, in its general features, analogous to that of *Dodge v. National Exchange Bank*, 20 Ohio St. 234, and should, as we think, be ruled by it. There a paymaster of the United States, who kept his account at the bank, drew his check on the bank in payment of an indebtedness of the United States to Frederick B. Dodge, and delivered it to the person who presented the certificate, he representing himself to be Dodge. This representation was false and the person making it was a thief. Being a stranger to the paymaster, he at first refused to pay the claim to him, but on his assuring him that he could identify himself at the bank, the paymaster drew the check payable to Dodge or order, and delivered it to the person presenting the certificate. The amount of the check was paid him by the bank on his representing himself to be Dodge and indorsing the check in that name. The bank had no knowledge of what had transpired prior to the presentation of the check for payment, and supposed it was paying it to the right person. In deciding the case the court laid down the following principles:

1. The duty of a banker is to pay the checks and bills of his customer drawn payable to order, to the person who becomes holder by a genuine indorsement; and he cannot charge him with payments made otherwise, unless the circumstances amount to a direction from the customer to the banker to pay the paper without reference to the genuineness of the indorsements, or are equivalent to a subsequent admission that the indorsement is genuine, in re-

liance on which the banker is induced to alter his position. 2. When there is no fraud, or special understanding between the banker and the customer, the liability of the banker for paying a check upon a forged indorsement cannot be affected by conduct of the customer in drawing the check of which the banker had no notice. The case was again brought to this court upon a question of evidence, and was assigned to and disposed of by the first commission, which, after a full and careful re-examination, approved and followed the former decision; and the principles announced in the case after such careful consideration must determine this one.

By the fraud of one Grimes the plaintiff was induced to purchase a note that had no real existence as a security. She is found by the court to have been ordinarily careful and prudent in the transaction, but was deceived. She supposed that she was purchasing a valid security belonging to a man, as represented by Grimes, by the name of William Brown, and for whom, as he represented, he was acting as agent, and gave to the assumed agent for Brown a check for the amount payable to Brown or his order. Now it is evident, both upon reason and the authority of the previous decisions, that the circumstances under which the plaintiff was induced to give the check, even though calculated to arouse suspicion on her part, cannot modify the duty required of the Bank in the matter of paying or not paying the check. It is not claimed that the Bank had any knowledge of how or under what circumstances Grimes had obtained the check, and there is no finding of any such course of dealing between the Bank and the plaintiff as would have authorized it to depart from the general duty of a banker in paying the checks of its customers, drawn payable to a certain person or order. It was its duty to pay to the person named or his order, and to withhold payment until it was satisfied, both as to the identity of the payee and the genuineness of his signature. *Morse, Banks and Banking*, § 474; *Roberts v. Tucker*, 16 Q. B. 560, per Maule, J., at p. 578.

It is found that the Bank made the usual inquiries respecting the identity of Grimes, and in other respects was ordinarily careful and prudent in relation to the transaction; but this must be taken in connection with the further fact that Grimes was not the payee of the check, and that his indorsement, without the genuine indorsement of the payee, could confer no title upon the holder of the check, or any interest in it, as against the drawer. "There is no doubt," says Lord Kenyon in *Tutlock v. Harris*, 3 T. R. at p. 181, "but that the indorsee of a bill of exchange, payable to order, must, in deriving his title, prove the handwriting of the first indorser." See *Mead v. Young*, 4 T. R. 28, 80; 2 Parsons, Notes and Bills, 595.

The indorsement on the check, purporting to be that of the payee, Brown, had been placed there by Grimes, and was either a forgery or a fraud, and, for the purposes of this case, it is not material which it is termed. As to it the Bank acted upon the representations of Grimes, and did not otherwise know whether it was genuine or not.

As said in *Dodge v. National Exchange Bank*, 30 Ohio St. 1: "The rightful possession of a

check by no means carries with it or implies a right to demand or receive payment of it, without the genuine indorsement of the person to whose order it is made payable;" and if a banker accept or undertake to pay a check, "he must see to it at his peril that he pays according to the terms of the order, and to the party named therein, or to one holding it under the genuine indorsement of such payee. . . . And this is true whether the defendant exercised the degree of caution which bankers ordinarily do in such cases or not. The question is, Was the check paid to the party to whom, by its terms, it was made payable?" Therefore the court rightly concluded, as a question of law from the facts found, that the payment of the check by the defendant was not authorized by the plaintiff, and that it could not rightfully be charged to her account.

The fact that the check was made payable to a person that had no existence does not alter the rights of the plaintiff as against the Bank, for she supposed that Brown was a real person, and intended that payment should be made to such person. The doctrine that treats a check or bill made payable to a fictitious person as one made payable to bearer, and so negotiable without indorsement, applies only where it is so drawn with the knowledge of the parties. *Tutlock v. Harris*, 3 T. R. 174, 180; *Vere v. Lewis*, Id. 182; *Minet v. Gibson*, Id. 481; *S. C.* in the House of Lords on error, *Gibson v. Minet*, 1 H. Bl. 569; *Colles v. Emmett*, 1 H. Bl. 313; *Gibson v. Hunter*, 2 H. Bl. 197.

The doctrine that a bill payable to a fictitious person or order is equivalent to one payable to bearer had its origin in these cases, which all grew out of bills drawn by Levisay & Co., bankrupts, payable to a fictitious person or order, and were accepted by Gibson & Co.; but it will be noticed that the holding in each case was upon the express ground that the acceptor knew at the time of his acceptance that the bill was payable to a fictitious person; and but for this fact the fictitious indorsement would have been held to be a forgery—some of the judges expressing a doubt whether it was not so, although its character was known to the acceptor. 3 T. R. 181.

These cases will be found reviewed in a note to *Bennett v. Farnell*, 1 Campb. 130. It was held in this case that a bill made payable to a fictitious person or order is neither payable to the order of the drawer or bearer, but is completely void. But in an *addendum* to the case at page 180c of the report, Lord Ellenborough observes that this holding must be taken with this qualification: "Unless it can be shown that the circumstance of the payee being a fictitious person was known to the acceptor." The rule is stated with this qualification in *Byles on Bills*, 73. See also, to the same effect, *Forbes v. Espy*, 21 Ohio St. at p. 483. 1 Randolph, Com. Paper, §§ 162, 164. 2 Parsons, Notes and Bills, 591 and note (a).

Mr. Daniels, in his work on Negotiable Instruments, § 139, states the rule to be general, but, as shown by Mr. Randolph, the cases do not bear out the text. 1 Randolph, Com. Paper, § 164, note 4.

And upon principle we do not see how the law could be held to be otherwise. For if the fictitious character of the payee is unknown to

the drawer, whoever indorses the paper in that name with intent to defraud perpetrates a forgery and the indorsement is void, a general intent to defraud being sufficient to constitute the offense.

The case of *Lane v. Kreckle*, 22 Iowa, 399, is not in point, for there the note was made payable to a fictitious person "or bearer," and passed by delivery without indorsement. The case of *Phillips v. Im Thurn*, 114 Eng. C. L. 694, cited by the learned judge, is clearly distinguishable from the case before us. There the signature of the drawer as well as the indorsement was a forgery; but the defendant, the acceptor, was held liable because the plaintiff discounted the paper, relying in good faith upon the acceptance of the defendant. The case was finally disposed of on a case stated, reported in L. R. 1 C. P. 463. The ground of the decision appears from the following observations of Keating, J., p. 472: "I think, upon the facts stated in this special verdict, that it was not competent to the defendant to deny the genuineness of this bill. He knew that the plaintiffs were willing to advance money upon the bill only upon his vouching by his acceptance the authenticity of the drawing. His acceptance amounted to a representation to the plaintiff which enabled the person representing Plana to obtain money from the plaintiff on the bill." The decision in this case simply followed a well-recognized principle in the law of notes and bills. It is thus stated by Mr. Smith: "Though the drawer's signature be forged, the drawee, if he accept the bill, is bound to pay it, provided it be in the hands of a holder bona fide and for value, for the drawer's acceptance admits the drawer's handwriting to be genuine." Smith, *Mercantile Law*, 334.

Now Mrs. Armstrong can in no way be said to have affirmed by any act of hers that the indorsement upon the check was genuine, for there was no indorsement on it when it left her hands.

The case of *Rogers v. Ware*, 2 Neb. 29, cited by counsel for defendant in error, does not support his contention. The case of *Ort v. Fowler*, 31 Kan. 478, was rested upon a number of grounds; and, in so far as it may have been on the ground that a note made payable to a fictitious person or order is in effect payable to bearer, irrespective of the knowledge of the maker, it simply follows the authority of 1 Daniel, Neg. Inst. § 129, which we have shown is not borne out by the cases relied on.

If the drawer of a check acting in good faith makes it payable to a certain person or order, supposing there is such person, when in fact there is none, no good reason can be perceived

why the banker should be excused if he pay the check to a fraudulent holder upon any less precautions than if it had been made payable to a real person; in other words, why he should not be required to use the same precautions in the one case as in the other, that is, determine whether the indorsement is a genuine one or not. The fact that the payee is a non-existing person does not increase the liability of the bank to be deceived by the indorsement. The fact is that an ordinarily prudent banker would be less liable to be deceived into a mistaken payment by a fictitious indorsement such as this was than by a simple forgery. The determination of the character of any indorsement involves the ascertainment of two things: (1) the identity of the indorser, and (2) the genuineness of his signature; and no careful banker would pay upon the faith of the genuineness of any name, until he had fully satisfied himself both as to the identity of the person and the genuineness of his signature.

Now a careful banker may be deceived as to the signature of a person with whose identity he may be familiar; but he is less liable to be deceived when both the signature and the person whose signature it purports to be are unknown to him. In making the inquiry required in such case to warrant him in acting, he will either learn that there is no such person, or that no credible information can be obtained as to his existence, which, with an ordinarily prudent banker, would be the same as actual knowledge that there is no such person, and he would withhold payment, as he would have the right to do in such case. But still, if he should be deceived as to the existence of the person, he would, nevertheless, require to be satisfied as to the genuineness of the signature. Of this, however, he could not be through his skill in such matters, and on which bankers ordinarily rely, for he would be without any standard of comparison, and he could have no knowledge of the handwriting of the supposed person, for there is no such person. So that if he acts at all it must be upon the confidence he may place in the knowledge of some other person, and if he choose to act upon this, and make, instead of withholding, payment, he acts at his peril and must sustain whatever loss may ensue.

It is a saying frequently repeated in "The Doctor and Student," that "he who loveth peril shall perish in it." In other words, where a person has a safe way and abandons it for one of uncertainty, he can blame no one but himself if he meets with misfortune.

Judgment of the Circuit Court reversed, and that of the Common Pleas affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

CITY OF BOSTON

v.

William A. SIMMONS *et al.*

(....Mass....)

1. An averment that a series of con-

nected acts, resulting in damage and constituting a tort, was done by several in pursuance of a conspiracy, does not so change the nature of the action that it cannot be maintained against one of the defendants alone, if it is shown that the acts were done by him only.

NOTE.—Conspiracy to commit tort.

A conspiracy may be described in general terms as a combination of two or more persons, by some

concerted action, to accomplish some unlawful purpose. *Heaps v. Dunham*, 95 Ill. 583.

The essence of a conspiracy, so far as it justifies

2. Where a city officer corruptly agrees with another person that the latter shall buy certain property, selected by a board of which the officer is a member, as suitable for a certain public purpose, and that the officer shall use his influence to induce the board to purchase it from the other at an advanced price, the profits to be divided between them, and the fraud is consummated by means of the information given by the officer, and his influence with the board, they are alike liable to the city for the injury sustained.

(January 2, 1890.)

A PPEAL from a decision of the Superior Court, Suffolk County, sustaining a demurrer to the declaration in an action of tort. *Demurrer overruled.*

The facts are stated in the opinion.

Mr. Andrew J. Bailey, for plaintiff:

It is a general rule of the common law that a man shall have a remedy for every injury.

Rice v. Coolidge, 121 Mass. 394.

Simmons, as the agent to purchase for the plaintiff, was bound by his contract to act in good faith, and give his principal his best services, to enable it to purchase the land at the lowest possible price, and, for failure so to do is liable to the principal, in an action of law, for the damage sustained.

Perry, Tr. §§ 843, 847, 848; *Cutter v. Demmon*, 111 Mass. 474; *Bennett v. Preston*, 17 Ind. 291; *Farnsworth v. Hemmer*, 1 Allen, 494; *Walker v. Osgood*, 98 Mass. 348; *Rice v. Wood*, 113 Mass. 133; *McMillan v. Arthur*, 98 N. Y. 167; *Greenfield Sav. Bank v. Simons*, 133 Mass. 415.

In *United States v. State Bank*, 96 U. S. 85 (24 L. ed. 648), the court says: "The interference of equity is not necessary, where trust funds are misplaced. The *cestui que trust* can follow it as far as it can be traced."

The defendant Wilson aided and abetted

Simmons to commit the wrong upon the City. He thereby became a joint wrong-doer, and is jointly liable with Simmons to the plaintiff in an action of tort in the nature of trespass on the case.

Adams v. Paige, 7 Pick. 542-550.

It is not necessary, to maintain an action on the case, that there should be any moral turpitude in the act complained of. It lies whenever a damage is occasioned by a wrong done.

Bird v. Randall, 3 Burr. 1353; 3 Bl. Com. 122.

Wherever the common law gives a right, or prohibits an injury, it also gives a remedy by action; and, therefore, wherever a new injury is done, a new method of remedy must be pursued.

3 Bl. Com. 123; *Millar v. Taylor*, 4 Burr. 2345; *Webb's Case*, 8 Coke, 45 b.

The alleged conspiracy is not one of the elements of the cause of action and need not be proved in order to make one defendant liable.

Rice v. Coolidge, 121 Mass. 393; *Savile v. Roberts*, 1 Ld. Raym. 379; *Kellogg v. Kimball*, 122 Mass. 163; *Skinner v. Gunton*, 1 Saund. 230, note; *Suffolk Bank v. Lowell Bank*, 8 Allen, 355; *Subley v. Mott*, 1 Wils. 210; Com. Dig. *Action on Case for Conspiracy*, c. 1.

Novelty is no objection to a special action on the case.

Winmore v. Greenbank, Willes, 577; *Emery v. Haggood*, 7 Gray, 55. See also *Morgan v. Elford*, L. R. 4 Ch. Div. 352; *Tyrrell v. Bank of London*, 10 H. L. Cas. 26.

In *Kingman v. Pierce*, 17 Mass. 247, the court says: "Instead of maintaining a bill in equity for the return of property fraudulently obtained of an agent or trustee, the *cestui que trust* may maintain an action of trover.

See also *Kitchen v. Bedford*, 80 U. S. 13 Wall. 416 (20 L. ed. 638).

a civil action for damages, is a concert or combination to defraud or to cause other injury to person or property of the person injured or defrauded. Page v. Parker, 43 N. H. 383; *Wiggins v. Leonard*, 9 Iowa, 196; *Whitman v. Spencer*, 2 R. I. 124; *Walsham v. Stainton*, 33 L. J. N. S. Ch. 68; *Place v. Minster*, 65 N. Y. 95.

The act charged to result in a conspiracy may, in one aspect of the case, be innocent; in another it may be fraudulent. It will be necessary to consider the intent with which the act was done, so that the question will be peculiarly for the consideration of the jury. *Place v. Minster*, *supra*.

Action for damages for joint tort.

In an action against two or more, on the case, in the nature of a conspiracy, if the tort be actionable whether committed by one or more, recovery may be had against but one; but if the tort be actionable only when committed under an unlawful conspiracy of two or more, the conspiracy must be established. *Collins v. Cronin*, 9 Cent. Rep. 759, 117 Pa. 35; *Rundell v. Kalbfus*, 125 Pa. 132.

When a fraudulent combination is established, the acts and declarations of any one of the parties thereto may be proved against the other. *Cuyler v. McCartney*, 33 Barb. 172.

As soon as the conspiracy was established the declarations became part of the *res gestae* under well-settled rules applicable to that branch of the case. *Place v. Minster*, 65 N. Y. 106.

Where two unite in a common undertaking to defraud, the admissions of one are competent against both, although there is no evidence of conspiracy.

6 L. R. A.

Riehl v. Evansville Foundry Asso. 104 Ind. 70, 1 West. Rep. 885, note.

Where defendants are in the position of quasi trustees, who have been guilty of a fraudulent breach of their trust, the right of action is *ex delicto*, and the tort may be treated as several or joint; and the trustees have no right of contribution as between themselves. *Ervin v. Oregon R. & Nav. Co.* 22 Blatchf. 184. See *Wilkinson v. Parry*, 4 Russ. 272; *Franco v. Franco*, 3 Ves. Jr. 75.

Person contributing to a tort responsible for the entire damage.

One who contributes to a tort is responsible for the whole; and all who contribute, whether personally present or absent at the doing of the act, are each liable to the person injured for the entire damage. *Fuller v. Chamberlain*, 11 Met. 503; *Beal v. Finch*, 11 N. Y. 128; *Keegan v. Hayden*, 14 R. I. 173; *Hill v. Goodchild*, 5 Burr. 2790; *Freeman v. Scurlock*, 27 Ala. 407; *Clark v. Bales*, 15 Ark. 453; *Lewis v. Johns*, 34 Cal. 629; *Tompkins v. Clay St. R. Co.* 66 Cal. 163; *Brooks v. Ashburn*, 9 Ga. 297; *Olsen v. Upsahl*, 69 Ill. 273; *Wallard v. Worthman*, 84 Ill. 446; *Whitney v. Turner*, 2 Ill. 253; *Caldar v. Smalley*, 66 Iowa, 219; *Louisville, C. & L. R. Co. v. Case*, 9 Bush, 728; *Minneapolis Mill Co. v. Wheeler*, 31 Minn. 121; *Nagel v. Missouri Pac. R. Co.* 75 Mo. 653; *Murphy v. Wilson*, 44 Mo. 813; *Fairbanks v. Kerr*, 70 Pa. 86; *Barrett v. Third Ave. R. Co.* 45 N. Y. 623, 631; *Bulkeley v. Smith*, 1 Duer, 704; *Gates v. Fleischer*, 67 Wis. 504; *O'Shea v. Kierker*, 4 Bosw. 120; *Hill v. Goodchild*, 5 Burr. 2790; *Brown v. Allen*, 4 Esp. 159; *Mitchell v. Milbank*, 6 T. R. 190.

The demurrer is special; unless it can be sustained for the causes specifically assigned, it cannot avail.

Parker v. Huntington, 2 Gray, 124.

Messrs. Seth J. Thomas and Augustus Russ, for defendant Wilson:

A civil action cannot be maintained for a conspiracy merely.

Livermore v. Herschel, 8 Pick. 88; *Morgan v. Bliss*, 2 Mass. 111; *Hayward v. Draper*, 8 Allen, 552; *Randall v. Hazelton*, 12 Allen, 417.

If the acts charged, when done by one alone, are not actionable, they are not made actionable by being done by several in pursuance of a conspiracy.

Rice v. Coolidge, 121 Mass. 898; *Wellington v. Small*, 3 Cush. 145; *Parker v. Huntington*, 2 Gray, 124; *Bowen v. Matheson*, 14 Allen, 499; *O'Callaghan v. Cronan*, 121 Mass. 114; *Carew v. Rutherford*, 106 Mass. 10; *Bradley v. Fuller*, 118 Mass. 239; *Lamb v. Stone*, 11 Pick. 527.

Devens, J., delivered the opinion of the court:

The averment of a conspiracy in the declaration does not ordinarily change the nature of the action nor add to its legal force or effect. The gist of the action is not the conspiracy alleged, but the tort committed against the plaintiff, and the damage thereby done it wrongfully. Where damage results from an act which if done by one alone would not afford ground of action, the like act would not be rendered actionable because done by several in pursuance of a conspiracy. *Wellington v. Small*, 3 Cush. 145; *Parker v. Huntington*, 2 Gray, 124; *Hayward v. Draper*, 8 Allen, 552;

Randall v. Hazelton, 12 Allen, 417; *Bowen v. Matheson*, 14 Allen, 499.

On the other hand, when the tort committed and the damage resulting therefrom proceed from a series of connected acts, the averment that they were done by several in pursuance of a conspiracy does not so change the nature of the action that, if the wrongful acts are shown to have been done by one only, it cannot be maintained against him alone, and the other defendants exonerated.

As it would be necessary in the case at bar, in order that both defendants should be held responsible, to prove a combination and united action on their part, the allegation of a conspiracy is a convenient and proper mode of alleging such combination and action. For any other purpose it is wholly immaterial.

The declaration to which the defendants have demurred, and the allegations which we must take for this hearing to be true, omitting the expletives by which they have been characterized, are that Simmons was a member of the Water Board of the City of Boston, which board was empowered and authorized to purchase for the City land for the purpose of constructing a reservoir; that he knew and had a share in determining the action of the board in making such purchase, and further that Wilson had knowledge of the position, knowledge and authority of Simmons; that together, taking advantage of this, and intending to defraud the plaintiff, it was agreed corruptly between them that Simmons would inform Wilson of the doings of the board in the selection of the land, and of the price which they should consider suitable for the site for said reservoir; that they further agreed that Wilson should become the purchaser of this

No contribution between wrong-doers.

Among tortfeasors, who are knowingly such, there can be no contribution. *The Hudson*, 15 Fed. Rep. 167; *Webb v. Haviland*, 42 How. Pr. 410; *Merryweather v. Nixan*, 8 T. R. 188; *Atty-Gen. v. Wilson*, Craig & Ph. 28; *Peck v. Ellis*, 2 Johns. Ch. 131; *Berry v. Fletcher*, 1 Dill. 67; *Gudger v. Western N. C. R. Co.* (N. C.) 21 Fed. Rep. 81; *Brown v. Lent*, 20 Vt. 529; *Bird v. Lynn*, 10 B. Mon. 422; *Woodbridge v. Conner*, 49 Me. 353; *Sikes v. Johnson*, 16 Mass. 389; *Brown v. Perkins*, 1 Allen, 89; *Andrews v. Murray*, 33 Barb. 356; *Bath v. Metcalf*, 145 Mass. 274; *McManus v. Lee*, 43 Mo. 208; *Elder v. Frevert*, 18 Nev. 446; *Bell v. Miller*, 5 Ohio, 250; *Whitaker v. English*, 1 Bay, 15; *Chenet v. Parker*, 1 Mill, Const. Rep. (S. C.) 383; *Shepherd v. McQuilkin*, 2 W. Va. 90.

One who has paid the whole cannot compel contribution from the others. *Acheson v. Miller*, 2 Ohio St. 203; *Moore v. Appleton*, 26 Ala. 633; *Hunt v. Lane*, 9 Ind. 248; *Bailey v. Bussing*, 28 Conn. 455; *Dupuy v. Johnson*, 1 Bibb, 562; *Wilford v. Grant*, Kirby, 114; *Peck v. Ellis*, 2 Johns. Ch. 131; *Atty-Gen. v. Wilson*, Craig & Ph. 1; *Pearson v. Skelton*, 1 Mees. & W. 504; *Thweatt v. Jones*, 1 Rand. 323. See note to *Smith v. Ayrault*, 1 L. R. A. 313.

The rule is confined to cases where plaintiff must be presumed to know that he was doing an unlawful act. *Armstrong v. Clarion Co.* 66 Pa. 220, 5 Am. Rep. 369.

It is founded on public policy, and is intended to check the disposition to combine in committing wrongs, by declaring that each wrong-doer is liable to bear the whole loss or damage. *Pierson v. Thompson*, 1 Edw. Ch. 218

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No right of contribution exists where the demand sought to be enforced is *ex delicto*. *Boyd v. Gill*, (N. Y.) 19 Fed. Rep. 146; *The Hudson* (N. Y.) 15 Fed. Rep. 167; *Andrews v. Murray*, 33 Barb. 356; *Webb v. Harland*, 42 How. Pr. 410; *Thorp v. Ames*, 1 Sandf. Ch. 84, 2 Leg. Obs. 180; *Miller v. Fenton*, 11 Paige, 18; *Murray v. Fox*, 39 Hun, 112.

The rule in respect to wrong-doers is the same in equity as at law. *Pierson v. McCurdy*, 61 How. Pr. 137.

Neither can maintain a suit against the other to enforce contribution for what he has been required to pay, or to establish any other like equity. *Herr v. Barber*, 2 Mackey (D. C.) 545; *Miller v. Fenton*, 11 Paige, 18; *Campbell v. Phelps*, 1 Pick. 62, 65; *Vose v. Grant*, 15 Mass. 505, 521; *Peck v. Ellis*, 2 Johns. Ch. 131; *Moore v. Appleton*, 26 Ala. 633; *Minnie v. Johnson*, 1 Duv. (Ky.) 171; *Acheson v. Miller*, 18 Ohio, 1; *Rhea v. White*, 8 Head, 121; *Anderson v. Saylor*, Id. 551; *Merryweather v. Nixan*, 8 T. R. 188; *Mitchell v. Cockburne*, 2 H. Bl. 379; *Peacock v. Terry*, 9 Ga. 137; *Mills v. Western Bank*, 10 Cush. 22.

The doctrine that defendants standing *in equalitate* are bound to contribute does not apply. *Dent v. King*, 1 Ga. 253, 44 Am. Dec. 640; *Thweatt v. Jones*, 1 Rand. 323.

Where the managers of the bank were wantonly and willfully guilty of an illegal and fraudulent act, the doctrine of contribution cannot be invoked. *Wilkinson v. Dodd*, 2 Cent. Rep. 252, 40 N. J. Eq. 138. See *Moore v. Appleton*, 26 Ala. 633; *Pom. Eq. Jur.* § 1061; *Heath v. Erie R. Co.* 8 Blatchf. 347, 411.

lot; that it should afterwards be purchased by the board at an advanced price, and that the profits should be divided between themselves. The declaration further avers that, in pursuance of this agreement, Simmons did impart to Wilson that the board had considered a particular lot suitable for a reservoir; that it was then bought by Wilson; that thereafter the board, influenced by Simmons, did purchase this land for the City at an advanced price from Wilson, and that Wilson and Simmons divided the profits of the transaction. If this whole transaction as described by the declaration had been conducted by Simmons alone, without aid from or intervention of Wilson, if knowing the determination of the board that the lot in question was suitable for the purpose, he had himself purchased it, and then, availing himself of his influence with the board, had induced it to purchase the lot from him at an advanced price, he certainly would have been liable to the City for the injury occasioned by this abuse of his trust. He was one of the officials of the City, acting on its behalf, bound to act in good faith, to make a proper selection of the lot for a reservoir and to have it purchased at the most reasonable price. *Rice v. Wood*, 113 Mass. 133; *Walker v. Osgood*, 98 Mass. 348; *Cutter v. Demmon*, 111 Mass. 474.

To purchase the lot of land himself, which he knew the board, of which he was a member, had considered suitable, with a view to compel it to pay an advanced price therefor, and thereafter to avail himself of his influence with the board to have this advanced price actually paid and thus to obtain a profit, would be a violation of the duty he owed to the City and a wrong done to the City for which it should be entitled to a remedy. The fact that he acted according to the averments of the declaration in connection with another party, presumably that his relation to the purchase might not appear and his influence be thus destroyed, does not diminish his own responsibility; while the other, who participated in the scheme, and who has knowingly aided and abetted in the transaction and shared its profits in pursuance of their agreement so to do, becomes a wrong-doer with him. *Adams v. Paige*, 7 Pick. 542, 550; *Emery v. Hapgood*, 7 Gray, 55, 58; *United States v. State Bank*, 96 U. S. 35 (24 L. ed. 648).

It is said, on behalf of Wilson, that nothing had been done towards the purchase of the lot when Simmons imparted to him the information; that the allegation that the board had considered the lot in question as suitable for the reservoir is not an allegation that anything was actually done towards its purchase; that Wilson might have obtained information elsewhere that the board were talking of buying the lot; that this conversation gave them no right in it; that the owner could still properly sell to whom he pleased, and that Wilson had the same right to purchase that anyone has who buys in anticipation of future uses for an estate which will make it more valuable.

While it is true that one may avail himself of his own judgment or of information properly obtained to purchase land in anticipation of its rise in value, it is quite a different question whether one who knows another to be acting for a principal who desires to purchase

a piece of land may, on receiving information of this from the agent, purchase the land himself upon an arrangement with the agent that he will use his efforts to induce the principal to complete the purchase at an advanced price and then divide the profit with him. The abuse of trust of which the agent is guilty with his knowledge and co-operation is a wrong for which both are liable, as the injury to the principal is the result of their combined action.

Where an agent purchased property for his principal and falsely represented that he had paid for it a larger sum than he had actually paid, it has been held that he would be liable for such overplus. There is no reason why one who has intentionally co-operated with him, and has enabled him to commit the fraud, should not be equally so. *McMillan v. Arthur*, 98 N. Y. 167.

The owner or *cestui que trust* may pursue the trust funds into whose hands they may have passed, so long as they can be traced and knowledge of their character brought home to the possessor. Not less should the principal, who has been wronged by the misconduct of its own official, be allowed to pursue, not merely him, but those who have actively co-operated in his breach of duty and accepted their share of the profits of the transaction.

It is not important that the board, when, as it is alleged, Simmons informed Wilson that it had determined that the lot was a suitable one for the reservoir, does not appear to have then finally decided to take it, or that Simmons alone could not have compelled them to take it. He had no right to confide to another the result of the deliberations of the board so far as they had progressed. If he did so, and if, with full knowledge on the part of both, the two entered into an agreement that Wilson should then purchase and hold the land for an advanced price, to be divided between them if the operation should prove successful, while Simmons should use his influence with the board of which he was a member to have it purchased at the advanced price, an agreement was made to commit a fraud upon the City. If the allegations made shall be proved, and if the fraud shall have been consummated by means of the information imparted by Simmons, the purchase made by Wilson and the influence of Simmons with the board, which were all parts of the same plan, the defendants are alike liable for the injury which the City has sustained.

Demurrer overruled.

Libbie LEONARD

v.

James LEONARD.

(....Mass....)

A sentence to imprisonment in the state prison of a foreign state is not a ground of divorce within the Statute providing that a divorce may be decreed when either party has been sentenced to confinement in "the State prison."

(February 26, 1890.)

ON report from the Superior Court for Suffolk County of a suit for divorce in which an order had been entered dismissing the libel. *Libel dismissed.*

At the hearing in the court below the court ruled that the libel should be dismissed, and then, at the request of libellant, reported the case for the determination of this court; if the ruling was right the order to stand, otherwise such order to be made as law and justice might require.

The facts sufficiently appear in the opinion. *Messrs. Baker & Curry* for libellant.
No appearance for libelee.

C. Allen, J., delivered the opinion of the court:

The libellant seeks a divorce from her husband on the ground that he has been sentenced to imprisonment at hard labor in the state prison at Waupun, Wisconsin, for a term of seven years and six months; and the question presented to us is, whether such a sentence passed in another State is a good cause of divorce here.

Pub. Stat., chap. 146, § 1, provides that a divorce may be decreed "when either party has been sentenced to confinement at hard labor for life or for five years or more in the state prison, or in a jail or house of correction."

The first Statute in this Commonwealth making a sentence to imprisonment a cause of divorce, was Rev. Stat., chap. 76, § 5, where the language is substantially similar to that quoted above, except that the term prescribed is seven years or more. Desertion was not made a cause of divorce till afterwards, by Stat. 1888, chap. 126; and it is therefore apparent that the sentence to imprisonment was not deemed merely to be substantially equivalent to a desertion. It imported an offense, the nature of which was known to the Legislature. Imprisonment elsewhere might be for a cause punishable here for a less term, or possibly not punishable at all.

The term "the state prison," when used without further description in the Revised Statutes, as well as in the more recent legislation, means the state prison of this Commonwealth. No instance to the contrary has been cited to us, and we do not now recall any. If a state prison elsewhere was intended, it would be natural to say so in distinct language, as in Rev. Stat., chap. 144, § 84. A sentence to imprisonment elsewhere is not included as a cause of divorce, within the meaning of Pub. Stat., chap. 146, § 1. *Martin v. Martin*, 47 N. H. 53.

Libel dismissed.

PENNSYLVANIA SUPREME COURT.

COMMONWEALTH OF PENNSYLVANIA, for Use of ALLEGHENY COUNTY *et al.*,

v.

Jeremiah MILLER, *Appt.*

(....Pa....)

Furnishing oleomargarine to patrons of a restaurant as part of a meal ordered by them, although they do not eat it, but carry it away with them, is a sale thereof subjecting the

proprietor to a penalty under the Act of May 21, 1885.

(*Parson, Ch. J., dissents.*)

(January 6, 1890.)

APPEAL by defendant from a judgment of the Court of Common Pleas, No. 1, of Allegheny County in favor of plaintiffs upon appeal from the judgment of a justice of the peace in an action brought to recover the penalty provided in the Oleomargarine Act of May 21, 1885, § 3. *Affirmed.*

NOTE.—Police power of States: prohibition of sale of oleomargarine.

It is the settled doctrine of this court that, as government is organized for the purpose, among others, of preserving the public health and the public morals, it cannot divest itself of the power to provide for those objects; and the Fourteenth Amendment was not designed to interfere with the exercise of that power by the States. *Mugler v. Kansas*, 123 U. S. 603 (31 L. ed. 211); *Butchers Union S. H. & L. S. L. Co. v. Crescent City L. S. L. & S. H. Co.* 111 U. S. 746, 751 (23 L. ed. 585, 587); *Barbier v. Connolly*, 113 U. S. 27 (23 L. ed. 323); *Yick Wo v. Hopkins*, 118 U. S. 356 (30 L. ed. 220).

By Acts of the General Assembly of Pennsylvania, one approved May 22, 1878, and entitled "An Act to Prevent Deception in the Sale of Butter and Cheese," and the other approved May 24, 1883, and entitled "An Act for the Protection of Dairymen, and to Prevent Deception in Sales of Butter and Cheese," provision was made for stamping, branding or marking, in a prescribed mode, manufactured articles or substances in semblance or imitation of butter or cheese, not the legitimate product of the dairy, and not made exclusively of milk or cream, but into which oil, lard or fat not produced

from milk or cream, entered as a component part, or into which melted butter or any oil thereof had been introduced to take the place of cream. Pa. Laws 1878, p. 87; 1883, p. 43.

But this legislation, we presume, failed to accomplish the objects intended by the Legislature; for, by a subsequent Act, approved May 21, 1885, and which took effect July 1, 1885, entitled "An Act for the Protection of the Public Health and to Prevent Adulteration of Dairy Products and Fraud in the Sale thereof," it was provided, among other things, as follows:

"Sec. 1. That no person, firm or corporate body shall manufacture out of any oleaginous substance or any compound of the same, other than that produced from unadulterated milk, or of cream from the same, any article designed to take the place of butter or cheese produced from pure unadulterated milk or cream from the same, or of any imitation or adulterated butter or cheese, nor shall sell or offer for sale, or have in his, her or their possession, with intent to sell the same, as an article of food.

"Sec. 2. Every sale of such article or substance, which is prohibited by the first section of this Act, made after this Act shall take effect, is hereby declared to be unlawful and void, and no action shall

A case stated was agreed upon for the decision of the court below as follows:

"The defendant is the owner and proprietor of a restaurant and eating house at No. 123 Fifth Avenue, Pittsburgh, Allegheny County, Pa., and personally conducts and manages said business, which consists of furnishing meals to transient and regular patrons, who pay for the same daily and upon the completion of each meal.

"On the 31st of January, 1889, William McRay and George Spence called at said restaurant and asked for a meal, which was at once furnished them by the waiters and employes of the defendant in the usual manner. Among other articles of food furnished them said defendant by his employes set before them as a part of their meal what appeared to be butter, but which in fact was an article known as oleomargarine, and manufactured out of an oleaginous substance or a compound of the same other than that produced from unadulterated milk or cream from the same, and designed to take the place of butter produced from unadulterated milk or cream from the same.

"The article so furnished to said McRay and Spence as a part of their respective meals was so furnished as an article of food and as an imitation of butter, and designed to take the place of butter, and was the same article the manufacture and sale of which is prohibited by section 1 of 'An Act for the Protection of the Public Health and to Prevent the Adulteration of Dairy Products and Fraud in the Sale Thereof,' approved May 21, 1885, Pub. Laws, 22, 29.

"Upon finishing their meals said William McRay and George Spence paid defendant the sum of fifty cents each for said meals, including said small dish of oleomargarine, but they did not eat said oleomargarine, carrying the same away with them.

"This suit was brought by A. L. Best to recover the penalty of \$100 prescribed by section 8 of said Act. If the court be of opinion that upon the facts above stated the defendant has forfeited the penalty of \$100 prescribed by the

third section of said Act, then judgment to be entered for the plaintiff for the sum of \$100, but if not the judgment to be entered for the defendant. The costs to follow the judgment and either party reserving the right to sue out a writ of error therein."

On July 13, 1889, judgment was entered against the appellant and from that judgment this appeal is taken.

Mr. John S. Ferguson, for appellant:

The putting of oleomargarine on a restaurant table as a part of a meal is not a sale of the oleomargarine. The guest may eat it or let it alone, and if he does not eat it, it is not his to take away. He therefore does not acquire by paying for the meal an absolute or entire title to it.

A sale is the transfer of the entire title to property for an agreed price.

Story, Sales, § 1; *Creveling v. Wood*, 95 Pa. 152.

To constitute a sale of personal property, especially under a penal statute, there must be a transfer of title for a certain consideration.

Garbracht v. Com. 96 Pa. 449.

Messrs. William Yost and John Rebmman, Jr., for appellees.

Clark, J., delivered the opinion of the court:

The defendant is the proprietor of a restaurant in the City of Pittsburgh; his business consists, in part, in furnishing meals to transient and regular patrons, who pay for the same daily or by the meal, according to the ordinary usage in that business. From the facts set forth in the case stated, it appears that on the 31st of January, 1889, William McRay and George Spence called at this restaurant and ordered meals, which were served to them in the usual manner. Among other food furnished by the defendant on this occasion was a small quantity of what appeared to be butter, but which, in fact, was oleomargarine, an article of manufacture and sale of which is prohibited by the Act of May 21, 1885, entitled "An Act for the Protection of the Public Health, and to Prevent Adulteration of Dairy Products and Fraud

be maintained in any of the courts of this State to recover upon any contract for the sale of any article or substance.

"Sec. 3. Every person, company, firm or corporate body who shall manufacture, sell or offer or expose for sale, or have in his, her or their possession with intent to sell, any substance, the manufacture and sale of which is prohibited by the first section of this Act, shall for every such offense forfeit and pay the sum of \$100, which shall be recoverable with costs by any person suing in the name of the Commonwealth as debts of like amounts are by law recoverable; one half of which sum, when so recovered, shall be paid to the proper county treasurer for the use of the county in which suit is brought, and the other half to the person or persons at whose instance such a suit shall or may be commenced and prosecuted to recovery.

"Sec. 4. Every person who violates the provisions of the first section of this Act shall be deemed guilty of a misdemeanor, and upon conviction shall be punished by a fine of not less than \$100, nor more than \$500, or by imprisonment in the county jail for not less than ten nor more than thirty days, or both such fine and imprisonment for the first offense, and by imprisonment for one year for every

subsequent offense." *Powell v. Pennsylvania*, 127 U. S. 678 (32 L. ed. 253).

This Statute is not repugnant to the clause of the Fourteenth Amendment forbidding the denial by the State to any person of the equal protection of the laws, nor as depriving any person of his property without just compensation, and is valid. *Ibid.* Followed in *Walker v. Pennsylvania*, 127 U. S. 699 (32 L. ed. 261).

The Act is to be sustained as a valid exercise of the police power of the State. *Powell v. Pennsylvania*, *supra*; *Thorpe v. Rutland & B. R. Co.* 27 Vt. 140; *Com. v. Alver*, 7 Cush. 85; *New York City v. Miln*, 36 U. S. 11 Pet. 102 (9 L. ed. 648); *License Cases*, 46 U. S. 5 How. 504 (12 L. ed. 256); *Munn v. Illinois*, 94 U. S. 125 (24 L. ed. 84). See *State v. Marshall*, 1 L. R. A. 51, note, 6 New Eng. Rep. 214, 64 N. H. 549.

A complaint under Mass. Stat. 1886, chap. 317, § 1, for selling imitation butter at retail without a label, need not allege whether it was done by the person or his agent. *Com. v. Gray* (Mass.) 23 N. E. Rep. 47.

The fact that a failure to attach a label to imitation butter on sale of it was the result of inadvertence and unintentional is no defense to a prosecution under Mass. Stat. 1886, chap. 317, § 1.

in the Sale Thereof" (Pub. Laws, 22). It is admitted that this oleomargarine was furnished for food as an imitation of butter, and that it was designed to take the place of butter in the meals thus served. McRay and Spence, having partaken of the food served to them, paid each fifty cents for their meals, "including said small dish of oleomargarine," which, however, for some reason they did not eat, but carried the same away, presumably for examination. This suit was brought to recover the penalty, provided in the third section of the Act, for the manufacture or sale of the prohibited article; and the single question for our determination is, whether or not, under the facts stated, there was a sale of the oleomargarine within the meaning of the Act referred to.

The purpose of the Act is expressed in the title. It is to prevent adulteration of dairy products, and fraud in the sale thereof, and to protect the public health. It is plain that the exact legislative intent was to prevent the sale, and thereby prevent the use of these adulterations and admixtures, as articles of food. It was the use, as food, and the frauds perpetrated upon the public in the sale, which was the mischief to be remedied, and the Statute, of course, must be construed with reference to the old law, the mischief and the remedy. That the food furnished to McRay and Spence, or so much of it as they saw fit to appropriate, was sold to them, cannot be reasonably questioned; when it was set before them, it was theirs to all intents and purposes, to eat all, or a part, as they chose, subject only to the restaurateur's right to receive the price, which it is admitted was promptly paid. They might not eat all of the article set before them, but they had an undoubted right to do so; and even assuming that the meal is the portion of food taken, in the sense stated, the transaction must be regarded as a sale wholly within the purport and meaning of the Statute. It is certain that the oleomargarine composed a part of the meal, the price of which was paid, and was embraced in the transaction as an integral part thereof.

If an unlicensed keeper of a restaurant may set before his guests a bottle of wine or other intoxicating liquor, charging a regular price for the same, with other articles of food furnished, with liberty to take much or little of the liquor as the guest may choose, or failing to drink it with his meal, permit him to take it away with him, then the Liquor Laws of the Commonwealth are of no avail, and the license to sell liquor is wholly unnecessary. When the liquor is thus furnished and paid for, it is in legal effect a sale, for the very act has been done which it is the policy of the law to prevent, and which it characterizes as a crime, viz., furnishing intoxicating liquors at a price which is paid. So, in this case, the oleomargarine was furnished to the person named as food and the price was paid. As the learned judge of the court below well said, it was not given away, and the fact that it was not sold separately, but with other articles for a gross sum, would not make it less a sale. It therefore comes within the letter of the law, and it is also within its spirit. If the use of such articles is injurious, it would seem to be especially within the spirit of the Act to prohibit

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public caterers from selling them to their guests as part of an ordinary meal. Penal statutes are to be strictly construed, but both the letter and the spirit of the Act of 1885 cover this case, and we think the judgment was properly entered.

Judgment affirmed.

Paxon, Ch. J., dissenting:

I am unwilling to be held responsible for this judgment and therefore dissent. I am opposed to extending penal laws beyond their plain and obvious meaning. I am of opinion that the Act of May 21, 1885 (Pub. Laws, 22), prohibiting the sale of the article of food known as "oleomargarine," was intended to apply only to dealers, or persons engaged in the sale thereof in the line of their business. When the Legislature used the word "sale" it is fair to assume that it was employed in the sense in which it is popularly understood. If it was the intention not only to prohibit sales of oleomargarine, but also its use as an article of food, or in the preparation of food, by proprietors of eating-houses, restaurants and hotels, it was easy to have said so in express terms. As the Act stands there is nothing to warn this defendant that he violated it by placing oleomargarine on his table as an article of food. I am unable to see how the legal or the popular meaning of the word "sold" will support this judgment. A sale is the transfer of the title to property at an agreed price. *Story, Sales, § 1; Crutwell v. Wood, 95 Pa. 152.*

I find nothing in the facts as set forth in the case stated to justify the conclusion that there was a sale of the oleomargarine. The two individuals referred to entered the defendant's place of business and ordered a meal. It was furnished, but oleomargarine formed no part of it. It is true, there was some of that article on the table; they might have partaken of it, but they did not. When they left they carried the oleomargarine away with them. This, in my opinion, they had no right to do. A guest at a hotel may satisfy his appetite when he goes to the table; he may partake of anything that is placed before him, but after filling his stomach he may not also fill his pockets, and carry away the food he cannot eat. This I understand to be the rule as applicable to hotels and eating-houses in this country, and if there is anything in this case to take it out of its operation, it does not appear in the case stated. The illustration of the bottle of wine, referred to in the opinion of the court, does not appear to me a happy one. Surely, if the proprietor of a hotel places a bottle of wine before his guest, who does not partake thereof, it cannot be said that it is a sale of the wine, nor has the guest the right to carry it away. He might as well carry off the table furniture.

It is quite possible, under our construction of the Act of 1885 (see *Powell v. Com.* 114 Pa. 245, 5 Cent. Rep. 890), the Legislature may have the power to prohibit the use of oleomargarine as an article of food in hotels and eating-houses, and punish a landlord who places it before his guests; but this has not yet been done, and I would not extend a highly penal law by implication.

James W. FRIEND, *Appt.*,
v.
CITY OF PITTSBURGH.

(....Pa....)

1. **Municipal bonds**, in the absence of any provision as to the place of payment, are payable at the treasury of the municipality.
2. **Interest does not run after maturity** on municipal bonds which specify no place of payment, if funds for payment are then provided at the municipal treasury; at least in the absence of demand and refusal of payment. It is not necessary for the municipality to seek out the creditor and tender payment.

(January 6, 1890.)

A PPEAL by plaintiff from a judgment of the Court of Common Pleas, No. 1, of Allegheny County in his favor, but for a less amount than he claimed, in an action to recover the amount alleged to be due on a certain municipal bond. *Affirmed.*

The case sufficiently appears in the opinion. *Mr. W. W. Thomson*, for appellant:

Where there is a contract to pay a certain sum of money, no certain place of payment being appointed in the contract, the debtor, on the maturity of the debt, is bound to find his creditor and tender him the money wherever he may happen to be, provided he is within the State.

All-house v. Ramsay, 6 Whart. 384; *Re Shaffer's Estate*, 9 Serg. & R. 265, 266; Wharton, Cont. §§ 873, 990; Leake, Cont. pp. 852, 853, 855; Chitty, Cont. 1057, 1058, 1069; Chitty, Bills, p. 359; *Roberts v. Beatty*, 2 Pen. & W. 71; *Stewart v. Morrow*, 1 Grant, 204; *Howard v. Miner*, 20 Me. 330.

The proposition that municipal obligations are payable at its treasury, is not sustained by any authority outside of the State of Illinois.

See Dillon, Mun. Corp. § 598; *Allegheny v. Campbell*, 107 Pa. 535.

The right to interest in Pennsylvania is recoverable by the common law of the State, in the absence of any express contract, when payment is withheld after it has become the duty of the debtor to discharge the debt.

Ditworth v. Sindcring, 1 Binn. 494; *Obermyer v. Nichols*, 6 Binn. 164; *Minard v. Beans*, 64 Pa. 413; *Port Royal v. Graham*, 84 Pa. 426; *West Republic Min. Co. v. Jones*, 108 Pa. 69.

Municipal corporations are not exempt from liability for interest under the law of this State.

Allegheny v. Campbell, 107 Pa. 535; *Kerr v. Corry*, 105 Pa. 282, 293; *Fidelity Ins. T. & S. Dep. Co. v. Scranton*, 102 Pa. 387, 391, 394; *Beaver Co. v. Armstrong*, 44 Pa. 63, as explained in *North Pennsylvania R. Co. v. Adams*, 54 Pa. 94, 95. See also *Walnut v. Wade*, 103 U. S. 695 (26 L. ed. 530); *Koshkonong v. Burton*, 104 U. S. 676, 677 (26 L. ed. 889); *Genoa v. Woodruff*, 92 U. S. 502 (23 L. ed. 586); *Pana v. Bowler*, 107 U. S. 546 (27 L. ed. 430); *Gelpcke v. Dubuque*, 68 U. S. 1 Wall. 206 (17 L. ed. 625); *Thompson v. Lee Co.* 70 U. S. 8 Wall. 327 (18 L. ed. 177); *Aurora v. West*, 74 U. S. 7 Wall. 82, 104, 105 (19 L. ed. 42, 50); *Clark v. Iowa City*, 87 U. S. 20 Wall. 589 (23 L. ed. 429); *Thorndike v. United States*, 2 Mason, 19, 20; *Langdon v. Castleton*, 80 Vt. 286, 296; *Hollingsworth v. De-* 6 L. R. A.

troit, 3 McLean, 472, 479; *Daniel*, Neg. Inst. § 1514.

There is no duty on the part of the creditor to make demand at the time payment is due, but it is the duty of the debtor to have the money at the place, at the very time fixed for payment, and to keep it there in readiness to pay until demand is made; otherwise, he is at once in default and liable for interest.

North Pennsylvania R. Co. v. Adams, 54 Pa. 94; *Walnut v. Wade*, 103 U. S. 688, 695, 696 (26 L. ed. 526, 530); *Middleton v. Boston Locomotive Works*, 26 Pa. 257; *Filler v. Beckley*, 2 Watts & S. 458; *Wallace v. McConnell*, 38 U. S. 13 Pet. 136 (10 L. ed. 95); 2 *Daniel*, Neg. Inst. § 1514; *Sedgwick, Damages*, 374; *Miller v. Bank of Orleans*, 5 Whart. 503; 1 *Sutherland, Damages*, 596.

Being in default, notice alone to the creditor that he was afterwards ready to pay would not be sufficient to relieve him from the payment of interest. It would be his duty to tender the amount of the debt and accrued interest to the creditor, to stop the running of interest.

Hummel v. Brown, 24 Pa. 312; *West Republic Min. Co. v. Jones*, 108 Pa. 69.

Mr. W. C. Moreland, City Atty., for appellee:

It was the duty of the holder to present this bond as the various installments fell due, and demand payment therefor, before he could maintain an action for interest upon such matured installments.

Beaver Co. v. Armstrong, 44 Pa. 63; *Emlen v. Lehigh Coal & Nav. Co.* 47 Pa. 82; *Dyer v. Coalington Twp.* 19 Pa. 200; *Luzerne Co. v. Day*, 23 Pa. 141; *Allison v. Juniata Co.* 50 Pa. 351; *Weir v. Allegheny Co.* 95 Pa. 413; *Scranton v. Hyde Park Gas Co.* 103 Pa. 383; *Com. v. Lancaster Co. Comrs.* 6 Binn. 5; *Com. v. Philadelphia Co. Comrs.* 4 Serg. & R. 125; *Adams Exp. Co. v. Milton*, 11 Bush, 49; *Paul v. New York*, 7 Daly, 144.

Municipal corporations are not bound to discharge their indebtedness elsewhere than at their treasuries.

People v. Tazewell Co. 22 Ill. 147; *Pekin v. Reynolds*, 31 Ill. 529; *Johnson v. Stark Co.* 24 Ill. 75; *South Park Comrs. v. Dunlevy*, 91 Ill. 49; *Chicago v. People*, 56 Ill. 327.

Interest is not chargeable against the State until a lawful demand of the principal and a refusal of payment by the proper officer chargeable with that duty.

People v. Canal Comrs. 5 Denio, 404, 405.

Paxson, Ch. J., delivered the opinion of the court:

This suit was brought in the court below against the City of Pittsburgh to recover the amount due on a bond given by said City, and payable by installments. There was no dispute as to the amount of the bond, nor that the respective installments were all due; the contention was over the question of interest on the respective installments after their maturity. It appeared upon the trial below that no demand had ever been made by the holder of the bond for payment, and that for a portion of the time, at least, the money had been provided for its payment, and was in the city treasury. Under these circumstances, the learned judge instructed the jury as follows: "Therefore, as

I say, the simple question is this: Did the City of Pittsburgh provide the means for the payment of these bonds? If she did before the maturity of the bonds, that is, by the maturity of the last payment, then the interest would stop from that date, and you will fix the time when that provision was made. As I have said before, the evidence does not satisfy me that a provision was made before 1890. It is a question of fact, however, for you, and you will fix the time and allow interest on the installment from the time it came due up until the time that you find that the City had provided for the payment of the bonds. That is all the interest the plaintiff is entitled to in my judgment."

This, and other instructions of like tenor, were assigned in error here. The contention of the plaintiff is, that a municipal corporation, like an individual, must seek out its creditor, if it desires to stop interest, and tender him the money due. If this contention is well founded, the effect of it will be to work a revolution in the mode of transacting business with such municipalities. Singularly enough, the precise point does not appear to have been decided in this State, yet there are plenty of dicta scattered through our books which plainly show the bent of the judicial mind.

In the case of *Luzerne Co. v. Day*, 23 Pa. 141, it was said by this court: "When a legal claim is presented for payment, it is the duty of the commissioners to draw their warrants for payment. If this is refused, or the order is not paid when demanded, a suit will lie against the county, but until demand is made, neither the commissioners nor the county are in default, and without it a suit cannot be maintained."

And in *Allison v. Juniata Co.* 50 Pa. 351, it was held that the holder of a county warrant or order cannot recover interest even after demand and nonpayment for want of funds. It is true these cases were put partly upon the ground that such orders are neither bills, notes, checks nor contracts, nor even a satisfaction of the original indebtedness. Had the action been upon such original indebtedness, as was said in *Dyer v. Covington Twp.* 19 Pa. 200, the court could decide whether it was a case for the allowance of interest or not.

In *Emlen v. Lehigh Coal & Nav. Co.* 47 Pa. 76, it was said by Justice Read, in discussing the general rule upon the allowance of interest: "There are, however, exceptions to the general rule, as in the case of banks, who are the debtors of their depositors, and of trustees, who have not failed in the discharge of their

trusts. And we must undoubtedly add the cases in which the United States and the several States have been prepared to pay their loan-holders when their loans fell due, of which it is their practice to notify their creditors beforehand. . . . The result is, that these debts are payable at a fixed period, at which time and place the loan-holder is to present his evidence of debt and receive payment. Whether he does or not, interest stops from that moment."

The point decided in that case was that the Lehigh Coal and Navigation Company was not bound to seek its creditor in a foreign country, and make a tender, in order to stop payment. In the State of Illinois it has been repeatedly decided that municipal corporations are not bound to discharge their indebtedness elsewhere than at their treasuries. *Pekin v. Reynolds*, 81 Ill. 529; *People v. Tazewell Co.* 22 Ill. 147; *Johnson v. Stark Co.* 24 Ill. 75; *South Park Comrs. v. Dunleavy*, 91 Ill. 49.

It must be conceded that this is the rule applicable to the United States and to the several States. And the rule does not depend upon the fact, alone, that in such instances no suit would lie. It rests upon the broader ground of public policy and public convenience, and the further reason, that, as to all municipal organizations or governments, the municipal treasury is the recognized place where all claims against it shall be paid. This rule has been recognized by common consent by every person and in every place. The reason of it applies with equal force to a city as to a State. The only difference between them is that one can be sued, the other cannot. It would entail intolerable inconvenience if the rule were otherwise. The bonds of some municipal corporations are largely held in every State in the Union, and in nearly every nation abroad. It is impossible in many instances for such corporations to know their creditors or where they reside. To hold that they must find them and tender the amount of their debt before interest could be stopped, would entail endless confusion and do no practical good. Their obligations are as much payable at their treasury as if so "nominated in the bond," and it is so understood by all who deal with them.

We regard the instructions of the court below as favorable to the plaintiff as he was entitled to.

There is nothing in the remaining specifications of error which requires discussion.

Judgment affirmed.

KENTUCKY COURT OF APPEALS.

Elizabeth B. WILLIAMS, *Appt.*,

v.

E. P. WILLIAMS.

(...Ky....)

A widow's right to dower is not barred by adverse possession of the property by a third party during her husband's lifetime, though it continues for a period sufficient to defeat his title.

6 L. R. A.

(December 14, 1889.)

A PPEAL by plaintiff from a judgment of the Chancery Court for Pendleton County in favor of defendant in an action to enforce an alleged dower right in certain lands. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Dougherty & Boner and C. H. Lee* for appellant.

Messrs. M. M. & C. A. Rardin and O'Hara & Bryan for appellee.

Holt, J., delivered the opinion of the court:

Pope Williams died, intestate, in 1834, the owner of a considerable tract of land, and leaving nine children as his heirs. One of them, Felix Williams, married the appellant, Elizabeth B. Williams, in 1839. The testimony does not clearly show a division of the land among the heirs, but it is probable one was had in 1842 or 1843. It is claimed that the appellant and her husband sold his interest in or portion of the land, in 1848 or 1844, to their brother-in-law, one Byrd, and he, in 1845 or 1846, to the appellee, E. P. Williams. The latter, and those claiming under him, have had the actual possession of it ever since his purchase, claiming it as their own. Felix Williams died July 27, 1888; and the appellant, as his widow, brought this action of July 31, 1886, to recover dower in the land. The three requisites to entitle her to it at common law are shown; to wit, the marriage, seisin by the husband, and beneficially so, during the coverture, and his death. Unless, therefore, she has in some legal mode been divested of the right, she is entitled to relief.

The appellee defends upon the ground that she and her husband sold and conveyed the land to Byrd, and, if not, that then the adverse possession for so long a time bars a recovery by her. No writing evidencing any sale is produced. There is no deed of record, and search has been made at the proper places, and inquiry of the proper persons, and none found. We cannot doubt, however, but what the husband, at the time named, sold his portion of the land. All the circumstances say so. He remained near the land until 1839, and, long after his removal from the State, returned to its vicinity for a protracted visit. During all this time he knew his portion of the land was adversely held and claimed; and yet, from the time when it is claimed he sold to Byrd until his death, he never set up any claim to it. We cannot presume, however, that a deed was executed by the appellant. None is produced, or shown to have been executed by her; and, unless this was done, and it recorded, her then inchoate right of dower did not pass, although a sale was made by the husband. She testifies that she never joined in any deed, and never knew of any sale of the land. One witness says she told him that they (her husband and herself) had sold and conveyed it. He is, however, interested adversely to her in this litigation, and is contradicted by her.

Not having parted with her right, is she now prevented, by lapse of time, from asserting it? This state of case is presented: The appellee asserts a sale by the husband and wife. The appellant denies it; and it is urged in argument for the appellee that, if her denial be true, yet she cannot recover, because of the adverse holding of the land for over forty years. In short, if she conveyed, she has no right; but, even if she did not, and her version be true, then limitation defeats her. The last question remains to be considered.

Article 1, chap. 71, of the General Statutes, provides: "Section 1. An action for the recovery of real property can only be brought 6 L. R. A.

within fifteen years after the right to institute it first accrued to the plaintiff, or to the person through whom he claims. Sec. 2. If, at the time the right of any person to bring an action for the recovery of real property first accrued, such person was an infant, married woman, or of unsound mind, then such person, or the person claiming through him, may, though the period of fifteen years has expired, bring the action within three years after the time such disability is removed. . . . Sec. 4. The period within which an action for the recovery of real property may be brought shall not in any case be extended beyond thirty years from the time at which the right to bring an action first accrued to the plaintiff, or the person through whom he claims, by reason of any death, or the existence or continuance of any disability whatever."

Manifestly, neither the three nor fifteen nor the thirty years' Statute applies to the appellant's claim. It is true, she sues to recover a freehold estate, and that the right of dower is a right to real property. *Anderson v. Sterritt*, 79 Ky. 499.

Her right is only inchoate, however, where marriage and seisin in the husband concur. It is consummated at his death. During his life she has only a mere shadowy expectancy, or future contingent interest. No right of action accrues to her, as it is, until his death. It, of course, never did accrue to the husband; and therefore the limitations provided by the sections of the Statute above cited do not apply to the case in hand, or forbid a recovery.

It is urged, however, that the adverse holding against the husband had, before his death, continued so long as to extinguish his title; and that, as he was barred of a recovery long before his death, therefore the widow cannot be endowed. Waiving the undoubted fact that the appellee claims through the husband of the appellant, we will consider whether an adverse holding, so long continued before the husband's death, but not before the marriage, as to vest the disseisor with a right, and toll the husband's right of entry, will defeat the wife's claim to dower. Upon first thought, one might suppose it would do so. The wife is, however, endowable, under our law, not of what the husband may be seised of in fee simple at his death, but of any real estate so held by him at any time during the coverture. The Statute says: "After the death of the husband, the wife shall be endowed for her life of one third of the real estate of which he, or anyone for his use, was seised of an estate in fee simple at any time during the coverture, unless her right to such dower shall have been barred, forfeited or relinquished." Gen. Stat. chap. 52, art. 4, § 2.

The dower estate arises in perfection at the death of the husband. It relates back, however, by virtue of the inchoate right, and embraces any real estate beneficially held by him in fee simple at any time during the coverture. The wife cannot be heard until she becomes a widow; and the law is unwilling to make the silence of a party deprive her of a right when it at the same time forbids her to speak.

The Statute of Limitations is founded upon the idea that if one has a right, and neglects to

avail himself of the remedy which the law affords within the time limited, it is to be presumed that he has abandoned the right. It would be unreasonable to devert the wife of her inchoate right of dower for non-action, when she has no power to protect or save it, and is guilty of no laches. If so, she would suffer from silence enjoined by law. This would be paradoxical. Limitation cannot justly run against her right, because every such statute rests for its existence upon the laches of the party to be affected by it. From its earliest history, the common law has favored the right of dower, because it is necessary to the support of the widow, and the nurture of her children. It will not, therefore, admit of its defeat by the acts or laches of the husband.

1 Washb., Real Prop., ed. 1862, p. 218, says: "So far as the Statute of Limitations grows out of the supposed right to presume a title from long adverse enjoyment by the person in possession, it could not well apply to the case of dower, since, upon the death of the husband, the wife is not seised, nor has she a right of entry." Again, on page 250: "At common law, the moment her coverture and her husband's seisin concur, she acquires a right which nothing but her death or her voluntary act can defeat, unless it be by an exercise of sovereignty, by the forms of the law, in appropriating the estate of the husband to a public use. No adverse possession, therefore, as against her husband, however long continued, can affect her right to recover dower after his decease." He is sustained in this view both by decision and other text-writers.

The same rule will be found more fully laid down in 2 Scribner, Dower, 579. It is there declared that an adverse occupation of the premises during the life of the husband cannot affect the rights of the widow; that she cannot be prejudiced by his laches, nor her inchoate

right affected by his act or that of a third person.

In the case of *Durham v. Angier*, 20 Me. 242, there had been an adverse holding for over twenty years before the husband's death, and the widow was allowed dower. The court, in its opinion, says: "Nor can the neglect of the husband to enter during his life destroy the right of his widow."

The case of *Hart v. McCollum*, 28 Ga. 478, is to the same effect. There the husband had been disseised for about twenty-three years at the time of his death, but the court said: "The mere failure of the husband to sue for lands, of which he was once legally seised during coverture, until the Statute of Limitations attaches as against him, does not exclude the wife's right to dower in said lands,—a right which she may assert when she becomes discoverer."

In *Moore v. Frost*, 3 N. H. 126, the same rule was applied, and we have not been able, after a careful investigation, to find any counter authority.

The case of *Hawkins v. Page*, 4 T. B. Mon. 136, so far as it relates to this question, merely decides that where the husband, by adverse possession, has acquired the right to land, his widow is entitled to be endowed.

The case now presented is unlike that of a husband selling the wife's land. In such a case, she may sue at once. Nor is it one where the disseisor's right by adverse possession to the husband's land becomes perfect before marriage, and the husband therefore has no title at any time during the coverture; but it is one where the husband was seised in fee simple during the coverture, and the right of the wife has never been "barred, forfeited or relinquished." She is therefore entitled to dower; and the judgment is accordingly reversed, and cause remanded for further proceedings consistent with this opinion.

INDIANA SUPREME COURT.

William WRIGHT, *Appt.*,
v.
Theodore E. GRIFFITH *et al.*

(.....Ind.....)

1. Notice of acceptance of a guaranty in an order to let the guarantor's daughter "have what goods she wants" is not necessary, where it was given after a refusal of credit to her.
2. An order to let a person "have what goods she wants," and agreeing to "stand good for the money and settle the bills," is a continuing guaranty.

(January 16, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Randolph County in favor of plaintiffs in an action upon an alleged guaranty. *Affirmed.*

NOTE.—See *National Exchange Bank v. Gay*, 4 L. R. A. 842, note, 57 Conn. 224.
6 L. R. A.

The facts are fully stated in the opinion.

Mr. Theodore Shockney, for appellant: When the guaranty is an offer to become responsible for a credit, which may or may not be given to another, at the option of the party to whom the application for the credit is made, the guarantor must, within a reasonable time, be notified of the acceptance of the guaranty.

Edmonston v. Drake, 30 U. S. 5 Pet. 624 (8 L. ed. 251); *Douglass v. Reynolds*, 32 U. S. 7 Pet. 118 (8 L. ed. 626); *Lee v. Deck*, 35 U. S. 10 Pet. 482 (9 L. ed. 508); *Adams v. Jones*, 37 U. S. 12 Pet. 207 (9 L. ed. 1058), and the cases there cited; *Brandt*, Sur. p. 222.

A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not.

McCollum v. Cushing, 23 Ark. 540. See *Oakes v. Weller*, 13 Vt. 106; *Kellogg v. Stockton*, 29 Pa. 460.

Where the obligation assumed by the principal is not only uncertain in amount within a fixed limit, but is unlimited, and for an uncer-

tain time, notice of the acceptance of the guaranty should be given the guarantor within a reasonable time, and such notice should at least be approximately certain as to the amount of the principal's indebtedness for which the guarantor is collaterally liable.

Wade, Notice, § 424. See *Parsons*, Cont. p. 14; *Duncan v. Heller*, 18 S. C. 94; *King v. Batterson*, 18 R. I. 117; *Brandt*, Sur. § 164.

The communication pleaded was a mere proposition, and until it was accepted, and notice of that fact given, the minds of the parties had not met, and there was no contract.

See *New Haven Co. Bank v. Mitchell*, 15 Conn. 206.

Messrs. S. R. Bell and J. B. Ross, for appellees:

This writing constituted an absolute and complete guaranty, and in such case no notice of acceptance is necessary and none need be alleged in the pleading.

Parsons, Cont. 479; 2 Story, Cont. § 1133; *Kline v. Raymond*, 50 Ind. 271; *Clay v. Edgerston*, 19 Ohio St. 549; *Castle v. Rickly*, 6 West. Rep. 813, 44 Ohio St. 490; *Jackson v. Yandes*, 7 Blackf. 526; *Studabaker v. Cody*, 54 Ind. 586.

Where an offer to guarantee is absolute, and contains in itself no intimation of desire for specific notice of acceptance, it may be supposed that the offeror has a reasonable knowledge that his guaranty is accepted and acted upon, unless he is informed to the contrary.

2 *Parsons*, Cont. p. 14. See *Douglass v. Howland*, 24 Wend. 85; *Smith v. Dann*, 6 Hill, 543; *Union Bank v. Coster*, 3 N. Y. 212; *Bright v. McKnight*, 1 Sneed, 158; *Maynard v. Morse*, 36 Vt. 617; *Cooke v. Orne*, 37 Ill. 186; *Dickerson v. Derrickson*, 89 Ill. 574; *Sanders v. Etchenson*, 36 Ga. 404; *Davis v. Wells*, 104 U. S. 159 [26 L. ed. 686]; *Furat & B. Mfg. Co. v. Black*, 111 Ind. 308, 10 West. Rep. 248; *Scott v. Myatt*, 24 Ala. 489; *Ward v. Wilson*, 100 Ind. 52.

In regard to the subject matter, a guaranty to cover goods supplied to a certain amount, without restriction of time, continues until revoked.

2 *Parsons*, Cont. p. 20; *Merle v. Wells*, 2 Campb. 413; *Broom v. Batchelor*, 1 Hurlst. & N. 255; *Hotchkiss v. Barnes*, 34 Conn. 27; *Grant v. Ridsdale*, 2 Harr. & J. 186; *Gate v. McKee*, 13 N. Y. 232.

The guaranty made by appellant in this case was a continuing guaranty, binding upon him until he in some way limited his liability.

Brandt, Sur. §§ 130-134; 2 Am. Lead. Cas. pp. 44, 135-137; *Boehne v. Murphy*, 46 Mo. 57; *Crittenden v. Fiske*, 46 Mich. 70; *Rapelye v. Bailey*, 5 Conn. 149; *Fellows v. Prentice*, 3 Denio, 512; *Lowe v. Beckwith*, 14 B. Mon. 184; *Scott v. Myatt*, 24 Ala. 489; *Clark v. Burdett*, 2 Hall (N. Y.) 197; *Grant v. Ridsdale*, *supra*.

Words uncertain are to be accepted in the strongest sense against the party using them.

Shine v. Central Sav. Bank, 70 Mo. 524; *Bailey v. Larchar*, 5 R. I. 580; *Ward v. Wilson*, 100 Ind. 56; 2 *Parsons*, Cont. 509; *Mason v. Pritchard*, 12 East, 227.

Mitchell, Ch. J., delivered the opinion of the court:

Action upon a writing in the following words:

6 L. R. A.

Union City, Ind., March 17th, '82.

Messrs. Griffith Brothers:

Please let my daughter, Mrs. W. E. Headington, have what goods she wants, and I will stand good for the money to settle the bills. You will find the pay part all right with her, I think. Yours truly, Wm. Wright.

The questions presented arise on the complaint, the material averments of which are to the effect that Mrs. Headington applied to the plaintiffs to purchase millinery goods, and that the plaintiffs declined to furnish them to her on credit; that thereupon, in consideration that they agreed to sell and deliver to her from time to time on credit such goods and merchandise as she might require in her business, the defendant, her father, by the contract above set out, promised and agreed to pay for the goods so to be furnished. It is averred that, relying upon the agreement so made, the plaintiffs from time to time sold and delivered to Mrs. Headington goods and merchandise to the amount of \$3,284.56, and that there remains due them on account thereof \$426.78, for which they pray judgment against the defendant.

It is contended that the complaint fails to state a cause of action, because it contains no allegation that the plaintiffs, within a reasonable time after receiving the communication above set out, notified the defendant of the acceptance of the proposal or direction therein contained. The rule is abundantly maintained which requires that, upon an offer or mere proposal to become responsible for credit, which may or may not be extended to another, the person making the order must be notified within a reasonable time of its acceptance, in order that he may be held as a guarantor. This is so upon the familiar principle that, while the proposition remains pending, without notice of acceptance, simultaneous concurrence of mind essential to the completion of a contract has not taken place. *Furat & B. Mfg. Co. v. Black*, 111 Ind. 308, and cases cited; *Powers v. Bumcratz*, 12 Ohio St. 273; *Brandt*, Sur. § 157.

"A mere offer," as has often been said, "not accepted, is not a contract, and a mere mental acceptance of a proposition, not communicated to the party to be charged, is not an acceptance at all in the eye of the law." *Kellogg v. Stockton*, 29 Pa. 460; *Walker v. Forbes*, 25 Ala. 139.

Where, however, the delivery of the guaranty is not a mere incipient step in the transaction, but is in fact a part or the consummation of the contract to which it is collateral, the acceptance of the guaranty, and the performance of the consideration upon which it rests, are all that are essential to make the contract complete and enforceable. *Snyder v. Click*, 112 Ind. 293, and cases cited; *Davis v. Wells*, 104 U. S. 159 [26 L. ed. 686].

As has been well observed, however, "care must be taken in all cases to mark the distinction between a consummate and perfect guaranty and a mere proposal or offer or tender of a guaranty, which must be accepted, and the acceptance notified to the maker, and his final assent to the engagement be obtained, ere it can become a perfect and concluded contract." 3 Addison, Cont. § 1115.

Mrs. Headington, so it is averred in the complaint, applied to the plaintiffs to purchase

goods on credit. The application was declined. Then followed the letter of her father, in which he requested them to let her have what goods she wanted; adding, "I will stand good for the money to settle the bills." Thereupon, in reliance upon the promise contained in the letter, goods were furnished as requested. The letter was therefore not a mere overture or proposition. It was the final consummation of a pending arrangement, in pursuance of which the writer's daughter was furnished with goods.

When the contract of guaranty is executed contemporaneously with, and as a part of, the consideration for the contract or transaction guaranteed, the law imputes notice to all the parties immediately related to the transaction of its character and extent, and no further notice of the acceptance of the guaranty is required. *Furst & B. Mfg. Co. v. Black, supra*; *Brandt, Sur. § 164*; *Paige v. Parker, 8 Gray, 211*.

Moreover it is an established rule, applicable to cases like the present, that if, upon a fair construction of the instrument, it appears to be the personal undertaking of the guarantor to pay for goods sold, or to be sold, to a third person, it will be regarded as an absolute promise or conclusive guaranty, which, when acted on, makes the promisor immediately liable, and no notice is necessary to the acceptance of the guaranty. *Ward v. Wilson, 100 Ind. 52*; *Kline v. Raymond, 70 Ind. 271*; *Wills v. Ross, 77 Ind. 1*; *Birdsall v. Heacock, 32 Ohio St. 177*; *Wise*

v. Miller, 45 Ohio St. 388, 11 West. Rep. 645; *Powers v. Bumeratz, supra*; *Douglass v. Howland, 24 Wend. 85*; *Brandt, Sur. § 167*.

The contract involved in the present case is a direct engagement to pay. The language is, in effect: "Let my daughter have what goods she wants, and I will pay the bills." As was said in *Smith v. Dann, 6 Hill, 543*, a case parallel with the present: "But here the undertaking was absolute, and the defendant said to the plaintiff, in substance: 'If you deliver the goods, I will guaranty the payment.' We cannot add a condition that the defendant shall have notice. He should have provided for that himself in the proposal made to the plaintiffs." *Scott v. Myatt, 24 Ala. 489*; *Union Bank v. Coster, 8 N. Y. 203*.

According to its terms, the guaranty is not only absolute, but it is continuing. There is nothing in the letter to indicate, or from which the inference can arise, that the liability of the guarantor is to be restricted to a single transaction. On the contrary, the language, which need not be repeated, indicates that successive bills were contemplated. The rule is that, unless the words in which the guaranty is expressed fairly imply that the liability of the guarantor is to be limited, it continues until the guaranty is revoked. *Brandt, Sur. §§ 183, 184*.

As we have seen, the language here is with out limitation. We find no error

Judgment affirmed, with costs.

COLORADO SUPREME COURT.

Lorenzo D. HERR, *Plff. in Err.*,
v.

DENVER MILLING & MERCANTILE CO.

(....Colo....)

1. Delivery of personal property in order to pass title requires an acceptance, and

an actual, notorious and unequivocal change of possession.

2. A chattel mortgage, in which the name of the mortgagee is left blank, is of no effect as against a third party acquiring rights in the property, where the same formalities are required in the execution of such instruments as in the case of a conveyance of real estate.

NOTE.—Chattel mortgage, what constitutes.

A chattel mortgage is an instrument whereby the owner of personal property transfers the title to such property to another, as security for the payment of a debt or obligation, subject to be defeated upon payment of the debt or obligation. *Jones, Chat. Mort. 1*; *Porter v. Farmley, 52 N. Y. 185*; *Betsinger v. Schuyler, 46 Hun, 353*; *Nichols v. Mead, 2 Lans. 222*; *Parshall v. Eggert, 54 N. Y. 18*; *Smith, Chat. Mort. 1*; *Bouvier, L. Dict. 2*; *Kent, Com. 516*.

A mortgage of goods is more than a pledge, for it is an absolute pledge to become an absolute interest if not redeemed at the specified time. *Cortelyou v. Lansing, 2 Cal. Cas. 200*; *Brown v. Bement, 8 Johns. 89*; *Barrow v. Paxton, 5 Johns. 258*; *Jones v. Smith, 2 Ves. Jr. 378*; *1 Powell, Mort. 3*.

The distinction between a pledge and a chattel mortgage is that in the case of a pledge a special property only passes to the pledgee, while in the case of a chattel mortgage, upon breach of its condition, title becomes absolute in the mortgagee. *Conard v. Atlantic Ins. Co. 26 U. S. 1 Pet. 449 (7 L. ed. 139)*; *Sims v. Canfield, 2 Ala. 555*; *Heyland v. Badger, 35 Cal. 404*; *Wright v. Ross, 36 Cal. 414*; *Evans v. Darlington, 5 Blackf. 380*; *Badlam v. Tucker, 1 Pick. 389*; *Barfield v. Cole, 4 Sneed, 465*; *Wood v. Dudley, 8 Vt. 435*; *Conner v. Carpenter, 28 Vt. 237*.

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Legal title vests in mortgagee.

The legal title is vested in the mortgagee, and becomes absolute in law upon default. *Bragelman v. Daue, 69 N. Y. 69*; *Neldig v. Elifer, 18 Abb. 353*; *Stoddard v. Denison, 38 How. 296*; *Moses v. Walker, 2 Hilt. 536*; *Miner v. Judson, 2 Hun, 441*; *Porter v. Farmley, 52 N. Y. 185*; *Judson v. Easton, 58 N. Y. 664*; *Noyes v. Wyckoff, 30 Hun, 466*; *Langdon v. Buel, 9 Wend. 80*; *Stewart v. Slater, 6 Duer, 83*; *Lambert v. Leland, 2 Sweeny, 218*; *Woodbridge v. Nelson, 13 Hun, 390, 6 Week. Dig. 248*; *Mowry v. Wood, 12 Wis. 414*; *Duffus v. Bangs, 43 Hun, 52*; *Klug v. Walbridge, 48 Hun, 470*.

A chattel mortgage may be valid although made by parol. But in such case delivery of the mortgaged property should accompany the parol contract. *Bank of Rochester v. Jones, 4 N. Y. 498*; *Ackley v. Finch, 7 Cow. 290*; *Ferguson v. Union Furnace Co. 9 Wend. 345*; *Bardwell v. Roberts, 66 Barb. 433*; *Coas v. Bramley, 18 Hun, 187*.

As between the parties a chattel mortgage made entirely by parol will be valid. *Conchman v. Wright, 8 Neb. 1*; *Bank of Rochester v. Jones and Ferguson v. Union Furnace Co. supra*; *Ackley v. Finch, 7 Cow. 290*; *Brooks v. Ruff, 37 Ala. 371*; *Morrow v. Twiney, 35 Ala. 131*.

It may also be good as against third parties if pos-

3. One who pays for the maker a note secured by a chattel mortgage, and receives a new note and mortgage therefor, cannot claim as assignee of the former mortgage when his own proves defective, if the original intention was to cancel the former note and mortgage.

4. The recital of a chattel mortgage in a subsequent mortgage upon the same property, which is duly recorded, is not notice to third parties of the lien of the former mortgage, especially where the first mortgage is ineffectual by reason of the omission therefrom of the mortgagee's name.

(November 8, 1896.)

ERROR to the Superior Court of Denver to review a judgment in favor of defendant upon appeal from a justice of the peace in an action in the nature of trover to recover the value of a quantity of wheat. *Affirmed.*

Commissioner's opinion.

The facts are fully stated in the opinion.

Mr. Clay B. Whitford, for plaintiff in error:

One who buys property must at his peril ascertain the ownership, and if he buys of one who has no authority to sell, his taking possession in denial of the owner's right is a conversion.

Cooley, Torts, p. 451. See also 1 Hill. Torts, p. 25; 2 Hill. Torts, p. 82.

The mere possession of a chattel will not of

itself render the chattel liable to the debts or disposition of the possessor.

Craig v. Ward, 9 Johns. 197. See also *Thatcher v. Kaucher*, 2 Colo. 698; *Morrill v. Moulton*, 40 Vt. 242; *Moon v. Hawks*, 2 Aik. 890, 16 Am. Dec. 727; *Thrall v. Lathrop*, 80 Vt. 307; *Saltus v. Everett*, 20 Wend. 267, 83 Am. Dec. 541; *Everett v. Coffin*, 6 Wend. 604; *Hyde v. Noble*, 18 N. H. 494; *Covill v. Hill*, 4 Denio, 827, and cases therein cited; *Taylor v. Pope*, 5 Coldw. 413.

Mr. L. B. France, for defendant in error: The Statute in relation to chattel mortgages is in derogation of the common law and must be strictly construed.

Porter v. Dement, 35 Ill. 478.

A chattel mortgage, in fact, must, to be valid, be to some party named therein.

A mortgagee must use due diligence in taking possession of personal property.

Cass v. Perkins, 23 Ill. 382; *Arnold v. Stock*, 81 Ill. 407; *Wooley v. Fry*, 30 Ill. 158; *Funk v. Staats*, 24 Ill. 632; *Hanford v. Obrecht*, 49 Ill. 146; *Wylder v. Crane*, 53 Ill. 490.

A party who obtains goods, even from one who has obtained them by fraud, without notice of the fraud in the usual course of trade and for value, will be protected in his purchase.

Root v. French, 18 Wend. 570.

Reed, C., delivered the following opinion:

An action in the nature of an action in trover,

session of the property is delivered to the mortgagee. *Bardwell v. Roberts*, 66 Barb. 433; *Day v. Swift*, 48 Me. 368.

But it is good as between the parties without any filing or change of possession. *Stewart v. Platt*, 101 U. S. 731 (25 L. ed. 816); *Hodgson v. Butts*, 7 U. S. 3 Cranch, 140 (2 L. ed. 391); *Winsor v. McLellan*, 2 Story, 492; *Merrick v. Avery*, 14 Ark. 370; *Fuller v. Paige*, 26 Ill. 358; *McTaggart v. Rose*, 14 Ind. 230; *Smith v. Moore*, 11 N. H. 55; *Williamson v. New Jersey Southern R. Co.* 28 N. J. Eq. 398; *Hudson v. Warner*, 2 Harr. & G. 415; *Panocast v. American Heating & P. Co.* 66 How. Pr. 49; *Wescott v. Gunn*, 4 Duer, 107; *Morrow v. Reed*, 30 Wis. 81.

Delivery and acceptance essential.

Merely to sign, seal and acknowledge a writing, and then to keep it in one's possession, conveys no title. *Messelbach v. Norman*, 46 Hun, 416.

A delivery and acceptance are essential to constitute a valid mortgage. Without these there is only an attempt to make a mortgage. *Jones, Chat. Mort.* 106.

If a mortgage be made to several creditors, the refusal of one to accept it does not impair the mortgage as to those who have accepted it. *Brown v. Clapp*, 8 Bosw. 824.

The question of delivery is one of fact for the jury, and it is always competent to show that it was never delivered, or that it was delivered as an escrow, or that the mortgagee obtained possession of it by fraud. *Roberts v. Jackson*, 1 Wend. 478.

Unless the property subject to the mortgage is delivered to and retained by the mortgagee, the mortgage is invalid as against creditors of the mortgagor if not filed for record in the office designated by statute; and whether there was an actual and continued change of possession is a question for the jury. *Ford v. Williams*, 24 N. Y. 385; *Wood v. Lowry*, 17 Wend. 492; *Hicks v. Williams*, 17 Barb. 523; *Stewart v. Slater*, 6 Duer, 83; *Stowe v. Meserve*, 13 N. H. 46; *Bither v. Buswell*, 51 Me. 601; *Curtiss v. McDougal*, 28 Ohio, 68.

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The presumption of fraud, in case there is no actual change of possession, is conclusive under the statute unless the mortgage is duly filed. That presumption, however, is one which may be repelled by evidence, where the condition of filing has been complied with. *Frost v. Mott*, 34 N. Y. 255.

The change of possession, where the mortgage is not filed, must be open, actual and public; constructive or legal change is insufficient. *Otis v. Sill*, 8 Barb. 102; *Camp v. Camp*, 2 Hill, 628; *Hanford v. Artocher*, 4 Hill, 271; *Steele v. Benham*, 84 N. Y. 634; *Crandall v. Brown*, 18 Hun, 461.

As against an attaching creditor, a chattel mortgage is absolutely void, unless it, or a true copy thereof, is filed in the proper office, or unless there was an immediate delivery of the property to the mortgagee, followed by an actual and continued change of possession. *Siedenbach v. Riley*, 20 N. Y. S. R. 120, 111 N. Y. 600; *Clark v. Gilbert*, 14 N. Y. Week. Dig. 241.

A temporary resumption of the possession by a mortgagor is a badge of fraud, although open to explanation. *Look v. Comstock*, 15 Wend. 211.

Title must vest by contract.

The title must vest by the contract, for a mere executory agreement to sell chattels cannot be construed as a chattel mortgage, even though the purchaser be put into possession, and the object of the agreement be merely to furnish security for the purchase price. *Brewster v. Baker*, 20 Barb. 364, 16 Barb. 613; *Neldig v. Eifer*, 18 Abb. 358.

An agreement by which a chattel was delivered by a debtor to a person who was his surety, such surety to have the use of the chattel and to become the owner of it if the debtor made default, has been held to be a chattel mortgage, though the whole contract was by parol. *Ferguson v. Union Furnace Co.* 9 Wend. 345.

It is essential that the contract shall provide that the title shall vest in the mortgagee upon the non-performance of the agreement which the mortgage is made to secure; but any agreement which accom-

to recover the value of wheat, tried in justice's court, from which an appeal was taken to the Superior Court of the City of Denver. On April 29th a trial was had by the court without a jury, resulting in judgment for the defendant. A motion for a new trial was made, and denied. There is but little controversy in regard to the facts. The principal contention is in regard to the law applicable to the facts. It appears that Mrs. F. E. Sweetzer, a married woman, living with her husband, leased from the Platte Land Company 160 acres of land, subleased eighty acres, and, with her husband, put the other eighty acres into wheat. Some time prior to September 1, 1884, R. B. Sweetzer (the husband) and F. E. Sweetzer were, or one of them was, indebted to one S. H. Brackbill, and had jointly executed to him a promissory note, and secured it by chattel mortgage. Brackbill wanting his money, an arrangement was made whereby plaintiff Herr was to take up the note, and the Sweetzers were to make a new note to him, to be secured by chattel mortgage upon the same personal property formerly mortgaged to Brackbill, among which was the eighty acres of wheat, on the ground before spoken of. A note was drawn September 1, 1884, for \$429.20, payable to the order of plaintiff, executed by both the Sweetzers, and across the note was written: "Secured by chattel mortgage on wheat, teams, etc." An attempt was made to make and execute a chattel mortgage, and the paper executed appears

to have been regular, except that there was no grantee in the conveyance, the space where it should have been being left blank. Why the name of the grantee was left out, there is no attempt to explain. When, if ever, the grantors discovered the defect is not disclosed; but it appears in the testimony of plaintiff that they regarded it as a valid and existing mortgage on the wheat, at or about the time of the delivery of the wheat out of which this contention arose. It is shown that Sweetzer hauled, delivered and sold to defendant four loads, as his own and in his own name, drawing a small sum of money and taking milling receipts to himself for the balance, leaving about \$100 due on the price of the wheat. The evidence in regard to the notice to defendant is very meager. It is not claimed that defendant had any knowledge in reference to the claim of the plaintiff until after the wheat was bought and delivered. There is no evidence of plaintiff's notifying defendant of his supposed rights, or of having any conversation with him at all. The only notice or conversations on the subject testified to were those of plaintiff's brother, T. W. Herr, and it nowhere appears that he was authorized, or the agent of plaintiff. That G. E. Smith, a witness, and party who purchased the wheat, was the agent of defendant, is admitted. The evidence on the subject of notice is that of T. W. Herr and J. K. Mullen.

Herr testified as follows: "I had a conversation with the agent of defendant in reference

plishes this end would justly be termed a chattel mortgage. *Bunacleugh v. Poolman*, 3 Daly, 236; *Ferguson v. Union Furnace Co.* 9 Wend. 345; *Langdon v. Buel*, 9 Wend. 80; *Marsh v. Lawrence*, 4 Cow. 461; *Bissell v. Hopkins*, 3 Cow. 168; *Thompson v. Blanchard*, 4 N. Y. 306; *Johnson v. Crofoot*, 37 How. 59, 58 Barb. 574.

Sale upon condition for redemption.

In its most common form a chattel mortgage is a sale upon condition, vesting the legal right in the mortgagee, subject to an absolute right of redemption by the mortgagor upon performance of the condition. *Parshall v. Eggart*, 52 Barb. 367; *Stoddard v. Denison*, 38 How. 296, 7 Abb. N. S. 309; *Miner v. Judson*, 2 Hun, 441.

In all cases the court will incline to construe a transaction as a chattel mortgage rather than a conditional sale. *Pioneer Gold Min. Co. v. Baker*, 23 Fed. Rep. 258, 10 Sawy. 539; *Locke v. Palmer*, 26 Ala. 312; *Parish v. Gates*, 29 Ala. 254; *Brown v. Dewey*, 2 Barb. 28; *Hughes v. Sheaff*, 19 Iowa, 336; *Wilson v. Weston*, 4 Jones, Eq. 349; *Scott v. Britton*, 2 Yerg. 215; *Watson v. James*, 15 La. Ann. 386.

If one gives his note for purchase money of a chattel, and sells it to a third person upon the oral condition that such third person pay the note, it is a chattel mortgage as between the payee of the note and the purchaser. *Wayne v. Sherwood*, 14 Barb. 633.

Absolute sale may be shown to be a mortgage.

A sale of chattels absolute upon its face, whether it be in writing or not, may be shown by parol to be intended as a mortgage. *Champlin v. Butler*, 18 Johns. 169; *Hall v. Tuttle*, 8 Wend. 375; *Wayne v. Sherwood*, 14 Barb. 633; *Tyler v. Strange*, 21 Barb. 198; *Despard v. Walbridge*, 15 N. Y. 374; *Smith v. Beattie*, 31 N. Y. 542; *Carpenter v. Snelling*, 17 Mass. 452; *Taber v. Hamlin*, 97 Mass. 489; *Sledge v. Clopton*, 6 Ala. 603; *Scott v. Henry*, 13 Ark. 112; *Rogers v. Vaughan*, 31 Ark. 62; *National Ins. Co. v. Webster*, 83 Ill. 470; *Plummer v. Shirley*, 16 Ind. 380; *McAnulty v. Seick*, 59 Iowa, 586; *Reed v. Jewett*, 5 Me. 6 L. R. A.

96; *Brogden v. Walker*, 2 Harr. & J. 283; *Ing v. Brown*, 3 Md. Ch. 521; *Laeber v. Langhor*, 45 Mo. 477; *Seighman v. Marshall*, 17 Md. 550; *Caswell v. Keith*, 13 Gray, 351; *Fuller v. Parrish*, 3 Mich. 211; *Cooper v. Brook*, 41 Mich. 488; *Carter v. Burris*, 10 Smedes & M. 527; *Fowler v. Stoneum*, 11 Tex. 478; *Horne v. Puckett*, 22 Tex. 201; *Frost v. Allen*, 57 Ga. 333; *Blodgett v. Blodgett*, 48 Vt. 22.

This rule applies however, only between the parties, and cannot be used to the prejudice of creditors. *Gaither v. Mumford*, 2 Tay. (N. C.) 600.

A bill of sale of chattels, absolute in its terms, becomes a mortgage upon proof by parol that it was made to secure a debt, such evidence being always admissible for this purpose. *Despard v. Walbridge*, 15 N. Y. 374; *Hodges v. Tennessee Marine & F. Ins. Co.* 8 N. Y. 418; *Smith v. Beattie*, 31 N. Y. 542; *Coe v. Cassidy*, 72 N. Y. 133; *Michelson v. Fowler*, 27 Hun, 159; *Tyler v. Strang*, 21 Barb. 198; *Bissell v. Hopkins*, 3 Cow. 168; *Schoenrock v. Farley*, 17 Jones & B. 302; *Stoddard v. Denison*, 38 How. Pr. 296; *Nichols v. Lyon*, 14 N. Y. S. R. 549, 47 Hun, 636; *Wilmerding v. Mitchell*, 42 N. J. L. 476; *School Land Comrs. v. Babcock*, 5 Or. 472; *Kaahn v. Graves*, 9 Iowa, 306; *Cooper v. Brook*, 41 Mich. 488; *Jones, Chat. Mort.* § 275.

The evidence, however, must be clear, convincing and decisive. *Freeman v. Baldwin*, 13 Ala. 246.

A tenant gave to his landlord a bill of sale of certain goods in his house, with a proviso that the transfer should be void if the rent were punctually paid, and this was held to be a mortgage. *Barrow v. Paxton*, 5 Johns. 258.

A bill of sale for three horses for the consideration of \$210, and an agreement by the vendee to deliver the horses to the vendor in fourteen days, upon payment by him of \$210, was adjudged to be a mortgage. *Brown v. Bement*, 8 Johns. 96.

Chattel mortgage of crops and emblements. *Johnson v. Grisard*, 3 L. R. A. 795, note, 51 Ark. 410.

Mortgage for railroad stock. *Gibson v. Richmond & D. R. Co.* 2 L. R. A. 467, 37 Fed. Rep. 742.

to this matter. It was with the person in charge of the mill,—I think it was Mr. Smith. In the conversation I had with Smith at the mill I asked him if he had bought wheat from a man named Sweetzer. He said he had. I asked him how much. He said four loads. Subsequent to the interview with Mr. Smith, I had a conversation with J. K. Mullen in regard to this transaction. I don't remember where I first saw him about it; but he spoke about it once on Curtis Street, in front of the postoffice, and he said they had about \$100 in their hands, or something over \$100; that it was immaterial who he paid it to; that he had been garnished by somebody, but he didn't know who it was. Before the commencement of this suit I notified the defendant that this wheat was ours. I did so at the mill, at the time I spoke of before. I told Mr. Smith that the wheat was ours,—that my brother had a chattel mortgage on it; and I showed him the chattel mortgage. I did not notice that it had no grantee in it at that time. I showed him the chattel mortgage, and told him that the wheat had all been turned over to us, and that it was our wheat, and that he should not pay Sweetzer any money on account of it. At that time he told me he had made some little advancement on it,—a few dollars,—but that he would not pay more until he knew they had a right to it, or something to that effect. I made a demand on the defendant for the price they agreed to pay Sweetzer, and asked him to pay me. He said he would see about it. They never paid anything. I went afterwards, and they said they were garnished, and they could not pay now. I told the defendant where the wheat came from; showed them the chattel mortgage, that the quarter section of wheat belonged to Mrs. Sweetzer. It was about the last of September, 1884, that I had this conversation with Mr. Smith. I don't know that he said he bought the wheat of Sweetzer, but he said Sweetzer had delivered four loads there. When I asked him for the money, and to pay us, he said the receipts were out for it. I can't remember how long after the wheat had been delivered that I had this conversation with Smith. It may have been two or three days, or a week. I am not certain. I got no wheat from Sweetzer after that conversation with Smith. Sweetzer left the country."

J. K. Mullen testified: "Am acquainted with R. B. Sweetzer by meeting him a few times. He was tarming in the fall of 1884. In the fall of that year our manager bought wheat of him. It was in September, 1884. He brought the wheat to the mill in our sacks, and dumped it into the hopper outside, with other wheat. We only paid him \$11.20 on that sale. Delivered him receipts for the wheat. We bought no wheat from Sweetzer after a conversation had with Mr. Herr in relation to the wheat. That conversation is the first I ever heard of Mr. Herr having a claim on it. At that time the wheat had been delivered, and the receipts received. Mr. Herr came down to see me about this matter. He gave notice that he had a claim on it. He saw me and talked with me about it. A good while after I told Mr. Herr that we had the money there, and would pay it to whoever was lawfully entitled to it. The money is still in our hands, except the \$11.20."

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(The garnishee process from the county court, and the summons in this case, were both served on the same day. Witness could not state which was first served.) "Mr. Sweetzer came, and demanded the money, and we notified him of the fact that Mr. Herr had notified us. He left something there in writing; and we notified Mr. Sweetzer we could not pay him until the matter was settled in the courts."

It appears from the testimony that no sacks were furnished by plaintiff at the time of threshing, as required by Sweetzer. Strong, a witness, testified that he got for himself 500 sacks of the defendant, 100 of which he let Sweetzer have. It appears that the wheat sold defendant was delivered in those sacks.

The defendant put in evidence the transcript of a record and judgment in the county court, wherein the W. J. Kinsey Implement Company obtained judgment by default against R. B. Sweetzer, for \$111.65 and costs, on the 15th day of October, 1884; that the Denver Milling & Mercantile Company had been served with garnishee process on the 10th day of October, 1884, whereby it was commanded to retain possession of money and property in its hands belonging to R. B. Sweetzer, that it might be dealt with according to law. Although the facts are few and easily understood, and the testimony not contradictory, the case is one of some difficulty; the controversy having arisen between the party assuming to be the mortgagee and a third party,—the supposed mortgagor having left the country. All the evidence in support of the mortgage, and the doings, and declarations, and acts of the parties under it, come necessarily from the plaintiff.

The first question to be determined is: Was there a delivery or transfer of the possession of the wheat by the mortgagors to the plaintiff, under the mortgage, previous to the delivery of the wheat by R. B. Sweetzer to the defendant?

Theo. W. Herr, brother of plaintiff, said: "Mrs. Sweetzer turned the wheat over to me." There is no evidence of any agency, or of any authority from the plaintiff to the Sweetzers to turn the wheat over to him, or to the witness receiving it for him. There is no evidence of any attempted transfer of possession to plaintiff. All through the witness says, in speaking of it, "me," or "I," or "we," as if he were the party, or the transaction was one in which he and plaintiff were jointly interested.

Unless the agency of T. W. Herr is presumed, as it was not proved, the discussion of this part of the case might end here. There is no proof of any demand on the part of the plaintiff for possession, or any attempt or intention on the part of the Sweetzers to deliver to him. Assuming that he was the agent, and the proper person to transact the business, we find his statement that Mrs. Sweetzer did turn the wheat over to him was merely his conclusion, and one not warranted by the facts. He appears to have treated her alleged statements of willingness and intention as equivalent to doing the act. It is evident from the evidence that he did not furnish the sacks; did not go after the grain after it was threshed, and receive possession of it; the Sweetzers did not deliver the possession; and that the possession of the four loads in controversy remained in them until delivery to defendant.

In *Cook v. Mann*, 6 Colo. 21, cited and approved in *Wilcox v. Jackson*, 7 Colo. 521, Elbert, *Ch. J.*, said: "The vendee must take the actual possession; and the possession must be open, notorious and unequivocal, such as to apprise the community, or those who are accustomed to deal with the party, that the goods have changed hands and that the title has passed out of the seller and into the purchaser. This must be determined by the vendee using the usual marks or *indicia* of ownership, and occupying that relation to the thing sold which owners of property generally sustain to their own property."

To establish the plaintiff's right to recovery on the ground of a delivery, as claimed by counsel, there should have been positive proof of an actual delivery on the part of the Sweetzers, and an acceptance by plaintiff, either in person or by an authorized agent, and an actual, notorious and unequivocal change of possession. The law upon this point has been positively and clearly asserted by Elbert, *Ch. J.*, in *Cook v. Mann*, *supra*, and by Beck, *Ch. J.*, in *Wilcox v. Jackson*, *supra*, and perhaps in other cases, and is a rule of law that has been almost universally accepted in construing the Statute of Frauds in force in this State. A careful examination of the evidence will make it apparent that the proof in this case fell far short of establishing the necessary facts under the law.

Failing to establish a delivery, acceptance and absolute change of possession of the wheat, plaintiff could only succeed by proof of a legal, valid and existing mortgage of the property at the time of the sale and alleged conversion. The paper relied upon as a conveyance, although, as appears, properly executed by grantors, acknowledged and recorded, contained no mortgagee or grantee. For the protection of purchasers of personal property, and the prevention of fraud by means of fictitious chattel mortgages, the Legislature has wisely required the same formal and solemn execution, acknowledgment and recording of such conveyances as in the conveyance of real estate. And, if authorities are wanting to determine the validity and construction of this class of conveyances, the legality of the instrument in question can readily be determined from decisions in regard to conveyances of real estate and other instruments requiring the same formalities and essentials as are required in chattel mortgages by our Statute.

In 1 Schouler on Personal Property, § 425, after stating the object, intention and necessity of acknowledgment, recording, etc., it is said: "In this aspect, then, the law of chattel mortgages comes to resemble more closely than ever that of real-estate mortgages."

The oldest authority found on the subject is in *Shep. Touch.* 64, where it is said: "Every deed, well made, must be written; *i. e.*, the agreement must be all written before the sealing and delivery of it."

In the case of *Chauncey v. Arnold*, 24 N. Y. 380, there was, as in this case, a mortgage, with no grantee, and the papers so remained with the blank unfilled when produced in court. In delivering the opinion, Denio, *J.*, said: "The question, therefore, is whether the paper in question, defective as it is, by the omission of the name of the plaintiff, as the

party in whose favor it is alleged to have been executed, can nevertheless be sustained as a deed mortgaging the property to him. If we take into consideration only what is written, the paper is wholly without meaning. A transfer to a person not named, or in any way described or designated, is, unconnected with anything else, a mere nullity." Smith, *J.* (concurring), said: "The single question presented upon this appeal is whether the judge at the circuit erred in excluding the mortgage purporting to have been executed by Mrs. Arnold when the same was offered in evidence. I think there can scarcely be any doubt that the decision was entirely correct. The paper called a mortgage was not, in fact, in any sense a deed. It was entirely incomplete. Upon its face it was an imperfect instrument. No mortgagee or obligee was named in it, and no right to maintain an action thereon or to enforce the same was given therein to the plaintiff or any other person. It was *per se* of no more legal force than a simple piece of blank paper. . . . Delivery is essential to the validity of a deed. When the deed is perfect upon its face, possession by the grantee named therein is presumptive evidence of a proper delivery."

In *Drury v. Foster*, 69 U. S. 2 Wall. 24 [17 L. ed. 780], the paper purporting to be a mortgage was left with blanks for the insertion of the mortgagee's name and the sum borrowed, to be filled up by the husband. The court, by *Mr. Justice Nelson*, says: "Second. There could be no acknowledgment of the deed within the requisitions of the statute, until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The act of the *feme covert*, and of the officers, were nullities, and the form of the acknowledgment annexed as much waste paper as the blank mortgage itself, as the time of signing."

In *Preston v. Hull*, 23 Gratt. 600, it is said of a bond executed and delivered without an obligee: "A writing, though executed with all the solemnities of a deed, without such obligee, is a mere nullity. It imposes no liability on the party issuing it. It confers no rights upon him who receives or holds it. It is not simply an imperfect deed. It is no deed at all. It only becomes a deed when the name of an obligee is inserted, and delivery made by the obligor, or by someone legally authorized by him."

In *Upton v. Archer*, 41 Cal. 85, it is said: "When that instrument was left with Webster by the plaintiff, it was not his deed for the obvious reason that there was only one party to it. No one could convert it into his deed, except the plaintiff himself, or someone by him thereto duly authorized, and it could not become the plaintiff's deed until the name of the grantee was inserted." See *Squire v. Whitton*, 1 H. L. Cas. 333.

In *Simms v. Hursey*, 19 Iowa, 274, Dillon, *J.*, decided briefly and broadly, as follows: "Under our statute, as at common law, a grantor, a grantee and a thing to be granted must all be described in a deed; and an instrument in which any of these are omitted is not legally executed, and can convey no title."

In *Will. Real Est.* 877: "A grant, to be

valid must be to a corporation, or to some certain person named, who can take by force of the grant, and hold in his own right, or as trustee." See also *Meighen v. Strong*, 6 Minn. 177 (Gil. 111); *Conover v. Porter*, 14 Ohio St. 450; *People v. Organ*, 27 Ill. 29.

The conclusion is that the paper was no chattel mortgage when, as in this case, the proceeding is against a third party. And this must be so on reason. The object and intention of the Legislature in requiring the same formalities in executing, acknowledging and recording as in mortgages and conveyances of real estate was not to protect the parties to the instrument, but to protect creditors and purchasers from fraud where, as in this State, the chattels are allowed to remain in the possession of the mortgagor until after default in payment. Hence our Statute requires these formalities, and that the instrument be recorded for the purpose of being constructive notice and a protection. In this case the paper could be no notice of anything. If such a paper is to be construed as a conveyance, then only one party is needed, and any failing or dishonest debtor could retain the property by his own act in making and filing a paper. The instrument in this case could only have been made valid between the supposed original parties by the filling up of the blanks and a redelivery by the mortgagors. I am aware that there is a line of cases holding that, where a note and chattel mortgage are executed with a blank for payee and mortgagee, and placed in the hands of an agent to raise money, with verbal authority to fill the blanks and deliver the papers, the transaction is held valid, and to a certain extent they are treated as commercial papers, and probably correctly so. But this is on the theory, and can only be, that the party negotiating the loan is the agent of the maker, but the papers when delivered are complete and the act of the agent in filling the blanks and making delivery is regarded as the act of the maker; but in no case have these papers ever been held valid without parol proof of the direction and authority to fill the blanks and make the delivery. A glance will

show that this does not fall into that line of cases.

The claim of plaintiff's counsel that, if plaintiff did not take title to the wheat under the defective mortgage, he took title by the assignment of the Brackbill mortgage, cannot be sustained. If that mortgage had not become *functus officio* by its terms and the lapse of time, it was made so by the acts of the parties. Their intention, as shown by the evidence, was to cancel those papers and substitute others. That mortgage was not made to secure the note relied upon in this case, but another and different one, which, for all that appears, was canceled and destroyed. It is well settled in this class of cases that the note is the principal thing; the mortgage, collateral or incidental to it. Hence the mortgage was worthless without the production of the note, which was not produced or sought to be recovered upon. Neither can it be successfully held, as contended in argument, that the recital in the second mortgage made to Buell & Buell was notice to the defendant under the Statute. That record could only be notice of that lien. Had defendant been required—which he was not—to see that record, he would not have been aided, as the recital was in regard to a deed which had no existence.

If parties lose the benefits of securities through inattention to, and carelessness in, their business, courts cannot assist them. The actual control and possession of personal property, without notice, is *prima facie* indicative of ownership at law. And where, as in this case, one of two parties must suffer for the wrongful act of the third, the loss must fall upon him who, having the means of preventing it, through carelessness or inattention, allows a purchaser to be misled.

The judgment of the court below should be affirmed.

Richmond and Pattison, CC., concurred.

Per Curiam:

For reasons stated in the foregoing opinion, the judgment of the Superior Court is affirmed.

KANSAS SUPREME COURT.

ATCHISON, TOPEKA & SANTA FÉ R. CO., *Plff in Err.*,

v.

D. C. LINDLEY.

(...Kan....)

*1. Where a shipper of stock was on a

*Head notes by HORTON, Ch. J.

NOTE.—*Volunteer cannot recover for injuries, except where caused by wantonness or malice.*

A person traveling on a train in charge of cattle is a passenger for hire; the consideration for his passage is the service he renders in taking care of the cattle, or it is found in the charges made for shipping the cattle. *Missouri Pac. R. Co. v. Ivey*, 1 L. R. A. 500, 71 Tex. 409. See *Dewire v. Boston & M. R. Co.* 2 L. R. A. 166, note, 148 Mass. 443.

A mere order to one riding on the train, given by the conductor, will not constitute an employment 6 L. R. A.

freight train accompanying two loads of his stock, which were being transported to market, and the train had attached to it a caboose for the shippers on the train to ride in, and, while the train was stopping at a station, the conductor addressed the shipper as follows: "You get on top, and help signal, until the last load of hogs comes up, and we will water them,"—and the shipper voluntarily obeyed the order or

within the scope of the implied authority of the conductor; so a mere order or request by a conductor, to a night watchman about a station who was riding on a freight train to a distant station for his meals, to make a coupling for him, does not constitute an employment. *Georgia Pac. R. Co. v. Propst*, 85 Ala. 203.

For the rule as to assuming risks of employment and its extension to passengers volunteering to assist employes, see *Stringham v. Stewart*, 1 L. R. A. 484, note, 111 N. Y. 123.

direction, and got upon the train moving backward, and while on the top of the train, near to the end of a car, watching a brakeman trying to make a coupling, was severely injured by a sudden forward motion or jerk of the train, without any signal thereof,—*Held*, that as the shipper voluntarily placed himself in a position of known danger, and, as he was not upon the top of the train to look after or care for his stock, the Railroad Company is not liable in damages for his injuries.

2. An examination of the testimony and special findings of the jury does not establish such gross negligence in the case as amounts to wantonness or malice on the part of the Railroad Company or any of its employés.

(December 7, 1889.)

ERROR to the District Court for Sumner County to review a judgment in favor of plaintiff in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Reversed.*

Statement by **Horton, Ch. J.:**

On the 26th day of February, 1887, D. C. Lindley filed his amended petition against the Atchison, Topeka & Santa Fé Railroad Company to recover \$25,000 damages for certain personal injuries received by him on July 16, 1885, at a point upon the railroad between Lawrence and Argentine. On the 21st day of April, 1887, the Railroad Company filed an amended answer, setting up: *first*, a general denial; *second*, contributory negligence; and, *third*, that plaintiff was wrongfully on the train under a stock pass issued to W. T. Lindley, and not to the plaintiff. A copy of the stock-contract pass is as follows:

Atchison, Topeka and Santa Fé Railroad Company.

Live-Stock Contract.

Duplicate.

No. of cars. Initials.

2,128.

at

13,872.

at Perth Station,

July 15, 1885.

Received of James Holland 2 cars of stock (85 head) to be delivered at Kansas City station at special rates, being

_____ dollars per car for horses and mules.

Wfr. _____ " " " " cattle and hogs.

_____ " " " " sheep.

Consigned to G. W. Kefner at Kansas City, Mo., station.

Agreement made between the Atchison, Topeka and Santa Fé Railroad Company, party of the first part, and James Holland, party of the second part, witnesseth that in consideration of the above-named special rates and other valuable considerations (hereby acknowledged), the said party of the second part hereby relieves said party of the first part from the liability of a common carrier in the transportation of said stock, and agrees that such liability shall be only that of a private carrier for hire. (2) And said party of the second part hereby accepts for such transportation the cars provided by said Company, and used for shipment of said stock, and hereby assumes all risk of injury which the animals, or any of them, may receive in consequence of their being wild, unruly or weak, or maiming each other or themselves, or in consequence of heat or suf-

focation or other ill effects of being crowded in the cars, or on account of being injured by the burning of hay, straw or other material used by the owner for feeding the stock, or otherwise; and also all risk of damage or injury or loss whatever which may be sustained by reason of any delay or detention in such transportation, whether occasioned by any mob, strike or threatened violence to person or property from any source, or injury to track or yards, or any or all other causes, whether mentioned or not, and all risk of the escape of any portion of said stock, or loss of or damage from any other cause or thing not resulting from the willful negligence of the agents of said party of the first part. (3) And said party of the second part further agrees that he will load and unload said stock at his own risk, and feed, water and attend to the same at his own expense and risk while it is in the stock yards of the party of the first part awaiting shipment, and while on the cars, or at feeding or transfer points, or where it may be unloaded for any purpose. (4) And it is further agreed that said party of the second part will see that said stock is securely placed in the cars furnished, and that the cars are securely and properly fastened so as to prevent the escape of said stock therefrom. (5) And it is further agreed that, in case the said party of the first part shall furnish laborers to assist in loading and unloading said stock, they shall be subject to the order, and be deemed employés, of said party of the second part while so assisting. (6) And for the consideration aforementioned said party of the second part further agrees that, as a condition precedent to his right to recover any damage for loss or injury to said stock, he will give notice in writing of his claim therefor to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, or from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock. (7) Agents of this Company are not authorized to agree to forward live stock to be delivered at any special time. (8) The evidence that said party of the second part after a full understanding thereof assents to all the conditions of the foregoing contract is his signature thereto.

A. E. Finch, Agent for the Company.

James Holland, Shipper.

Witness: W. E. Keer. (To be other than either signer of the contract.)

Not negotiable.

Notice. Agent will have shipper sign duplicate in copying ink, and take an impression of same before forwarding to general freight agent.

Executed in duplicate.

Form 67. Duplicate.

Atchison, Topeka and Santa Fé R. Co.

Live-Stock Contract.

From Perth station.

To stock shippers, agents and conductors.

(9) On and after May 1st, 1884, the following rules will govern the issuance of passes to men in charge of live stock, and their return. (10) On shipment of horses, mules, cattle, hogs and sheep, belonging to one owner, shippers will be passed on freight train with stock.

and on contracts as follows: (11) on shipment of one (1) car live stock, one (1) man will be carried free one way in charge of stock, and his contract will be authority for conductors to pass him. No return passes will be given on account shipment one (1) car. (12) One (1) man with two (2) to three (3) cars; two (2) men with four (4) to seven (7) cars; three (3) men with eight (8) to twenty (20) cars; four (4) men with twenty-one (21) cars or more, which is the maximum number that will be passed with stock for one owner. (18) The agent at the station where the stock is loaded will enter on the back of the contract in ink, and erase with ink the spaces not used, the name or names of the persons who are actually entitled to pass free with stock, which is the authority for the conductors to accept such, and pass the parties. When no return pass is given, forwarding agent will erase with ink the space provided for return pass. (14) Names entered in pencil will not be accepted by conductors when no person is in charge. Erase all the spaces on the back of the contract. Agents will refuse to enter any names on the contract but those of the owner or employees in charge of stock, without regard to passes required by the number of cars. (15) It is understood that the shippers are passed on freight trains to take care of their stock, and stock contracts, except to return, countersigned as below, are not good on passenger trains. (16) Return passes, good on all trains that carry passengers, will be given to the parties passed with stock on stock contracts only, and will not be accepted unless countersigned and stamped by the general freight agent at Topeka, or by the agent at the station to which stock is contracted. (17) Return passes will not be given unless contracts are presented within ten (10) days from their date, and will be good only when used within three (3) days after being countersigned and stamped. When contract is presented for return trip, conductor of last division will be particular to take up and return it to the general freight agent. (18) Contracts for single car shipments must be taken up on the trip (see note ten) and returned to auditor with ticket collections by conductors of last division. No return pass will be given on account of emigrant outfit. (19) For other rules governing the shipment of live stock, see local tariff. H. C. Barlow, General Freight Agent.

Release.

(20) We, the undersigned, in charge of live stock mentioned in the within contract, in consideration of the free pass granted us by the Atchison, Topeka and Santa Fé Railroad Company, hereby agree that said Company shall not be liable to us for injury or damage of any kind suffered by us while in charge of said stock, or while traveling upon such free pass. Wm. F. Lindley, with two cars, the numbers of which are noted within, July 15th, 1885.

(21) Pass, on freight trains only, Wm. F. Lindley, party in charge accompanying stock. E. A. Finch, Agent.

(22) Only names of parties entitled to pass must be entered, and draw a pen through the blank spaces. Agents will make, and have signed, two copies of contract, giving original
6 L. R. A.

to shipper, and sending duplicate to general freight office.

Atchison, Topeka and Santa Fé Railroad Company. Good for return passes from ——— to ——— for the person or persons named above, if stamped or countersigned by the general freight agent, or agent at delivery station.

Void unless used within three (3) days from date.

Trial had at the May Term of the court for 1887, before the court with a jury. The jury returned a verdict for the plaintiff for \$9,650. The jury also made the following special findings of fact: "(1) After watering the car of hogs on the first section of the train, where did the plaintiff, D. C. Lindley, go? Answer. On the top of the rear of the portion of the train attached to the engine. (2) Where did the plaintiff, D. C. Lindley, first go after getting on top of the train? If towards the engine, how many cars? A. On the second or third car from the rear portion of that portion of the train attached to the engine. (3) For what purpose, if any, did the plaintiff, D. C. Lindley, go to the rear car on the first section of the train after going towards the engine? A. It is not clear to the minds of the jury. (4) What, if anything, did the plaintiff, D. C. Lindley, do after reaching the rear car of the first section, and upon what part of the rear car did he stand? In what direction was he looking? A. Walked to rear end of run-board in center of car, towards the detached portion of the train. (5) What caused the plaintiff, D. C. Lindley, to fall from the car? A. By a sudden forward motion of the train. (6) Was the plaintiff, D. C. Lindley, guilty of negligence in going to end of rear car of the first section of the train? A. Not by reason of going. (7) Did the engineer who was operating the engine at the time of the accident see the plaintiff, D. C. Lindley, on the top of the first section of the train to which the engine was attached, at any time just prior to or at the time of the accident? A. We do not know. (8) Were any of the trainmen on the train under the influence of intoxicating liquor? If so, who? A. We do not know. (9) Were any of the men who were running and operating the train guilty of any negligence at the time of the accident? If yes, in what did it consist? A. Yes; in the hurried manner in which the employees of the said train managed the same. (10) Was the plaintiff, D. C. Lindley, guilty of negligence in going on top of the train at Eudora just prior to the accident? A. No. (11) Who made the coupling at the time of the accident, and was he the head or rear brakeman? A. Guy, the head brakeman. (12) Was the plaintiff, D. C. Lindley, watching the brakemen between cars making the coupling at the time of the accident? A. Yes. (13) Was it part of the duties of the plaintiff, D. C. Lindley, in taking care of the two carloads of stock on the train, to assist the trainmen in the management, running or coupling of the cars on the train, and in making signals to the engineer? A. No. (14) How much was the damage to the plaintiff, D. C. Lindley, on account of expenses while at Kansas City, Mo., and in what do they consist? Answer fully. A. About \$833; doctor bills, nurse and board. (15) Did

the engineer who was operating the engine at the time of the accident, and just prior thereto, have any knowledge that the plaintiff, D. C. Lindley, was on top of the train of cars attached to the engine? A. We do not know. (16) Did the engineer who was operating the engine at the time of the accident to the plaintiff, and just prior thereto, use ordinary care in handling the engine? A. No."

The Railroad Company filed its motion for judgment upon the special findings of the jury, notwithstanding the verdict, and also filed its motion for a new trial. These motions were heard on the 6th day of June, 1887, and taken under advisement until the next term of the court. At the September Term of the court for 1887 the motions were overruled, and judgment was rendered in favor of the plaintiff, and against the Railroad Company, for the sum of \$9,583. The Railroad Company excepted, and brings the case here.

Messrs. George E. Peck, A. A. Hurd, O. J. Wood and Robert Dunlap, for plaintiff in error:

The testimony on behalf of plaintiff was to the effect that the jar in this case was no greater than would occur where the coupling in a train should break. Therefore the evidence was not sufficient to establish negligence in the defendant.

Mitchell v. Chicago & G. T. R. Co. 51 Mich. 236, 12 Am. & Eng. R. R. Cas. 163; *Hayes v. Forty-Second Street & G. S. P. R. Co.* 97 N. Y. 259; *Brown v. Congress & B. Street R. Co.* 49 Mich. 153, 8 Am. & Eng. R. R. Cas. 388.

The conductor was not shown to have any power or authority to employ men to do the train work, or discharge the service required of plaintiff. The Company ought, therefore, not to be bound by any such unauthorized direction given by the conductor, nor be held liable for an injury which resulted from the awkwardness of the plaintiff.

It is a liability which the Railroad Company could in no manner anticipate.

Everhart v. Terre Haute & I. R. Co. 78 Ind. 292, 4 Am. & Eng. R. R. Cas. 602-604; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112; *Flower v. Pennsylvania R. Co.* 69 Pa. 210.

A custom to do a negligent act and take risks could not excuse the plaintiff in the doing of a negligent act.

Lawson, Usages and Customs, 328, 329; *Berg v. Chicago, M. & St. P. R. Co.* 50 Wis. 419, 2 Am. & Eng. R. R. Cas. 70.

The assent or direction of the conductor does not render the act of the plaintiff in assuming this perilous position any the less negligent.

Baltimore & P. R. Co. v. Jones, 95 U. S. 439 (24 L. ed. 506); *Hickey v. Boston & L. R. Co.* 14 Allen, 433; *Downey v. Hendrie*, 46 Mich. 501; *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21; *Lehigh Valley R. Co. v. Greiner*, 4 Cent. Rep. 898, 118 Pa. 607; *McCorkle v. Chicago, R. I. & P. R. Co.* 61 Iowa, 555; *Rucker v. Missouri Pac. R. Co.* 61 Tex. 499; *Lindsey v. Chicago, R. I. & P. R. Co.* 64 Iowa, 407; *Bon v. Railway Pass. Assur. Co.* 56 Iowa, 664; *Player v. Burlington, C. R. & N. R. Co.* 62 Iowa, 723; *Higgins v. Cherokees R. Co.* 73 Ga. 150, 151; *Robertson v. New York & E. R. Co.* 22 Barb. 91; *Hoar v. Maine Cent. R. Co.* 70 Me. 65; *Houston* 6 L. R. A.

& T. O. R. Co. v. Clemmons, 55 Tex. 88; *Blair v. Grand Rapids & I. R. Co.* 60 Mich. 124; *Norfolk & W. R. Co. v. Ferguson*, 79 Va. 241; *Ward v. Central Park R. Co.* 11 Abb. Pr. N. S. 411; *Quinn v. Illinois Cent. R. Co.* 51 Ill. 495; *Doggett v. Illinois Cent. R. Co.* 34 Iowa, 284; *Dougan v. Champlain Transp. Co.* 6 Laus. 480, 435, 436; *Harris v. Hannibal & St. J. R. Co.* 5 West. Rep. 412, 89 Mo. 233; *Wallace v. Western N. O. R. Co.* 98 N. O. 494; *Smith v. Richmond & D. R. Co.* 99 N. C. 241; *Camden & A. R. Co. v. Hooley*, 99 Pa. 592; *Adams v. Lancashire & Y. R. Co.* L. R. 4 C. P. 742; *Siner v. Great Western R. Co.* L. R. 4 Exch. 117; *Blitch v. Central R. Co.* 76 Ga. 333; *Todd v. Old Colony & F. R. Co.* 3 Allen, 18; *Smotherman v. St. Louis, I. M. & S. R. Co.* 29 Mo. App. 265.

The authority of the conductor of this stock or freight train was necessarily more limited than that of the conductor of a regular passenger train, and notice of his limited authority will be implied.

Eaton v. Delaware, L. & W. R. Co. 57 N. Y. 392, 393.

Mr. Charles Willsie, for defendant in error:

The same degree of care was demanded of the railroad company as if plaintiff had been a passenger for hire in any other way than as a shipper.

Jacobus v. St. Paul & C. R. Co. 20 Minn. 125; *Ohio & M. R. Co. v. Nickless*, 71 Ind. 271; *Indianapolis & St. L. R. Co. v. Horst*, 93 U. S. 291 (23 L. ed. 898); *Ohio & M. R. Co. v. Selby*, 47 Ind. 471.

Drovers in charge of stock on the train are at all times under the direction of the conductor, who is, above everybody else, supposed to know where to direct and how to direct shippers.

Jacobus v. St. Paul & C. R. Co. 20 Minn. 125, *Caldwell v. Murphy*, 1 Duer, 233; *Spooner v. Brooklyn City R. Co.* 54 N. Y. 230; *Creed v. Pennsylvania R. Co.* 86 Pa. 139; *Dunn v. Grand Trunk R. Co.* 58 Me. 187; *Lucas v. Milwaukee & St. P. R. Co.* 53 Wis. 41; *Meesel v. Lynn & B. R. Co.* 8 Allen, 234.

He is the animating and controlling spirit of the mechanism employed, and his standard of duty is according to the risks he requires, or knowingly permits, a shipper to take.

Indianapolis & St. L. R. Co. v. Horst, supra.

Negligence is not imputable to a person for failing to look for danger, when from the surrounding circumstances the person sought to be charged with it had no reason to suspect that danger was to be apprehended.

Moulton v. Aldrich, 28 Kan. 300.

If the engineer started up that engine and train without a signal so to do, jerked that train in two, and hurt Lindley, as was done, the Railroad Company is estopped from saying that the engineer was not guilty of gross and willful negligence.

Kansas Pac. R. Co. v. Peavey, 29 Kan. 180.

But giving the defendant all it can ask in the premises, then Lindley's act was merely a condition, and not a judicial cause of the injury; which is not a bar to a recovery, even though the plaintiff was guilty of negligence.

Thirteenth & Fifteenth Street Pass. R. Co. v. Boudrou, 92 Pa. 475, 37 Am. Rep. 707.

Assuming that the conductor had nothing to do about Lindley going on top of the train, and that it was dangerous for him, under any circumstances, to be on the top and end of the car, it was no excuse for the Railroad Company to recklessly injure him.

Liartfield v. Roper, 21 Wend. 615; *Vandegrift v. Rediker*, 22 N. J. L. 185; *Lafayette & I. R. Co. v. Adams*, 26 Ind. 76; *Indianapolis & C. R. Co. v. McClure*, 26 Ind. 870; *Mulherrin v. Delaware, L. & W. R. Co.* 81 Pa. 866; *Norris v. Litchfield*, 85 N. H. 271; *Daley v. Norwich & W. R. Co.* 26 Conn. 571; *Chicago & N. W. R. Co. v. Donahue*, 75 Ill. 106; *Litchfield Coal Co. v. Taylor*, 81 Ill. 590; *Clarton v. Lexington & B. S. R. Co.* 18 Bush, 636; *Cooley, Torts*, 674; *Brown v. Hannibal & St. J. R. Co.* 50 Mo. 461; *Kerwhaker v. Cleveland, C. & C. R. Co.* 8 Ohio St. 172; *Kansas Pac. R. Co. v. Pointer*, 14 Kan. 37; *Union Pac. R. Co. v. Rollins*, 5 Kan. 176; *Pacific R. Co. v. Houts*, 12 Kan. 328; *Burns v. Bellefontaine R. Co.* 50 Mo. 139.

The injury was not the consequence of Lindley's position on the train, but the consequence of the jerking of the train; and to determine whether an act is negligent, its character and all of its qualities, and all the circumstances under which it was done, must be known and considered.

Wood v. Chicago, M. & St. P. R. Co. 51 Wis. 196. See also *Philadelphia & R. R. Co. v. Derby*, 55 U. S. 14 How. 468 (14 L. ed. 502); *The New World v. King*, 87 U. S. 16 How. 469 (14 L. ed. 1019); *Dunn v. Grand Trunk R. Co.* 58 Me. 187; *Tuller v. Talbot*, 23 Ill. 357; *Pittsburg, C. & St. L. R. Co. v. Thompson*, 56 Ill. 138; *Toledo, W. & W. R. Co. v. Owen*, 43 Ind. 405; *Doggett v. Illinois Cent. R. Co.* 34 Iowa, 284; *Colegrove v. New York & N. H. R. Co.* 20 N. Y. 492; *McAunich v. Mississippi & M. R. Co.* 20 Iowa, 845; *Clark v. Eighth Avenue R. Co.* 36 N. Y. 135, 93 Am. Dec. 495; *Werle v. Long Island R. Co.* 98 N. Y. 650; *Kentucky Cent. h. Co. v. Dilla*, 4 Bush, 593; 1 Lacey, Dig. of Railway Dec. 418; 2 Wood, Railway Law, 1112, 1121; *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. R. Cas. 10; *Topeka City R. Co. v. Higgs*, 89 Kan. 875; *St. Joseph & W. R. Co. v. Wheeler*, 85 Kan. 190; *Cincinnati, W. & M. R. Co. v. Peters*, 80 Ind. 168, 6 Am. & Eng. R. R. Cas. 137; *Lake Shore & M. S. R. Co. v. Brown*, 11 West. Rep. 800, 123 Ill. 162, 31 Am. & Eng. R. R. Cas. 61; *McGee v. Missouri Pac. R. Co.* 10 West. Rep. 282, 92 Mo. 208, 81 Am. & Eng. R. R. Cas. 6; *Rucker v. Missouri Pac. R. Co.* 61 Tex. 499, 21 Am. & Eng. R. R. Cas. 245, 249 note.

If the Company's employes directed or permitted passengers to occupy unusual places on the train, the Company is held to the utmost care in avoiding injuries to passengers.

Allender v. Chicago, R. I. & P. R. Co. 43 Iowa, 276, 14 Am. R. Rep. 443.

Even if Lindley was negligent in standing on the end of the car, the employes knowing it, they should have taken care to prevent an injury, and a failure to do so renders the Company liable.

Houston & T. C. R. Co. v. Smith, 52 Tex. 178; *Cleveland, C. & C. R. Co. v. Crawford*, 24 Ohio St. 631, 7 Am. R. Rep. 172; *Pennsylvania R. Co. v. Werner*, 89 Pa. 59; *Mark v. St. Paul, M. & M. R. Co.* 80 Minn. 493

4 L. R. A.

Horton, Ch. J., delivered the opinion of the court:

This was an action by D. C. Lindley against the Atchison, Topeka & Santa Fé Railroad Company for injuries received while traveling on a stock train, and resulted in a verdict against the Company for \$9,850. McCambridge was the conductor of the train, Allen was the engineer and Guy the head brakeman. Lindley was a live-stock dealer, fifty years of age, residing in Albion, Harper County, in this State. He had shipped live stock for thirty-four years. The alleged cause of action occurred on the 16th day of July, 1885. Lindley had shipped on the defendant's train one carload of hogs and one carload of cattle, from Perth Station, in Sumner County, to be transported to Kansas City, Mo., and was on top of one of the stock cars just before his injuries. He arrived at Eudora, a station between Topeka and Argentine, between 5 and 6 o'clock in the morning. The train consisted of forty-five cars, loaded with stock. Soon after arriving at Eudora, eight or ten of the cars, with the caboose, broke or separated from the main train.

The petition alleged, among other things, that "the conductor then in charge of the train, totally disregarding the safety of human life, and being grossly careless of the safety of the passengers on the train, and well understanding the culpably negligent manner in which the engineer was handling the train, carelessly and negligently asked, directed and induced the plaintiff to climb up on the top of the cars, and signal for the front portion of the train to be backed up so as to have the rear and front portion of the train coupled together, and then signal the cars containing hogs needing water in the hind part of the train, so that the conductor could water them. That the front part of the train was then backed up to the hind portion of the train; and while the brakeman was between the cars making the coupling, and while plaintiff was on top of the cars, looking in an opposite direction from the engineer, the latter, then and there operating the engine of the train, did then and there, with gross and wanton negligence, and with utter disregard for human life, without any warning suddenly throw open the throttle of the engine, and turn on all the steam power possible, so that the engine started up with the cars with so much force and power that the life of any human being upon the top of the train was unsafe. That the train started up so suddenly, and with such a tremendous jerk, that it threw the plaintiff clear off of his feet, and pitched him head foremost down upon the railroad track, where he would have been run over and mashed, if he had not been snatched from his perilous condition."

The evidence upon the part of Lindley tended to show that when the train stopped at Eudora he got out of the caboose with McCambridge, the conductor, and T. V. Borland, another shipper having stock upon the train; that they walked up to the water tank; that the engine and three carloads of hogs had passed the tank; that the plaintiff then asked the conductor if he would not back up the train, and water the three cars that had passed the tank; that the conductor said, "No; the hogs are not yours;" that, finally, the train was backed up to water or shower the hogs; that the conduct-

or, who was standing at the water-tank, looking down at Lindley and Borland, said, "You fellows stand down there, and, when a car of cattle or horses come along that you don't want watered, throw down your hands, and I will turn the water off; and when you come to a carload of hogs, throw up your hands, and I will shower them;" that Lindley and Borland did as the conductor suggested; that about a dozen or fourteen carloads of hogs were then watered; that, when the last carload of those cars was watered, the conductor looked down again, and said to Lindley and Borland, "You fellows get up on top, and help signal until the last carload of hogs comes up, and we will water them;" that Lindley and Borland got upon the top of the train as requested; that Lindley got upon the hind end, but stepped from there to a car near the engine; that Borland remained on the end car; that the train then backed down to where the detached portion of it was; that, when the train got down to the detached cars, it stopped quite a long time; that Lindley had curiosity enough to walk down where Borland was; that at this time the train was standing still; that, when the plaintiff came near to where Borland was, the brakeman was in the act of coupling the cars; that the plaintiff saw Borland looking down at him; that plaintiff walked up towards Borland, and got near the end of the car; that just at that moment Borland threw up his hands, and said, "Look out!" that the crash then came; that the coupling-pin broke, and the cars separated; that Lindley fell off, and was severely bruised and injured.

The court charged the jury, among other things, as follows: "If you find, from the evidence, that the plaintiff went upon the top of the train at the request of the conductor of the train to assist the trainmen in giving signals to the engineer to back up the train for the purpose of coupling onto the part which had been detached, you would be justified in finding that he went upon the train voluntarily, as the conductor, in so doing, would be acting beyond the scope of his employment."

The jury also made the following findings of fact: "Who made the coupling at the time of the accident, and was he the head brakeman? Guy, the head brakeman. Was the plaintiff, D. C. Lindley, watching the brakeman between the cars making the coupling at the time of the accident? Yes. Was it a part of the duties of the plaintiff, D. C. Lindley, in taking care of the two carloads of stock on the train, to assist the trainmen in managing, running or coupling the cars on the train, and in making signals to the engineer? No."

The plaintiff contends that he was thrown or pitched off of the top of the car by a sudden forward motion of the train; and in this he is supported by the findings of the jury. The defendant insists that Lindley fell off the car while the slack of the train was running out.

The important question in the case is whether, under the allegations of the petition, the testimony of the plaintiff, the instructions of the court and the special findings of the jury, the plaintiff is entitled to recover. We think not. Lindley knew, according to his own testimony, the places of danger and safety upon the train. He was under no obligation to climb

upon the top of the train, and signal the conductor or any other employé. "Out of curiosity," he walked down to the end of the car, where the brakeman was coupling the train. At the time of the accident, he was watching the brakeman coupling the cars. He assumed a position on the top of the cars which he knew was peculiarly dangerous and perilous. It was not necessary for him to be there to care for his stock, or as a passenger. The order or direction of the conductor to him "to go on top of the cars and help signal" was entirely without the routine of the conductor's duties; and, as it was voluntarily obeyed by Lindley, it could not fasten any liability on the Railroad Company. If he acted as an employé or brakeman, it was of his own volition. He occupied merely the position of a passenger who voluntarily assumed a very dangerous position to make signals at the request of the conductor, as a matter of accommodation.

In *McCorrle v. Chicago, R. I. & P. R. Co.* 61 Iowa, 555, it is said: "Plaintiff got off a cattle train at night to examine his cattle, when the train stopped for that purpose, and, not hearing the signal to start, attempted to get on a freight car after the train had started, because he supposed, from the 'lively rate' the train was moving, he would not be able to get on the 'caboose,' at the rear of the train, which had been provided for passengers. At the time he attempted to get on the freight car, he had a 'prod-pole,' and a lantern in his hand. His foot caught in a hole caused by a defective plank in the bridge over which the train was passing, and he fell from the car and was injured. Held, that he was guilty of contributory negligence, and not entitled to recover."

In *Pennsylvania R. Co. v. Langdon*, 92 Pa. 21, it is said: "On the other hand, should a passenger insist upon riding upon the cow-catcher, in the face of a rule prohibiting it, and, as a consequence, should be injured, I apprehend it would be a good defense to an action against the company, even though the negligence of the latter's servants was the cause of the collision or other accident by which the injury was occasioned; and if the passenger, thus recklessly exposing his life to possible accidents, were a sane man, more especially if he were a railroad man, it is difficult to see how the knowledge, or even the assent, of the conductor to his occupying such a position could affect the case. There can be no license to commit suicide. It is true, the conductor has the control of the train and may assign passengers their seats; but he may not assign a passenger to a seat on the cow-catcher, a position on the platform or in the baggage car. This is known to every intelligent man, and appears upon the face of the rule itself. He is expressly required to enforce it, and to prohibit any of the acts referred to, unless it be riding upon the cow-catcher, which is so manifestly dangerous and improper that it has not been deemed necessary to prohibit it. We are unable to see how a conductor, in violation of a known rule of the Company, can license a man to occupy a place of danger so as to make the Company responsible."

In *Lehigh Valley R. Co. v. Greiner*, 113 Pa. 600, 4 Cent. Rep. 898, it is said: "Where one negligently, and without excuse places him-

self in a position of known danger, and thereby suffers an injury at the hands of another, either wholly or partially by means of his own act, he cannot recover damages for the injury sustained. The contributory negligence which prevents recovery for an injury, however, must be such as co-operates in causing the injury, and without which the injury would not have happened."

In *Little Rock & Ft. S. R. Co. v. Miles*, 40 Ark. 298, 13 Am. & Eng. R. R. Cas. 10, it is said: "But there are certain portions of every railroad train which are so obviously dangerous for a passenger to occupy, and so plainly not designed for his reception, that his presence there will constitute negligence as a matter of law, and preclude him from claiming damages for injuries received while in such position. A passenger who voluntarily and unnecessarily rides upon the engine or the tender, or upon the pilot or bumper of the locomotive, or upon the top of a car, or upon the platform, cannot be said to be in the exercise of that caution and discretion which the law requires of all persons who are of full age, of sound mind and ordinary intelligence," etc.

In *Flower v. Pennsylvania R. Co.* 69 Pa. 210, an engine with one freight-car had been detached from a train, and was stopped at a water station. The fireman requested a small boy, standing near, to put in the hose and turn on the water. While he was clinging on the tender to do this, the other freight cars belonging to the train came down without a brakeman, and struck the car behind the tender. The boy fell, and was crushed to death. The court held that the company owed no special duty to the boy, saying: "The case turns wholly on the effect of the request of the fireman, who was temporary engineer. Did that request involve the company in the consequences? . . . The fireman, through his indolence or haste, was the cause of the boy's loss of life. Unless his act can be legally attributed to the company. It is equally clear the company was not the cause of the injury. The maxim, *qui facit per alium facit per se*, can only apply where there is an authority, either general or special. It is not pretended there was a special authority. Was there a general authority which would comprehend the fireman's request to the boy to fill the engine tank with water? This seems to be equally plain without resorting to the evidence given, that engineers are not permitted to receive anyone on the engine but the conductor and fireman or superintendent; that it is the duty of the fireman to supply the engine with water; that he has no power to invite others to do it, and can leave his post only on a necessity."

In *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 [24 L. ed. 506], Jones was one of a party of men employed by a railroad company in constructing and repairing its roadway. They were usually conveyed by the company to and from the place where their services were required, and a box-car was assigned to their use. Mr. Justice Swayne, delivering the opinion of the court, said: "The plaintiff had been warned against riding on the pilot, and forbidden to do so. It was next to the cow-catcher, and obviously a place of peril, especially in case of collision. There was room for him in the box-

car. He should have taken his place there. He could have gone into the box-car in as little, if not less, time than it took to climb to the pilot. The knowledge, assent or direction of the company's agents as to what he did is immaterial. If told to get on anywhere, that the train was late, and that he must hurry, this was no justification for taking such a risk. As well might he have obeyed a suggestion to ride on the cow-catcher, or put himself on the track before the advancing wheels of the locomotive. The company, though bound to a high degree of care, did not insure his safety. He was not an infant, nor *non compos*. The liability of the company was conditioned upon the exercise of reasonable and proper care and caution on his part. Without the latter, the former could not arise. He and another who rode beside him were the only persons hurt upon the train. All those in the box-car, where he should have been, were uninjured. He would have escaped also if he had been there. His injury was due to his own recklessness and folly. He was himself the author of his misfortune. This is shown with as near an approach to a demonstration as anything short of mathematics will permit."

In *Georgia Pac. R. Co. v. Propst*, 83 Ala. 518, it was decided that "a railroad company is liable, as principal, for injuries received by a person who was employed by the conductor of a freight train as a brakeman during the trip, while acting under the orders of the conductor in coupling cars; but not if the person so acting and injured was only a passenger who was not employed by the conductor, nor under any obligation to obey his orders." In the opinion rendered by Chief Justice Stone it was said that, "so far as this count informs us, the plaintiff was a mere passenger on the train; and, so far as the right to control or direct the movements of the plaintiff is shown in this count, the conductor would have had as much authority over any other passenger, or even a bystander, as he had over him. Such order or direction, as averred, is entirely without the routine of the conductor's duties."

In *Georgia Pac. R. Co. v. Propst*, 85 Ala. 203, the conductor addressed the plaintiff as follows: "Will, come here, and make this coupling for me;" and the plaintiff was injured in conforming to this order or request. The court said such an order or direction could not fasten a liability on the railroad corporation. See also *Gilliam v. South & North Ala. R. Co.* 70 Ala. 268; *Howard v. Kansas City, F. S. & G. R. Co.* 41 Kan. 403.

We are referred to *Indianapolis & St. L. R. Co. v. Horst*, 98 U. S. 291 [23 L. ed. 898], as decisive in favor of the recovery of the plaintiff. That case decides that a shipper accompanying his stock on the train is entitled to the rights of a passenger, but in many particulars widely differs from this. In that case the shipper was commanded by the conductor to get out of the caboose, and go on top of the train, because the caboose was about to be detached. The shipper had no choice but to obey, or leave his stock to go forward without anyone to accompany or take care of them. In this case there was a caboose accompanying the train, where the plaintiff might have ridden in safety. He did not go upon the top of the train to ac-

company his stock, or to take care of them. He went, as before stated, merely to comply with the order or request of the conductor to assist in signaling the train. The other cases referred to by the plaintiff are not contrary, we think, to the law as before declared.

In answer to one of the questions, the jury stated that the plaintiff was not "guilty of negligence in going on top of the train at Eudora just prior to the accident." This finding of the jury, however, is not conclusive. If the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his favor, so that a verdict for the plaintiff, if one should be returned, would be set aside, the court may properly direct a verdict for the defendant without submitting the evidence to the jury.

In *Atchison, T. & S. F. R. Co. v. Plunkett*, 25 Kan. 188, the jury found that Plunkett, at the time of his injuries, was in the exercise of reasonable and ordinary care. This finding was not considered sufficient to authorize the verdict, in view of the testimony and the other findings. *Mr. Justice Valentine*, in that case, said: "If the findings in detail contradict the general findings we may order the judgment to be rendered in accordance with the findings in detail, and wholly ignore the general findings. For instance, where a question of negligence arises in the case, the jury cannot be allowed to say conclusively, after finding certain special facts, that these facts constitute negligence, when in fact and manifestly they do not constitute negligence."

Finally, it is claimed that, although Lindley

might have been guilty of contributory negligence, he is entitled to recover because the conductor and engineer of the Railroad Company were guilty of gross negligence. Neither the findings of the jury nor the testimony introduced in the case establish that the Company or any employé was guilty of such gross negligence as amounted to wantonness. *Southern Kansas R. Co. v. Rice*, 38 Kan. 893; *Kansas Pac. R. Co. v. Whipple*, 39 Kan. 531.

Allen, the engineer, testified that the fireman signaled him to stop. Bradshaw, the fireman, testified that Guy, the head brakeman, signaled him. The jury found that the engineer did not see the plaintiff on top of the train just prior to the accident; therefore he was not actuated either by gross negligence or malice towards him or anyone else. The conductor did not give the engineer the signal to move forward. The jury, in returning their answers about the negligence of the employes of the train, found as follows: "Were any of the men who were running or operating the train guilty of any negligence at the time of the accident? If yes, in what did it consist? A. Yes; in the hurried manner in which the employes of the train managed the same. Q. Did the engineer who was operating the engine at the time of the accident to the plaintiff, and just prior thereto, use ordinary care in handling the engine? A. No."

These answers do not tend to show malice or gross negligence.

The judgment of the District Court will be reversed, and the cause remanded for a new trial; all the Justices concurring.

OREGON SUPREME COURT.

CORT, *Appt.*,

v.

LASSARD *et al.*, *Respts.*

(....Or....)

*1. Where a contract stipulates for special, unique or extraordinary per-

*Head notes by LORD, J.

NOTE.—*Contracts for services involving special merit and skill.*

As trade and commerce have increased, the necessities for the exercise of equity jurisdiction to decree a specific performance have increased; and the discretion of courts has led to some confusion and discrepancies in the decisions. *Marsh v. Blackman*, 50 Barb. 332. See *Phyre v. Wardell*, 2 Edw. Ch. 47; *Wedgwood v. Adams*, 6 Beav. 605; *Hall v. Warren*, 9 Ves. Jr. 606; *Bennett v. Smith*, 10 Eng. L. & Eq. 272; *Gibson v. Goldsmid*, 27 Eng. L. & Eq. 588; *Hooper v. Brodrick*, 11 Sim. 47; 2 Story, Eq. Jur. § 724, note 1.

In the nature of things that which is lawful to tender on the one hand is lawful to demand on the other. *Carpenter v. Atherton*, 28 How Pr. 812.

Equity will not interfere to enforce part of a contract, unless that part is clearly severable from the remainder. *Blanchard v. Detroit, L. & L. M. R. Co.* 31 Mich. 58, 18 Am. Rep. 153; *Port Clinton R. Co. v. Cleveland & T. R. Co.* 13 Ohio St. 544; *Baldwin v. 6 L. R. A.*

sonal services, such as involve special merit, skill, knowledge or ability, so that, in case of default, the same services could not be easily obtained from others, nor be compensated in damages at law, a court of equity would be warranted in applying its preventive remedy by injunction. Otherwise, if such service were ordinary, and without special merit, and such as could be easily supplied without much difficulty or expense.

2. The principle is that contracts for

Society for Diffusion of Useful Knowledge, 9 Sim. 393; *Sanquillo v. Benedetti*, 1 Barb. 815; *Dodd v. Seymour*, 21 Conn. 470; *Waters v. Taylor*, 15 Ves. Jr. 10-25.

When equity will not enforce specific performance.

A contract for the personal services of an adult, as a general thing, is a matter for courts of law; and, for a violation of it, the remedy is in damages, and a specific performance will not be enforced. *Hamblin v. Dinnerford*, 2 Edw. Ch. 533; *Halght v. Badgley*, 15 Barb. 501. See *Kemble v. Kean*, 6 Sim. 833; *Clark's Case*, 1 Blackf. 122; *Smith v. Gould*, 2 Ld. Raym. 1274; *Rutland Marble Co. v. Ripley*, 77 U. S. 10 Wall. 339 (19 L. ed. 955); *Cooper v. Pena*, 21 Cal. 408; *Randall v. Latham*, 36 Conn. 48; *Richmond v. Dubuque & S. C. R. Co.* 33 Iowa, 442; *Ford v. Jermon*, 6 Phila. 6; *Palmer v. Scott*, 1 Russ. & M. 201; *Mair v. Himalaya Tea Co. L. R. 1 Eq. 411.*

This court cannot decree a specific performance of a contract to perform at a theater; the only re-

such services are personal and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate in damages for their breach.

(December 9, 1899.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County dismissing his bill filed to enjoin defendants from rendering services as acrobats to a rival theater manager in breach of their contract with plaintiff. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Sears & Beach for appellant.

Mr. C. H. Hewitt for respondents.

Lord, J., delivered the opinion of the court: This is a suit wherein the plaintiff, who is a theatrical manager, seeks to enjoin and prevent the defendants, who are acrobats, from performing at a rival theater in the same place.

The plaintiff alleges, among other things, that the plaintiff and defendants entered into a contract whereby it was agreed that the defendants were to perform as acrobats, exclusively for the plaintiff, during a period of six weeks, at a salary of \$60 per week, etc.; that the plaintiff has performed all the conditions of his said contract, and gone to large expense in advertising, etc., and would have derived large emoluments from the performances of the defendants, which are alleged to be unique and attractive; that said defendants, after performing for the plaintiff for the space of three weeks, refused to perform longer, and engaged themselves to perform as acrobats at another theater mentioned, in said city; and that said

performance of the said defendants will attract large crowds, etc., and will largely diminish, if permitted to be given, the receipts of the plaintiff, and cause an irreparable loss, etc., and diminish the attractions of his said theater, etc.; that the said defendants are entirely impetunious, and unable to respond to an action for a breach of the contract, etc. The answer denies nearly all the material allegations, but admits the hiring, etc., and then avers affirmatively that the plaintiff failed to fulfill his part of the contract, etc., and that the plaintiff discharged them, etc.; all of which was put in issue by the reply.

Upon all the issues presented by the pleadings, the finding of the court was favorable to the plaintiff, with this exception: "That the performance of the said defendants was not of an unique or unusual character, but that of an ordinary acrobat and tumbler, which could have been easily supplied, with little or no delay or expense; and that said service was of a common and ordinary character, and not such as could be enjoined in equity, for a breach of contract to perform," etc. As a result, the court found, as a conclusion of law, that the plaintiff was not entitled to any relief in equity, and that his suit be dismissed. The contention of counsel for the plaintiff is to this effect: (1) That it is immaterial whether the performance is unique, or involves special knowledge or skill; and (2) that the finding is contrary to the evidence, which will show that the performance was unique and unusual. In this case, there is no negative clause in the contract; but the suit, as decided by the court, assumes and admits that such a stipulation is not a pre-

He if it could give would be to restrain the actor from performing elsewhere; but this would leave the positive part of the agreement untouched. *Daly v. Smith*, 49 How. Pr. 158, 6 Jones & S. 167; *Hayes v. Willho*, 11 Abb. Pr. N. S. 174.

A court of equity will not enforce the specific performance of an agreement to sing in concerts, operas, etc. *Sanquircio v. Benedetti*, 1 Barb. 316; *Mapleson v. Del Puente*, 13 Abb. N. C. 146. But see *Lumley v. Wagner*, 1 De G. M. & G. 604.

Whether any master could be found, possessing the qualifications necessary to decide whether a singer performed his contract to sing,—*quere*. *Robertson v. Pullions*, 9 Barb. 130.

When equity will interfere by injunction.

Equity will not hesitate to interfere by injunction to prevent the violation of a negative stipulation, where the terms and nature of the contract are such as to justify its interference. *Hahn v. Concordia Society*, 42 Md. 465.

An action will lie by an employer against his employé to prevent the employé from rendering his services to any other person than his employer when by so doing irreparable injury will be caused; although the contract does not contain the negative clause. *Daly v. Smith*, 6 Jones & S. 166, 49 How. Pr. 157. See *Butler v. Galletti*, 21 How. Pr. 465; *De Pol v. Sohike*, 7 Robt. 28.

The inadequacy of the legal remedy is the sole criterion for interference by injunction to restrain the violation of contracts for personal services. *California Bank v. Fresno Canal & I. Co.* 53 Cal. 201; *Smith v. McElwain*, 57 Ga. 247; *Hahn v. Concordia Society*, 42 Md. 460; *W. U. Teleg. Co. v. Western & A. R. Co.* 8 Baxt. 54; *Crutchfield v. Wason Car Works*, 8 Baxt. 242; *Manhattan Mfg. & F. Co. v. 6 L. R. A.*

New Jersey Stock Yard & M. Co. 23 N. J. Eq. 161; *Gallagher v. Fayette Co. R. Co.* 38 Pa. 102; 3 Pom. Eq. Jur. 471.

Services which involve the exercise of powers of mind, which, in many cases, as of writers and performers, are purely and largely intellectual, may form a class in which the court will interfere; such services are generally individual and peculiar. They exist in nature or in degree, with some modifications of character or expression, in the one person. *Fredricks v. Mayer*, 13 How. Pr. 568, 1 Bosw. 231.

Defendant, having contracted to perform at plaintiff's theater, at a fixed compensation, for a certain time, and not to perform elsewhere during that time, might be restrained by injunction from carrying out an agreement to perform elsewhere, there being no demand in the complaint for a decree of specific performance, and no uncertainty in the contract as to time, place or substance. *Hayes v. Willho*, 11 Abb. Pr. N. S. 175. See *Montague v. Flockton*, L. R. 16 Eq. 189.

Courts will not restrain where they cannot enforce performance.

Injunction is only granted as auxiliary to the execution of the decree; and where the decree itself cannot be enforced the court will not attempt to restrain, but will leave the party complaining of the breach to his remedy at law. *Fredricks v. Mayer*, 13 How. Pr. 568, 1 Bosw. 231. See *Morris v. Colman*, 18 Ves. Jr. 437; *Clarke v. Price*, 3 Wils. Ch. 157; *Kemble v. Kean*, 6 Sim. 388; *Baldwin v. Society for Diffusion of Useful Knowledge*, 9 Sim. 386. But see, *contra*, *W. U. Teleg. Co. v. Union Pac. R. Co.* 1 McCrary, 558; *W. U. Teleg. Co. v. St. Joseph & W. R. Co.* 1 McCrary, 565; *Singer S. M. Co. v. Union B. H. & E. Co.* 1 Holmes, 253.

requisite to the exercise of jurisdiction, but that it is enough to warrant equity to interfere if the contract alleged to have been broken stipulated for services which are unique and extraordinary in their character, or which involve special skill or knowledge or ability, and provide that such services were to be rendered at a particular place or places, and for a specified time.

The question whether a court of equity will apply the preventive remedy of injunction to contracts for the services of professional workers of special merit, or leave them to the remedy at law for damages, has been the subject of much discussion, and the existence of the jurisdiction fully established. It is not, perhaps, possible, nor is it necessary, to reconcile the decisions; but the ground of the jurisdiction, as now exerted, rests upon the inadequacy of the legal remedy.

In an early English case, where the jurisdiction was invoked to prevent the actor Kean from performing at another theater upon a contract for personal services, at which there was a stipulation to the effect that he should not perform at any other theater in London during the period of his engagement, it was held, as the court could not enforce the positive part of the contract, it would not restrain by injunction a breach of the negative part. *Kemble v. Kean*, 6 Sim. 338.

But this case was expressly overruled in *Lumley v. Wagner*, 1 D. G. M. & G. 604, upon a like contract for personal services, to sing, during a certain period of time, at a particular theater, and not to sing elsewhere, without written authority, upon the ground that the positive and negative stipulations of such contract formed but one contract, and that the court would interfere to prevent the violation of the negative stipulation, although it could not enforce the specific performance of the entire contract. In delivering this opinion, among other things, the Lord Chancellor said: "The agreement to sing for the plaintiff, during three months, at his theater, and during that time not to sing for anybody else, is not a correlative contract. It is, in effect, one contract; and though, beyond all doubt, this court could not interfere to enforce the specific performance of the whole of this contract, yet, in all sound construction, and according to the true spirit of the agreement, the engagement to perform for three months at one theater must necessarily exclude the right to perform at the same time at another theater. It was clearly intended that J. Wagner was to exert her vocal abilities to the utmost to aid the theater to which she agreed to attach herself. I am of opinion that if she had attempted, even in the absence of any negative stipulation, to perform at another theater, she would have broken the spirit and true meaning of the contract, as much as she would now do with reference to the contract into which she has actually entered."

In *Montague v. Flockton*, L. R. 16 Eq. 189, it was held that an actor who enters into a contract to perform for a certain period at a particular theater may be restrained by injunction from performing at any other theater during the pendency of his engagement, notwithstanding that the contract contains no negative

clause restricting the actor from performing elsewhere. Referring to *Lumley v. Wagner*, *supra*, the vice-chancellor said: "It happened that that contract did contain a negative stipulation, and finding it there, Lord St. Leonards relied upon it; but I am satisfied that, if it had not been there, he would have come to the same conclusion, and granted the injunction, on the ground that Mlle. Wagner, having agreed to perform at Mr. Lumley's theater, could not at the same time be permitted to perform at Mr. Gye's. But, however that may be, it is comparatively unimportant, because the subsequent authorities have completely settled this point."

As a result of these English authorities, while conceding that specific performance of such contracts could not be enforced, the jurisdiction is established that relief may be granted on a contract for such services, even though it contains no negative clause, upon the ground that a contract to act or play at a particular place for a specified time necessarily implies a prohibition against performing at any other place during that period. The American courts, while they recognize the existence of the jurisdiction, have exhibited much hesitancy in applying it to such enlarged uses.

Until *Daly v. Smith*, 49 How. Pr. 150, was decided, the doctrine of *Lumley v. Wagner*, *supra*, was either entirely rejected or only partially accepted. *Sanquirico v. Benedetti*, 1 Barb. 315; *Hamblin v. Dinneford*, 2 Edw. Ch. 529; *Fredricks v. Mayer*, 13 How. Pr. 568; *Butler v. Galletti*, 21 How. Pr. 465; *Burton v. Marshall*, 4 Gill, 487; *Hayes v. Willio*, 11 Abb. Pr. N. S. 167.

In that case (*Daly v. Smith*, *supra*) the authorities are carefully discriminated, and the injunction was granted restraining an actress from violating her agreement to play at the plaintiff's theater for a stated period; and the case is on all fours with *Lumley v. Wagner*, *supra*. See also *Hahn v. Concordia Society*, 42 Md. 465; *McCaull v. Braham*, 16 Fed. Rep. 37. In *Fredricks v. Mayer*, 13 How. Pr. 567, and *Butler v. Galletti*, 21 How. Pr. 468, the court indicates the principle that where the services involve the exercise of powers of the mind, as of writers or performers, which are purely and largely intellectual, they may form a class in which the court will interfere, upon the ground that they are individual and peculiar.

In these cases the element of mind furnishes the rule of distinction and decision, as distinguished from what is mechanical and material, and would exclude professional workers, such as dancers and acrobats, where performances are largely mechanical, however unique or extraordinary such performance may be. But it is apprehended that this distinction cannot be maintained, for the fact is that such actors do often possess special merit or extraordinary qualifications in their line, which makes their professional performances distinctly personal and peculiar; and that, in case of their default on a contract for services, there would be the same difficulty in supplying their places, or in obtaining from others the same service, as would happen with actors, whose merits were largely intellectual, showing the same reason to exist as much in the one case as the other for the application of the preventive rem-

edy by injunction. Relative to this subject, the authorities indicate that the American courts have refused to interfere, unless there was a negative clause forbidding the services sought to be enjoined.

Such a stipulation existed in the contract in *Daly v. Smith*, *supra*, upon which relief was granted, although the opinion is broad enough to include contracts without such stipulations, when the facts show that the contract is reasonable, the complainant without fault, and that he has no adequate remedy at law. To my mind, this is the correct principle to apply to such cases, even though the contract contains no negative stipulation; for, in the nature of things, a contract to act at a particular theater for a specified time necessarily implies a negative against acting at any other theater during that time. The agreement to perform at a particular theater for a particular time, of necessity involves an agreement not to perform at any other during that time. According to the true spirit of such an agreement, the implication precluding the defendant from acting at any other theater during the period for which he has agreed to act for the plaintiff follows as inevitably and logically as if it was expressed. So, that, according to all the authorities where one contracts to render personal service to another which requires special merit or qualifications in the professional worker, and, in case of default, the same service is not easily obtained from others, although the court will not interfere to enforce the specific performance of the whole contract, yet it will exert its preventive power to restrain its breach. While it is true that the court cannot enforce the affirmative part of such contract, and compel the defendant to act or perform, it can enjoin its breach, and compel him to abstain from acting elsewhere than at the plaintiff's theater. The principle upon which this doctrine rests is that contracts for such services are individual and peculiar, because of their special merit or unique character, and the inadequacy of the remedy at law to compensate for their breach in damages.

"Where" says Prof. Pomeroy "a contract stipulates for a special, unique or extraordinary personal service or acts, or for such services or acts to be rendered or done by a party having special, unique and extraordinary qualifications, as, for example, by an eminent actor, singer, artist and the like, it is plain that the remedy at law of damages for its breach might be wholly inadequate, since no amount of money recovered by the plaintiff might enable him to obtain the same, or the same kind, of services or acts elsewhere, or by employing any other person." Pom. Eq. Jur. § 1343.

Damages for a breach of such contracts are not only difficult to ascertain, but cannot, with any certainty, be estimated; nor could the plaintiff procure, by means of any damages, the same services in the labor market as in case of an ordinary contract of employment between an artisan, a laborer or a clerk, and their employer.

It results, then, that if the services contracted for by the plaintiff to be rendered by the defendants were unique or extraordinary, involving such special merit or qualifications in them as to make such services distinctly per-

sonal and peculiar, so that, in case of a default by them, the same or like services could not be easily procured, nor be compensated in damages, the court would be warranted in applying its preventive jurisdiction, and granting relief, but otherwise, if such services were ordinary, and without special merit, and such as could be readily supplied or obtained from others, without much difficulty or expense.

But the present case is far from being one of such character as falls under the principle of the authorities in which the preventive remedy by injunction has been allowed. There is absolutely nothing in the evidence to show that the performances of the defendants were unique, or of any special merit. The plaintiff himself will not even admit that they are; while others say the performances were "neat," "pretty good," "do a fair act," etc.; and others that their performances were merely that of the ordinary acrobat, and that there would be no trouble in supplying their places, or, as one of a good deal of professional experience says, "in getting a thousand to do just as good variety business."

Indeed, according to our view of the evidence, the plaintiff fails to make a case within the principle in which equity allows relief for a breach of contract for personal services, and the court below committed no error in dismissing the bill.

William MOAKLER, *Appt.*,

vs.

PORTLAND & WILLAMETTE VALLEY
R. CO., *Resp.*

(....Or....)

"Where a passenger was riding on a car with his elbow resting on the window-sill, and slightly projecting out of the window, but his hand and wrist were inside, and a stick of cord-wood fell from the pile corded or stacked near the track, through the open window at which he sat, striking in the palm of the hand, or near it, catching in the mouth of the coat sleeve, and jammed the arm backward, and injured it,—Held, that the facts were not such that the court could grant a nonsuit, and thus decide that he was guilty of negligence in law, but they were for the jury.

(November 18, 1883.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Multnomah County granting a nonsuit in an action to recover damages for personal injuries inflicted upon plaintiff while a passenger in defendant's car, and alleged to have resulted from defendant's negligence. *Reversed.*

The facts are fully stated in the opinion. Messrs. Charles H. Carey and A. H. Tanner, for appellant.

Negligence is ordinarily a question of fact for the jury to determine from all the circumstances of the case, and the cases where a nonsuit is allowed are exceptional and confined to those where the uncontradicted facts show the

*Head note by LORD, J.

omission of acts which the law adjudges negligent.

Walsh v. Oregon R. & Nav. Co. 10 Or. 255; *Durbin v. Oregon R. & Nav. Co.* 17 Or. 18; *Grant v. Baker*, 12 Or. 329; *Cumberland Valley R. Co. v. Maugans*, 61 Md. 53; *Stackus v. New York Cent. & H. R. R. Co.* 79 N. Y. 464.

Slight negligence on the part of the plaintiff will not preclude recovery when the negligence of the defendant is gross.

Bequette v. People's Transp. Co. 2 Or. 200; *Holstine v. Oregon & C. R. Co.* 8 Or. 168; *Ford v. Umatilla County*, 15 Or. 318.

It strikes the mind as wholly unjust and unreasonable to say that the mere fact that the plaintiff casually laid his arm on the window sill, possibly projecting slightly, is such wanton carelessness as to justify withdrawing his case from the jury and nonsuited him without regard to the other circumstances of the case and notwithstanding gross and inexcusable carelessness on the part of the defendant.

Spencer v. Milwaukee & P. R. Co. 17 Wis. 488; *Dahlberg v. Minneapolis Street R. Co.* 82 Minn. 404; *Barton v. St. L. & I. M. R. Co.* 52 Mo. 253, 14 Am. Rep. 418; *Chicago & A. R. Co. v. Pondrom*, 51 Ill. 833; *Seigel v. Eisen*, 41 Cal. 109; *Farlow v. Kelly*, 108 U. S. 288 (27 L. ed. 726); *Dickinson v. Port Huron & N. W. R. Co.* 53 Mich. 43; *New Jersey R. Co. v. Kennard*, 21 Pa. 203.

Mr. C. J. MacDougall, for respondent:

The fact the plaintiff had his arm projecting through and out of the window three or four inches at the time of the accident constituted negligence *in se*; and such being the case it was the duty of the court to nonsuit when plaintiff had rested his case.

Todd v. Old Colony & F. R. R. Co. 8 Allen, 21; *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. 293, 297; *Indianapolis & C. R. Co. v. Ruthersford*, 29 Ind. 82; *Catawissa R. Co. v. Armstrong*, 49 Pa. 186; *Holbrook v. Utica & S. R. Co.* 12 N. Y. 235; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 829.

If the negligence of plaintiff in any degree contributed to the injury he cannot recover.

Monongahela City v. Fischer, 111 Pa. 13; *Geisselman v. Scott*, 25 Ohio St. 86; *Haley v. Chicago & N. W. R. Co.* 31 Iowa, 15; *Haley v. Earle*, 30 N. Y. 208; *Wood v. Meares*, 12 Ind. 515; *Murch v. Concord R. Corp.* 29 N. H. 9; *Fallon v. Boston*, 8 Allen, 38; *Michigan Cent. R. Co. v. Leahy*, 10 Mich. 198; *Louisville & N. R. Co. v. Sickings*, 5 Bush, 1; *Dix v. Brown*, 41 Miss. 181; *Neal v. Gillett*, 23 Conn. 437; *Meyer v. Pacific R. Co.* 40 Mo. 151; *Kellogg v. The T. D. Hine*, 19 La. Ann. 804; *Noyes v. Morristown*, 1 Vt. 357; *Earhart v. Youngblood*, 27 Pa. 381; *Northern Cent. R. Co. v. State*, 29 Md. 420; *Rorer, Railroads*, p. 1108; *Morel v. Mississippi V. L. Ins. Co.* 4 Bush, 585.

Where the whole evidence in a case shows that the injury took place to the plaintiff by reason of his want of ordinary care, the question whether there was or was not negligence on the part of plaintiff is a question of law for the court.

Mynning v. Detroit L. & N. R. Co. 67 Mich. 677; *Grant v. Baker*, 12 Or. 333, 334; *Walsh v. Oregon R. & Nav. Co.* 10 Or. 250; *Dwyer v. New York, L. E. & W. R. Co.* (N. J.) 7 Atl. Rep. 417; *Cordell v. New York C. & H. R. R. Co.* 75 N. Y. 833; *Beisegel v. New York C. R. Co.* 14 Abb. Pr. N. S. 29; *Corcoran v. Boston & A. R. Co.* 138 Mass. 507; *Riley v. Connecticut River R. Co.* 135 Mass. 292; *Carroll v. Staten Island R. Co.* 58 N. Y. 126; *Berry v. Pennsylvania R. Co.* (N. J.) 4 Atl. Rep. 303; *Orange & N. H. R. Co. v. Ward* (N. J.) 4 Atl. Rep. 331; *Crabell v. Wapello Coal Co.* 68 Iowa, 751; *Bunt v. Sierra Buttes Gold Min. Co.* 24 Fed. Rep. 847; *Hathaway v. East Tenn. V. & G. R. Co.* 29 Fed. Rep. 489; *Gregory v. Cleveland, C. C. & I. R. Co.* 112 Ind. 385; *Scott v. Oregon R. & Nav. Co.* 14 Or. 211; *Durbin v. Oregon R. & Nav. Co.* 17 Or. 18; *Columbus & W. R. Co. v. Bradford*, 86 Ala. 574; *Alabama G. S. R. Co. v. Jones*, 71 Ala. 487; *East Tenn. V. & G. R. Co. v. Bayless*, 74 Ala. 150.

Lord, J., delivered the opinion of the court:

This is an action brought by the plaintiff to recover damages for an injury alleged to have been caused by the negligence of the defendant while he was a passenger on one of its trains. By his answer the defendant denied the negligence alleged, and averred that the negligence of the plaintiff contributed to his injury. To this the plaintiff filed his reply, and, issue being thus joined, the trial was proceeded with until the plaintiff rested his case, when the defendant, by his counsel, moved for a judgment of nonsuit, upon the ground that the evidence showed that the plaintiff was guilty of contributory negligence, which the court allowed, and from which the present appeal is taken. Explanatorily, it may be said that the evidence showed that large piles of wood were corded, at places along the track, about one foot or a foot and a half from the cars, and so high that passengers often could not see out on account of it; that from one of these piles some of the sticks fell upon the cars, and through the window at which the plaintiff was sitting, with his arm resting on the window-sill, causing the injury complained of. As relevant to the point upon which this case must be determined, it is necessary to understand how the injury occurred. Mr. O'Leary, a witness for the plaintiff, testified: "It hit him in the palm of the hand; that is where the wood hit him. It was not on the elbow. The elbow, went up against the jamb of the window, and that is what hurt his elbow."

Q. How was his hand?

A. Probably a few inches out of the window. The force of the stick and the car going, of course, hurt his elbow; that is what done it.

On cross-examination, after testifying that the stick came through the open window, in reply to the question that the stick struck him "when his hand was outside," he says: "His hand was inside. It was the wood that hit his hand; it did not hit his elbow."

Q. It pressed his hand back this way?

A. Pressed it back against the window, and that is what hurt it,—hand inside the window.

Q. Elbow outside?

A. Yes, sir; I think so.

Q. How far did the elbow extend outside?

A. Maybe a few inches; I don't know.

It will be noticed that this witness first stated that the plaintiff's hand was "probably a few inches out of the window," but on his cross-examination testifies that it "was inside the

window," and that the "elbow was outside" of the window a few inches. Looking at the whole of the evidence, and the manner in which he says the injury occurred, it was probably the elbow to which he referred; and this, too, is consistent with the testimony of the plaintiff, who succeeded him as a witness.

After some preliminary matters, the plaintiff testified:

Q. Now you may state whether or not any part of your arm was projecting outside of the car.

A. No, sir; it was right on the window-sill.

Q. You say that this falling stick of wood caught in your coat, and jerked your hand out?

A. Sitting just like here (explaining by reference to witness box); stick struck just here (referring to the mouth of his coat sleeve), and pulled it out, etc. I was this way; train going this way; arm on the window right here. The first thing I knew a piece of wood, coming in, grabbed my coat sleeve in the mouth of it, something like here, and just pulled my arm out, and got jammed backwards, etc.

Q. Your arm was resting on the window?

A. Resting on the window (evidently means resting on the window-sill).

Q. Was your elbow out three or four inches?

A. Two or three inches,—maybe four inches.

Q. Caught in the palm?

A. No, sir; in the coat-sleeve and pulled right out.

It will be observed that both witnesses agreed that the hand was inside, and that the elbow was outside, of the window; that the stick of wood which did the injury came through the open window, and one says, struck the palm of his hand, and the other, caught in the mouth of his coat-sleeve: but both agree that the stick did not hit the elbow and as to the manner it operated in jamming the arm backwards and producing the injury. The plaintiff's testimony is that his arm was resting on the window-sill, but that no part of his arm was outside of the car, although he admitted it was outside of the window. This must be based on the idea that the window-sill slightly extended beyond the exterior surface of the car. The truth is, it is generally difficult to reconcile the testimony in cases of this character, and reach a state of facts not disputed and beyond the reach of controversy. At any rate, in our judgment, the evidence submitted by the plaintiff tended substantially to establish this state of facts: That the plaintiff, while riding as a passenger on one of the defendant's trains, rested his arm on the window-sill of an open window, with his hand inside, but his elbow extending a few inches outside of the window; that alongside of the track a great quantity of cord-wood was piled, at places so high as to obscure a view from the window of the cars, and at a distance of a foot or a foot and a half from the cars; that while thus riding some of the sticks of cord-wood fell from the pile, and against the cars, and through the window, upon his palm, or caught in the mouth of his coat-sleeve near the palm, and jammed his arm backward, breaking it, and badly lacerating his arm and hand. As here used, when it is said that the elbow was outside of the window, it is meant that it was outside of the surface of the window, and exposed to injuries from external ob-

jects. It was so treated at the argument, and it will be so considered by us.

The inquiry, then, presented by this record, is: Do the facts show such an act of contributory negligence on the part of the plaintiff as will prevent a recovery, and make it the duty of the court to so declare as a matter of law, notwithstanding the negligence of the defendant in permitting the wood to be so carelessly piled near the track of the passing train?

"Contributory negligence" is defined to be "a want of ordinary care upon the part of the person injured by the actionable negligence of another, combining and concurring with the negligence, and contributing to the injury as a proximate cause thereof, without which the injury would not have occurred." 4 Am. & Eng. Cyclop. Law, 17.

The law will not permit a recovery where the plaintiff, by his own negligence, has contributed to produce the injury from which he has suffered. "And it matters not," said Mr. Justice Field, "whether that contribution consists in his participation in the direct cause of the injury, or in his omission of duties which, if performed, would have prevented it. If his fault, whether of omission or commission, has been the proximate cause of the injury, he is without remedy against one also in the wrong." And he adds that "it would seem that the converse of this doctrine should be accepted as sound; that when one has been injured by the wrongful act of another, to which he has in no respect contributed, he should be entitled to compensation in damages from the wrong-doer." *Little v. Hackett*, 116 U. S. 871 [29 L. ed. 654].

To have adjudged the plaintiff guilty of contributory negligence, upon the facts, the court must have found that there was want of ordinary care on his part, and a proximate connection between such want of ordinary care and the injury complained of. Our case, then, is thus put up by Mr. Beach: "(1) Did the plaintiff exercise ordinary care, under the circumstances? (2) Was there a proximate connection between his act or omission and the hurt he complains of?" Beach, *Contrib. Neg.* § 3, p. 7.

If these two questions be answered in the affirmative, the two elements concur which constitute contributory negligence, and, in the sense of the law, the plaintiff is responsible for his own wrong, and is precluded from a recovery.

The facts show that the plaintiff's elbow was slightly extended outside of the window, but that the other portion of his arm and hand was inside of the window. The elbow was not hit, but a stick of wood, falling through the open window at which he sat, and upon the sill on which his arm rested, struck the part of the arm inside of the window, and caught in the mouth of the coat-sleeve, which, with the motion of the train, jammed the arm backward against the frame of the window, and produced the injury complained of. Now, it will be noted (1) that, although the elbow was outside of the window, it was not hit, and the injury did not arise as the direct consequence of the exposed condition of the elbow to external objects with which it might come in contact by reason thereof; and (2) that the hand and part

of the arm which were struck with the stick were within the window. The facts concede that an injury would be likely to happen if the elbow had not been exposed, while the arm continued to rest upon the window-sill in the same relative position. By merely changing the angle of the inclination of the arm, so that the elbow would not be exposed, leaving the arm otherwise in the same relative position, a similar injury would have likely happened or resulted, upon the facts. But in neither case, whether the elbow was inside or outside of the window, is the injury occasioned by or the result of its contact with external objects. Yet this judgment punishes the plaintiff with the same consequences as if the injury resulted from exposing the arm outside of the window to contact with external objects. In that view it makes no difference whether the arm or elbow was inside or outside of the window when the injury occurred,—the same legal consequences ensue; but this cannot be, unless it be a negligent act to rest the arm on the window-sill of the car, irrespective of the fact whether the injury occurred to the exposed part of the arm or not.

The counsel for the defendant insists that the plaintiff, by exposing his elbow two or three inches out of the window, contributed to produce the injury of which he complains, and that without it he would not have been injured. He places the injury upon the same footing as if it had occurred in consequence of the elbow being struck by reason of its exposure to passing objects external to the car, and, as a consequence, asserts that the conduct of the plaintiff was negligence *in se*, and, as such, that it was the undoubted duty of the trial court to grant the nonsuit. In support of this position, he cites *Pittsburg & C. R. Co. v. McClurg*, 56 Pa. 294; *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 829; *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 83; *Todd v. Old Colony R. Co.* 8 Allen, 18; *Dun v. Seaboard & R. R. Co.* 78 Va. 645; *Louisville & N. R. Co. v. Sickings*, 5 Bush, 1.

It will be best to ascertain the facts upon which the law is predicated in these cases, to understand the reason of it and the principle applied.

In *Pittsburg & C. R. Co. v. McClurg* the plaintiff was injured "while a passenger in the cars of the defendant, by reason of the protrusion of his elbow beyond the sill of the car window next to which he sat during the journey, or part of it, coming in contact with a car standing on a switch on the defendant's road."

In *Todd v. Old Colony R. Co.* 8 Allen, 18, the court says that "the only error in the instructions of the court related to that part of the case which involved an inquiry into the position of the plaintiff's arm at the time of the accident. If he was then riding in the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care, which would prevent him from maintaining his action."

In *Indianapolis & C. R. Co. v. Rutherford*, 29 Ind. 83, "the evidence showed," says the court, "that the injury received was a broken arm, and that at the time of the accident the

plaintiff's arm was projecting out of the window of the coach in which he rode, in consequence of which it came in contact with some object outside, probably a timber frame supporting a water-tank."

In *Pittsburg & C. R. Co. v. Andrews*, 39 Md. 842, the court says: "It is admitted his arm at the time was out of the window," and that "it is perfectly clear he would have received no injury if his arm had not been in this position."

Without further reference, it is enough to say that the plain result of these cases is that if a passenger is riding in a car, with his elbow or arm projecting out of the window, by reason of which he sustains an injury, it is such a clear act of contributory negligence on his part as will prevent a recovery, and make it the duty of the court to so declare, as a matter of law, notwithstanding the negligence of the defendant in permitting obstacles to be placed too near the track of the passing train.

But why is it contributory negligence, within the reason of these cases? The answer is, because, in projecting his elbow or arm out of the window, he was bound to know, as a reasonable man, in the exercise of ordinary care and foresight, that there was liability to injury from the exposed condition of the arm coming in contact with some external obstacle or force. He ought to know, to expose his arm or elbow under the surrounding circumstances, that it was dangerous, and liable to result in injury to it, because a prudent man might well foresee the possibility of such an occurrence; and, if he do not avoid it by the exercise of such reasonable foresight, he may justly be held to have taken upon himself the risk of such a peril. It is therefore considered in these cases to be a want of ordinary care for a passenger riding in a car to protrude his arm or elbow out of the window, and if he does, and is injured by reason thereof, it results, as a consequence, that his own want of ordinary care has contributed directly to produce such injury as the proximate cause thereof.

But how is this to apply to the facts in the case at bar? It was not the elbow of the plaintiff, or any part of his arm, that was exposed to injury from outside obstacles, that caused the injury. His elbow, or the part of the arm outside of the window, was not hit. The stick of wood struck the palm of his hand, or so near it as to catch in the mouth of the coat-sleeve, which was inside of the window, and not exposed to external objects, unless they came inside of the window, as the evidence here shows. The cases referred to, and relied upon by counsel, proceed upon the hypothesis that the injury occurred because the elbow or arm which was exposed out of the window came in contact with some external obstacle or force, and produced the injury.

In the strongest of these cases, *Pittsburg & C. R. Co. v. McClurg*, and often cited, Thompson, *Ch. J.*, said: "If he allow it [arm] to protrude out, and is injured, is this due care?"—which Bigelow, *Ch. J.*, had previously answered in *Todd v. Old Colony R. Co. supra*, saying: "If he was riding in the car with his elbow or arm projecting out of the window, by reason of which he sustained an injury, he was guilty of a want of due care."

The due care here required to be exercised is not to expose the arm out of the window, as there is liability that it may come in contact with outside obstacles. It is based on the idea that, when an arm is thus exposed, the injury which may result may be foreseen and avoided by the exercise of ordinary circumspection. It has no reference to risks or injuries which, according to common experience, and in the exercise of reasonable care and foresight, could not have been anticipated, or their consequences avoided. "We are not to link together," said Agnew, J., "as cause and effect, events having no probable connection in the mind, and which could not, by prudent circumspection and ordinary thoughtfulness, be foreseen as likely to happen in consequence of the act in which we are engaged. It may be true that the injury would not have occurred without the concurrence of our act with the event which immediately caused the injury; but we are not justly called to suffer for it, unless the other event was the effect of our act, or was within the probable range of ordinary circumspection, when engaged in the act." *Fairbanks v. Kerr*, 70 Pa. 86.

Sitting, as he was, with his arm resting on the window-sill, and his elbow projecting out, especially in view of the fact that a similar injury would have probably occurred whether the elbow was inside or outside of the window, was it within the range of ordinary circumspection and foresight to have anticipated, as likely to happen, the event which occurred and produced his injury,—to have anticipated that a stick of wood should fall through the open window, and inside of it, and strike his palm, or so near it as to produce the injury admitted, in consequence of the act in which he was engaged? Under the circumstances of this case, are we authorized to say, as a matter of law, that by the exercise of ordinary care and prudence he could have foreseen that there was liability to injury in the way in which it occurred, as the consequence of his act?

Be it remembered that the injury did not arise because the elbow projected, but because the stick struck the palm or wrist inside of the window, where it had a right to be, and worked its injury, and the case, upon its facts, would seem to stand precisely as if the arm rested on the window-sill entirely within the car. The law is well established that this cannot be declared to be negligence *in se*.

In *Farlow v. Kelly*, 108 U. S. 288 [37 L. ed. 726], it was held that it was not contributory negligence for a passenger to rest his arm upon the window-sill of a car in which he was riding without allowing it to project. Such an act creates no presumption of negligence, and cannot be declared negligence in law. *Breen v. New York O. & H. R. R. Co.* 109 N. Y. 297; *Winters v. Hannibal & St. J. R. Co.* 39 Mo. 470.

The inception of the injury being inside of the window, it was not caused by any exposure of the arm outside of it, and can we say, logically or judicially, that the act of the defendant contributed to produce it? It would seem, as to the facts upon which that injury was predicated, that he stood without fault; for although the plaintiff may have been negligent in allowing his elbow slightly to extend out-

side of the window, yet if that did not cause the injury, and the result was the same as though he exercised the care required, and kept his arm inside, then such want of care, as was said in *Walker v. Westfield*, 39 Vt. 246, did not contribute to produce such injury, and it is the same as though he was without fault.

As the injury occurred, then, the plaintiff was under no legal obligation to assume or anticipate that sticks or a stick of falling cordwood would be projected inside of the window, and cause the accident where it happened. To have his hand and wrist where they were, and where the stick struck them, was where they had a right lawfully to be, and raised no presumption of negligence in law. If such is the case, however strictly the rule of contributory negligence may be enforced, can we declare that the negligence of the plaintiff was the proximate cause of the injury, or, in other words, that his want of ordinary care contributed directly to the injury? It is enough to say when the arm is exposed, and the injury occurred on that account, when the facts are admitted, that it is negligence in law. Negligence is generally a question of fact, to be decided by the jury upon all the facts and circumstances, and the court ought not to declare it as a matter of law, unless there is such a plain act of carelessness upon the part of the plaintiff contributing to his injury as makes that a duty. The rule, as it is established by the weight of authority, has not always met with entire approval, and is sufficiently strict and arbitrary, without extending the domain of its operations.

In *Spencer v. Milwaukee & P. R. Co.* 17 Wis. 487, the opposite view is ably and forcibly presented by a vigor and fitness of reasoning which it is difficult to answer. The truth is that it is an every-day occurrence for passengers to ride with their elbow on the sill, slightly extending out of the window, though not perhaps outside of the sill. We all know in warm weather, when the windows are up, it is the constant and ordinary habit of passengers of all classes and all degrees of intelligence to so ride; and, judged in the light of our general knowledge and experience, it would be difficult to condemn such conduct as an act so plainly and palpably careless as to require the court to declare it negligence as a matter of law. If the rule is to obtain as decided by the weight of authority, let it continue to be confined in its operations to injuries which result from exposing the arm to outside obstacles; but let it not be extended to those where the facts are complicated, and the injury, although the elbow was slightly out of the window, did not arise from that fact, or if it had been inside, the arm otherwise preserving its relative position, a like injury would probably have happened. In cases of the first sort it may be conceded, when the facts stand confessed or admitted, that the court may declare the act negligence as a matter of law, *non constat* that it can upon the facts here. In cases of this sort, where the facts are complicated and debatable, where men of ordinary discretion and prudence might differ as to the inferences to be drawn from them in determining the character of the act, it is safer and better to submit them to the jury in connection with all its attendant cir-

cumstances, whom the law assumes to be best qualified to dispose of them under proper instructions from the court, than that the court itself should decide them, as a question of law, by allowing a nonsuit. Before the court can do this, and cut off the plaintiff's right to submit his case to the jury, the inferences from the proof ought to be certain and incontrovertible, freeing the mind from all doubt or hesita-

tion; for it must always be borne in mind that it is generally for the jury to determine whether the defendant was negligent, or the plaintiff was contributorily negligent, which, as Dr. Wharton has aptly said, is seldom the "subject of direct proof, but an inference from facts put in evidence."

The judgment must be reversed, and the nonsuit set aside.

LOUISIANA SUPREME COURT.

Thomas P. LEATHERS, *Appt.*,

v.

John JANNEY *et al.*

(....La. Ann....)

- *1. No law prevents a corporation from selling any or all of its property, provided the charter contains no prohibition thereof, and it acts in accordance with the duly expressed will of its stockholders and directors.
2. The same person may fill the office of president of two distinct corporations, and such identity does not, of itself, invalidate dealings between the two corporations.
3. Where one corporation sells property to another for a fixed price, to be paid

*Head notes by FENNER, J.

NOTE.—Private corporations; common-law powers.

The common-law powers of a corporation are the same as those possessed by individuals, and may be employed in the same manner, unless restricted by some positive or clearly implied prohibition of law. See *De Groff v. American Linen Thread Co.* 21 N. Y. 124; *Williams v. W. U. Tele. Co.* 9 Abb. N. C. 443; *Barry v. Merchants Exch. Co.* 1 Sandf. Ch. 280.

A corporation, without special authority, may dispose of land, goods and chattels, or of any interest in the same, as it deems expedient, and in the course of its legitimate business may make a bond, mortgage, note or draft; and also may make compositions with creditors, or an assignment for their benefit, with preferences, except when restrained by law. *White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 424 (16 L. ed. 158); *Partridge v. Badger*, 25 Barb. 146; *Beers v. Phoenix Glass Co.* 14 Barb. 358; *Dana v. Bank of U. S.* 5 Watts & S. 223; *Frazier v. Wilcox*, 4 Rob. (La.) 517; *U. S. Bank v. Huth*, 4 B. Mon. 423; *State v. Bank of Md.* 6 Gill & J. 206; *Pierce v. Emery*, 32 N. H. 486.

May mortgage.

Corporations, unless restrained by their charters, have the power to mortgage their property to secure borrowed money, or their debts. *Carpenter v. Black Hawk Gold Min. Co.* 65 N. Y. 49; *DeRuyter v. St. Peter's Church*, 3 N. Y. 238; *King v. Merchants Exch. Co.* 6 N. Y. 547; *Richards v. Merrimack & C. R. R. Co.* 44 N. H. 127.

At the common law, a mortgage bona fide made may be for future advances, and liabilities for the mortgagor by the mortgagee, as well as for present debts and liabilities. *Truscott v. King*, 6 N. Y. 160; *Walker v. Snediker*, Hoffm. Ch. 145.

May borrow money.

Private corporations may borrow money, or become parties to negotiable paper in the transaction

in stock of the latter, to be delivered to the former through its designated officer, delivery of the certificates of stock to such officer, or to another by his order, operates a discharge for the price.

4. Corporate property is held subject to corporate debts, and when a corporation sells its whole property and rights to a purchaser, knowing the fact, equity, in proper cases, will subject the property in the hands of the purchaser to the payment of the debts with which it is charged; but the purchaser of specific property, such as a steamboat, from a corporation, is not bound to follow the price paid into the hands of the selling corporation, and see to its distribution among the latter's stockholders, in the absence of fraudulent connivance between the purchaser and seller to wrong the stockholders.
5. The sale attacked in this case being real and fair, for a sound price, duly paid to the

of their legitimate business, unless expressly prohibited; and until the contrary is shown, the legal presumption is that their acts in that behalf were done in the regular course of their authorized business. *Chicago, R. I. & P. R. Co. v. Howard*, 74 U. S. 7 Wall. 413 (19 L. ed. 121); *White Water Valley Canal Co. v. Vallette*, 62 U. S. 21 How. 424 (16 L. ed. 158); *Farnum v. Blackstone Canal Corp.* 1 Sumn. 44.

Transactions auxiliary to primary business.

Corporations may transact all such matters as, being auxiliary to their primary business, are transacted by ordinary individuals under similar circumstances. *Eureka Iron & Steel Works v. Bresnahan*, 60 Mich. 383; *Bissell v. Mich. Southern & N. L. R. Co.* 22 N. Y. 233.

In order to attain its legitimate objects, it may deal precisely as an individual may who seeks to accomplish the same ends. *Curtis v. Leavitt*, 15 N. Y. 237; *Fay v. Noble*, 12 Cush. 1; *Davis v. Second Universalist Meeting House*, 8 Met. 321; *Reynolds v. Stark County*, 5 Ohio, 205; *Brady v. Brooklyn*, 1 Barb. 584; *Madison, W. & M. Plank Road Co. v. Watertown & P. Plank Road Co.* 5 Wis. 173; *Macon v. Macon & W. R. Co.* 7 Ga. 221; *Hamilton v. Looming Mut. Ins. Co.* 5 Pa. 339; *King v. Merchants Exch. Co.* 3 Sandf. 693.

May make contracts.

Every corporation has power to make all contracts that are necessary and usual in the course of the business it transacts, as means to enable it to effect such object, unless expressly prohibited by law or the provisions of its charter. *Deringer v. Deringer*, 5 Houst. 523; *Farmers Loan & T. Co. v. Perry*, 3 Sandf. Ch. 347; *Home Ins. Co. v. Northwestern Packet Co.* 52 Iowa, 244, 7 Am. Rep. 191; *Re Howe*, 1 Paige, Ch. 214; *Hope Mut. L. Ins. Co. v. Perkins*, 38 N. Y. 404; *Feeny v. People's F. Ins. Co.* 3 Robt. 599.

seller according to the terms of the contract, and without a shadow of fraud on the part of the purchaser, the latter is not bound for any failure of duty of the officers of the selling corporation in distributing the proceeds among its stockholders.

(December 2, 1886.)

APPEAL by plaintiff from a judgment of the Civil District Court, Parish of Orleans, denying him certain relief which he claimed against the Planters & Merchants' Packet Company as an aid in the recovery of a debt due from defendant Janney. *Affirmed.*

The facts are fully stated in the opinion.

Mr. O. B. Sanson for appellant.

Messrs. Farrar, Jonas & Kruttschnitt for appellee.

Fenner, J., delivered the opinion of the court:

Prior to June, 1885, there existed three distinct corporations, viz.: the New Orleans, Baton Rouge & Bayou Sara Packet Company, the Merchants & Planters' Packet Company and the Coast & Mississippi River Packet Company,—each of which owned and operated a steamboat. Desiring to put an end to disastrous competition, the stockholders in these three corporations agreed to form a new corporation, which should acquire the ownership of all three boats, at valuations fixed in advance, and run them in a common interest. Accordingly, on June 22, 1885, a new corporation was formed in accordance with the laws of the State, styled the "Planters & Merchants' Packet Company," having a stock equal to the combined value of the three boats above mentioned, viz., \$110,000, in shares of \$100 each, and its objects are declared to be "the building, purchasing, chartering, hiring, running and selling one or more steamboats," etc. On June 30, 1885, at a special meeting of the stockholders and directors of the New Orleans, Baton Rouge & Bayou Sara Packet Company, a resolution was adopted authorizing John J. Brown, manager, to sell the steamboat Edward J. Gay to the Planters & Merchants' Packet Company, for the sum of \$50,000, in full paid-up stock of said company. On the same day, in pursuance of above resolution, Brown, manager, executed a deed of sale of the Gay to the Planters & Merchants' Company, upon the consideration, by him declared in the act, "of \$50,000, in full-paid stock of the Planters & Merchants' Packet Company, to represent which stock the said company have issued and delivered to me, on behalf of said New Orleans, Baton Rouge & Bayou Sara Packet Company, certificates for 500 shares, of the amount of \$100 each, of said capital stock paid up, the receipt of which I do hereby acknowledge," etc.

John Janney, the defendant, was a stockholder in the New Orleans, Baton Rouge & Bayou Sara Packet Company, and in 1884 had delivered to Thomas P. Leathers, to whom he was indebted, the certificate for 120 shares of said stock in pledge. The stock received from the Planters & Merchants' Company in payment for the Edward J. Gay was distributed among the stockholders of the New Orleans, Baton Rouge & Bayou Sara Packet Company by Brown, or under his direction, and Janney

received the whole amount thereof coming to him, without being required to produce the certificate held in pledge by Leathers. Brown was the manager of the New Orleans, Baton Rouge & Bayou Sara Packet Company, and was also chosen as manager of the new company.

The plaintiff filed the petition in this suit against John Janney, the New Orleans, Baton Rouge & Bayou Sara Packet Company and the Planters & Merchants' Packet Company. This petition first sets up the indebtedness of Janney, and the pledge of the stock, and then sets up that Brown was president and manager of the New Orleans, Baton Rouge & Bayou Sara Packet Company, and that he was also president and manager of the Planters & Merchants' Packet Company. That June 30, 1885, Brown, as the manager of the New Orleans, Baton Rouge & Bayou Sara Packet Company, pretended to convey and sell all the property of that corporation, to wit, the steamer Edward J. Gay, to the Planters & Merchants' Packet Company, for 500 shares of the capital stock of the last-named company, and that nothing was in fact paid by the latter to the former corporation. That Brown, being at the same time manager and president of both corporations, acted in the double capacity of seller for the one and buyer for the other corporation. That the New Orleans, Baton Rouge & Bayou Sara Packet Company had no property but the steamer Edward J. Gay, and the sale thereof was *ultra vires* and void, and that it was a fraud against plaintiff's rights in the premises. The petition prays citations against all the defendants, and judgment against Janney, for \$4,350.88, with interest from September 8, 1886, and for a lien and privilege on the steamboat, and a lien and privilege on all the property of the Planters & Merchants' Packet Company, and that the same be seized and sold to pay plaintiff's demand, interest and costs, unless property of the defendant Janney be found to satisfy the demand, and for general relief.

The plaintiff recovered a judgment against Janney, with lien and privilege on 120 shares of the stock of the New Orleans, Baton Rouge & Bayou Sara Packet Company, but was denied other relief, from which judgment he appeals.

Let us examine the grounds as set forth in the petition, on which the claim against the Planters & Merchants' Company and its property is based. They are:

1. That the sale of the Gay was pretended and fictitious. The sale was real, for a valuable consideration, of ample sufficiency, and duly paid, and the charge is simply frivolous.
2. That Brown was the manager of both the corporations which were parties to the sale. As he acted under full authority from the directors and stockholders of each corporation, we perceive no legal significance in this fact, and no principle of law or authority is cited to give it any force whatever.

3. That the sale was of the whole property of the selling corporation, and was therefore *ultra vires* and void. The inference does not follow from the predicate. There is no law prohibiting a corporation from selling any or all of its property, provided its charter contains

no restraint thereof, and it acts under proper authority.

4. That the sale was made in fraud of plaintiff's rights. The evidence conclusively shows that the sale was in itself as honest and fair a transaction as ever took place. Nobody connected with it, with the exception of Janney, had notice or knew in any way of the pledge of Janney's stock to Leathers. The sale was public and notorious, commented on in the newspapers and evidenced by conspicuous inscription of the new corporation's name upon the wheel-houses of the steamboats purchased. The purchaser exacted from the selling corporations an indemnifying bond against all debts, which was given, and it is not pretended that the New Orleans, Baton Rouge & Bayou Sara Packet Company has not paid every one of its corporate debts.

Before the sale Janney himself had consulted his then friend, the plaintiff, about the transaction, and the valuations placed on the different boats, which is admitted by plaintiff, though he says he did not understand that there was to be a sale to a new corporation. We are satisfied that no notion existed, even in the mind of Janney, of wronging plaintiff, or prejudicing his pledge, until some time after the consummation of the sale. He did not apply for or receive the shares of the new stock coming to him until several months after the sale had been consummated. In concealing the fact of the pledge, and in taking the stock without providing for the protection of Capt. Leathers' rights, he, no doubt, committed a wrong. It may be claimed that, in permitting and directing the delivery of the new stock to Janney without exacting the surrender of the old certificate, Brown and the New Orleans, Baton Rouge & Bayou Sara Packet Company incurred liability to Leathers; but no judgment appropriate to this liability is claimed in this suit, and the judgment appealed from specially reserves the rights of Leathers against them.

But what responsibility in the premises attached to the Planters & Merchants' Packet Company? It had bought the boat in good faith, for the price of so many shares of its own stock certificates, which were to be delivered to Brown, as manager and representative of the selling corporation, receipt of which certificates was actually acknowledged in the act. If the certificates had been delivered as so recited, no one would have had the hardihood to contend that the buying corporation would have had any further concern with their disposition. Although it appears that the certificates had not been delivered, yet, after the sale the stock stood as the property of the selling corporation, certificates for which were to be delivered, on demand, to Brown, as its manager, or to whomsoever he might direct.

When such delivery was made, the obligation of the buying company was discharged.

The receipt of the stock by Janney, under the authority of Brown, was the same as the receipt by Brown, manager of the selling company, to whom the contract required they should be delivered. In so disposing of the certificates, Brown acted solely in his capacity as manager of the selling company, which was the owner of the stock, and the buying company is in no manner affected by any failure on his part in his duty towards the stockholders of the selling company, with whom the former had no dealings, and as to whom it was under no duty.

Authorities are quoted to the effect that when a corporation sells or transfers its entire property to a purchaser, knowing the fact, the latter is chargeable with knowledge that the property is subject to the corporate debts, and that equity will, in proper cases, allow the corporate creditors to follow the property into the hands of the purchaser for satisfaction of their claims. *Mumma v. Potomac Co.* 33 U. S. 8 Pet. 281 [8 L. ed. 945]; *Wood v. Dummer*, 3 Mason, 308; *Bank of St. Marys v. St. John*, 25 Ala. 566; *Smith v. Huckabee*, 53 Ala. 191; *Voss v. Grant*, 15 Mass. 522; *Story, Eq. Jur.* 9th ed. § 1252.

But no authority is quoted or exists to the effect that the purchaser from a corporation is bound to follow the price into the hands of the seller, and see to the just and proper distribution of it among the latter's stockholders. In absence of fraudulent connivance or collusion to wrong the stockholders, the purchaser discharges his obligation by paying the price to the competent officers of the selling corporation, who are the agents of the stockholders and to whom the latter must look for the protection of their rights.

The case of *Fes v. New Orleans Gas-Light Co.*, 35 La. Ann. 413, has no application whatever to the questions here involved.

We therefore conclude that the plaintiff has no rights against the Planters & Merchants' Packet Company or upon its property.

A violent conflict is found in the evidence as to the amount of the debt for which the stock of Janney was pledged. It is a simple case of direct and positive contradiction between witnesses, on which the conclusion of the district judge should not be lightly disturbed. After carefully weighing the evidence, we find no sufficient ground to disturb it, in so far as it confines the pledge to the amount due on the note.

The amendments asked in favor of Janney are supported only by inferential evidence, and, as we think the judgment does substantial justice, we will leave it as it stands.

Judgment affirmed.

PENNSYLVANIA SUPREME COURT.

Elizabeth LEMON *et al.*, *Plffs. in Err.*,
v.

Elizabeth Jane GRAHAM.

(...Pa....)

1. The effect of an informal instrument transferring an interest in real estate depends, not
6 L. R. A.

upon any particular words or phrases found in it, but upon the intention of the parties as collected from the whole instrument.

2. The assignment under seal of all a grantee's right, title, claim, interest and property whatever in and to a deed, on the back of which it is written, and which gave the grantee an estate in fee simple, is sufficient to transfer

the fee without the use of the word "heirs" or its equivalent.

(February 2, 1890.)

ERROR to the Court of Common Pleas of Jefferson County to review a judgment in favor of defendant in an action of ejectment to try title to a certain tract of land. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Alexander C. White and J. M. Garrison*, for plaintiffs in error:

An assignment of note, bond, mortgage or deed borrows and adopts the language of the instrument, and the assignee stands in the place of the assignor.

2 Bl. Com. chap. 20, p. 826, D. C. 10, Sharswood's Add. 1889; Washb. Real Prop.* 57, citing Shep. Touch. 101; Com. Dig. *Estates A. 2*; 2 Prest. Est. 2; Wharton Law Dict.; *Lytle v. Lytle*, 10 Watts, 260; *Brink v. Michael*, 81 Pa. 165.

Messrs. W. F. Stewart, Charles Corbet and H. H. Brocius, for defendant in error:

A title in fee ought not to be allowed to pass by such a paper as that offered in evidence in this suit.

See *Rapalje & Lawrence, Law Dict.* and cases cited under the word "*Fees*," *Hileman v. Bouslaugh*, 18 Pa. 344; *Gray v. Packer*, 4 Watts & S. 17; *Clayton v. Clayton*, 8 Binn. 476; *Adams v. Ross*, 80 N. J. L. 505.

The assignment does not refer to or borrow the words of the deed, nor refer to the land therein described.

See *Brink v. Michael*, 81 Pa. 165; *Newman's App.* 35 Pa. 389, 347.

Williams, J., delivered the opinion of the court:

The title to the land in controversy was, in 1866, vested in James Ramsey, under whom both parties claim. In August of that year he made an assignment to his son, Allen Ramsey, which was written on the back of the deed under which he acquired title, and delivered the paper on which the deed and the assignment were written to his son. The assignment was in these words:

I, James Ramsey, do hereby assign and set over all my right, title, claim, interest, property and demand, whatsoever, in and to the within deed, unto Allen Ramsey, for value received. Witness my hand and seal this third day of August, 1866.

Attest, Geo. Bish. James Ramsey. [Seal.]

Eighteen years later, in 1884, he conveyed the same land by deed to his daughter, Elizabeth Jane Graham. The father was in possession until his death. Allen Ramsey died before his father. This action was brought by the heirs-at-law of Allen.

The defense alleges that Allen took only a life estate in the land under the assignment made by his father to him, and that on his death his title was extinguished, the fee having passed to Mrs. Graham under the deed made to her in 1884. Two questions were raised on the trial, and are now for determination. The first relates to the construction and legal effect of the assignment to Allen Ramsey. The other is over the right of the plaintiffs to show by George Bish, the scrivener by whom the assign-

ment was drawn and the subscribing witness to its execution, what the parties intended and agreed upon, what they asked him to put in writing, and what he undertook to do for them. The learned judge of the court below held that the assignment conveyed only a life estate, and that evidence offered to show that a fee simple was intended, and that the failure of the scrivener was by mistake of his own, was incompetent.

We do not doubt the general rule laid down by the learned judge that the word "heirs," or its equivalent, is necessary in a deed in order to vest a fee simple in the grantee. The rule is as old as the common law, and, as applicable to a formal deed, is well understood and constantly applied. It is the invariable practice of professional conveyancers to describe the estate which it is intended to convey by apt words. If it is a fee the words of inheritance are introduced. If it is for life of the grantee or of another the character and duration of the estate are clearly set forth.

Instruments having no apt words of description in them are not often met with, but when encountered are found like the one now before us to be the work of men who have no professional training and no knowledge of the principles of conveyancing. They are almost always intended to convey a fee simple, and fail to do so because of the omission of the necessary technical words, the importance of which was unknown to the scrivener and to the parties. It is for this reason that the courts have relieved against the mistakes so made when the proofs were sufficient to justify them in so doing, and have applied the general rule only to such cases as came clearly within its operation. Thus the courts, both in England and in this country, have held that the word "heirs" was not necessary to pass an absolute estate in fee when there was a gift by will, but that the intent to vest a fee may be gathered from the will as a whole. *Little's App.* 81 Pa. 190.

So it has been held that an executory contract without words of inheritance will pass a fee simple in equity. *Ogden v. Brown*, 38 Pa. 247.

And it was held in the case last cited that the effect of an informal instrument transferring an interest in real estate depends, not on any particular words or phrases found in it, but on the intention of the parties as collected from the whole instrument.

This case was followed in the recent case of *Dreibach v. Serfass*, 126 Pa. 32. But the effort to avoid the rigor of the rule where its application is not obligatory began long ago. Where technical words are supplied by reference to another instrument, which contains them, the case was recognized as an exception as early as the days of *Lord Coke*, and this exception was recognized by our own case of *Lytle v. Lytle*, 10 Watts, 259, and followed. The rule was plainly laid down in the last case cited, that a fee simple may be created in Pennsylvania by deed, without words of inheritance, by a reference to another instrument in which such words are found, and it was made clear that such was the rule in England at a very early date. The following examples are from Sheppard's Touchstone: A conveyance was made by deed in which the grantor recited that "B. hath enfeoffed him, the grantor of Whiteacre, to

have and to hold to him and his heirs, and that as fully as B has given Whiteacre to him and his heirs, he doth grant the same to C." Here the word "heirs" is supplied in the grant to C by the reference to the grant from B, and C takes a fee simple without the appearance of words of inheritance in the grant to him. Another case is that of a grant of two acres of land "to have and to hold the one acre to A and his heirs, and the other acre to B *in forma predicta*." Here B takes a fee simple by virtue of the reference to the grant to A, in which words of inheritance appear. The reference shows the intent of the grantor, and is held to import the words of inheritance into the grant to B.

In the light of these cases, let us look once more at the assignment before us. We find the assignor held a deed in fee simple in the usual form made in 1863 by another son, John. On the back of this deed the assignment is written. It refers for a description of the estate granted to the terms of the deed upon which it is indorsed, and professes to transfer to the assignee all the right, title, interest, property, claim and demand of the assignor "in and to the within deed." What was the title of the assignor? That question can only be answered by an examination of the description of it in the body of the deed; but whatever it was, the assignor undertakes to transfer it to his assignee. Not a part of it, not a life estate carved out of it, but "all the right, title, interest, property, claim and demand" of the assignor. Nothing was left. He transferred his whole estate

as vested in him by virtue of the deed by the reference to its terms in the assignment. He said in substance and in legal effect, "as fully as the within deed clothes me with the title to the land described in it, so fully and completely do I transfer the same land to my son Allen. He is to take from me the title which I took from my grantor." The technical words that are wanting in the assignment standing by itself are thus supplied by the reference to "the within deed" for a description of the estate; and the fee simple, which the father took by the deed from John, he transfers by his assignment to Allen. This is what was intended, and the scrivener wrought better than he knew in making his reference to "the within deed" for a description of the "right, title, estate, interest, property, claim and demand" of the assignor. If Allen bought a life estate only, it is reasonable to suppose that he would have taken possession; but he left his father in possession and in the full enjoyment of its proceeds. If the father understood that he parted with a life estate only and retained the fee, he would naturally keep the deed under which he acquired title; but he indorsed his assignment upon that deed and delivered it so indorsed to Allen.

We are satisfied, therefore, that the parties intended just what our construction of the assignment shows they did, viz.: to convey the fee simple to Allen. In this view of the case it becomes unnecessary to consider the other question at any length.

The judgment is reversed, and a venire facias de novo awarded.

ARKANSAS SUPREME COURT.

PERRY COUNTY, *Appt.*,

v.

CONWAY COUNTY.

(...Ark....)

1. A claim given by special Statute in favor of one county against another need not, unless required by such Act, be authenticated, as required in the case of ordinary claims against counties.
2. A proportion of the debt of a county

may be imposed upon another county to which territory detached from the former is attached, not merely by the Act segregating the territory, but, if that is silent on the subject, by subsequent legislation.

(February, 1, 1890.)

APPEAL from a judgment of the Circuit Court, Conway County, sustaining a demurrer to a claim under a special Statute. *Reversed.*

To Conway County was attached, by an

NOTE.—County indebtedness, latest decisions.

Under Mansf. Dig., § 1146, making all debts to a county payable in county script or warrants, a debt for money loaned by the county is payable in warrants drawn on a fund specially set apart to erect a court-house, and derived from the sale of property given to the county for that purpose. *White v. State (Ark.) 11 S. W. Rep. 765.*

A new county formed out of a portion of another county, and made liable for a portion of the indebtedness, is chargeable with such portion of the interest on outstanding bonds representing the indebtedness. *Hempstead Co. v. Howard Co. 51 Ark. 344.*

As long as bonds of a county are held by the county's agents they do not constitute an indebtedness of the county, within the meaning of a statute providing that a new county formed out of its territory shall bear a part of the indebtedness of the county. *Ibid.*

Under Cal. Const., art. 11, § 18, the income and

revenue provided for a county during a given fiscal year must be applied to the payment of the county indebtedness incurred during such year, before the payment of any indebtedness incurred during a preceding year can be made therefrom. *Shaw v. Statler, 74 Cal. 258.*

The California County Government Act, § 77, providing for payment of claims in order of priority of presentation, must be construed as requiring priority of payment only as between the warrants of any given year. *Ibid.*

Although the Legislature may ascertain or determine the ratable proportion of liability to be assumed by a new county, that question should be remitted to the appropriate local authorities, under suitable legislation. *Re House Bill No. 231 (Colo.) 21 Pac. Rep. 472.*

Under Colo. Const., art. 14, § 4, where a new county is created out of a part or parts of one or more existing counties, it must pay its ratable proportion of all then existing liabilities of the county

Act approved April 12, 1878, a part of the territory of Perry County. No provision was made by that Act in respect to sharing the indebtedness of Perry County, although about one fifth of its taxable property was taken away from that County by the detachment of territory. In 1885 an Act was passed making Conway County liable for a just proportion of the debt of Perry County as it existed when it was divided by the Act of 1878, and providing that Perry County might file a claim against Conway County in the County Court of the latter County. Such claim was filed for \$1,100, but was disallowed by the county court, and on appeal to the circuit court a demurrer was sustained and the case dismissed.

Mr. J. F. Sellers, for appellant:

Where there is an equitable claim and no legal remedy for its enforcement, it is within the recognized authority of the Legislature to provide a remedy by subsequent enactment.

Searcy v. Stubbs, 12 Ga. 497; *Cutts v. Hardee*, 38 Ga. 350; *Coccos River Steamboat Co. v. Barclay*, 80 Ala. 120; *Hope v. Johnson*, 2 Yerg. (Tenn.) 123; *Sutherland v. DeLeon*, 1 Tex. 250; *Caperton v. Martin*, 4 W. Va. 138; *Sampeyre v. United States*, 83 U. S. 7 Pet. 223 (8 L. ed. 665); *Oriental Bank v. Freese*, 18 Me. 109; *Larkin v. Saffarans*, 15 Fed. Rep. 147; *Bridgeport v. Housatonic R. Co.* 15 Conn. 475; *Cooley*, Const. Lim. 4th ed. p. 460; 1 Kent, Com. 11th ed. p. 455.

Apparently owing to the fact that it is so much the custom to provide for the division and payment of the debts by the same Act by which counties are divided, there seem to be few cases in which the power of the Legislature by subsequent Act to provide for the division has come directly in question; but the following seem to be in point.

Sedgwick Co. v. Bunker, 16 Kan. 498; *Beals v. Amador Co.* 28 Cal. 449; *Oreighton v. San Francisco*, 42 Cal. 446; *New Orleans v. Clark*, 95 U. S. 644 (24 L. ed. 521); 1 Dillon, Mun. Corp. §§ 68, 76, 189.

Mr. E. B. Henry for appellee.

Sandels, J., delivered the opinion of the court:

It is objected by defendant County that the claim of Perry County was not authenticated as required by the General Statute in case of ordinary demands against counties.

or counties from which such new county shall be formed; and the liability of the new county will rest upon the people of the new county as a whole. *Re House Bill No. 122* (Colo.) 21 Pac. Rep. 478.

Under Iowa Code, § 2610, no recovery can be had on a claim against a county for a larger amount than that presented to and demanded from the board of supervisors. *Marsh v. Benton Co.* 75 Iowa, 460.

The provisions of N. C. Const., art. 7, § 7, requiring the submission to the voters of a county of questions in reference to the contracting of debts, has no application to antecedent obligations or the use of the means necessary for their discharge. *Blanton v. McDowell Co.* 101 N. C. 532.

Where a county in Wisconsin entitled to the benefit of a percentage on the gross earnings of a railroad company, for the consideration of which the county had incurred indebtedness, was divided and the indebtedness apportioned, the benefit of such percentage of earnings should be applied in 6 L. R. A.

The special Statute giving the right to sue upon this claim does not require it, and no principle of statutory construction makes it necessary. The only other question presented is whether the Act of 1885 is constitutional.

The power of the Legislature to alter and abolish counties; to erect new corporations in the place of the old; to divide and dispose of the property held by counties; to charge portions of the debt of the old county upon that receiving its detached territory,—is every where conceded, and nowhere more emphatically than in this State. *Eagle v. Beard*, 38 Ark. 497, and cases cited.

Upon general principles of law, if a part of the territory and inhabitants of a county be separated from it by annexation to another, or by the erection of a new county, the remaining part of the county retains all its property, and remains subject to all its obligations and duties. *Laramie Co. v. Albany Co.* 92 U. S. 307 [23 L. ed. 552], and cases cited; *Mount Pleasant v. Beckwith*, 100 U. S. 514 [25 L. ed. 699].

The only debatable question is as to whether the Act segregating the territory must impose such proportion of the debt of the old county upon the new one, or upon the county receiving the detached territory, as is equitable and just; or whether, where such Act is silent as to this, subsequent legislation may make the imposition. This has been ruled differently in the courts.

The earlier doctrine [still followed by some courts] was that the Act detaching the territory must apportion the debt, and that it could not be subsequently taken from the old and imposed upon the new county. *Hampshire Co. v. Franklin Co.* 16 Mass. 76; *Bowdoinham v. Richmond*, 6 Me. 112.

The better doctrine is that, the power of the Legislature to impose the debt of one county upon another depending upon the existence of a moral obligation from the new county, or the county receiving new territory, to pay part of the old debt, the Legislature may so ordain whenever it finds the moral obligation to exist. *Sedgwick Co. v. Bunker*, 16 Kan. 498; *Oreighton v. San Francisco*, 42 Cal. 446; *Layton v. New Orleans*, 12 La. Ann. 515; *Laramie Co. v. Albany Co. supra*; *Lycoming Co. v. Union Co.* 15 Pa. 166; *Guilford v. Chenango Co.* 13 N. Y. 143; *New Orleans v.*

favor of the two counties ratably, according to the indebtedness, although no express provision to that effect was made by the Statute. *State v. Harshaw*, 73 Wis. 511.

No formal pleadings are required in the presentation of claims; a written statement or account giving the nature of the claim and identifying it so as to bar another action is all that is necessary. *Stout v. Grant Co.* 5 West. Rep. 635, 107 Ind. 343.

The authority for the allowance of claims must be found in the statute, either in express words or by fair implication. *Roberts v. People*, 9 Colo. 468.

A verification of a claim which states that the same is true and correct, and that the same is due and owing from the county, substantially complies with the Political Code. *Rhoda v. Alameda Co.* 60 Cal. 523.

Since the Constitution of 1877, all suits by or against a county must be in the name of the county. *Arnett v. Decatur Co.* 75 Ga. 723.

Clark, 95 U. S. 654 [24 L. ed. 522]; 1 Dillon, Mun. Corp. § 189.

The Act in this case is less open to objection than those usually passed, since it makes Conway County liable only for such equitable proportion of the debt as can be established by legal evidence. The field is open to show, as

against a proportion of the debt, the value of county property retained by the old County and the equity of the imposition of any burden at all.

The demurrer should have been overruled. *Reverse and remand for further proceedings.*

NEW YORK COURT OF APPEALS (2d Div.).

William F. TAYLOR, *Respnt.*,

v.

Elijah J. MILLARD, *Appt.*

(.....N. Y.)

Where upon parol partition of their lands, tenants in common agree orally that one shall have a right to enter and take away one half of the apples which shall grow in an orchard which is allotted to, and taken possession of by, the other, a subsequent recorded conveyance of the orchard which does not mention such agreement or right will defeat the alleged right to take the apples as against one who afterwards purchases the orchard in reliance upon the record title under the provisions of the Recording Act, and without notice of such right,—at least in the absence of the record in the county clerk's office of any other instrument alluding to the agreement or the right.

(January 14, 1890.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Third Department, affirming a judgment of the Rensselaer County Court in favor of plaintiff in an action to recover damages for the alleged wrongful taking by defendant of apples from plaintiff's orchard. *Affirmed.*

Statement by **Vann, J.:**

Appeal from a judgment of the General Term of the Supreme Court in the Third Judicial Department, affirming a judgment of the County Court of Rensselaer County, entered upon the decision of the county judge.

This is an action of trespass, brought in the county court, after a suit for the same cause of action, commenced in Justice's court, had been discontinued because a plea of title was interposed by the defendant. The county judge found as facts that from 1836 to 1850 two brothers, named John and Elijah Millard, owned as tenants in common a farm of about 170 acres in Rensselaer County, upon which there was an apple orchard; that in 1850 they made a parol partition of said farm, by which John was to have 100 acres, including the orchard, and Elijah the remaining seventy acres; and, as part of the arrangement between them, they made an oral agreement by which Elijah, his heirs and assigns, were to have the right to enter upon the part belonging to John, and gather one half of the apples growing or to grow in said orchard; that immediately after the parol partition was made they took possession of their respective portions of the farm, and from that time they and their successors in title have continued to own and occupy the parts so allotted to them, respectively, without any claim

of title being made by either to the land so owned and occupied by the other; that in 1854 Elijah died, leaving a last will and testament, by the second clause of which he devised said 70 acres and the appurtenances to the defendant; that the sixth clause of said will is as follows: "Sixth. I give and bequeath to Elijah J. Millard, and to his heirs and assigns, forever, all my right, title and interest to the apples growing or to grow in the premises now occupied by John Millard;" that the defendant took possession of the 70 acres under the will, and occupied them until September, 1861, when he conveyed them, "with the appurtenances," to Mary E. Millard, by quitclaim deed, duly recorded, which made no mention of any right, or supposed right, to enter upon the 100 acres and gather one half of the apples in the orchard thereon; that March 23, 1870, John Millard conveyed the 100 acres to one William A. Millard by warranty deed, duly recorded two days later, and on March 25, 1880, said William A. conveyed the same premises to the plaintiff by a like deed, recorded the next day; that neither of these deeds contained any reference to a right, or supposed right, of the owner of the seventy acres to enter on the land thereby conveyed, and gather apples, and that there is no evidence in the case that the plaintiff had notice of the existence of any such right or claim; that soon after plaintiff went into the possession of the 100 acres under said deed, and shortly before the commencement of this action, the defendant, by direction of said Mary E. Millard, entered thereon, and gathered apples from said orchard to the value of seven dollars, after he had been forbidden to do so by the plaintiff; that, from the time of the parol partition until the defendant was so forbidden by the plaintiff, Elijah Millard and his successors in title to the 70 acres had annually gathered apples from said orchard, and had never before been prohibited.

It was admitted by the parties, although not found as a fact, that twenty new trees were set out in the orchard after the parol partition.

The county judge found as a conclusion of law that the entry of the defendant on the lands of the plaintiff was without right, and that he was a trespasser in so doing; and judgment was directed against him for the sum of \$7 on account of such trespass, besides costs.

Mr. Henry L. Landon, for appellant:

The parol partition, both in regard to the land and the fruit of the orchard, was one entire transaction, and the agreement in regard to the fruit cannot be rescinded without rescinding the parol partition of the land. The moment either of the parties repudiates any of

fore require no proof of the fact. But there are doubtless intoxicating beverages which are not so well known, and of whose character the courts could not take notice, and more intoxicating beverages may yet be discovered. As to all such, when one is charged with selling them in violation of law, there must be proof that they are intoxicating before a conviction can be had. Hitherto the courts have not been willing to take notice that lager-beer is intoxicating, but have submitted the question, when controverted, to the jury, to be determined upon the evidence."

The use of the word in the Statute is in entire harmony with the views expressed in the case cited. The Legislature recognized the fact, of the existence of which courts take judicial notice, that fermented liquor may or may not be intoxicating. Some of it is, and some of it is not. The sale of the former was forbidden; not so as to the latter. Proof could always be given on a prosecution for violation of the law as to the character and effect of the particular drink sold under the name of "beer," and thus the law would be executed. It plainly was not the intention of the Legislature to prohibit the sale of the numerous kinds of mild drink sold under the name of "beer," and I think it may be affirmed that the term, as now used, if it imports any particular beverage, is generally understood to refer to "lager." This construction gives full effect to the law, and under this expansive meaning of the word, the sale of all fermented liquors which are shown to be intoxicating will be regulated. To adopt the contrary view will violate the cardinal rule which is applied in all criminal prosecutions, viz., that the prosecution must prove every fact essential to establish the guilt of the person charged with the crime. The fact of the sale of intoxicating liquor must be established. As to strong and spirituous liquors, the courts take notice of their intoxicating character, and that stands in lieu of evidence. But, as to the milder kinds of drink, proof of their intoxicating character must be adduced. If, therefore, on the trial, on proof of the sale of beer, without any evidence as to its character or quality, the jury is to be instructed that it is of the kind that intoxicates, the court assumes a fact not proven, and the burden of showing that it is of a non-intoxicating character is put on the defendant. As well might a person be convicted of grand larceny by proof of the theft of a watch, or of burglary in the first degree by proof of the breaking into an inhabited dwelling. But, as in the first-named offense the value of the watch is an essential ingredient of the crime, and in the second it is necessary to prove that the offense was committed in the night-time, so, with the sale of beer, it must be shown that it was of an intoxicating character; otherwise, there has been no violation of the law. The court can indulge in no presumption in the case, except as to the innocence of the accused; and, until it appears by sufficiency of proof that the particular beverage sold was of an intoxicating kind, the presumption of innocence controls the case. This rule applies not only to prosecutions distinctly criminal, but to penal actions, where the plaintiff seeks to charge the adverse party with a penalty or forfeiture, and is particularly applicable in an action like the 6 L. R. A.

present, where the consequences may be as disastrous to a defendant as they appear to have been in this case.

It is said, however, that by the decisions of the courts it has been decided that the word imports an intoxicating beverage. The only case that so holds, that I have been able to find, is *People v. Wheelock*, 8 Park. Cr. Rep. 9, which was a decision of the General Term of the Seventh District in 1855. The decision is based upon *Nevin v. Ladue*, 8 Denio, 48, and same case in error, page 487, and on the definition of the word in Webster's Dictionary.

In *Nevin v. Ladue*, the defendant was charged with selling "ale, strong beer or fermented beer," and admitted the sale, but claimed that it was not prohibited by statute. The supreme court affirmed the conviction on the authority of the definition of the word "beer" in Webster's Dictionary, which was said in the opinion to be "a spirituous liquor, made from grain," etc. It may be that the early edition of Webster's Dictionary so defined the word, but the later editions do not describe beer as a spirituous liquor, but as a "fermented liquor." Worcester's Dictionary gives the same definition to the word. This decision was reversed by the court of errors on the ground that the admission of a charge made in the alternative imputed nothing more than that the defendant had sold "fermented beer," and that that term, in the connection in which it was used, covered various kinds of beer, which had long been in use in this country, under the different names of "spruce beer," "ginger beer," etc., which had never been considered as intoxicating, either here or in England. There is nothing in the report of the case to show that the court concurred in the views of the chancellor on the meaning of the word "beer." Three other opinions were delivered, in all of which it was maintained that the question whether ale or strong beer was within the prohibition of the Excise Laws did not arise in the case; and the case is an authority for nothing more than that an admission of selling "fermented beer" was not a violation of the Statute against selling strong and spirituous liquors.

Any attempt to distinguish between "beer" and "fermented beer" would, I think, be a failure. Beer is a fermented liquor; and, unless the particular beverage under consideration is a fermented liquor, it is not beer. Strong beer, small beer and ale were always, here and in England, recognized as intoxicating drinks, as is shown by the very interesting opinion of the chancellor in the case cited, but the term "fermented beer" or "beer" includes them all, and many more besides, that are not intoxicating. The decision in *People v. Wheelock* is not, therefore, sustained by the authorities cited to support it.

In *Tompkins Co. Excise Comrs. v. Taylor*, 31 N. Y. 173, the defendant was charged with selling "strong beer," and this court held it within the meaning of the term "strong and spirituous liquors."

People v. Wheelock was cited and referred to in the opinion, but I do not understand that it received the approval of the court. Indeed, the opinion recognizes the rule laid down in *Rau v. People*, *supra*, that a distinction must be made between such liquors as are "capable

of causing intoxication and those containing so small a percentage of alcohol that the human stomach cannot contain sufficient of the liquor to produce that effect;" and cites spruce beer, lager-beer, and others among the latter kind.

Killip v. McKay, 13 N. Y. S. R. 5, was an action for penalties under section 18, chap. 628, Laws 1857. The General Term of the Fifth Department held that the evidence in that case was susceptible of the construction that the "beer" that the witness drank had the taste and quality of ale or strong beer, and, although it might have been sold under the name of "lager-beer," possessed properties which were intoxicating, and upheld the verdict of the jury.

It thus appears that none of the cases, except *People v. Wheelock*, have attempted to give to the word "beer" a meaning imputing an intoxicating liquor, but all recognize the fact that some kinds of beer are intoxicating, and some are not. While it is not necessary to say that the word would include in its ordinary meaning such mild drinks as spruce beer or ginger beer, it certainly would include lager-beer, which is one of the best known, and probably the most extensively used, of the malted liquors. But, as has been shown, lager-beer is not to be deemed intoxicating, without the proof of the fact. I do not see, therefore, how, on proof of a sale of beer, the jury could say that it was strong beer, or intoxicating beer. It might have been lager-beer; and, if it was, they were not authorized, on the proof, to find for the plaintiff. The proper rule is to require, in all prosecutions for violation of the Statute for selling beer, proof of the character and quality of the particular beverages sold. Full effect is thus given to the intention of the Legislature to regulate the sale of those liquors which are intoxicating, and the rules that must apply to all prosecutions of a criminal character are maintained.

In this case, the jury might very well have found from the plaintiff's evidence that the particular beer drank by the plaintiff's husband was intoxicating; but that question was withdrawn entirely from their consideration, and they were not permitted to exercise their judgment upon it.

For this error the judgment should be reversed, and a new trial granted, with costs to abide the event.

Vann, Haight and Parker, JJ., concur.

Bradley, J., dissenting:

The complaint alleges a cause of action within the Statute which provides that a wife injured in her means of support, in consequence of the intoxication of any person, shall have a right of action against any person who, by selling or giving away intoxicating liquors, shall have caused the intoxication in whole or in part of such person. Laws 1873, chap. 646.

On the evening of March 8, 1885, the husband of the plaintiff, after having been at the saloon of the defendant, went to his place of residence, and there, at some time during the night, committed suicide by hanging himself. The plaintiff charges that such act of self-destruction of the husband was caused by his intoxication, produced by intoxicating liquors

obtained by him at the defendant's saloon, and that, in consequence of such intoxication, the plaintiff was injured in her means of support. If those propositions were supported by the evidence, the conclusion that the plaintiff was entitled to recover was warranted. *Volans v. Owen*, 74 N. Y. 526; *Mead v. Stratton*, 87 N. Y. 493; *Nau v. McKechnie*, 95 N. Y. 632.

The plaintiff gave evidence tending to prove that during his life she was dependent upon him for support, the means for which he provided by his services, and that her customary means of support were cut off by his death. The propositions whether he was intoxicated, and whether his death was caused by, or was the consequence of, his intoxication, were questions of fact, upon the evidence, for the jury to determine. The plaintiff and her daughter testified that he came home intoxicated that evening, twenty minutes before 11 o'clock; that, at a quarter past 12, the plaintiff went to bed, leaving him lying on the lounge; and that the next morning he was found hanging by the neck, dead. Those questions were submitted to the jury, and their finding upon both facts must, for the purposes of this review, be deemed conclusive. He was a man forty-three years of age, and, for aught that appears, was in good health, although somewhat intemperate in his habits. He had a family, consisting of his wife and several children. The jury were at liberty, upon the evidence, to conclude that there was no motive on his part to take his life, except that arising from a reckless condition resulting from his intoxication of that night, and that it was the proximate cause of the act which produced his death. The fact that he had attempted a year before to commit suicide in the same manner, and that he at times was despondent, and had threatened to take his own life, were properly matters for consideration upon the question of the cause or motive of his act of self-destruction; but it cannot, as matter of law, be said to have been controlling. The fact was for the jury to determine, and their conclusion was permitted by the evidence.

It is, however, contended by the defendant's counsel that the evidence failed to prove that the husband obtained any intoxicating liquor at the defendant's saloon that evening, or that he was intoxicated when he left there, and therefore the trial court erred in charging the jury that the plaintiff's husband drank intoxicating liquors that evening at the defendant's saloon; to which charge exception was taken. This instruction by the court to the jury was founded upon the undisputed evidence that the husband drank two or three glasses of beer there at that time. The question raised by that exception is whether, without other evidence as to its quality or effect, it may be assumed that the term "beer," as a beverage, imports intoxicating liquor. It is well understood that all spirituous liquors are intoxicating, and that all intoxicating liquors are not spirituous. As commonly used, the term "spirituous liquors" does not embrace fermented liquors. The latter may, or may not, be strong and intoxicating. Some of it is, and some of it is not so. *Nevin v. Ladue*, 3 Denio, 487.

The question whether the words "intoxi-

ating liquors" embraced lager-beer, arose in *Rau v. People*, 63 N. Y. 277. It was there remarked that the courts had not then been willing to take notice that lager-beer was intoxicating, and therefore proof of the fact was essential to justify a conviction for a sale of it in violation of the Statute.

In the Revised Statutes the liquors which it was penal to sell at retail, without license, were designated as strong, or spirituous. And in *People v. Wheelock*, 3 Park. Cr. Rep. 9, it was held that the word "beer," in its ordinary sense, denoted a beverage which was intoxicating, and came within the meaning of the words "strong or spirituous liquors," as used in the Statute. That case was cited with apparent approval in *Tompkins Co. Excise Comrs. v. Taylor*, 21 N. Y. 173, 175, in which *Nevin v. Ladue* was cited and explained. And such was the view of the court in *People v. Hart*, 24 How. Pr. 269.

There has also been some legislative import given to the word "beer" in its use to designate a liquor used as a beverage. In the "Act to Suppress Intemperance, and to Regulate the Sale of Intoxicating Liquors" (Laws 1857, chap. 628, § 5), as amended by Laws 1873, chap. 549, § 3, the inhibited sale was applied to "strong or spirituous liquors, wines, ale or beer." The evident purpose of the Statute was to regulate the sale of intoxicating liquors, and those there expressly mentioned must be deemed within the intended legislative denunciation as such liquors. They are treated by the Statute as intoxicating liquors, and, therefore, within its purpose, to place the regulated restric-

tion upon their sale and disposition for use as a beverage. And it may be presumed that such legislative action and intent were founded upon the requisite information. *Bumsey v. People*, 19 N. Y. 41, 47.

It is a fact, of which notice may be taken, that there are fermented liquors and malt liquors which will produce intoxication; and, in view of the Statute and cases already referred to, the conclusion is fairly required that the word "beer," unqualifiedly applied to liquor sold or given away to be used as a beverage, presumptively imports intoxicating liquor. It was so held in *Briffitt v. State*, 58 Wis. 89.

The exception to the charge of the court was therefore not well taken. The jury having found that the husband was intoxicated, they were permitted to also find that the intoxication was produced in whole or in part by the beer drunk at the defendant's place, although they would have been justified, upon the evidence on the part of the defendant, to have concluded otherwise. It was wholly a question of fact for the jury. It did not appear that the husband obtained any liquor elsewhere that night, and the conclusion was warranted that he reached home about ten minutes after he left the defendant's saloon. The question whether or not the damages were excessive was disposed of in the court below. There seems to us to be no further question presented by any exception for consideration on this review. The judgment should be affirmed.

Follett, C. J., and Potter, J., concur.

MISSOURI SUPREME COURT.

J. W. WEIR and Wife, *Petitioners*,

J. W. MARLEY, *Respond.*

(...Mo....)

1. The principle of *res judicata* applies to a decision as to the custody of a child on a writ of habeas corpus while the state of facts remains the same.
2. The presumption is that it is for the best interest of a child to be left with its father rather than to be given to grandparents.
3. A parol agreement by a father to give his infant child to its grandparents will not be sufficient, at least upon doubtful proof of such contract, to deprive him of his right to the custody of the child, in the absence of proof that it is not for the child's interest to remain with him.

(*Sherwood, J., dissents.*)

(January 27, 1890.)

PETITION for writ of habeas corpus to obtain the custody of a minor child. On return to writ, *child remanded into custody of respondent.*

The facts are fully stated in the opinion.

NOTE.—See *Dollong v. Schuyler Nat. Bank* (Neb.) 8 L. R. A. 142; *Sharon v. Terry*, 1 L. R. A. 572, and *notes*, 36 Fed. Rep. 337.
6 L. R. A.

Messrs. Boyd & Delaney, for petitioners:

J. W. Marley by contract, consent or agreement, relinquished his parental control over the child Louise, and surrendered the same to the petitioners herein. Such contract is valid and binding on him, especially as he permitted petitioners for years to discharge the obligations of parents and permitted the affections of the child to become attached and a current given to her life.

Hurd, *Habeas Corpus*, 537; *Tyler, Infancy and Cov.* 284; *Church, Habeas Corpus*, § 444; *Re McDowle*, 8 Johns. 328; *Re Murphy*, 19 How. Pr. 518; *Dumain v. Guynne*, 10 Allen, 274; *Bonnett v. Bonnett*, 61 Iowa, 199; *State v. Smith*, 6 Me. 462; *State v. Bratton* (Del.) 15 Am. L. Reg. N. S. 362; *Re O'Neal*, 3 Am. L. Rev. 678; *Clark v. Bayer*, 32 Ohio St. 310; *Ellis v. Jeaup*, 11 Bush, 414; *Varney v. Young*, 11 Vt. 258; *Wodell v. Coggeshall*, 2 Met. 92; *People v. Weissenbach*, 60 N. Y. 385; *Pool v. Gott* (Mass.) 14 Law Rep. 269; *Com. v. Dougherty*, 1 Leg. Gaz. Rep. (Pa.) 63; 9 Am. & Eng. Encyclop. L. pp. 241-243, and *notes*.

But a mere contract, as such, is not binding on the father; and if gifts of this character are revokable, such revocation must be timely.

Chapsky v. Wood, 26 Kan. 650; *Re Bort*, 25 Kan. 808.

If one assumes by contract the obligation of

a parent, and stands *in loco parentis* for years, such an one will be held legally to the duties of sustaining said child.

Re Clements, 78 Mo. 352.

The ruling of the circuit judge does not bar petitioners.

Howe v. State, 9 Mo. 682; *Ferguson v. Ferguson*, 36 Mo. 197.

Messrs. J. H. Morrison and Goode & Cravens, for respondent:

Primarily the father is entitled to the custody of his minor children, and he cannot be deprived of this natural and legal right unless the facts bring him within one of the following exceptions: (1) where the father is incompetent or an improper person to have the care and custody of his child; (2) where the enforcement of the general rule would obviously destroy the happiness and well-being of the child.

Re Searrit, 76 Mo. 565; *Chapsky v. Wood*, 26 Kan. 650, and cases cited; *Brinater v. Compton*, 68 Ala. 299, referred to in *Church on Habeas Corpus*, §§ 441, 442; *United States v. Green*, 8 Mason, 482; *Jones v. Darnall*, 103 Ind. 569, 53 Am. Rep. 545; *Sturtevant v. State*, 15 Neb. 459, 43 Am. Rep. 349; *Moore v. Christian*, 56 Miss. 408, 31 Am. Rep. 375.

Such a contract as that claimed by petitioners is not irrevocable.

Re Searrit and *Chapsky v. Wood*, *supra*; *State v. Libbey*, 44 N. H. 321; *State v. Baldwin*, 5 N. J. Eq. 454; *Johnson v. Terry*, 34 Conn. 259; *Brooke v. Logan*, 112 Ind. 183; *People v. Mercier*, 8 Hill, 399.

Brace, J., delivered the opinion of the court:

The issues in this case arise upon the return of the respondent to a writ of habeas corpus issued by Sherwood, J., on the 9th day of September, 1889, returnable to the supreme court at the October Term thereof, by which the petitioners, who are husband and wife, and the maternal grandparents of Louise Marley, an infant aged six years on the 6th day of May last past, seek to recover the custody of said infant from the respondent, who is the father of said infant, and who on the same day, before W. D. Hubbard, judge of the Circuit Court within and for Greene County, on writ of habeas corpus, had theretofore recovered the said infant from the custody of the petitioners. The parties to this suit and to that before Judge Hubbard are the same. The state of facts, on the same day and almost within the same hour within which that adjudication was had and this writ was issued, are the same. The facts stated in the return of the petitioners to the writ of Judge Hubbard, and those stated by them in the petition herein, are substantially the same, and the question whether the discharge of a party in custody by writ of habeas corpus, by a court or officer of competent jurisdiction, is final and conclusive as to the legality of such custody upon the then existing state of facts, is presented by the facts of the case, and we are requested to express an opinion thereon, though not formally pleaded as an estoppel.

Treating this case for the present as a normal one, in which a party charged to be illegally restrained of his liberty, and for whose relief a writ of habeas corpus is the appropriate rem-

edy, and who has by such writ been discharged from that restraint by a tribunal competent to so discharge him, is such discharge final and conclusive?

That the doctrine of *res judicata* is not applicable to the case of a refusal to discharge, and that the prisoner is entitled to the opinion of all the courts or officers authorized in a given cause to issue the writ as to the legality of his imprisonment, is conceded and is not limited in this State by statutory enactment, except in the one particular that the applicant for the writ in his petition must state "that no application has been made to or refused by any court or officer superior to the one to whom the petition is presented." Subject to this limitation, one restrained of his liberty may in succession apply to every court or officer authorized to issue the writ, notwithstanding another court or officer having jurisdiction may have refused to issue it or to discharge him from such restraint, "and from such refusal no appeal will lie," as was held in *Howe v. State*, 9 Mo. 682, the reason assigned in that case being that "the refusal to grant a discharge is not a final judgment from which an appeal will lie to this court;" and in *Ferguson v. Ferguson*, 36 Mo. 167, where an order had been made by the circuit court discharging one child from and remanding two other children into the custody of the father, on a writ issued upon the petition of the mother, appealed from to this court, it was ruled that, "so far as the decision discharged or remanded the persons restrained, this court has no appellate jurisdiction to interfere with it, and no appeal lies to this court in such case" (citing *Howe v. State*, *supra*).

"In this respect the decision is not of the nature of a final judgment. It concerns only the present actual condition of things, and the order of the court is at once executed and accomplished beyond recall, and, in reference to any new state of facts existing afterwards, the parties have the same remedies as before, whether by writ of habeas corpus or other proceeding, in any court of competent jurisdiction."

From these cases may be deduced the doctrine that the principle of *res judicata* does not apply in cases of habeas corpus to judgment remanding the prisoner, or to judgments discharging the prisoner, where a new state of facts warranting his restraint is shown to exist different from that which existed at the time the first judgment was rendered. That it does apply to a judgment discharging the prisoner, where no such new state of facts is shown, may as readily be deduced from the case of *Ex parte Jitz*, 64 Mo. 205. The distinction thus made between judgments remanding and those discharging the prisoner grows out of the nature of the writ, whose *raison d'être* is the protection of personal liberty. It loses none of its characteristics when used for the purpose of obtaining the custody of children, and the same analogies ought to obtain in such cases as when used simply for the purpose of discharging a prisoner from illegal restraint. If this be so, then the judgment of a court or officer of competent jurisdiction, discharging the infant in this case from the custody of the petitioners on the 9th day of September, 1889, on writ of habeas corpus, ought to be a complete answer to

their petition presented on the same day to another court or officer of like jurisdiction, for a like writ, to recover that custody from the same person to whom it was awarded, setting out the same grounds for such recovery in their petition as were set up in their return to the former writ; and this conclusion would not be inconsistent with the actual rulings in the cases cited from this State or the nature of the writ, and would be sustained by authority elsewhere (*Mercein v. People*, 25 Wend. 64; *People v. Mercein*, 3 Hill, 899; *People v. Brady*, 56 N. Y. 182; *Com. v. McBride*, 2 Brewst. 545; *Re Da Costa*, 1 Park. Cr. Rep. 129; *Brooke v. Logan*, 112 Ind. 183; *Spalding v. People*, 7 Hill, 801; *People v. Burnett*, 5 Park. Cr. Rep. 113; *McConologue's Case*, 107 Mass. 154; *Freem. Judgm.* 8d ed. § 824; *Church, Habeas Corpus*, §§ 886, 387), and might be placed upon the ground thus stated in *Freeman, supra*: "The principles of public policy requiring the application of the doctrines of estoppel to judicial proceedings, in order to secure the repose of society, are as imperatively demanded in the cases of private individuals contesting private rights under the form of proceedings in habeas corpus as if the litigation were conducted in any other form; otherwise, as is well stated in the opinion of *Senator Paige [Mercein v. People]*, 25 Wend. 64; 'such unhappy controversies as these may endure until the entire impoverishment or the death of the parties renders their further continuance impracticable. If a final adjudication upon a habeas corpus is not to be deemed *res judicata*, the consequences will be lamentable. This favored writ will become an engine of oppression, instead of the writ of liberty.'"

The serious objection to the conclusiveness of a judgment on habeas corpus in such cases would be removed by a provision for review by appeal or writ of error. It would seem that such provision has been made by statute in some of the States (*Church, Habeas Corpus*, § 888); but Mr. Church is mistaken in the statement that decisions in such cases may be reviewed by statutory authority in Missouri by appeal, and *Ferguson v. Ferguson, supra*, cited by him, is not authority for such statement.

This much has been said in reference to the conclusiveness of the discharge of the infant from the custody of the petitioners on the first writ, in deference to the wish of the parties to have the views of the court upon that subject expressed; but as both parties seem desirous of having the status of this infant definitely settled as far as may be by this court on the merits of the case, and with this view have taken testimony bringing the status of the relations of the parties *inter se* and towards the child before this court up to the time of its submission, and as this remedy from its nature must be ambulatory, to the extent that a judgment in any case can be conclusive only when the same state of facts is shown to exist, we pass to the consideration of the case on its merits.

The mother of the infant Louise (Julia Marley) died in the City of Oswego, Kan., on Monday, the 10th of June, 1868, when the child was five weeks old. The petitioners and respondent were both living in that city at the time, and the kindest and most affectionate relations existed between both parties and their

families. She died at the home of the respondent's father, with whom the respondent and his wife were living at the time, and where the petitioners were also in attendance upon her. The petitioner, Mrs. Weir, testifies that three days before she died she told her that she wanted to have a talk with her husband, and that she said she wanted to tell him, among other things, that she wanted Mrs. Weir to raise the baby. That just before she died, when the parties were by her bedside, she (Mrs. Weir) having kissed her daughter, her daughter said, "This means something;" when Mrs. Weir said to respondent, "Yes; she wants me to ask you if I may raise the baby? You will, won't you?" He hesitated a moment, and said, "Yes." My daughter then motioned for a kiss, and, when he bent over her to kiss her, she said, "It is ma's baby." He said, "Yes; ma's baby." That was all that was said that related to the baby."

The testimony of Dr. Weir and his daughter Miss Ellen, as to what occurred at the bedside just before the death of Mrs. Marley, is to the same effect. Mr. and Mrs. Hobart testified that, on the Thursday after the death of Mrs. Marley, Mr. Hobart asked Mrs. Weir, in the presence of Mr. Marley, "Is this Julia's baby?" and Mrs. Weir replied: "No; it is ours. Julia gave her to us to raise, and Mr. Marley consented;" and Mr. Marley made no reply.

On the other side the respondent denied that any such conversations took place; testified that Mrs. Weir appealed to her daughter to give her the child on the night of her death, but that her daughter made no response, nor did he. The testimony of the other witnesses who were in attendance upon her that night tended to support the testimony of the respondent, and the respondent introduced other evidence tending to prove that, in response to a request of Mrs. Weir, subsequently made to him, to give her the child, he gave a denial; and here ends the only material conflict in the testimony. The child was taken to the home of the petitioners, was tenderly cared for, and nursed by its grandparents through the ills incident to childhood, with the consent of the father, and remained with them almost continuously until about the 27th of April, 1869. In the mean time the petitioners had removed from Oswego to Springfield, Mo., and the respondent had married again. At the date last aforesaid Louise was taken to her father's home at Oswego; remained a time; returned to Springfield; remained a short time at the home of her grandparents; returned again to Oswego; remained with her father at his home until about the 4th of September, when she returned with him to the home of her grandparents. On the 22d of August, just before the last return, the respondent had written to Dr. Weir signifying his desire that Louise should make her future home with him at Oswego, and during this last visit this controversy about the future home and custody of Louise grew up, and culminated in these proceedings by habeas corpus.

The petitioner, Dr. Weir, is a physician aged about fifty years, in comfortable circumstances, with a large and increasing practice, a pleasant home, a refined and cultured family, consisting of his wife, aged about forty-five years, two daughters, aged, respectively, about twenty-

three and twenty years, and two sons, about nineteen and fifteen years, and the aged mother of Mrs. Weir, of about eighty years. The respondent is a banker, aged about thirty-six years, in comfortable circumstances, of exemplary character and habits, and bright prospects; has a pleasant home, his family consisting of his father, a retired banker, aged about sixty years, and his wife, aged about twenty-six years, to whom he has been married about two and one-half years, and by whom he has no child. His wife is a refined, cultured and affectionate lady. The parties and their families, before this controversy, entertained for each other the kindest feelings, and have each at all times treated each other with the greatest cordiality and respect, and since with such consideration as speaks volumes in their favor. The glimpse which the evidence gives us into these two erstwhile, and now, save for this unfortunate controversy, happy homes, leaves no doubt in our minds that Louise would find a congenial and happy home in either; to the members of each of which she seems warmly attached, and by whom it is as warmly reciprocated.

In all civilized countries in which the family is regarded as the unit of social organization, its minor members must and ought to be subject to the custody and control of those who are immediately responsible for their being; for the reason that by nature there have been implanted in the human heart those seeds of parental and filial affection that will assure to the infant care and protection in the years of its helplessness, to be returned to the parents again when they in their turn may need protection in their years of helplessness, and of their child's strength and maturity. The law at the birth of an infant imposes upon the parent the duty of such care and protection, to the performance of which the instincts of nature so readily prompt, and clothes him with the right of custody that he may perform it effectually, upon the presumption that such custody, being in harmony with nature, is best for the interest, not only of the parent and child, but also of society. Conceding, however, that the primary object is the interest of the child, the presumption of the law is that its interest is to be in the custody of its parent. The law has made provision, in two instances, whereby this presumption may be overcome, in the statutes providing for the adoption and apprenticing of children, when, for their interest, this right of custody is permitted to be transferred to another. In regard to all other contracts by parents for the custody of their children, this presumption must obtain; and while the parent may, by his inability or failure to discharge properly his duty towards his child, forfeit his right to its custody because the interest of the child demands it, yet, upon the trial of an issue involving such a forfeiture, he is entitled to the benefit of such presumption, and, unless the interest of the child does demand it, such forfeiture cannot take place. He cannot deprive himself of this right of custody, which is the concomitant of a personal trust imposed upon him by the law of nature as well as by positive

law, and essential to the discharge of the duties of that trust, by contract *per se*; otherwise he might deprive his child and society of the benefits which the law contemplates will inure to each by the personal discharge of his parental duties.

An analysis of the many cases to which we have been cited by counsel serves only to confirm, in our judgment, the correctness of the ruling of this court in *Re Searritt*, 76 Mo. 585, that a father cannot, by contract other than such as are provided for by statute, confer upon another irrevocably and absolutely, as against himself, a right to the custody of his minor child; that, notwithstanding any such contract, upon habeas corpus for the custody of such child, the custody will be awarded to the father unless the welfare of the child demands that it should remain in, or be restored to, the custody of the person with whom it was placed by the father under such contract, or that some other disposition be made of it. Such a contract is not to be entirely ignored. It is to be considered, not for the purpose of fixing the rights of the parties, but for the purpose of shedding light upon their actual relations and feelings toward the infant, and assisting the exercise of a wise discretion by the court as to what disposition should be made of it for the promotion of its own welfare. What is for the best interest of the infant? is the question upon which all the cases turn, at last, whatever may be said in the opinion about contracts; and the answer returned is that the custody of the child is by law with the father, unless it appears by satisfactory evidence that the best interest of the child demands that he should be deprived of that custody, and upon him who so avers devolves the burden of proof, — the presumptions are against it. *State v. Libbey*, 44 N. H. 321; *Chapaky v. Wood*, 26 Kan. 650; *United States v. Green*, 3 Mason, 482; *Hurd, Habeas Corpus*, 537; *Jones v. Darnall*, 103 Ind. 569; *Brooke v. Logan*, 112 Ind. 183; *State v. Banks*, 25 Ind. 495; *Armstrong v. Stone*, 9 Gratt. 102; *Johnson v. Terry*, 34 Conn. 259; *State v. Paine*, 4 Humph. 523; *Rust v. Vanvactor*, 9 W. Va. 600; *State v. Richardson*, 40 N. H. 272; *State v. Baldwin*, 5 N. J. Eq. 454.

And no well-considered case will be found where the custody of a minor child was by habeas corpus taken from the father and given to another upon the sole ground that the legal right of the father had passed to and vested in such other person by parol contract; and yet upon this ground alone, in the light of all the evidence, we are asked to take this child from its father, and give it to the petitioners; for it is impossible to see from the evidence that the interests of the child will be better promoted by awarding its custody to the grandparents than it would be if such custody was awarded to the father. In such case the presumption of the law must obtain that it is to the interest of the child to be in the custody of its father.

The said Louise Marley will therefore be remanded to the custody of the respondent.

All concur, except *Sherwood, J.*, who dissents; *Barclay, J.*, in the result.

MINNESOTA SUPREME COURT.

FIRST NATIONAL BANK of Deadwood,
Appt.,
v.

GUSTIN-MINERVA CONSOLIDATED
MINING CO. et al., Respts.

(....Minn.....)

*1. Where a person becomes a stockholder in a corporation organized under the laws of a foreign State, he contracts with reference to all the laws of that State which enter into the constitution of the corporation; hence the extent of his individual liability, as a shareholder, for corporate debts, must be determined by the laws of that State. This liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. The remedy, however, is governed by the law of the forum.

2. Where, by arrangement between the corporation and the shareholders, the stock is issued as fully paid up, without in fact having been paid for to the full amount of its par value, equity will set aside this fictitious arrangement for its payment, and hold the shareholders liable for the amount not actually paid, in favor of creditors who can fairly be presumed to have given credit to the corporation in reliance upon its apparent and professed capital having been fully paid in; but no such trust will

*Head notes by MITCHELL, J.

be enforced against the stockholders in favor of creditors, who have dealt with the corporation with full knowledge of the arrangement by which the stock was to be fictitiously issued as paid up.

3. If a corporation issued new shares after the claim of a creditor arose, he, not having dealt with the company on the faith of any capital represented by such shares, cannot insist on the contribution by the holders of a greater amount of capital than the corporation itself could claim from them as part of its assets.

(January 14, 1890.)

APPEAL by plaintiff from a judgment of the District Court for Rice County in favor of defendants in an action to enforce payment of a corporate debt by the holders of stock which was not fully paid up. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. G. E. Moody and John B. & W. H. Sanborn for appellant.

Messrs. Warner & Lawrence for respondents.

Mitchell, J., delivered the opinion of the court:

This action was brought upon a debt of the defendant Company, a corporation organized under the Laws of Dakota Territory, and against the other defendants, citizens of this State, as stockholders, to obtain judgment

NOTE.—Liability of stockholder of foreign corporation for its debts.

If the liability of a resident stockholder of a foreign corporation rests in contract merely, as in case of the obligation to pay for shares of stock obtained by subscription or purchase, if the obligation thus assumed is valid and subsisting according to the law of the domicile of the corporation, it will be good everywhere, and will be enforced in the courts of every other State or country; and the receiver or assignee in bankruptcy of a foreign corporation may maintain his action against the resident stockholder, if the corporation itself could have maintained it had the stockholder been a citizen of the State in which it was domiciled. *Mann v. Cooke*, 20 Conn. 178; *Payson v. Withers*, 5 Biss. 269; *Payson v. Stoever*, 2 Dill. 428; *Seymour v. Sturges*, 26 N. Y. 134; *McDonough v. Phelps*, 15 How. Pr. 372; *Thompson, Liability of Stockholders*, 90.

If the liability of the domestic shareholder in a foreign corporation exists wholly by virtue of a foreign statute, the principle of law that the legislation of one State has no operation in another State *ex proprio vigore*, but only *ex comitate*, applies. *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233, 46 N. H. 371; *Smith v. Mutual Life Ins. Co.* 14 Allen, 230; *Halsey v. McLean*, 12 Allen, 438; *Gale v. Eastman*, 7 Met. 14; *Healy v. Root*, 11 Pick. 389; *Plymouth First Nat. Bank v. Price*, 33 Md. 487.

Liability governed by law of domicile, remedy by law of forum.

The charter of a corporation or the statute under which it is organized furnishes the guide in determining the liability of its stockholders to its creditors. *Bingham v. Rushing*, 5 Ala. 408; *Lane v. Morris*, 8 Ga. 474; *Shaw v. Boylan*, 16 Ind. 384; *Sumner v. Marcy*, 8 Woodb. & M. 105; *Bank of St. Marys v. St. John*, 25 Ala. 620; *Smith v. Huckabee*, 53 Ala. 61. R. A.

See also 12 L. R. A. 307.

192; *Trustees v. Flint*, 13 Met. 539; *Coffin v. Rich*, 45 Me. 510; *Thompson, Liability of Stockholders*, 90.

As regards the common law and statutory liability of a stockholder on his stock, the law of the domicile of the corporation determines the extent of the liability, while the law of the forum determines the method of enforcing that liability. *New Haven Horse Shoe Nail Co. v. Linden Spring Co.* 2 New Eng. Rep. 580, 142 Mass. 349; *Cook, Stock and Stockholders*, 10.

If the stockholder is liable at all, he is, in general, liable only according to the law of the domicile of the corporation. *Payson v. Withers*, 5 Biss. 269, 278; *Seymour v. Sturges*, 26 N. Y. 134; *Merrick v. Van Santvoord*, 34 N. Y. 208, 210; *McDonough v. Phelps*, 15 How. Pr. 372; *Ex parte Van Riper*, 20 Wend. 614.

One who accepts shares of stock in a foreign corporation cannot plead ignorance of such laws, any more than one can plead ignorance of the laws of another State when he makes a contract to be executed therein. *Payson v. Withers*, *supra*.

Enforcement of liability; law of comity.

Courts of different States have enforced against their own citizens, stockholders in foreign corporations, a limited statute liability to creditors, in excess of any amount which might remain unpaid of their stock subscription. *Sackett's Harbour Bank v. Blake*, 3 Rich. Eq. 225. See also *Bond v. Appleton*, 8 Mass. 472; *McDonough v. Phelps*, 15 How. Pr. 372; *Paine v. Stewart*, 33 Conn. 517; *Ex parte Van Riper*, 20 Wend. 614; *Seymour v. Sturges*, 26 N. Y. 134; *Thompson, Liability of Stockholders*, 92.

If the liability sought to be enforced is in the nature of contract, and is not opposed to the legislation or public policy of the State in which it is sought to be enforced, the courts of such State will give effect to it. If the statute creating such liability is penal in its nature, it will not be enforced outside of the sovereignty enacting it. *Derrick-*

against the Company for the amount of the debt, and against the other defendants for the respective amounts alleged to be due and unpaid on the stock held by them, so far as necessary to satisfy the judgment against the corporation. To dispose of certain preliminary questions raised by the defendants it may be stated, at the outset, that it is elementary law that, where a person becomes a stockholder in a corporation organized under the laws of a foreign State, he must be held to contract with reference to all the laws of the State under which the corporation is organized and which enter into its constitution; and the extent of his individual liability as a shareholder to the creditors of the company must be determined by the laws of that State, not because such laws are in force in this State, but because he has voluntarily agreed to the terms of the company's constitution.

It is equally clear, upon both principle and authority, that this liability may be enforced by creditors wherever they can obtain jurisdiction of the necessary parties. This does not depend upon any principle of comity, but upon the right to enforce in another jurisdiction a contract validly entered into. The remedy, however, does not enter into the contract itself; and for this reason the individual liability of shareholders can only be enforced by the remedies provided by the laws of the forum. Hence the question of the liability of the defendant shareholders must be determined by the laws of Dakota, and that of remedy by the laws of Minnesota.

That the remedy resorted to by plaintiff in this case is a proper one is well settled. *Merchants Nat. Bank v. Bailey Mfg. Co.* 84 Minn. 323, 325.

Upon the trial the judge considered it to be one triable by the court, but, on his own motion, submitted a specific question of fact to a jury; but subsequently, considering the verdict as immaterial, he proceeded without regard to it, and found the facts upon all the issues in the case. As neither party claims anything from this special finding of the jury, and as there is no exception which raises the question whether the action was triable by the court or by a jury, the whole case is reduced to the single question whether the conclusions of law are justified by the findings of fact.

Section 418 of the Civil Code of Dakota provides that "each stockholder of a corporation is individually and personally liable for the debts of the corporation to the extent of the amount that is unpaid upon the stock held by him." This is but declaratory of the common law.

The findings of fact, so far as here material, are, in substance, as follows: Prior to November 13, 1886, there had been organized, and were at that date in existence, under the laws of Dakota, two mining corporations, viz., the Gustin Belt Gold Mining Company and the Minerva Mining Company, of the latter of which the plaintiff, a national banking association at Deadwood, Dak., was a creditor. On the date named the defendant corporation was organized for the purpose and with the inten-

son v. Smith, 27 N. J. L. 166; Plymouth First Nat. Bank v. Price, 33 Md. 457; Halsey v. McLean, 12 Allen, 438; Gale v. Eastman, 7 Met. 14; Scoville v. Canfield, 14 Johns. 338; Ogden v. Folliot, 3 T. R. 738; State v. John, 5 Ohio, 217.

Statutes making stockholders liable to pay the debts of the company in case of a failure to give a certain notice therein specified, or for certain contracts forbidden by statute, are penal in their nature, and not enforceable outside the State enacting them. *Sturges v. Burton*, 8 Ohio St. 215; *Kritzer v. Woodson*, 19 Mo. 327; *Hill v. Frazier*, 23 Pa. 320; *Harrisburg Bank v. Com.* 26 Pa. 451; *Andrews v. Murray*, 53 Barb. 354; *Shaler & Hall Quarry Co. v. Bliss*, 34 Barb. 309; *Boughton v. Otis*, 21 N. Y. 261; *Squires v. Brown*, 22 How. Pr. 85, 45; *Bird v. Hayden*, 1 Robt. 383, 2 Abb. Pr. N. S. '61; *Cable v. McCune*, 26 Mo. 371; *Lawler v. Burt*, 7 Ohio St. 341; *Derrickson v. Smith*, *Halsey v. McLean* and *Plymouth First Nat. Bank v. Price*, *supra*.

Issue of paid-up stock certificates.

The corporation, after issuing its stock as paid-up stock, is estopped from proceeding to collect the unpaid part of the par value, either from the person receiving the stock, or his transferee. See *Scoville v. Thayer*, 105 U. S. 143 (21 L. ed. 781); *Cook, Stock and Stockholders*, 84.

A contract whereby stockholders are to pay but part of the par value of their stock to the corporation, "though binding on the company, is a fraud in law on its creditors, which they can set aside. When their rights intervene and their claims are to be satisfied, the stockholders can be required to pay their stock in full." *Scoville v. Thayer*, 105 U. S. 143 (21 L. ed. 781).

Upton v. Tribblecock, 91 U. S. 45 (23 L. ed. 203), is the first of a series of cases growing out of the failure of the Great Western Insurance Company of Illinois. The other cases are *Sanger v. Upton*, 91 6 L. R. A.

U. S. 56 (23 L. ed. 230); *Webster v. Upton*, 91 U. S. 65 (23 L. ed. 384); *Chubb v. Upton*, 95 U. S. 605 (24 L. ed. 623); *Pullman v. Upton*, 96 U. S. 323 (24 L. ed. 818); *Hawley v. Upton*, 102 U. S. 814 (26 L. ed. 179); *Flinn v. Bagley*, 7 Fed. Rep. 735; *Re Glen Iron Works*, 17 Fed. Rep. 324; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.* 97 Ill. 537, also reviewing the doctrine; *Hickling v. Wilson*, 104 Ill. 54; *Northrop v. Bushnell*, 38 Conn. 498; *Fisher v. Seligman*, 7 Mo. App. 383; *Eyerman v. Krieckhaus*, Id. 455; *Skranka v. Allen*, Id. 434; *Plokering v. Templeton*, 2 Mo. App. 424; *Christensen v. Eno*, 21 Week. Dig. 302; *Mann v. Cooke*, 20 Conn. 178; *Myers v. Seeley*, 10 Nat. Bankr. Reg. 411.

A resolution by the directors of a corporation that no further calls should be made on account of stock subscribed was void, and a receiver of the corporation could proceed in equity to compel payment of what was due on account of such subscriptions to the capital stock. *Sagory v. Dubois*, 3 Sandf. Ch. 466; *Thompson, Liability of Stockholders*, 234.

While the law may reject, as illegal and fraudulent, that which the parties have agreed upon, it will not arbitrarily incorporate, in lieu thereof, terms in the contract to which the parties have never assented. *Granite Roofing Co. v. Michael*, 54 Md. 65; *Union Mut. L. Ins. Co. v. Frear Stone Mfg. Co.* 97 Ill. 537.

But where the issue of stock was for cash, under an agreement that only part of the par value need be paid, corporate creditors may compel the persons receiving the stock to pay the unpaid full par value. *Sagory v. Dubois*, 3 Sandf. Ch. 466, 469.

Issue of watered or fictitious stock.

The issue of watered or fictitious stock may be lawful, but it is generally in fraud of the rights of some interested party, such as creditors, shareholders,

tion of consolidating the other two companies, acquiring their property, and with the property so acquired carrying on a general mining business. "At the time of the organization of the defendant Company, and as the scheme on which the same was based, it was agreed by the parties so incorporating, and by those representing and having authority to act for the two existing companies, that all the mines and mining property of such two corporations should, upon its organization, be transferred and conveyed to the new, or defendant, Company, and constitute its entire capital stock and resources for the prosecution of its enterprise, and be represented in such organization by a nominal capital stock of \$2,500,000, divided into 250,000 shares of \$10 each, which should all be deemed and held as represented by the properties so conveyed to it; that 50,000 of said shares should be issued to the former shareholders of each of the two old companies, and the remaining 150,000 shares belong to and constitute the working capital of the new corporation, and be sold under its authority, and on such terms as it should direct; and the proceeds of such sales constitute a fund to pay off the debts on the properties, and develop the mines thereon, and be used generally in the prosecution of the business of the new corporation, for the benefit of all its stockholders. That it was never expected or intended by such corporation, or by those to whom its stock was issued, that any subscription to the capital stock of the new Company should ever be made, or that any capital stock should ever be taken, or any capital subscribed for or paid in, except by conveyance to it of the mining properties referred to, and the sale of the stock reserved for its working capital in open market for such sum as could be obtained therefor."

This scheme was carried into effect by the conveyance to the new or defendant corporation of the properties of the two old corporations, and the issue to their stockholders, according to their respective holdings, of 100,000 shares of the stock of the new Company (called in the findings "Old Company Stock") as paid-up stock, and by placing the remaining

150,000 in charge of the board of directors, to be by them sold in the open market for such price per share (not less than fifty cents) as could be obtained therefor. The mining properties of the two old companies conveyed to the new Company were not worth to exceed \$50,000 cost, and were at the time of this scheme of consolidation considered and estimated as of the aggregate value of \$100,000. The new and defendant Company assumed payment of the indebtedness of the Minerva Mining Company to the plaintiff, which consented to a novation of its debt, accepting the notes of the defendant Company in place of those of the old Minerva Company. This is the claim upon which this action is brought.

The court also finds "that the payees in said notes named, and the general managing officer of the plaintiff, well knew at the time of the execution of said notes, and of their indorsement and delivery to the plaintiff, all the facts hereinbefore stated, relating to the organization of the defendant corporation, and the understanding and plan of its organization, and so dealt with the defendant knowing such matters, and were parties to and interested in the original scheme of the incorporation of the defendant Company as in the findings set forth." This must be construed as meaning that the "general managing officer" referred to is the person who transacted the business with the defendant Company in taking these notes, and of the benefit of whose action in that regard the plaintiff has availed itself. Notice to him must be deemed notice to the plaintiff.

Returning, now, to the subsequent management of the affairs of the defendant Company, the board of directors, pursuant to the scheme of organization, offered for sale in the open market the 150,000 shares remaining in the treasury, as fully paid-up stock, and some of it was bought as such by the other defendants in good faith, for a price exceeding its fair market value (but not exceeding \$1 per share), believing it to be fully paid-up stock. This is called in the findings "Treasury Stock." The holders of the old company stock also placed their stock in the market, some of which the

ers, classes of shareholders or the public. *Cook, Stock and Stockholders*, 11.

Such an issue of stock might constitute a misuse of the corporate rights and privileges. In such a case it is not clear but that the State might proceed to forfeit the charter of the corporation. *Holman v. State*, 3 West. Rep. 744, 105 Ind. 569. See also *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242; *Erie & N. E. R. Co. v. Casey*, 20 Pa. 287-318.

When a corporation is guilty of an *ultra vires* act, and such act is detrimental to the interests of the public, it is competent for the Attorney-General to file an information for the purpose of enjoining or setting aside such act. *Green's Brice, Ultra Vires*, 3d ed. 708, 709.

Directors, power to sell property of corporation.

The directors of a corporation have no right to sell or dispose of its movable property where this prevents the continuance of their business. *Balliet v. Brown*, 103 Pa. 546. To the same effect, *Gray v. New York & V. Steamship Co.* 5 Thomp. & C. (N.Y.) 224. But see *Hutchinson v. Green*, 6 West. Rep. 834, 91 Mo. 367; *Cook, Stock and Stockholders*, 705.

A dissenting stockholder may prevent the sale by the directors, or by a majority of the stockholders, 6 L. R. A.

of corporate property which is essential to the continuance of the business of the corporation, unless such sale is made with a view to the dissolution of the corporation, or the payment of the corporate debts. *Smith v. New York Consol. Stage Co.* 18 Abb. Pr. 419, 435; *Robbins v. Clay*, 33 Me. 132; *Sheldon H. B. Co. v. Eickmeyer H. B. Co.* 56 How. Pr. 78; *Barclay v. Quicksilver Min. Co.* 9 Abb. Pr. N. S. 284; *Copeland v. Citizens Gas Light Co.* 61 Barb. 60; *Conroy v. Port Henry I. Co.* 12 Barb. 27; *Adrian v. Roome*, 52 Barb. 309; *Brady v. Mayor*, 16 How. Pr. 432; *Middlesex R. Co. v. Boston & C. R. Co.* 115 Mass. 347; *Dana v. Bank of U. S.* 5 Watts & S. 247; *Union Bank of Tenn. v. Elliott*, 6 Gill & J. (Md.) 383; *Kean v. Johnson*, 9 N. J. Eq. 401. See also *Sheldon H. B. Co. v. Eickmeyer H. B. Co.* 90 N. Y. 607.

Such a dissolution is practically a fraud on the law and on dissenting stockholders. It seems to do indirectly what cannot be legally done directly. *Boston & P. R. Corp. v. N. Y. & N. E. R. Co.* 13 R. I. 280.

If, however, the corporation is an unprofitable and failing enterprise, then the sale of all the corporate property with a view to dissolution may be made by a majority of the stockholders. *Lauman v. Lebanon Valley R. Co.* 30 Pa. 42.

defendants also bought, under like circumstances and in the same belief. In March, 1887, the board of directors, pursuant to a resolution adopted by them, distributed *pro rata* among the individual shareholders all the stock remaining unsold in the treasury. Of this the individual defendants received their respective shares, for which they paid nothing. This is called in the findings "Prorate Stock." The court also finds that none of such defendants ever contracted, promised or in any manner agreed or intended to contract, promise or agree, to pay, on account of such stock, any other or different or greater sum or consideration, unless the law would impose or imply such promise, contract or agreement from the foregoing facts. The holdings of the defendants consist, in part, of old-company stock, in part of treasury stock and in part of prorated stock.

The contention of the plaintiff is that the defendant shareholders are individually liable, as for unpaid stock subscriptions, for amounts equal to the amount of their stock, less the value of what they have actually paid therefor, viz., \$9 per share on the old company and treasury stock, for which they paid in value only \$1 per share, and \$10 per share on the prorated stock, for which they paid nothing. If these stockholders were indebted to the corporation for unpaid installments on stock, this debt would be an asset of the corporation which, in case it became insolvent, any creditor might always enforce for the purpose of satisfying his claim. But it is very clear from the facts that the defendant Company has no claim against the defendant stockholders. They owe it nothing. As between them and it, the arrangement by which this stock was issued and sold or given away, as fully paid stock, is entirely valid. But the plaintiff bases its claim upon the familiar doctrine that the capital stock of a corporation is a trust fund for the benefit of its creditors, and that, if shares are not in fact paid up, an arrangement between the corporation and the shareholders, that they shall be deemed paid up, although valid between the company and the stockholder, will be ineffectual as to creditors, and that equity will hold the shareholder liable for the amount not in fact paid on his stock, to the extent necessary to satisfy the demands of creditors. We waive consideration of the question (which may, at least, admit of doubt) whether plaintiff's complaint is sufficient to entitle it to such relief. See *Phelan v. Hazard*, 5 Dill. 45; *Cook, Stock and Stockholders*, § 47; *Seville v. Thayer*, 105 U. S. 143 [26 L. ed. 968].

The general proposition advanced by plaintiff cannot be controverted, but the principle upon which this trust in favor of creditors rests and is administered must not be overlooked. The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid-up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist the rule itself ceases to apply.

6 L. R. A.

This trust does not arise absolutely in every case, in favor of every and any creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than than it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment. For example, to distribute the capital among the shareholders without provision for paying corporate debts would be a fraud on existing creditors, as well as on such subsequent creditors as deal with the corporation in reliance upon the assumption that its professed capital remains intact.

An illustration of this kind is to be found in the very first case in which what is now called the "American doctrine" was announced by *Justice Story*. We refer to the case of *Wood v. Dummer*, 3 Mason, 811, where a banking association distributed three fourths of its capital among its shareholders without providing for the payment of bill-holders, and the court impressed a trust in their favor upon the capital in the hands of the shareholders. So, again, where corporations have organized and engaged in business with a certain amount of ostensible and professed paid-up capital, but which was not in fact paid in, there are numerous cases in which the courts have set aside the arrangement by which the stock was called "paid up," and impressed a trust upon the subscription of the shareholder in favor of subsequent creditors who relied upon, or whom the law would presume to have relied upon, the apparent and professed amount of capital. To this class belong many of the cases cited by plaintiff; as, for example, *Savryer v. Hoag*, 84 U. S. 17 Wall. 610 [21 L. ed. 731]; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

While the courts have not always had occasion to state the limitations upon the doctrine that "the capital is a trust fund for the benefit of creditors," yet we think that it will be found that in every case where they have impressed a trust upon the subscription of the shareholders it has been in favor of creditors becoming such afterwards, and hence fairly to be presumed as relying upon the amount of capital which the company was represented as having. We are referred to none, and have found none, where any such trust has been enforced in favor of creditors who have dealt with the corporation with full knowledge of the facts. The reason is apparent, for in such cases no fraud, actual or constructive, has been committed on such creditors.

If a corporation issued new shares after the claim of a creditor arose, it is clear that the latter could not have dealt with the company on the faith of any capital represented by them. Whatever was contributed as capital in respect of the new shares was a clear gain to the creditor's security. So, too, if a party deals with a

corporation with full knowledge of the fact that its nominal paid-up capital has not in fact been paid for in money or property to the full amount of its par value, he deals solely on the faith of what has been actually paid in, and has no equitable right to insist on the contribution of a greater amount of capital by the shareholders than the corporation itself could claim as part of its assets. *Coit v. North Carolina Gold Amalgamating Co.* 14 Fed. Rep. 12, S. C. 119 U. S. 843 [90 L. ed. 420].

This doctrine with respect to trusts has no application to a case where a party, like the plaintiff, was cognizant of the whole arrangement under which the stock of the defendant Company was issued, and of what was paid or intended to be paid for it, and who accepted a novation of its debt with full knowledge of these facts, and received as great or greater security for it than it had before. To hold otherwise would be to perpetrate a fraud on the stockholders, and not on the creditors. These views effectually dispose of the question of the

liability of the defendants, at least on account of their old company and treasury stock. We think it also logically follows from what we have said that the defendants are not liable to the plaintiff upon their "prorate" stock as for unpaid stock subscriptions. This stock had not been issued when plaintiff's debt was contracted. It could not have dealt with the Company on the faith of any capital represented by these shares. In fact, it knew that no such capital had been paid in, unless the mining properties of the two old Companies can be considered as represented in part by them; and the value of these properties remained the same, and they were equally available to creditors whether represented by 100,000 shares or 250,000 shares of stock. Under such circumstances, the plaintiff has no equitable right to insist on the contribution of a greater amount of capital by the holders of these shares than the corporation itself could insist on. *2 Morawetz, Priv. Corp.* §§ 832, 833.

Judgment affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Malcom SILLARS

v.

Perry COLLIER.

(....Mass....)

1. **No averment of special damages is necessary** in an action to recover damages for slander consisting of defamatory words spoken of plaintiff with reference to his official position as member of the State Legislature.
2. **While spoken words** in order to be defamatory of one in respect to his public office need not import a charge of crime, yet they must go at least so far as to impute to him some incapacity or lack of due qualification to fill the position, or some positive past misconduct which will injuriously affect him in it, or the holding of principles which are hostile to the maintenance of the government.
3. **The expression of an opinion** that a certain person, as a member of the Legislature, is corrupt in his heart and might be induced to change his course from improper motives and inducements, is not actionable without averment and proof of special damages.
4. **The old doctrine of scandalum magnatum** has never been adopted in Massachusetts as a special remedy.

(February 25, 1890.)

NOTE.—Slander; criticism of public officer, not actionable.

No criticism of a person holding a public office is libelous unless it is malicious. *Harle v. Catherall*, 14 L. T. N. S. 801; *Crane v. The Boston Advertiser*, 13 Reporter, 650; *Rowand v. DeCamp*, 96 Pa. 493.

It is only when the character of the publication is malicious, and its tendency is to degrade and excite to revenge, that it is condemned by the law, and subjects the publisher to prosecution. *Tappan v. Wilson*, 7 Ohio, 183.

In Pennsylvania, immunity from prosecution by indictment is provided for by statute, on investigating the official conduct of public officers, etc. 6 L. R. A.

A PPEAL by plaintiff from a judgment of the Superior Court for Essex County sustaining a demurrer to the declaration in an action to recover damages for an alleged slander. *Affirmed.*

The amended declaration in this case charged in substance that defendant publicly, falsely and maliciously accused the plaintiff of corruptly accepting a gift and gratuity, with an understanding that his vote, opinion and judgment should be given in support of a bill to incorporate the Town of Beverly Farms, a question then depending in the Massachusetts House of Representatives whereof said Sillars was then a member, by words spoken of the plaintiff substantially as follows, to wit: "I am sorry that the representative from this district (meaning the plaintiff, who was the only representative from said district) has had a change of heart. Sometimes (slapping his hand upon his pocket) a change of heart comes from the pocket." That many citizens of the Town of Beverly, including the defendant, being exasperated by the independent position of plaintiff, had habitually charged him with acting from corrupt motives in the discharge of a public duty, and were disappointed in their expectation that he would favor their interests; and that the words "Sometimes a change of heart comes from the

(*Commonwealth v. Odell*, 3 Pittsb. L. J. 449); but private character is not to be attacked. *Rearick v. Wilcox*, 81 Ill. 77; *Townshend, Slander and Libel*, 4th ed. 437 *et seq.*

It is not permitted to publish of a public officer that he is unfit for his office (*Broadbent v. Small*, 2 Vic. L. Rep. 121); or a charge of having received a bribe (*Hamilton v. Eno*, 81 N. Y. 116; *Hand v. Winston*, 38 N. J. L. 122); or of gross incapacity and ignorance. *Sporing v. Andrae*, 45 Wis. 330.

To excuse an aspersive attack upon the character and motive of an officer the truth of the utterances must be shown. *Hamilton v. Eno*, 81 N. Y. 116.

pocket" were intended to express that the plaintiff (originally supposed to be opposed to this scheme for the division of the Town of Beverly) had changed his original views, not in the exercise of honest judgment, but from corrupt considerations either of money and valuable things actually paid, or of promises and inducements of future favor and personal advantage to be expected, under an agreement and with an understanding that his vote and legislative influence should be corruptly bestowed against the dignity of the Commonwealth and contrary to the form of the statute in such case made and provided.

That these words were spoken before a fully attended meeting of the inhabitants of the Town of Danvers, duly warned, according to law, to consult upon town affairs, the defendant not being a citizen of said town, but one who impertinently intruded himself upon the deliberations of the qualified voters, and falsely and maliciously uttered and spoke the scandalous words.

The plaintiff further says that it is for the interest and true dignity of the Commonwealth that the scandal of magnates shall not be permitted, and that public officers and legislators shall not be wantonly and unjustly assailed for the faithful performance of high trusts.

Defendant demurred to the amended declaration, and, the demurrer having been sustained and judgment entered for defendant, plaintiff took this appeal.

Mr. Stephen H. Phillips, for appellant:

The words spoken are slanderous and actionable because (1) they charge a state prison offense (Pub. Stat. chap. 205, §10); (2) they were spoken of a representative to general court, in connection with his office.

Chaddock v. Briggs, 13 Mass. 252; *Bloss v. Tobey*, 2 Pick. 323; *Miller v. Pariah*, 8 Pick. 385; *Brown v. Nickerson*, 5 Gray, 1.

In regard to a certain class of high and honorable offices, the common law recognizes so large a public interest in the good name of the incumbent that the party slandered may maintain an action in his own name. This is the theory of the offense of *scandalum magnatum*.

When the slander assumes that the plaintiff held such high office, proof of the words is sufficient.

2 Starkie, Slander, p. 14, note p.

In all such cases of slander, it is not necessary to allege or prove special damage.

Allen v. Hillman, 12 Pick. 101.

Messrs. H. F. Hurlburt and D. W. Quill, for appellee:

The words "Sometimes a change of heart comes from the pocket," if taken in connection with the other allegation of the declaration, are not of themselves actionable *per se*, because in themselves, taken by themselves, as they must be in order to be actionable *per se*, they do not accuse the defendant of committing any crime.

See *Bloss v. Tobey*, 2 Pick. 323; *Stevenson v. Hayden*, 2 Mass. 406; *Odorner v. Bacon*, 6 Cush. 185.

By the ordinary meaning and under the intrinsic force of the language used, it cannot be said that those words can impute a crime; and such meaning under an intrinsic force of language is a question for the court.

Carter v. Andrew, 16 Pick. 1; *Dunnell v.*

Flake, 31 Met. 551, 553; *Barrows v. Bell*, 7 Gray, 101.

In order for words to be actionable *per se* there must be a direct charge of a crime.

Goodrich v. Davis, 11 Met. 473.

If the words are not actionable *per se*, plaintiff must allege and prove special damage.

Odgers, Libel and Slander, p. 2. See *Goodrich v. Hooper*, 97 Mass. 1; *Farnsworth v. Storrs*, 5 Cush. 412.

The words as spoken by the defendant do not impute a crime.

Tebbetts v. Gooding, 9 Gray, 254.

If the language used does not charge the commission of a crime, the innuendoes will not aid the pleader.

See *Snell v. Snow*, 13 Met. 273; *Carter v. Andrews*, 16 Pick. 1-9; *Adams v. Stone*, 131 Mass. 433; *York v. Johnson*, 116 Mass. 482, 504; *Bloss v. Tobey*, 2 Pick. 320-323; *Barham v. Nethersall*, Yelv. 22; *Joannes v. Burt*, 6 Allen, 236; *Goodrich v. Hooper*, 97 Mass. 18.

Those who fill "a public position must not be too thin-skinned in reference to comments made upon them."

Odgers, Libel and Slander, No. 13, from 2d Eng. ed. p. 33. See *Seymour v. Butterworth*, 3 Fost. & F. 376; *Kelly v. Sherlock*, L. R. 1 Q. B. 689, 35 L. J. Q. B. 209, 12 Jur. N. S. 937; *Onslow v. Horne*, 3 Wils. 177, 2 W. Bl. 750; *Mayrant v. Richardson*, 1 Nott & McC. 347; *Hogg v. Dorrah*, 2 Port. (Ala.) 212.

C. Allen, J., delivered the opinion of the court:

We are ready to assume in favor of the plaintiff that by the declaration it is intended to aver that he was a member of the House of Representatives, and that the words set forth were spoken of him with reference to his official position. This being so, no averment of special damages was necessary, provided the words are defamatory, and to make them defamatory it is not necessary that they should import the charge of crime. It would be sufficient if they imported such misconduct as would expose him to expulsion, or even to censure from the House; and we are inclined to think also that it would be sufficient if they imported such conduct as would, by the general sense of the community, be deemed immoral or discreditable in such a way as clearly to impair his influence and lessen his position and standing as a public man, and thus to affect him injuriously as a member of the Legislature. But in applying this last suggestion, it is obvious that some caution is necessary, since freedom of speech and of the press is guaranteed by the Constitution (U. S. Const. 1st Amend.; Mass. Const. arts. 16, 19; Dec. of Rights); and "entire freedom of discussion in respect to the character and conduct of public men is deemed essential to the judicious exercise of the right of suffrage, and of that control over their rulers which resides in the free people of the United States." Kent, Com. 17.

Bearing this in mind, it is not unreasonable to hold that, in order to be defamatory of one in respect to his public office, the spoken words must go at least so far as to impute to him some incapacity or lack of due qualification to fill the position, or some positive past misconduct which will injuriously affect him in it, or

the holding of principles which are hostile to the maintenance of the government. Looking at the words set forth in the plaintiff's declaration, in the light of the intrinsic facts which he avers, we do not find them fairly capable of the meaning which the plaintiff ascribes to them, or of any meaning which is defamatory within the sense above expressed. We are not to travel into the region of conjecture, but must confine ourselves to the words themselves, with the other facts contained in the declaration. There is in them no suggestion that the plaintiff has changed his vote, or that he has voted at all upon the question of the division of the Town of Beverly, or made any speech in the Legislature or elsewhere, or taken any public action, or solicited any other member of the Legislature to favor a particular side, or, in short, that he has done anything whatever by way of action or of promise of action in support of the measure for dividing the town. The whole charge in relation to his change of heart relates merely to what was in his heart—that is, to what he was capable of doing, or at most to what he had a purpose of doing in the future. And the statement that "sometimes the change of heart comes from the pocket" does not, when fairly considered, import that the plaintiff's change of heart had come from any actual bribery or pecuniary inducements already received, or, indeed, anything further than that in the speaker's opinion the plaintiff would change his conduct on account of an expectation of a future pecuniary benefit to himself. The words do not fairly imply any actual fact which has happened at the time of speaking them, and which involves corruption on plaintiff's part, but only at most that in the speaker's opinion the plaintiff is corrupt in his heart, and open to pecuniary inducements. To get out of them anything beyond this, one must travel beyond the words themselves and the facts set out in the declaration.

The expression of the defendant's opinion that the plaintiff as a member of the Legislature is of such a disposition, wavering in mind, and open to change his course from improper

motives and inducements, is not actionable without averment and proof of special damages. It is one of the infelicities of public life that a public officer is thus exposed to critical, and often to unjust, comments; but these, unless they pass the bounds of what the law will tolerate, must be borne for the sake of maintaining free speech.

In the various cases which have been cited to us, or which have come under our observation, where, under such circumstances, actions have been maintained, the words have been considered to contain a charge of positive misconduct. Such, for instance, were *Wilson v. Noonan*, 28 Wis. 105; *Powers v. Dubois*, 17 Wend. 63, and *Littlejohn v. Greeley*, 13 Abb. Pr. 41.

But where the words spoken have simply amounted to the opinion of the speaker, however strongly expressed, as to the disposition of the public officer, the actions have been held not to be maintainable. *Onelow v. Horne*, 3 Wils. 177; *Hogg v. Dorrah*, 2 Port. (Ala.) 212.

In like manner, words conveying a suspicion that a person, not a public officer, has committed a crime, are not actionable. *Simmons v. Mitchell*, L. R. 6 App. Cas. 156.

The plaintiff further avers in his declaration that it is for the interest and true dignity of the Commonwealth that the scandal of magistrates shall not be permitted, and relies on the old doctrine of *scandalum magnatum* to support his declaration.

Mr. Odgers, in his work on Libel and Slander, says that he believes no such action has been brought [in England] since 1710.

In Townshend on Slander it is said that *scandalum magnatum* is not known in the United States. § 187.

In *Hogg v. Dorrah*, *supra*, the plaintiff's counsel expressly disclaimed relying upon this doctrine. The plaintiff has cited no decision or text-book to support his contention that this special remedy exists in this country, and we are of the opinion that it has never been adopted in Massachusetts. See also *Reeves v. Winn*, 97 N. C. 246.

Judgment for defendant affirmed.

INDIANA SUPREME COURT.

Margaret RAMSEY, *Appt.*,
v.

John L. RAMSEY.

(.....Ind.....)

1. The right to the custody and service of a child, and the obligation to support and

NOTE.—Custody and support of child in case of divorce.

The court of chancery may transfer the custody of children from the father to the mother after a decree of divorce between them. *Cowls v. Cowls*, 8 Ill. 435.

It has plenary jurisdiction over the persons and estates of infants. *Grattan v. Grattan*, 18 Ill. 171; *Lynch v. Botan*, 30 Ill. 19; *Hartmann v. Hartmann*, 39 Ill. 104.

The superior right of the father to the custody of
 § L. R. A.

See also 47 L. R. A. 391.

educate it, are reciprocal rights and obligations, unless otherwise fixed by judicial decree.

2. A divorced wife who voluntarily retains the custody of a child born after the divorce was granted, and maintains and supports the child without any request from the father, or any refusal on his part to support it, or anything tending to show his purpose to abandon it, can-

his child may be forfeited by abuse, or cruelty or misconduct, or lost by reason of his bad character and conduct. In which case a court of competent jurisdiction may interfere, and, if the welfare of his children requires it, the custody and control of them may be given to the mother or some other person. *People v. Mercerein*, 3 Hill, 309, 38 Am. Dec. 644; *Bently v. Terry*, 50 Ga. 555, 37 Am. Rep. 399; *McKim v. McKim*, 12 R. I. 462, 34 Am. Rep. 604; *Re Bort*, 25 Kan. 308, 37 Am. Rep. 255; *Heineman's App.* 96 Pa. 112, 42 Am. Rep. 532; *Feld*, Law of Infants, 64.

not maintain an action against him to recover compensation for such support.

3. An adjudication settling the rights of parties as they exist at the time of divorce, and giving alimony to the wife, does not affect their rights so far as concerns the custody or support of a child then unborn.

(December 10, 1889.)

APPEAL, by plaintiff from a judgment of the Circuit Court for Posey County in favor of defendant in an action to recover compensation for support rendered to his minor child. *Affirmed.*

The case sufficiently appears in the opinion. *Mr. Ernest Dale Owen*, for appellant.

Messrs. E. M. Spencer, Alvin P. Hovey and G. V. Menzies for appellee.

Mitchell, Ch. J., delivered the opinion of the court:

The judgment from which this appeal is prosecuted was entered against the plaintiff below upon substantially the following facts, which appear in the pleadings: Margaret Ramsey, having been theretofore lawfully joined in marriage with John L. Ramsey, obtained a divorce from him at the March Term of the Posey Circuit Court, in 1878. She was pregnant at the time with a child, begotten by her husband in wedlock, which was born shortly after the decree dissolving her marriage with the defendant was pronounced. As a part of the decree the wife was awarded \$800 as alimony, but, notwithstanding the fact of her pregnancy was averred in the complaint for divorce, there was no order concerning the future custody or support of the expectant child. Living apart from her former husband, and possessed of no means of support except her earnings, the divorced wife assumed the custody of, and furnished the necessary support for, the child, without any request or promise from the father, who was possessed of sufficient means for its support and education. Having thus supported the child until it was nine years old, she instituted this suit against the father to recover for the maintenance and support of his child.

The question is whether, upon the facts stated, a recovery should have been allowed. The argument in favor of a reversal is predicated upon the proposition "that a father is bound for the necessities furnished his minor child, and is bound to whomsoever shall keep and maintain his child during the first years of life, when it is helpless to provide for itself." As sustaining this proposition the following decisions are relied on: *Haase v. Roehrscheid*, 6 Ind. 66; *Wallace v. Ellis*, 42 Ind. 582; *Kinsey v. State*, 98 Ind. 351.

Two of the cases cited hold, in effect, that a

father who is guardian of his minor child will not be allowed to assert a claim against the estate of his ward for its support, unless it is affirmatively shown that he was unable to furnish suitable support and education out of his own private means. As a reason for the ruling in those cases, it is said that, by the common law, it is made the duty of parents to support their minor children, at least while they are incapable of supporting themselves. The correctness of the ruling in the cases cited cannot be doubted. In the other case nothing more is decided than that a father who is ready, able and willing to support his minor children at home cannot be held liable to another who, without his assent, supports them abroad. This decision affords scant support to the appellant's position. While it is true beyond any question that the common law enjoins upon parents the duty of protecting, educating and maintaining their children, it is also true that, in the absence of statutes, the common law never afforded any means of enforcing this obligation.

In the language of Lord Eldon, in *Wellesley v. Duke of Beaufort*, 2 Russ. 8-23: "The courts of law can enforce the rights of the father, but they are not equal to the office of enforcing the duties of the father." The duty of the father to protect, educate and support his tender infant child, for whose being he is responsible, is not only a plain precept of universal law and natural justice, but is enjoined by the positive teachings of the Christian religion.

However clear and imperative the duty, or sacred the obligation, of parental support, it is open to serious consideration whether it does not fall within that class of imperfect obligations or moral duties, the enforcement of which, according to the common law, it was deemed wise to leave to the impulses of natural affection, rather than that it should be committed to unrestrained regulation in the courts. The delicate parental duty which requires of a child submission to reasonable restraint, and demands habits of propriety, obedience and conformity to domestic discipline, may induce a minor to abandon his father's home, rather than submit to what may seem to the parents proper discipline and necessary restraints of the household. It would be intolerable if anyone who should choose to furnish a minor necessities, under all circumstances, could compel the father to answer to a court or jury concerning the propriety of the family discipline. If this were allowed, a child impatient of parental authority might be incited to set at naught all reasonable domestic control by holding over his father's head the alternative of allowing him his way at home, or of paying for his support abroad. Accordingly, it

In case of a divorce granted in favor of a wife, the court may award the children of tender years to the mother. *Goodrich v. Goodrich*, 44 Ala. 670; *McBride v. McBride*, 1 Bush, 15; *Gardenhire v. Hinds*, 1 Head, 402.

His paramount right to their custody is not recognized in case of a divorce obtained by his wife for his misconduct. *Hewitt v. Long*, 78 Ill. 409.

In such case it has been held that he is liable only for their bare support and maintenance. *Stanton* 6 L. R. A.

v. Willson, 3 Day, 37; *Cowls v. Cowls*, 8 Ill. 435; *Plaster v. Plaster*, 47 Ill. 290; *Bazeley v. Forder*, L. R. 3 Q. B. 559; *McCarthy v. Hinman*, 35 Conn. 538.

But a stranger who voluntarily furnishes an infant with necessities cannot, as a general rule, enforce payment therefor against the father, who did not give any authority, express or implied, therefor. *Raymond v. Loyl*, 10 Barb. 483; *Hunt v. Thompson*, 4 Ill. 180; *Gordon v. Potter*, 11 Vt. 350.

has been said no one shall take it "upon him to dictate to a parent what clothing the child shall wear, at what time it shall be purchased, or of whom. All that must be left to the discretion of the father or mother." *Bainbridge v. Pickering*, 2 W. Bl. 1825. It is therefore the settled rule of law in England, as well as in this country, that, however derelict a father may have been in the discharge of his parental duty, he is under no legal obligation, in the absence of statutory enactment, to remunerate one who may have furnished necessities or afforded relief to his minor child, unless either an express promise to pay, or circumstances from which such a promise may be implied, can be shown. *Gotts v. Clark*, 78 Ill. 229; *McMillen v. Lee*, Id. 443; *Freeman v. Robinson*, 88 N. J. L. 383; *Hunt v. Thompson*, 8 Scam. 180; *Gordon v. Potter*, 17 Vt. 348; *Varney v. Young*, 11 Vt. 258; *French v. Benton*, 44 N. H. 30; *Townsend v. Burnham*, 33 N. H. 277; *Raymond v. Loyl*, 10 Barb. 483; *Blackburn v. Mackey*, 1 Car. & P. 1. See Schouler, Dom. Rel. § 241. and notes; Tyler, Inf. §§ 190, 191.

Thus, in *Kelley v. Davis*, 49 N. H. 187, where a father had been guilty of a palpable omission of duty in turning his son adrift upon the world, with little education or ability to take care of himself, it was held, in an elaborate opinion, in which the authorities were fully reviewed, that the father was not liable to one who had furnished him with necessities, in the absence of a contract, express or implied. In that case the court declared the conclusion "that a parent cannot be charged for necessities furnished by a stranger for his minor child, except upon a promise to pay for them, and that such promise is not to be implied from mere moral obligation. . . . But the omission of duty from which a jury may find a promise by implication of law must be a legal duty, capable of enforcement by process of law." The father's conclusion was declared that it would be a question for the jury in each case, taking into consideration all the circumstances connected with the parent's neglect, as indicating his intention, views and purposes with regard to the wants of the child, whether or not the facts were sufficient to warrant the finding of a promise, express or implied.

Quoting from Chitty, this court said, in *Hollingsworth v. Swedenborg*, 49 Ind. 378: "Though, independently of an express contract, or one implied from particular facts, a father cannot be sued for the price of necessities provided for his infant son, yet very slight circumstances will suffice to justify a jury in finding a contract on his part."

So, in *Shelton v. Springett*, 20 Eng. L. & Eq. 281, it was held that a father is not liable on a contract made by his minor child, even for necessities furnished, unless an actual authority be proved, or the circumstances be sufficient to imply one.

In *Mortimer v. Wright*, 6 Mees. & W. 482, Lord Abinger, C. B., declared that "in point of law, a father who gives no authority, and enters into no contract, is no more liable for goods supplied to his son than a brother or an uncle or a mere stranger would be;" and he said further that "the mere moral obligation on the

father to maintain his child affords no inference of a legal promise to pay his debts."

On the other hand, it has sometimes been said, where a parent fails to discharge the natural obligation resting upon him, by neglecting to provide necessities for his infant children, that any other person who supplies them will be deemed to have conferred a benefit upon the delinquent parent, for which the law raises an implied promise on his part to make compensation. *Van Valkenburgh v. Watson*, 13 Johns. 480; *Reynolds v. Sweetser*, 15 Gray, 78.

While we should hesitate to declare that a father is not in any sense under a legal, as well as a moral, obligation to nurture and maintain his minor child during the tender years of infancy and helplessness, we do give full recognition to the rule, which lies at the foundation of all the cases, that the right of a third person to recover, who has discharged the obligation of the father, and supplied his offspring with necessities which he neglected to furnish, must, in every instance, be predicated upon a contract, express or implied. *White v. Mann*, 8 West. Rep. 558, 110 Ind. 74; *Horn v. Eberhart*, 17 Ind. 118; *Wiggins v. Keizer*, 6 Ind. 252; Schouler, Dom. Rel. § 241.

It would be futile as well as hurtful to attempt, by any general statement, to lay down a rule, or otherwise describe the circumstances under which the law would imply a promise on the part of a father to pay for necessities supplied by another to his minor child. Surely it would be safe, on the other hand, to say, if a father should purposely abandon his child, or cast it out helpless upon the world, under such circumstances that but for the intervention of another the life or health of the infant would be imperiled, the parent would not be heard to say that he did not come under an implied obligation to pay for doing that which it was his duty to do. On the other hand, if a minor child, who had reached years of discretion, should abandon the parental roof, even though it were with the consent of his parents, in order to escape domestic discipline or parental restraint, it could not reasonably be inferred that he carried with him, by legal implication, the right to pledge his father's credit for support. *Weeks v. Merrow*, 40 Me. 151; *Angel v. McLellan*, 16 Mass. 27.

Slight evidence may sometimes warrant the inference that a contract for the infant's necessities is sanctioned by the father, and the evidence of a contract may grow out of an infinite variety of circumstances. A relation which the law recognizes as contractual may arise between parties in three ways: (1) The terms of the agreement may have been uttered, avowed or expressed at the time it was made, in which an express contract results; (2) Circumstances may have arisen, or acts may have been done, which, according to the dictates of reason and justice, and the ordinary course of dealing, or the common understanding of men, show a mutual intention to contract, in which case an implied contract arises. *Day v. Caton*, 119 Mass. 513; *Addison*, Cont. 23; 8 Am. & Eng. Cyclop. Law, 861; (3) There may have been no intention to contract at all, and yet one may have come under a legal duty to another of such a character that the law precludes him

from asserting that he did not agree to perform it; and thus, by fiction of law, a contract results by construction or implication. *Hertzog v. Hertwig*, 29 Pa. 465.

Implied or constructive contracts of this latter class are similar to the constructive trusts of courts of equity. They arise out of a state of facts from which the law alone, contrary to the intention of the parties, produces the obligation by compulsion or "by force of natural equity." *People v. Speir*, 77 N. Y. 144-151; *Wright v. Moody*, 116 Ind. 175.

It is, of course, plain enough that there was no express contract in the present case to pay for the support of the child. It seems equally plain, from all the circumstances, that there was no mutual intention on the part of the father and mother that the latter should be compensated for the support of the child. When the marital relation was dissolved the mother, by the decree of nature, was the necessary custodian of the child, and it was then certain that she must remain its custodian until it should arrive at an age when maternal care was no longer indispensable. Possibly, if she had offered then, or at any subsequent time, to surrender the child to the custody of the father, and he had refused to accept it, the law might have implied a promise to pay for its future support. The mother chose, however, to indulge the better instincts of her nature, and keep her child. While she retains the custody and society of the child, unless she does so in consequence of the refusal of the father, the law will not imply a mutual intention to make or receive compensation for its support. The right to the custody and services of the child, and the obligation to support and educate, are reciprocal rights and obligations, unless otherwise fixed by judicial decree. *Husband v. Husband*, 67 Ind. 583; *Johnson v. Onsted*, 74 Mich. —, 42 N. W. Rep. 62; Schouler, Dom. Rel. § 237; 2 Bishop, Mar. and Div. § 557.

It does not appear that the husband was absent from the State or neighborhood in which the mother and child lived, or that he refused, or would have been permitted voluntarily, to take the custody and support of the child. All that appears is that the mother voluntarily retained the custody, and maintained and supported it without let or hindrance, and without any request from the father. Where a parent supports a child or a child a parent, the law refers the motive which induced the support to the relationship and affection consequent thereon, and will not imply a promise to pay, or infer a mutual intention to make or receive compensation. *Wright v. McLarinnan*, 92 Ind. 103; *Davis v. Davis*, 85 Ind. 157; *Fittler v. Fittler*, 33 Pa. 50; *Frost App.* 105 Pa. 258.

Services which are intended to be gratuitous at the time they are rendered cannot afterwards be used as the basis of an implied promise to pay for them. *Potter v. Carpenter*, 76 N. Y. 157; *St. Joseph's Orphan Society v. Wolpert*, 80 Ky. 86.

Ordinarily, where a wife with an infant child is driven from the husband's house by his cruelty or misconduct, she may pledge his credit for the child's necessities, as well as her own, while he permits it to remain with her, but she can exercise no such agency after she is divorced. Schouler, Dom. Rel. 824.

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After a decree of divorce, either with or without an order for the custody of the children, there is no implied obligation on the part of the father to pay for support voluntarily furnished by the mother to the children, while she asserts and maintains the right to their custody and society, unless the father has in some way manifested his purpose to abandon them, or has refused to take them into his custody and render them proper support. *Hancock v. Merriek*, 10 Cush 41.

After a wife is divorced she occupies the same relation to her husband in respect to her common-law right to recover for necessities furnished his children as any other stranger. Her right to recover must rest upon a contract, express or implied. The facts in the present case fall far short of showing an implied contract; nor do the facts make the present a case in which a contract by construction or compulsion of law arises. The child having necessarily come into the custody of the mother after the dissolution of the marital relation, it cannot be charged against the father as a wrong that he did not assert the right to separate it from its mother, as possibly he might have done. That he allowed it to remain with her cannot be regarded as an abandonment of the child. As was pertinently said in *Fittler v. Fittler*, *supra*: "When a man abandons his child, and casts it upon the public, he becomes liable for its support. But it is entirely impossible to treat a child as thus cast upon the public when the fact simply is that the mother has deserted the father, and carried away the child, and continues to support it. This is merely leaving it with her until she chooses to restore it, and while she keeps it on such ground she has no claim for compensation."

It is true in the case cited the wife was in the wrong, she having, while pregnant with an unborn child, deserted her husband, who afterwards obtained a divorce. But the right of the wife to recover was denied upon the ground that the husband had been guilty of no wrong to the child in leaving it with the mother in deference to her feelings, and that hence no contract could be inferred. Accordingly we rest our conclusion here upon the fact that the child, so far as appears, was allowed to remain with its mother out of regard to her feelings, and not in pursuance of any purpose to neglect or abandon it.

The case of *Gilley v. Gilley*, 4 New Eng. Rep. 494, 79 Me. 292, has fallen under our observation. In that case a father had deserted his wife and children and left the State, and it was held in a contest between the wife and the creditors of the husband, after a decree of divorce for desertion and want of support, no decree for custody or alimony having been made, that the mother might maintain an action against the father for the necessary support of their minor children. But the decision in that case went upon the distinct theory that the father had deserted and discarded his minor children, and in that view it is in consonance with our conclusion here. As we have seen, nothing of that kind appears in the present case, and it follows from what has preceded that the plaintiff had no common-law right to recover upon the facts stated. Our conclusion is not at all affected by the contention that the right to re-

cover for the support of the child was adjudicated in the proceeding for divorce. That adjudication settled the rights of the parties as they existed at the time, but it did not affect their rights so far as the father's custody or support of the unborn child was concerned. Whatever relief the mother may be entitled to, if any, growing out of the changed circumstances since the rendition of the decree, must be sought by an application to the court for a modification of the decree in reference to the support and custody of the child. *Dubois v. Johnson*, 96 Ind. 6, 5 Am. & Eng. Cyclop. Law, 887. There was no error.

The judgment is affirmed, with costs.

Simon NADING, *Appt.*,

v.

John A. MCGREGOR.

(....Ind....)

An agreement "to stand good for, or, in other words, . . . guarantee to pay for," any timber of a certain class that shall be furnished to a third person, with whom the promisor states that he has a contract for articles to be manufactured therefrom, is an original undertaking, and no notice to him of acceptance, or of failure to pay, is necessary.

(January 15, 1890.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Bartholomew County in favor of defendant in an action upon an alleged guaranty. *Reversed.*

The facts are fully stated in the opinion.

Messrs. Marshall Hacker and William T. Strickland, for appellant:

There is nothing of an indirect collateral guaranty about the undertaking in question; it is not an engagement to guarantee the performance of a contract by a third person, but it is a direct engagement on the part of the appellee to pay or perform absolutely and at all events; in other words, it is an original, absolute engagement.

Frash v. Polk, 87 Ind. 55; *Burnham v. Galentine*, 11 Ind. 295; *Kirby v. Studebaker*, 15 Ind. 45; *Kline v. Raymond*, 70 Ind. 271; *Watson v. Beabout*, 18 Ind. 281; *Ward v. Wilson*, 100 Ind. 52; *Furst & B. Mfg. Co. v. Black*, 10 West. Rep. 243, 111 Ind. 308; *Allen v. Hubert*, 49 Pa. 259.

Where the guaranty is made only as an offer or a proposition, there must be notice of acceptance of it, but where the undertaking, is absolute, notice is unnecessary.

Kline v. Raymond, *supra*; 2 Story, Cont. § 1133.

Where one writes, "I hereby guarantee you," etc., and delivers the paper, that is not an offer or proposition to guarantee, but is an absolute and complete guaranty, and binds the party making it, without further action on the part of him who receives it.

Kline v. Raymond, *supra*; 1 Parsons, Cont.

NOTE.—Guaranty; rule of construction. *King v. Bates* (Mass.) 4 L. R. A. 268, note; *National Exch. Bank v. Gay* (Conn.) 4 L. R. A. 343, note. 6 L. R. A.

p. 479; *Taylor v. Taylor*, 64 Ind. 356; *Frash v. Polk*, *supra*; *Milroy v. Quinn*, 69 Ind. 406.

If the promisor is himself interested in the subject matter of the promise or the transaction to which it relates, he will stand in the position of a principal contracting party.

8 Addison, Cont. § 1111; *Davis v. Wells*, 104 U. S. 159 (26 L. ed. 686).

Messrs. Cooper & Cooper for appellee.

Coffey, J., delivered the opinion of the court:

On the 30th day of July, 1885, the appellee executed the following instrument of writing, viz.:

Office of J. A. McGregor, manufacturer and dealer in oil barrel staves.

Columbus, Ind., July 30th, 1885.

Mr. Nading, Esq., Hope, Indiana:—

Dear Sir: I have made a contract with Stephen A. Douglass for a lot of staves to be delivered at Hope, Ind. Any white or burr-oak timber you may sell him I will stand good for, or, in other words, will guarantee the pay for it. Yours truly, J. A. McGregor.

The appellant filed a complaint in the Bartholomew Circuit Court, consisting of two paragraphs, each of which is based upon the above instrument of writing. The first paragraph alleges the execution of said writing by the appellee upon the consideration that the appellant would sell certain white-oak and burr-oak timber to Stephen A. Douglass; that the appellant accepted the promise therein contained, and on the faith thereof sold to the said Douglass certain white-oak and burr-oak timber at prices agreed upon between him and the said Douglass, amounting to \$500, a bill of particulars of which is filed with the complaint; that, although often requested so to do, the appellee fails and refuses to pay for the same, and that the said sum is due and unpaid. The second paragraph alleges that, in consideration that appellant would sell and deliver to Stephen A. Douglass certain white-oak and burr-oak timber, the appellee guaranteed and promised the appellant, by the writing above set out, that he would be answerable for, and stand good for, the payment for said timber at the prices agreed upon between the appellant and the said Douglass; that he sold timber to said Douglass at an agreed price of \$500 on the faith of said guaranty; that the said Douglass has not paid for the same, although often requested so to do, nor has the appellee paid for the same, though often demanded and requested so to do, and that the said sum is due and unpaid.

To this complaint the appellee filed an answer, consisting of one paragraph, in which, after admitting the above writing, he avers that, immediately after the delivery of the same to the appellant, without any notice to the appellee of its acceptance, the appellant sold and delivered to the said Stephen A. Douglass the staves and timber mentioned in the complaint, under and in pursuance of a contract made between said appellant and the said Douglass, which said contract is in the words and figures following, to wit:

Hope, Indiana, August 3, 1885:

This is to certify that I, this third day of August, 1885, have sold to Stephen A. Doug-

lass white-oak and burr-oak timber enough for one hundred thousand (100,000) first-class oil-barrel staves, for which the said Stephen A. Douglass agrees to pay \$10.00 per thousand in the tree, and the said staves to be paid for when gotten out and delivered at Hope, Indiana, and pay-day shall be on Saturday. I shall have my choice of taking stave count for log measure for logs in Hitchcock's mill-yard.

Simon Nading.

That he never received any answer from said written proposition of guaranty mentioned in appellant's complaint, and did not know that the appellant had accepted the same, or was relying thereon, until the 30th day of December, 1885, when appellant sent appellee a statement of the account between appellant and the said Douglass, and demanded payment of the same; that at the time of said notice and demand said Douglass had sold all of said staves and timber, and had received the pay therefor, and was wholly insolvent and financially worthless, and soon thereafter removed from Bartholomew County, and his place of residence is now unknown; that if appellant had notified appellee of his acceptance of said guaranty within a reasonable time, appellee could have secured himself; that he did not know, and had no notice whatever, of appellant's intention to hold him upon said proposition of guaranty until the aforementioned time; that said Douglass was and still is indebted to the appellee, and he has no means of securing the same, or the appellant's claim. The court overruled a demurrer to this answer, to which the appellant excepted.

The appellant filed a reply in two paragraphs. The first paragraph consists of a mere repetition of the allegations contained in the complaint. It is alleged in the second paragraph that on the 30th day of July, 1885, the appellee had contracted with said Douglass for the purchase of 100,000 staves to be delivered at Hope, Ind.; that at that time said Douglass had no staves with which to fill said contract, and was wholly dependent upon appellant and others to sell him timber with which to fill his contract with appellee; that said Douglass was wholly insolvent, as was well known to both appellant and appellee; that on account of such insolvency appellant refused to sell him timber; that appellee was peculiarly interested in said contract and in the purchase of said timber by the said Douglass; that when manufactured into staves the same was to be delivered to the appellee, under his said contract with the said Douglass; that appellee, for the sole purpose of receiving the benefit of his said contract with the said Douglass, and for the purpose of procuring the staves contracted to be sold by the said Douglass to him, as aforesaid, made and delivered to the appellant the writing set out and filed with the complaint; that relying on the promises therein contained, he delivered to the said Douglass a large amount of oak timber, to wit, enough to make 75,000 staves, of the value of \$500, all of which was received by the appellant; that said Douglass was wholly insolvent, and failed to pay for the same, and that appellee fails and refuses to pay for the same. The court sustained a demurrer to each paragraph of said reply, and the appellant ex-

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cepted. On leave given the third paragraph of contract substantially, the same contained in the second above set out. The answer above set forth the paragraph of the contract overruled a demurrer to plead further, the appropriate costs. The assignment (tion the above several)

It is earnestly contended the instrument above 1885, is not a strict guarantee to pay for any work purchased by Douglass that, as it is an original part of the appellee, no acceptance, or of the failure was necessary in order. On the other hand, it is earnestness on the part of instrument of writing a than a mere proposition ment for timber purchase that it was not binding notice of its acceptance, to bind the appellee, the notified him within a month had sold Douglass the (Douglass) had failed to that the appellee might loss.

It is often a question to determine whether a of writing constitutes whether it constitutes a In a strict guaranty the undertake to do the thing bound to do, but his principal shall perform to perform, or, in the event guarantor will pay such from such failure. It is enables us to distinguish guaranty from a direct ie, so that when an inst solves itself into a prom the part of the person ex ticular thing which anot the event such other per the act himself, it is said undertaking, and not a stric ty. In the latter class of taking is in the nature person bound by it must fault of his principal. *Black*, 111 Ind. 308, 10 W v. *Griffith* (Ind.) 23 N. H. *Wilson*, 100 Ind. 52; *La R Bank*, 102 Ind. 332; *Rei* 438; *Woods v. Sherman*, *Thompson*, 104 Pa. 330.

The undertaking of the is not a strict or collateral direct, absolute and original appellee for any white or might sell to Stephen A. Polk, 67 Ind. 55; *Kline v. 271*; *Burnham v. Gallentine v. Studebaker*, 15 Ind. 45; 18 Ind. 281; *Ward v. Will*

By delivering such instrument to Douglass, the appellee made him his agent to deliver it to the appellant. In such cases its acceptance, and performance of the conditions upon which it rests, are all that is necessary to make the contract complete and enforceable. *Davis v. Wells*, 104 U. S. 159 [26 L. ed. 686]; *Wills v. Ross*, 77 Ind. 1; *Kline v. Raymond*, *supra*; *Cooke v. Orne*, 37 Ill. 183.

This contract not being a collateral guaranty, but an original undertaking in the nature of a surety, in which appellee bound himself to pay for the timber, he was not entitled to notice, either of its acceptance, or of the failure of Douglass to pay. If he had desired such notice, he should have stipulated for it in his contract. *Smith v. Dann*, 6 Hill, 548.

It follows from what we have said that the court erred in overruling the demurrer to the answer of the appellee.

Judgment reversed, with instructions to the Circuit Court to sustain the demurrer to the appellee's answer, and for further proceedings not inconsistent with this opinion.

Edward S. POPE, *Appt.*,

v.

John H. VAJEN.

(.....Ind.)

It is not a valid defense to a suit against the maker of a note given to secure the purchase price of land, that the maker has sold the land to a third party who has assumed payment of the note as part of the purchase price, and that the payee has agreed to release the maker and look only to such third party for payment, where such agreement was without consideration and the maker of the note has not, by acting upon faith of the promise, changed his position to his own hurt.

(*Elliot*, Ch. J., *dissent*.)

(October 15, 1899.)

A PPEAL by plaintiff from a judgment of the General Term of the Superior Court for Marion County, affirming a judgment of the Special Term in favor of defendants in an action upon certain promissory notes. *Reversed*. The facts are fully stated in the opinion.

Mr. James Buchanan, for appellant:

The answer shows no consideration whatever to support this alleged verbal promise of release, and is therefore bad.

Fitzgerald v. Smith, 1 Ind. 810; *Clark v. Billings*, 59 Ind. 508; *Bristol M. & Mfg. Co. v. Probasco*, 64 Ind. 406.

The assumption contracts became collaterals only to the original, and Pope had the right to

receive payments on other notes from the assumers without in any way affecting his right to sue and collect any unpaid notes or balance from the maker of the notes.

Josselyn v. Edwards, 57 Ind. 212; *Davis v. Hardy*, 76 Ind. 272; *McDill v. Gunn*, 43 Ind. 315; *Price v. Pollock*, 47 Ind. 363; *Campbell v. Patterson*, 58 Ind. 686; *Hoffman v. Risk*, 58 Ind. 113; *Merrick v. Leslie*, 63 Ind. 459; *Scarry v. Eldridge*, 63 Ind. 44; *Smith v. Ostermeyer*, 68 Ind. 432; *Risk v. Hoffman*, 69 Ind. 187; *Logan v. Smith*, 70 Ind. 597.

The acceptance of the contract of assumption does not of itself constitute a novation, nor discharge the original debtor from personal liability.

Clark v. Billings and Bristol M. & Mfg. Co. v. Probasco, *supra*; *Jeffries v. Lamb*, 73 Ind. 202.

Messrs. Duncan & Smith, for appellee:

As between Vajen and the several assumers, he was surety and they were principals. And the moment Pope elected to deal with said assumers with relation to said notes, that very moment he must of necessity have made them principal debtors and Vajen surety.

McDill v. Gunn, 43 Ind. 315; *Hill v. Minor*, 79 Ind. 48; *Carnahan v. Tousey*, 93 Ind. 561; *Figart v. Halderman*, 75 Ind. 564; *Josselyn v. Edwards*, 57 Ind. 212.

Such agreement of assumption is not a promise to pay the debt of another within the Statute of Frauds.

McDill v. Gunn, *supra*; *Helms v. Kearns*, 40 Ind. 124; *Fisher v. Wilmoth*, 68 Ind. 449.

If there was any consideration whatever to support the agreement to release, the court will not, in the absence of fraud, stop to consider the question of its adequacy.

Williamson v. Hittner, 79 Ind. 238; *Price v. Jones*, 3 West. Rep. 859, 105 Ind. 543; *Keller v. Orr*, 4 West. Rep. 707, 106 Ind. 406; *Vigo Agricultural Society v. Brumfield*, 102 Ind. 146; *Wolford v. Powers*, 85 Ind. 294.

It is a sufficient consideration for a contract that it affords the promisor a possibility of benefit or exposes the promisee to a possible detriment.

Smith, Cont. p. 143; *Willatts v. Kennedy*, 8 Bing. 5; *Hind v. Holdship*, 2 Watts, 104; *Train v. Gold*, 5 Pick. 380; *Sturlyn v. Albany*, 1 Cro. Eliz. 67.

It is sufficient that a slight benefit be conferred by the plaintiff on the defendant, or a third person; or even if the plaintiff sustain the least injury, inconvenience or detriment, or subject himself to any obligation without benefiting the defendant, or any other person.

Fall River Nat. Bank v. Buffinton, 97 Mass. 498.

The assumers were liable to pay said notes

NOTE.—*Novation*.

To constitute a novation of parties, there must be an extinguishment of the old debt by a mutual agreement between all parties, whereby it becomes the obligation of the new debtor. The discharge of the old debt must be contemporaneous with and result from the consummation of an arrangement with the new debtor. *Cornwell v. Megina*, 39 Minn. 407.

There must be the substitution of a new obligation for the old one, and the new contract must be 6 L. R. A.

a valid one upon which the creditor can maintain his remedy. *Spycher v. Werner*, 5 L. R. A. 414, 74 Wis. 456.

An agreement by a mortgagee to hold a grantee of the mortgaged property as his debtor and release the mortgagor is not a valid novation which will discharge the mortgage, where the deed was not made subject to the mortgage, and the grantee who was in fact incompetent to make a binding contract did not therein assume the mortgage, and no consideration for such assumption existed. *Ibid*.

according to their tenor, including 10 per cent interest after maturity.

Joselyn v. Edwards, 57 Ind. 212.

Payment of the notes would cut off such interest, and if for that reason Pope refused to produce the notes for payment, a sufficient consideration is thereby furnished for his promise to release Vajen.

Taylor v. Lohman, 74 Ind. 422.

By delay Vajen was assuming the liability or possibility of damage and loss to himself, that these assumers might become insolvent, and the mortgaged premises might depreciate in value, and thus not be good security for his debt, which was also a consideration for the promise.

See *Harris v. Brooks*, 21 Pick. 195; *Taylor v. Lohman*, 74 Ind. 418.

Forbearance to exercise rights is a good consideration.

8 Am. & Eng. Encyclop. Law, 836.

The holder of a note cannot give such assurances of release and discharge to a surety, and thus lull him into a sense of security, and years afterward, when in violation of his promise to the surety he sues the surety upon the note, put him upon the proof that the maker is in a worse condition than when the promise was made.

Whitaker v. Kirby, 54 Ga. 277.

There being some consideration to support the promise, the court must hold Pope bound by it.

Wolford v. Powers, 85 Ind. 294.

The answer pleads a good estoppel.

White v. Walker, 81 Ill. 422; *Knights v. Wifjen*, L. R. 5 Q. B. 660.

Berkshire, J., delivered the opinion of the court:

This is an action by the appellant against the appellee and his wife, Alice Vajen, founded upon several promissory notes executed by the appellee and wife to the appellant. The case was put at issue, and tried at Special Term of the Superior Court, and a judgment rendered for the appellee and his wife, Alice, from which an appeal was taken to the general term, and in general term the judgment at special term was affirmed, and from the judgment in general term as to the appellee alone the appellant has taken this appeal. The appellant has assigned several errors, but, in view of our conclusion, we need only notice one of them. During the progress of the case at special term the appellant filed his demurrer to the second paragraph of the answer of the appellee, which was overruled by the court, and an exception reserved. We have concluded to set the paragraph out in full in this opinion. It reads as follows:

"The defendant, John H. Vajen, for his further separate answer to the complaint herein, says that he admits the execution of the promissory notes mentioned and described in the several paragraphs of the complaint herein, and exhibited with the said complaint, but he says that the plaintiff ought not to have or maintain this action for the reason that said notes were each executed as part of the consideration of certain parcels of real estate, situated near the City of Indianapolis, each several note being a part of the consideration for a separate and distinct parcel of real estate; that said notes were only a small portion of the

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promissory notes executed their date; that, at the defendant purchased from the payee of said note eighty-five (85) parcels purchase price for each divided into six (6) equal annually, one installment lots each year for a period a total of twenty-three hundred notes so executed by this defendant Pope upon said purchase after said purchase, this three hundred and eighty land to George W. Parker; and that, upon said Hanway, they, as part of the purchase by them, assumed the said promissory notes defendant to said Abner J. after, said Parker and Hanway and sundry parties of said lots, as a part of such purchase, assuming the notes given by this defendant upon his purchase thereof Pope,—of all of which fact had full information; and said Parker and Hanway the plaintiff herein promised moneys from said owners assumed and agreed to pay with said assumers as payee the persons who were prior payment of said notes; made payable at Fletcher were not presented at said when due; and this defendant the payment of said promissory assumed by said purchase; said Pope was dealing with the reason of the failure of said bank, where he supposed that said notes were not paid, this defendant further covering that a large number not been paid, this defendant called upon the plaintiff, and he was ready and prepared to pay the notes, and that he was desirous of stopping the interest upon it was agreed by and between said plaintiff and said defendant that the plaintiff should produce all of said notes and this defendant should, that accordingly, at said defendant produce for payment a large number of notes, and thereupon this defendant in full, principal and interest, and there this defendant should produce all of said notes, held, given by this defendant to the plaintiff, in order that he might thus stop the interest, that the plaintiff should secure himself from suits against the several parcels assumed and agreed to pay said notes upon said plaintiff agreed that he should be released from liability on the account of any so executed by this defendant, and that the plaintiff the parties who had assumed

from all further liability upon said notes, this defendant was led to take no further steps in the matter looking to his own protection as against said parties who had assumed and agreed to pay said notes. 'Wherefore, this defendant says that the plaintiff herein is now estopped from prosecuting this action against him as the maker of said notes. And this defendant now prays judgment for his costs, and for all other proper relief.'"

We are of the opinion that the answer is bad, and that the court at special term erred in overruling the demurrer thereto, and erred in general term in affirming the judgment at special term. The answer, to be good, must be so upon at least one of three grounds: *first*, that the facts alleged constitute a novation; *second*, a release; and, *third*, an estoppel. In every novation there are four elements: (1) an existing and valid contract; (2) all parties must agree to the new contract; (3) the new contract must be valid; and (4) the new contract must extinguish the old one. *Morris v. Whitmore*, 27 Ind. 418; *Glasgow v. Hobbs*, 32 Ind. 440; *Jewett v. Pleak*, 43 Ind. 368; *Crim v. Fitch*, 53 Ind. 214; *Clark v. Billings*, 59 Ind. 508; *Fensler v. Prather*, 43 Ind. 119; *Bristol Milling & Mfg. Co. v. Probasco*, 64 Ind. 406; *Parsons v. Tillman*, 95 Ind. 452; *Kelso v. Fleming*, 104 Ind. 180, 1 West. Rep. 845.

It will hardly be necessary for us to take the time to explain wherein the facts, pleaded in the answer, fall short of showing a novation, and especially need we not do so as appellee's counsel do not contend there was a novation. To constitute a valid release there must be a valuable consideration paid therefor. See *Kelso v. Fleming*, and authorities cited.

No such consideration is shown. When Parker and Hanway purchased the real estate from the appellee, and as a part of the consideration therefor assumed and agreed to pay the notes that had been executed by the appellee, they became primarily liable for the payment of the debt, and as between the appellee and them the relation of principal and surety existed, they being the principals and he the surety. This, however, in no way changed or altered the appellee's liability to the appellant.

It was held in the case of *Sefton v. Hargett*, 113 Ind. 592, 13 West. Rep. 42, "that the purchaser of real estate who assumes the payment of incumbrances on the land thereby becomes, as to those previously liable, the principal debtor, without regard to the original relations of the parties, or whether the creditor consented thereto or not," and further, "in such a case, if the creditor has knowledge of the facts, and extends the time of payment without the consent of those who occupy the relation of sureties, the latter will be discharged. But it is not averred or contended that the appellant extended the time of payment to anyone, or made any agreement with reference to the payment of the notes, except so far as an

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would no longer look to the appellee for payment of the notes, but would look to those who had purchased the real estate and assumed payment of the notes, the agreement was not one that could be enforced unless bottomed upon a valuable consideration. *Kelso v. Fleming*, 104 Ind. 180, 1 West. Rep. 845.

The grantees of the appellee, by their purchase and assumption, having become the principal debtors, the appellant had a complete right of action against them as well as against the appellee at the time the agreement is alleged to have been made for his release. *Birke v. Abbott*, 103 Ind. 1, 3 West. Rep. 331; *Davis v. Hardy*, 76 Ind. 272; *Josselyn v. Edwards*, 57 Ind. 212; *Kelso v. Fleming*, *supra*; *Sefton v. Hargett*, *supra*.

The agreement did not give to the appellant an advantage or legal right which he did not already have. The appellee surrendered no legal right, nor was he placed in a different position, to his prejudice, because of the promise made by the appellant. It was not necessary to the right of the appellee to maintain legal proceedings against those who had assumed to pay his notes that he first pay them; but had payment been a condition precedent to his right of action, he was at liberty at any time to leave with the bank the money necessary to pay the notes, and this would have stopped the interest, which he alleges in his answer he very much desired to do; or he could have made a tender to the appellant and demanded his notes, and then brought an action for their cancellation, or waited until sued upon them, and kept his tender good by bringing the money into court. The facts pleaded do not constitute an estoppel. Much of what we have said with reference to the question of consideration is applicable to the question of estoppel; but, in addition, we may add that there is no averment tending to show that any one of the parties who assumed to pay all or any one of the notes is not at this time in as good condition financially as on the day when the agreement was made; nor is there any averment tending to show that any action which the appellee then had a right to bring will not be equally as available now as then.

The opinion in the case of *Kelso v. Fleming*, *supra*, covers the question presented by the record in this case, and has left very little to be said at this time.

The judgment is reversed, with costs, with directions to the court below to sustain the demurrer to the second paragraph of answer.

Elliott, Ch. J., dissenting:

Inasmuch as the terms of the agreement are explicit, and there was a surrender of a right by Vajen on the faith of the appellant's promise, I believe the agreement valid, and the answer good. I therefore dissent.

Petition for rehearing overruled December 19, 1889.

WISCONSIN SUPREME COURT.

W. A. GRAY *et al.*, *Respts.*,

v.

Henry HERMAN, *Appt.*

(....Wis....)

1. **Payment by a third person**, accepted by the creditor in satisfaction of the debt, is a defense to a person sued for the purchase price of articles.
2. **A promise by a third person to pay for articles** if the seller, who is holding them as security for the price, will turn them over to the purchaser, is a collateral promise and must be in writing if there is no release of liability of the original purchaser.

(January 7, 1890.)

APPPEAL by defendant from a judgment of the Circuit Court for Milwaukee County in favor of plaintiffs in an action to recover the contract price of certain machines and the value of certain repairs made thereon. *Reversed.*

The complaint stated three causes of action:

1. For a Gurney Crusher Brick Machine, manufactured for and sold to the defendant on the 15th day of April, 1886, and delivered to T. C. Gurney upon the defendant's order.
2. For another Gurney Crusher Brick Machine, manufactured for and sold to the defendant on the 8th day of June, 1886, and delivered to one T. C. Gurney upon the defendant's order.
3. For certain extra pieces, parts and repairs manufactured for and sold to the defendant on and between the 1st day of May and the 17th day of June, 1886, and delivered to one T. C. Gurney upon the defendant's order.

Defendant answered to the first cause of action:

1. A general denial.
2. That the machine mentioned was sold to Gurney, and that Gurney paid the plaintiffs for it on the 8th day of July, 1886; that on the last-mentioned date he assigned the plaintiffs an account against one Davelaar, which was accepted by the plaintiffs in satisfaction of the debt.

To the second cause of action he answered a general denial.

To the third cause of action he answered:

1. A general denial.
2. That the extras mentioned in the third cause of action were sold and the work done for one Gurney; that on or about the 8th day of July Gurney paid the plaintiffs in full and assigned them an account against Davelaar, which was accepted in full satisfaction of the debt.

At the trial defendant offered to prove that the machines and repairs had been paid for in the manner stated in the answer, but the offer was excluded and this action on the part of the court was assigned as error.

The court submitted ten questions to the jury for a special verdict, of which the material ones together with the answers thereto are as follows:

First. Did T. C. Gurney, some time in February, 1886, request the plaintiffs to manu-

facture for him brick machines of the Gaylord-Martin patent, and did the plaintiffs arrange with him to build such machines, and retain the property in them, and ship them to his (Gurney's) customers, and collect pay for them, and turn over to him whatever money they might so collect in excess of the amount due them for manufacturing and shipping such machines? Answer (by direction of the court.) Such an arrangement was made.

Second. Were any machines ever sold and delivered under that arrangement? A. (by direction of the court.) No.

Third. Did the defendant, Henry Herman, some time in April, 1886, call on the plaintiffs in company with said Gurney, and direct the plaintiffs to turn over the machine mentioned in the first cause of action in the complaint, and sometimes spoken of as the "Davelaar Machine," to said Gurney to dispose of on his own account, and promise to see that said machine should be paid for; and did the plaintiffs turn over said machine to said Gurney on the credit of said promise? A. Yes.

Sixth. Did the defendant order the machine mentioned in the second cause of action in the complaint, sometimes spoken of as the "Lansing Machine?" A. Yes.

Seventh. Did the defendant order the extra pieces and repairs mentioned in the third cause of action in the complaint? A. Yes.

Upon this verdict plaintiffs were given judgment for the full amount of their claim, and from that judgment, and from an order denying a new trial, defendant took this appeal.

Mr. Frank M. Hoyt, for appellant:

Conceding that the defendant made the agreement as testified to by the plaintiffs, it was void under the Statute of Frauds because not in writing.

Rev. Stat. 2807; *Young v. French*, 35 Wis. 116; *Olapp v. Webb*, 52 Wis. 641; *Hoile v. Bailey*, 58 Wis. 424; *Emerick v. Sanders*, 1 Wis. 77; *Dyer v. Gibson*, 16 Wis. 558; *Wyman v. Goodrich*, 26 Wis. 21; *Shook v. Vanmater*, 23 Wis. 532; *Vogel v. Melms*, 81 Wis. 306; *Watkins v. Perkins*, 1 Ld. Raym. 224; *Skinner v. Conant*, 2 Vt. 458.

There was no benefit to accrue to defendant, so that the case is not brought within the exception of the rule laid down in—

Weisel v. Spence, 59 Wis. 301.

The payment of the debt by a third person—although a mere volunteer—and an acceptance by the creditor of such payment in satisfaction of the debt, operates to extinguish it and to estop the creditor from afterwards maintaining an action therefor against the original debtor.

Pelton v. Knapp, 21 Wis. 68-71. See *Kimball v. Noyes*, 17 Wis. 695; *Putney v. Farnham*, 27 Wis. 187; *Leavitt v. Morrow*, 6 Ohio St. 71-81.

Meara, Williams, Friend & Bright, for respondents:

The agreement made by the defendant Herman was an original promise, not collateral, not to pay the debt of another, but to pay his own debt.

Young v. French, 35 Wis. 116.

The plaintiffs had not trusted Gurney, and would not. He had incurred no debt to them when Herman made his promise. Hence that promise was not within the Statute.

Dyer v. Gibson, 16 Wis. 557; *Voigt v. Melms*, 31 Wis. 311.

The sale was made to defendant and credit alone given to him, and the Statute of Frauds has no application.

Champion v. Doty, 81 Wis. 190; *Weisel v. Spence*, 59 Wis. 301; *Bentley v. Doggett*, 51 Wis. 232; *McCartney v. Hubbell*, 52 Wis. 371; *Heuett v. Currier*, 63 Wis. 386; *Grinnold v. Wright*, 61 Wis. 195; *Drummond v. Huysen*, 46 Wis. 188.

An agreement by one person to pay for goods furnished to another is not a collateral promise to pay the debt or answer to the default of another within the meaning of the Statute of Frauds. Goods charged upon the vendor's books to the person to whom they are delivered may, nevertheless, be shown to have been sold upon the credit of another.

Larson v. Jensen, 53 Mich. 427; *Benbow v. Southsmith*, 76 Iowa, 151; *Waters v. Shafer*, 25 Neb. 225.

A satisfaction of the debt by one not liable could not avail the defendant.

Mathews v. Lawrence, 1 Denio, 212; *Olow v. Borst*, 6 Johns. 88; *Russell v. Lytle*, 6 Wend. 390; *Edgecombe v. Rodd*, 5 East, 294.

The payment by a third party, to be available, must be by him as agent for and on account of the one who is liable, with the authority of the debtor. Satisfaction by a stranger is no plea.

Atlantic Dock Co. v. Mayor of N. Y. 53 N. Y. 67; *Bleakley v. White*, 4 Paige, 654; *Tilton v. Alcott*, 16 Barb. 598; *Kromer v. Heim*, 75 N. Y. 574, 81 Am. Rep. 491.

The most that could be claimed, if the evidence had been considered for all purposes, is an accord. It was never executed. That is no bar to the action against defendant.

Kromer v. Heim, 75 N. Y. 576; *Schlitz v. Meyer*, 61 Wis. 421; *Brooklyn Bank v. De Grauw*, 28 Wend. 343; *Day v. Roth*, 18 N. Y. 456; *Stone v. Todd*, 49 N. J. L. 274, 6 Cent. Rep. 523; *Leslie v. Keepers*, 68 Wis. 123.

Cole, Ch. J., delivered the opinion of the court:

We fail to perceive any sufficient ground or reason for excluding the evidence offered to show payment for the machines and repairs by Gurney. The answer alleged that the account of Davelaar was assigned to and accepted by the plaintiffs in full discharge and satisfaction of the debt, and for the machine mentioned in the first cause of action, and for the repairs mentioned in the third. And the defendant attempted to prove by Gurney that all the claims in suit had been paid, but the evidence was excluded. As we have observed, we perceive no valid reason, upon the facts of the case, for excluding the evidence. In the charge of the learned circuit judge, he says that, in his opinion, it was not competent for the party sued to plead payment by another party who was not sued, and could not be affected by the judgment. Why not, if it is shown that the creditor accepts the payment in satisfaction of the debt? Can it be said that the obligation is still in force? What

sense or reason is there in any such technical rule as that, if it exists?

The plaintiff's counsel says that the satisfaction of a debt by a stranger, between whom and the defendant there is no privity, is not available to the debtor as a defense. But again we ask, Why should it not be, if the creditor accepts the payment in satisfaction of the debt? If a debt is fully paid, it would seem, according to plain common sense, that the obligation was extinguished, and is no longer in force as a contract. What concern is it to the creditor who pays his debt, especially where he accepts the payment made in satisfaction of his debt?

But in this case the evidence is entirely conclusive that Gurney and the defendant were not strangers to each other in these transactions. Even if the defendant is liable as the original promisor, it is clear that he was purchasing the machines for the benefit of Gurney rather than for himself. Gurney was deeply interested in the payment of all these claims, even if they could be enforced against the defendant and not against him. This is too obvious from the testimony to require any argument to establish the fact. Although he was not a party to the record, yet the facts show that he was no stranger to these claims.

We have examined the cases to which we were referred in support of the position that payment by a third party cannot be availed of by the defendant as a defense, unless such payment was made by the debtor's agent, or by someone authorized by the debtor to make it. We do not think these cases are in point. Some of them relate to the defense of accord and satisfaction, and hold that, to sustain such a plea, an accord must be completely executed; that a part execution and tender of performance of the residue is insufficient (*Russell v. Lytle*, 6 Wend. 390; *Kromer v. Heim*, 75 N. Y. 574); while *Mathews v. Lawrence*, 1 Denio, 212, and *Atlantic Dock Co. v. Mayor of N. Y.*, 53 N. Y. 64, hold that, in a suit upon a judgment, which judgment was recovered for a cause of action which could exist only against one, it was no defense that the plaintiff had recovered a judgment for the same cause of action against another person, which had been paid, and that a cause of action *ex delicto* was not extinguished by a recovery and satisfaction of a judgment against a stranger in no wise joined in liability with the defendant, for the full amount of the damages claimed, nor is the plaintiff estopped thereby. Whether these decisions are in harmony with *Ellis v. Eason*, 50 Wis. 138, where it is impliedly decided that full compensation for an injury made by one of several wrong-doers is a bar to an action against the other wrong-doers, we shall not stop to determine.

The case of *Olow v. Borst*, 6 Johns. 88, is rested on the authority of *Grymes v. Blofield*, Cro. Eliz. 541, but this account is given of the latter case in a note of *Edgecombe v. Rodd*, 5 East, 294, as the decision: "If the condition of an obligation be to pay £20 at a certain day, and a stranger surrender a copyhold to the use of the obligee, in satisfaction of the £20, which the obligee accepts, this is a good satisfaction and discharge of the obligation."

Edgecombe v. Rodd decides nothing in conflict with that proposition.

perceive no ground, in reason or in law, for excluding the evidence of payment of the claims by Gurney. If these debts were really paid and satisfied by him, the defendant should have the benefit of the defense. Whether the payment was made by his authority or not, he surely ratified the act by seeking to avail himself of it on the trial. It was error to exclude the evidence.

In answer to the third question, the jury found that the defendant, some time in April, 1886, called on the plaintiffs, in company with Gurney, and directed the plaintiffs to turn over the machine mentioned in the first cause of action in the complaint, sometimes spoken of as the "Davelaar Machine," to said Gurney, to dispose of on his own account, and that he promised to see that said machine should be paid for, and that the plaintiffs turned over said machine to said Gurney on the credit of that promise. This finding should be considered in connection with the first question, the answer to which was given by the court; that is to say, that some time in February, 1886, an arrangement was made between the plaintiffs and Gurney, by which the former agreed to manufacture for him the machines named, and were to retain the property in said machines, and ship them to Gurney's customers, and collect the pay for the machines, and turn over to Gurney whatever money they might so collect, in excess of the amount which might be due them for manufacturing and shipping the machines. It is said that no machines were furnished under this arrangement; but it is necessary to refer to it to show the relation of the parties and the situation of things when the defendant directed the plaintiffs to turn over the machine to Gurney, and they did so on the credit of his promise.

On the arrangement as originally made, it is clear that Gurney was really the owner of the machines when manufactured, the plaintiffs retaining the title by way of security for their debt. This is apparent from the stipulation that they agreed to account to him for any excess of money in their hands after they were

used that he would pay for it. This promise was not in writing, and it does not appear that it was in any way beneficial to the defendant that Gurney should have the machine. The plaintiffs did not release Gurney from his liability under the first arrangement, and there was no new consideration arising between the defendant and the plaintiffs. The facts bring the case strictly within the rule, "as settled by this court, that, if the original debtor is not released from liability, a promise by a third person to pay the debt, in consideration that the creditor will release a lien which he holds upon the property of the debtor, where no benefit accrues thereby to such third person by such release, is within the Statute, and void, unless in writing." In such a case the promise of a third person is a collateral promise to answer for the default of the original debtor.

Such is the doctrine of this court, as pointed out by *Mr. Justice Taylor* in *Weisel v. Spence*, 59 Wis. 301. The question is so fully examined in that case that any further discussion here is unnecessary. We observe, further, that the original arrangement was in the nature of an executory contract of sale and purchase, and covered both machines mentioned in the complaint, and that that contract does not seem to have been rescinded by the parties. By the sixth and seventh findings, standing by themselves, the defendant seems to have been an original undertaker or promisor. Certainly, if he ordered the machine spoken of as the "Lansing Machine," and ordered the extra pieces and repairs mentioned in the third cause of action, he is clearly responsible for the payment of these claims. A new trial may disclose a different state of facts, which may affect his liability.

On the whole case, we think the judgment of the circuit court must be reversed, and a new trial ordered. We shall not consider the other errors assigned, as it is unnecessary to do so.

Judgment of the Circuit Court reversed, and a new trial ordered.

VIRGINIA SUPREME COURT OF APPEALS.

B. F. CARTER, Use of Kate E. Carter,
Plff. in Err.,

v.
Burr P. NOLAND.

(....Va.....)

An indorsement upon a bond payable on demand of a receipt of a portion of the amount due and of an agreement that no more shall be demanded thereon until the happening of a certain event, is not so far a part and parcel of the entire instrument as to require notice in the declaration in an action upon the bond.

(*Lacy, J., dissents.*)

(January 9, 1890.)

6 L. R. A.

ERROR to the Circuit Court for Loudoun County to review a judgment sustaining a demurrer to the declaration in an action to recover the amount due upon a bond. *Reversed.*

The case sufficiently appears in the opinion. *Mr. S. Ferguson Beach* for plaintiff in error.

Messrs. Holmes Conrad and Brooke & Scott, for defendant in error:

The effect of the indorsement was to materially alter the terms of the original contract, and to change the time when action could be maintained on the bond.

Its effect is the same as if it had been original part of the bond; and the original condition and the indorsement, as modified the one by the other, must be read as one entire agreement.

Price v. Kyle, 9 Gratt. 250, 251.

Such has been the effect given to similar indorsements.

Stone v. Hansbrough, 5 Leigh, 424; *Smith v. Spiller*, 10 Gratt. 322; *Broke v. Smith*, F. Moore, 679; *Burgh v. Preston*, 8 T. R. 488; *Gordon v. Frasier*, 2 Wash. (Va.) 180; *Greig v. Talbot*, 2 Baro. & C. 179; *Shermer v. Beale*, 1 Wash. (Va.) 11; *Smith v. Britton*, 2 Patton & H. (Va.) 124.

It was not necessary that the indorsement should be under seal.

Stone v. Hansbrough, *Smith v. Britton* and *Smith v. Spiller*, *supra*.

Hinton, J., delivered the opinion of the court:

This is an action of debt on a single bill. The plaintiff declared on the bond, taking no notice of the indorsement thereon in the words and figures following:

March 27th, 1875.

By amount paid for me by the Lucketts, in purchase of farm, five hundred dollars; by B. P. Noland's due-bill of this date for five hundred dollars; and it is agreed that no more of this note shall be demanded of the said Noland until the marble quarry is in successful operation and he receives therefrom enough to pay the balance of this note, or he can sell his stock for enough to pay said note, as per receipt given him.

B. F. Carter.

The defendant pleaded payment and several special pleas. On the call of the case for trial, however, he, by leave of the court, withdrew his pleas, craved oyer of the bond and the indorsement thereon, and demurred to the declaration. The court sustained the demurrer, and gave judgment thereon for the defendant, and it is this action of the court that we are now called on to review.

The ground of demurrer, as appears from the briefs of counsel, was that the indorsement on the bond entered into and became an integral part of the original instrument, making it a new and different bond from what it was at first, and that the bond, therefore, as it appeared on oyer, varied materially from that described in the declaration. The question we have to determine, therefore, is whether the bond and indorsement have become so far incorporated and merged into each other as to form an entire and indissoluble agreement, which must be fully set out in any action that may properly be founded thereon; for I entirely concur in the view of the plaintiff that, to make a subsequent agreement respecting a bond a part of the bond, so as to necessitate its recognition as such in declaring on the bond, it must be so ingrafted upon the bond that the original stock and the matter ingrafted shall together constitute inseparable parts of an entire instrument; and I do not think this ought ever to be regarded as having been accomplished if the indorsement can be regarded as a distinct and separate promise, covenant or condition that may be pleaded in defense of the action, or made the ground of a separate action. Now, does this indorsement introduce into the bond a new term, which, with the body of the bond, constitutes an entire agree-

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ment, or is it merely an engagement on the part of the obligee to postpone or defer the exercise of a right already accrued,—*cide*, the right to collect what remained due on the bond until the obligor shall have been enabled from the proceeds of the quarry, or from the sale of his stock, to pay it? Admitting, for the sake of the argument merely, that these writings, taken together, do make, as the defendant contends, a new and distinct agreement, yet it must be manifest that the effect of the indorsement has not been, as the defendant supposes, to change or alter the period for the maturity of the bond; for the bond is a bond payable on demand; and the case of *Payne v. Britton*, 6 Rand. (Va.) 104, is a distinct authority to show, if any was needed, that such a bond is due and payable from its date; and in this case the bond not only antedated the indorsement by nearly five years, but had absolutely been partly collected when the indorsement was made. So it appears that the effort in this case is not to graft upon the original obligation a new term, but to graft upon so much of the original obligation as remained at the time of the indorsement a promise not to sue.

Viewed in this aspect, this indorsement appears to us not to be part and parcel of an entire instrument, but merely a condition subsequent, to be set up as a matter of defense, or as the foundation of an action by the defendant.

In Gould's Pleadings, chap. 4, § 17, p. 164, it is said: "It is never necessary by the common law for the plaintiff in his declaration to state, or in any manner to take notice of, any condition subsequent annexed to the right which he asserts; for the office of such a condition is not to create the right on which the plaintiff founds his demand, but to qualify or defeat it. The condition, therefore, if performed or complied with, furnishes matter of defense which it is for the defendant to plead. Thus, in debt on a bond, it is not necessary for the plaintiff, in his declaration, to state or count upon any other than the penal part of the instrument, leaving the condition to be pleaded by the defendant, if it affords him any defense, as it does if performed." And again, (Id. § 19): "It is a general rule that, in declaring upon a deed or other instrument consisting of several distinct parts, the plaintiff is required to state so much of the instrument as constitutes *prima facie* a complete right of action; and, if any other part of the instrument furnishes the means of defeating the action, it is matter of defense, of which the defendant may, on his part, avail himself for that purpose."

And it would appear from the cases of *Hodges v. Smith*, Cro. Eliz. 623; *Trevett v. Aggas*, Willes, 109, *note*; *Deux v. Jefferies*, Cro. Eliz. 352; *Ayliff v. Scrimsheire*, 1 Show. 43, Carth. 63, 64,—that the rule at common law was for the plaintiff to count upon the bond, and for the obligor in the bond, if the condition amounted to a defeasance or a covenant not to put the bond in force, at any time to plead the covenant to the action on the bond as a release or in bar; but if the covenant was not to put the bond in force for a limited time the obligor was compelled to resort to an action on the covenant.

10 Gratt. 828; and *Peyton v. Harman*, 22 Gratt. 648, are, however, quoted and relied upon as establishing a different doctrine and course of procedure in this State. But to this we cannot assent, for, without questioning the propriety of the decision in either of those cases, we yet think that the rule laid down in them has no application to a case like the one in hand. Those cases serve to show what should be the practice in analogous cases,—that is, in cases where the bond and indorsement form a single

covenant amounting to no more than a mere promise to refrain from the exercise of a matured right for a limited time. We think it unnecessary to say more. In our opinion, the circuit court erred in failing to overrule the defendant's demurrer, and for this cause *the judgment must be reversed, and the case must be remanded for a trial to be had therein.*

Lacy, J., dissents.

Petition for rehearing denied.

MICHIGAN SUPREME COURT.

Neal MOLLOY, Admr. of Walter S. Gee, Deceased,

v.

TOWNSHIP OF WALKER, Appt.

(....Mich.....)

1. **Failure of a town to provide railings or barriers** at dangerous places along a public highway will render it liable for injuries thereby resulting, where the erection of such railing or barrier is a reasonable and necessary precaution to guard travelers against injury.
2. **The duty of townships, villages, etc., to keep highways in good repair** so that they shall be safe and convenient for public travel is made imperative by How. Stat. § 1445.
3. **It is a question for the jury whether**

railings or barriers are necessary to make a highway reasonably safe for travelers.

4. **Notice to township officers** of the necessity of barriers or railings along a dangerous place on a highway is sufficiently shown where it appears that they lived in close proximity to the place and some of them frequently passed over it.
5. **Whether an injury on a highway, caused by the sliding of the rear end of a vehicle over an embankment**, would have occurred if proper railings or barriers had been provided at the place, is a question for the jury.
6. **Whether a particular vehicle is unsuitable** and not roadworthy because unwieldy and unmanageable is a question for the jury.
7. **It cannot be held negligence, as mat-**

NOTE.—Highways; duty of towns and villages to keep in safe condition.

By the statutes of the New England States, all highways, townways, causeways and bridges within the bounds of any town are required to be kept in repair at the expense of such town, so that the same may be safe and convenient for travelers, with their horses, teams and carriages at all seasons of the year. *Stanton v. Springfield*, 12 Allen, 566; *Providence v. Clapp*, 58 U. S. 17 How. 161 (15 L. ed. 72).

Generally speaking, a town or city charged with the duty of keeping its highways or streets in repair performs that duty when the traveled way is without obstruction or structural defect which endangers the safety of travelers, and is sufficiently level and smooth, guarded by railings where necessary, to enable persons, by the exercise of ordinary care, to travel with safety and convenience. *Hixon v. Lowell*, 13 Gray, 59; *Barber v. Roxbury*, 11 Allen, 318.

The obligations resting upon towns in relation to the support of highways and bridges is not imposed by the common law, but is wholly a creature of the statute. *Chidsey v. Canton*, 17 Conn. 473, 478, approving *Mower v. Leicester*, 9 Mass. 247; *Reed v. Belfast*, 20 Me. 248; *Sanford v. Augusta*, 38 Me. 536; *Peck v. Ellsworth*, 36 Me. 308; *Baxter v. Winoski Turnp. Co.* 22 Vt. 114; *Hyde v. Jamaica*, 27 Vt. 448; *State v. Burlington*, 36 Vt. 521; *Kittredge v. Milwaukee*, 26 Wis. 46.

The duty to make repairs in a highway rests, at common law, on the town or other subdivision of the State on which the duty of opening and making the highway rests. *Erie Co. v. Com.* 127 Pa. 197.

If rails or barriers are necessary for the proper security of travelers, the authorities charged with

keeping the roads in repair and safe condition must furnish them. *Palmer v. Andover*, 2 Cush. 600; *Rowell v. Lowell*, 7 Gray, 100; *Jones v. Waltham*, 4 Cush. 289.

Whenever a public road is, from any cause, rendered so unsafe as to put the traveler in peril of his life, it is the duty of the authorities to do what is practicable and reasonable, under all the circumstances, to render it safe. *Plymouth Twp. v. Graver*, 125 Pa. 24; *Fowler v. Strawberry Hill*, 74 Iowa, 644.

A village which is constituted a separate road district, and the trustees of which are commissioners of highways, is bound to keep its streets and sidewalks in a reasonably safe and proper condition. *Pomfrey v. Saratoga Springs*, 7 Cent. Rep. 44, 104 N. Y. 459.

The duty of keeping in repair highways and bridges is imposed by statute upon the town in which they are located; and criminal information will lie against a town for failing to repair a bridge within it upon a public highway. *Saukville v. State*, 69 Wis. 173.

In Oregon, a county has sole charge and supervision over the highways within its boundaries, is bound to keep them in repair, and is liable for injuries resulting from defects therein. *Eastman v. Clackamas Co.* 32 Fed. Rep. 24.

A town is not obliged to remove irregularities outside of the road, or to erect barriers to prevent travelers from wandering into the adjoining fields. *Monk v. New Utrecht*, 7 Cent. Rep. 240, 104 N. Y. 552.

Liability for neglect of duty.

The care of roads and bridges is vested in the several towns of the New England and other States, and a cause of action is expressly given by statute against a town for neglect of repair. But no action

ment, to place the shoulder to the vehicle to prevent overthrowing. The most that can be claimed against him is that it is a question for the jury.

8. A general custom and usage as to placing railings or barriers along the highway embankment is of no importance in determining the liability of a town for failure to provide such barriers at a dangerous place, where the Statute imposes an absolute liability to make highways safe for travel.

(Campbell, J., dissents.)

(November 8, 1889.)

ERROR to the Circuit Court for Kent County to review a judgment for plaintiff in an action to recover damages for personal injuries resulting in death and alleged to have been caused by defects in a public highway which defendant's duty was to keep in repair. *Affirmed.*

The facts are fully stated in the opinion.

Mr. F. A. Stace, with **Mr. J. C. Fitzgerald**, for defendant, appellant.

Messrs. Blair, Kingsley & Kleinhans and **Thompson & Temple**, for plaintiff, appellee:

The want of railings necessary to the security of travelers is a "defect" in a way within the meaning of the Statute, which renders towns answerable for damages sustained "by reason of any defect in a way."

Haden v. Attleborough, 7 Gray, 838. See also *Norris v. Litchfield*, 35 N. H. 271; *Hyatt v. Rondout*, 44 Barb. 391.

lies except by force of the statute giving it. *Bigelow v. Randolph*, 14 Gray, 541; *Childsey v. Canton*, 17 Conn. 475; *Keed v. Belfast*, 20 Me. 246; *Eastman v. Meredith*, 36 N. H. 284; *Frazier v. Lewiston*, 76 Me. 531; *Altnow v. Sibley*, 30 Minn. 183; *Yeager v. Tippecanoe Twp.* 81 Ind. 46.

The liability of towns for defects in ways is wholly the creation of statutes, and is a liability strictly limited and peculiar. *Oliver v. Worcester*, 102 Mass. 489, 496; *Mower v. Leicester*, 9 Mass. 247; *Com. v. Springfield*, 7 Mass. 9; *Brady v. Lowell*, 8 Cush. 121, 124; *Bacon v. Boston*, 3 Cush. 174; *Brailley v. Southborough*, 6 Cush. 141; *Smith v. Dedham*, 8 Cush. 522; *Hixon v. Lowell*, 13 Gray, 59, 64; *Vinal v. Dorchester*, 7 Gray, 421.

Under Pub. Stat., chap. 52, §18, a town is liable for a defect in a highway,—as, a loose cover of a cesspool,—without actual notice, if it might have had notice by exercise of proper diligence, although the defect had not existed for any particular time. *Post v. Boston*, 1 New Eng. Rep. 542, 141 Mass. 189.

Dangerous ditches and excavations by the side of highways must be guarded; and after notice the city will be liable for injuries caused by neglect to put up barriers. Authorities cited in *Kiley v. Kansas City*, 2 West. Rep. 203, 87 Mo. 103.

Municipal authorities are liable for the failure to erect suitable barriers between a highway and a railroad parallel thereto, where, without such barriers, the place is so dangerous that travelers are exposed to great peril. *Plymouth Twp. v. Graver*, 125 Pa. 24.

A town is liable for injuries resulting from defects in those portions of its streets which are within the locality of railroads which cross them, of which it has or may have reasonable notice, if it can remedy them by reasonable care and diligence. 6 L. R. A.

ticular circumstances of the case.

Plymouth Twp. v. Graver, 125 Pa. 24; *Sharp v. Evergreen Twp.* 67 Mich. 443; *Joslyn v. Detroit* (Mich.) 42 N. W. Rep. 50; *Southwell v. Detroit* (Mich.) 42 N. W. Rep. 118.

Evidence that it was not customary in Kent County to have barriers on highway embankments was properly excluded.

Champaign v. Patterson, 50 Ill. 65; *Hinckley v. Barnstable*, 109 Mass. 126; *Kenworthy v. Ironton*, 41 Wis. 647, 653; *Perkins v. Fond du Lac*, 84 Wis. 435, 442; *Hubbard v. Concord*, 35 N. H. 60; *Littleton v. Richardson*, 32 N. H. 59; *Hyatt v. Rondout*, 44 Barb. 385; *Tripp v. Lyman*, 37 Me. 250.

The want of guard rails would be, in contemplation of law, the proximate cause of the accident, if their existence would have prevented it and the plaintiff was without fault.

Houfe v. Fulton, 29 Wis. 301; *Palmer v. Andover*, 2 Cush. 600.

If a wagon is roadworthy, then the fact that it has defects which the defects in the road make dangerous is no defense to the town.

2 *Thompson*, Neg. 1208; *Wharton*, Neg. par. 987; *Hammond v. Mukwa*, 40 Wis. 35; *Hodge v. Bennington*, 43 Vt. 450; *Palmer v. Andover*, 2 Cush. 600, 607, 610.

Long, J., delivered the opinion of the court:

This action is brought by the plaintiff as administrator of the estate of *Walter S. Gee*, deceased, against defendant Township, to recover damages on account of the death of *Walter S. Gee*, which the plaintiff alleges was caused

without interfering with the construction or operation of the railroad. *Noyes v. Gardner*, 1 L. R. A. 354, 147 Mass. 505.

A village taking possession of a strip of land over the right of way of a railroad and along the street, and constructing a sidewalk, is liable for injuries from its defective condition. *Mansfield v. Moore*, 13 West. Rep. 873, 124 Ill. 132.

A village is not liable for the death of a person drowned in a canal, attributable to want of a barrier between the village street and the canal, if the land where the barrier was required is the property of the State, or if the barrier would have rendered the travel on the street dangerous. *Veeder v. Little Falls*, 1 Cent. Rep. 519, 100 N. Y. 343.

If a traveler is injured in consequence of a palpable defect in a highway, it is no defense that his horse, at the exact time of the injury, was running away, or was beyond his control. *Plymouth Twp. v. Graver*, 125 Pa. 24.

It is not sufficient to exonerate a village that the superintendent has no money in his hands to repair walks, where he had no authority to call upon the trustees for the same. *Pomfroy v. Saratoga Springs*, 7 Cent. Rep. 44, 104 N. Y. 459.

The liability of the town or city does not extend to persons not within the protection of the statute. *Blodgett v. Boston*, 8 Allen, 237; *Higginson v. Nahant*, 11 Allen, 530; *Stickney v. Salem*, 3 Allen, 374; *Britton v. Cummington*, 107 Mass. 347; *Stinson v. Gardiner*, 42 Me. 248.

An action is not maintainable against a town, for a personal injury not received within the limits of a highway, but within five feet of the curbstone, which the town was not bound to repair. *Stone v. Attleborough*, 1 New Eng. Rep. 458, 140 Mass. 328.

1000. HENRY V. TOWNSHIP OF WALKER. 1001
by the wrongful negligence of the defendant to keep in good repair, and in a condition reasonably safe for travel, a certain highway in that Township. Plaintiff on the trial in the court below, before a jury, had a verdict and judgment for \$2,500. Defendant brings error.

Forty-nine errors are assigned. Ten of the assignments of error are based upon the ruling of the court in the admission and rejection of evidence during the trial. Twenty-two of such assignments of error are based upon the refusal of the court to give defendant's written requests to charge, and the balance of such assignments are based upon certain portions of the charge as given.

The circumstances under which Mr. Gee received his injuries are not much in dispute, and are stated very fully in the brief of counsel for defendant. It appears that a party of ladies and gentlemen, including plaintiff's intestate and the plaintiff, all residents of the City of Grand Rapids, had arranged to make a visit and spend the evening at the residence of Mr. A. J. Gill, which is situate in the Township of Walker, about two and a half miles west of the City of Grand Rapids, on the south side of the highway called "Bridge-Street Road," running from the city westward to the Grand River, a distance of about ten miles. Plaintiff's intestate, who was part owner of a livery-stable, furnished the conveyance, team and driver, for which he was paid by the party. The conveyance provided was a long carry-all on wheels of peculiar and unusual build, being more than twenty feet long, made without any reach, with a "goose-neck" forward supporting the driver's seat, and under which the fore-wheels turned. The seating room for passengers extended from behind the goose-neck backward several feet beyond the hind axle, and it was entered from behind by a step; the seats running lengthwise, and being over fifteen feet long. The vehicle was so constructed that when loaded the weight of the passengers rested almost entirely on the hind axle. The tread of the wagon was wider than usual, the wheels being nearly a foot further apart than in ordinary wagons. It was drawn by four horses, the pole being attached to the collars of the wheel-horses by pole-straps, no neck-yoke being used.

The party arrived at Mr. Gill's house between 8 and 9 o'clock in the evening, and remained till about 1 o'clock in the morning of February 25, 1887, when they started to return in the same conveyance. There were twenty-six full-grown persons, including the driver, in the load, one of whom, the plaintiff, besides the driver, sat on the driver's seat. Two of these persons, plaintiff's intestate and Mr. Fred Clark, rode standing on the hind step; and the remainder, nine gentlemen and thirteen ladies, in the seating room of the carry-all, the most of the ladies being in the forward part. The road at this time was covered with snow and ice. There had been several sunny days, and the snow had somewhat thawed in the daytime, but had frozen again at night. The conveyance was on wheels, though for some part of the way on this highway the sleighing was good, and sleighs were being generally used. A short distance from Mr. Gill's, on this road

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towards the city, over which the party started to return, was a valley between two hills. The road began to descend towards the east shortly after leaving Mr. Gill's gate, and continued to descend for about twelve to fifteen rods, until it reached an embankment constructed across the valley from hill to hill, a distance of about eighteen rods. This embankment was from twelve to sixteen feet wide at the top, with sides sloping at a grade of about one foot perpendicularly to one and one-half feet horizontally, being at the point where the accident occurred from nine to ten feet high above the natural surface, and some seventeen feet on the grade to the bottom of the embankment. It had no railings or barriers at the sides. The traveled track of the highway passed over this embankment, and there was a well-defined traveled track, with tracks of teams and vehicles worn down into the snow and ice forming two parallel troughs, from two to four inches deep, with a cone or raised ridge between them, along about the middle of the embankment; the track on the hill approaching it not being so well defined, as teams in descending the hill had not followed any particular track until they came to the embankment. Near the top of the hill, near Mr. Gill's, there was a hollow place, which had been washed out by a thaw in the early part of the winter. This place had been marked by a stake, and Mr. Gill accompanied the party with a lantern to guide them by this hollow, which he did, the team keeping to the south side of the road as they went down the hill.

The night was cold and frosty, and the road on the hill-side and across the embankment was icy and slippery. There was no moon, but it was not a dark night, being light enough for the driver to see the traveled track, ten or fifteen rods ahead of his team. After the team passed the hollow place, Mr. Gill left them, and returned home, and the vehicle proceeded down the hill, the horses going at a pace between a trot and a walk, keeping to the south side of the roadway until they approached the bottom of the cutting, and the beginning of the embankment. At this point there was a water-break, being a slight elevation crossing the road to turn the water which might flow down through the cutting to the sides of the embankment. On approaching this, the team and vehicle being on the south side of the road, the driver undertook to bring them into the traveled track, so that both off wheels should be on the south side of the ridge or cone, above mentioned, and both near wheels should be on the north side of it, and for that purpose drove his team somewhat to the north, and then along the center of the traveled track. It appears that the fore wheels, in coming on to the embankment, took the traveled track as intended, but the hind wheels did not follow therein, and, going too far to the north, both of them got wholly on the north side of the cone, and thus failed to track with or follow the fore wheels. The wagon proceeded along, the team and fore wheels keeping the track, and the hind wheels keeping out of it, and getting further and further out towards the north edge of the bank. The driver, giving his attention to his horses, did not notice the hind part of the wagon. Mr. Gee, the deceased, and Mr.

the hind part of the wagon had worked quite over to the north edge of the bank, the fore wheels remaining in the traveled track. Then a slight jolting was noticed, and deceased and Clark jumped to the ground, deceased putting his shoulder to the north side of the wagon, apparently endeavoring to push it back onto the roadway by his own strength. About this time the hind axle broke close to the off (or south) hind wheel, and the hind part of the wagon immediately slid sideways down the embankment, the horses being still in motion, and the driver knowing nothing of anything being wrong until the hind end of the wagon began to go down. The entire conveyance moved forward, from the place where the axle broke, about forty feet, before stopping. The fore wheels and fore part of the wagon remained on the roadway, and the hind part slid around so that the rear was at the foot of the bank, some seventeen feet from the top of the bank, the driver remaining on his seat until the horses were unhitched. None of the persons remaining in the wagon were injured. Mr. Gee, the deceased, being on the north side at the rear end of the wagon when it went over the edge, was thrown some distance down the bank, and in some manner received a blow on the head. At first he did not appear seriously hurt, and took an active part in unhitching the horses, and went back with a greater part of the party to Mr. Gill's house to obtain some other conveyance. Having obtained a sleigh at Mr. Gills, and the offer of another at Mr. Edison's, about a quarter of a mile further west, Mr. Gee started with Edison to walk there and get it, another of the party accompanying him with a pair of horses. During this walk Mr. Gee complained of a severe pain in his head, where he had received a blow, and returned to Gill's and laid down, and shortly after became unconscious, and died a few days thereafter from the effects of it.

The only ground upon which any attempt is made to hold the Township liable is the alleged neglect to provide barriers or railings along the sides of the embankment in question. The court in instructing the jury stated that, to entitle the plaintiff to recover, he must prove, by a fair preponderance of evidence, (1) that the highway at the place where Walter S. Gee received the injuries which caused his death was not in good repair, and in a condition reasonably safe and fit for travel; (2) that the defendant had reasonable time and opportunity after said highway became unsafe and unfit for travel to put the same in a proper condition for use, and had not used reasonable diligence therein; (3) that at the time said Gee received said injuries both he and the driver were exercising proper care and caution, and that no negligence of either contributed to the injury of which complaint is made; (4) that Mr. Gee's death was caused by injuries which he then received, and that his next of kin, the persons entitled by law to distribution of his personal estate, have sustained pecuniary loss by his death.

The defendant in its first request asked the court to charge the jury that under the pleadings and proofs, as no liability was shown, the

question whether this portion of the highway where the accident occurred was in a condition reasonably safe and fit for travel, and in this case that question will depend upon your solution of another question, viz., whether or not suitable railings or barriers along the sides and top of the embankment in question were necessary to render the highway reasonably safe and fit for travel."

The question of the negligence of the defendant under the charge so given was therefore made to depend upon the question of the duty of the defendant to erect and maintain these barriers, and, under the circumstances surrounding the case, was left as a question of fact for the determination of the jury. It is contended by defendant's counsel that this was error.

It appears that this highway had been used there for twenty-five years. That the Town had done work on this embankment during the spring and summer prior to the accident, when it was raised about fifteen inches, all the statutory labor during that year being put on this fill. There never was any railing or barrier of any kind on either side of the embankment. The actual condition of the hill and embankment was well known to the town officers, the supervisor, justice of the peace, town-clerk and commissioner of highways having passed over it during the winter and spring before the accident, and Mr. Edison, the overseer of that road district, lived on that road, within forty rods of the place of the accident, passing over it every time he went into the city.

Plaintiff's counsel in their brief assign the following as the reason of the accident: The accident did not occur because of any slipping or sliding of the wagon. It was one that might have happened on such a road as well in July as in February. It was simply one of those affairs by which a man gets unconsciously and imperceptibly out of the beaten track, either when he is on foot or driving in the night-time, and especially after being compelled to deviate from the straight traveled way by obstructions in his pathway which he must necessarily go around. That the immediate and proximate cause of the injury in this case resulted from: *first*, the narrow top or surface of the artificial embankment; *second*, the want of any barriers or guard along the sides to prevent vehicles from going over in the night-time.

It is claimed by plaintiff's counsel that owing to the steep embankment, and anticipating the results likely to ensue to travelers in passing over it in the night-time, it was the duty of the Township at this particular place to cause barriers and guards to be erected in order to secure a reasonable degree of safety for public travel, and that the circumstances of the case bring it within the provisions of the Statute requiring townships having the care and control of the highway to keep the same in good repair and in a condition reasonably safe and fit for travel. At least, the question was one for the jury to decide, under the circumstances, whether the road was in such condition, and whether it was the duty of the defendant Township to erect such guards or barriers. Outside this Statute there is no liability.

height, width or want of barriers. Counsel cite the following cases as sustaining these views:

In *Detroit v. Beckman*, 34 Mich. 126, the plaintiff's intestate was killed by running the wagon which he was driving off the end of a culvert, and overturning into a ditch. The negligence alleged was that the city erected too short a culvert, and left too much of the ditch open and unprotected. It was not alleged that there was any negligence whatever in the construction, except that which pertained to the plan itself. This court laid down the rule in that case that, "when complaint is made that the original plan of a public work is so defective as to render the work dangerous when completed, it is apparent that the fault found is with legislative action, and a suit grounded upon it is grounded on a wrong attributable to the legislative body itself; for the determination to construct a public work, and the prescribing of the plan, are and must be matters of legislation, whether done on behalf of the State, by or under the direction of its legislative body, or on behalf of a county, town or city, by or under the direction of the proper board or counsel. In carrying out of the plan there may be negligence attributable to ministerial officers, but negligence in the plan itself must be attributed to the body that devised, ordered or adopted it." The court further said: "In this State the question which lies at the foundation of this suit is not an open one. In *Larkin v. Saginaw County*, 11 Mich. 88, it was decided that no action would lie for an injury resulting from an exercise of legislative authority. In *Pontiac v. Carter*, 32 Mich. 164, which was a case of injury, by change in the grade of a street, to buildings previously erected with reference to an established grade, the point was quite fully discussed, and the liability of the city denied."

In *Lansing v. Toolan*, 37 Mich. 152, the same principle was stated, and the case of *Detroit v. Beckman*, *supra*, cited and approved.

In *Toolan v. Lansing*, 38 Mich. 315, the case was again before this court, and *Detroit v. Beckman*, again cited, and the doctrine there laid down approved.

In *Davis v. Jackson*, 61 Mich. 536, where the action was brought to recover damages for injuries to the plaintiff in driving his carriage against a stone placed on the end of a culvert and being overturned, the defendant asked the court to instruct the jury: "(4) If you find that the placing of the stone in question at or near to the end of the box-drain by the defendant was a part of the plan for improving the street, by putting in the drain and protecting the end of the drain and the traveling public from injury or accident by placing the stone in the position where it was at the time of the accident, the plaintiff cannot recover." "(9) The wrong which must exist to render the city liable is neglect, and there can be no neglect when the work was completed as intended. Negligence cannot be predicated on a work done in accordance with its design or plan, even though it does not sufficiently protect the public."

It was held that these instructions were proper.

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der which plaintiff claims to recover, except *Davis v. Jackson*, *supra*, which we think clearly distinguishable from the present case. The circumstances there tended to show that the city had placed some barriers at the ends of the culvert for the very purpose of preventing persons running off the end. The plaintiff ran against the barrier itself, and was injured. Since the adoption of the present Statute there has been no decision of this court laying down the rule now contended for by defendant's counsel. The Statute is imperative.

Section 1445, How. Stat., provides: "It is hereby made the duty of townships, villages, cities or corporations to keep in good repair, so that they shall be safe and convenient for public travel, at all times, all public highways," etc., "under their care and control, and which are open to public travel." Section 1442 and 1443 provide the penalty for such neglect, and authorize the bringing of suit by the party injured. It is, however, "provided that in all actions brought under this Act it must be shown that such township, village, city or corporation has had reasonable time and opportunity, after such highway . . . became unsafe or unfit for travel, to put the same in the proper condition for use, and has not used reasonable diligence therein." This Act was passed in 1879. Act No. 244, Laws 1879.

The Act of 1887 superseded and repealed the Act of 1879, but the provisions of this Act are very similar to the provisions of the Act of 1879, and the same duty is laid upon townships, etc., to keep the highways in repair.

Precisely the same question raised by counsel for defendant was presented to this court in *Alexander v. Big Rapids* (Mich.) 42 N. W. Rep. 1071, and there fully considered. In that case it was said: "Nor can the city escape responsibility because the crosswalk was removed in the improvement of Rose Avenue, on the principle enunciated in *Detroit v. Beckman*, 34 Mich. 125, and other cases cited. While the City of Big Rapids was improving Rose Avenue, or even after the improvement had been completed, it had no right to leave Pine Street, which crossed Rose Avenue, open to travel, unless the crossing of those two streets was made reasonably safe and fit for travel."

In *Joslyn v. Detroit* (Mich.) 42 N. W. Rep. 50, it was also held that this Statute makes the municipality not only liable for injuries resulting from a neglect to keep the highway in repair, but also to keep the same in a condition reasonably safe for travel. Whether this highway was in such a condition, it seems to us, was a question for the jury, under the circumstances here stated.

The negligence complained of was the want of any barriers or railways along a highway leading out from a populous city, and over which was a great amount of travel, the embankment being built up between two hills to such a height and so narrow that persons driving there might be in danger of being precipitated over the embankment, and the neglect to place some kind of barriers there would, under the circumstances here stated, become a question of fact for the determination of the

jury whether the Township had neglected a duty which this Statute imposes, and the question was fairly submitted under the charge as given.

In *Plymouth Twp. v. Graver*, 125 Pa. 24, a somewhat similar question arose under a statute of Pennsylvania. The statute provided that such roads should be kept constantly in a state of repair, and that at all seasons they should be kept clear of all impediments to easy and convenient traveling, at the expense of the township. It was held that where plaintiff's horse, traveling on a highway, and parallel with and adjoining a railroad, took fright at a locomotive, ran upon the track and was killed by the cars, it was for the jury to say whether the township supervisors were negligent in not erecting a barrier between the highway and the railroad.

In *Sharp v. Evergreen Twp.*, 67 Mich. 443, an action was brought to recover for injuries sustained by plaintiff in being overturned upon a public highway. It appeared that plaintiff was driving with her husband along a public highway, and that in descending a sand hill, where the road had been raised to the height of fifteen feet, and left about sixteen feet wide, unprotected on either side by any railing or other structure to prevent persons or teams from going off the bank at the sides in case of accident, the horse shied to the side of the track, and, becoming unmanageable, went off the embankment, taking the carriage with him, and seriously injuring the plaintiff. It was held by this court that it was a question for the determination of the jury, under the circumstances, whether the road was kept in reasonable repair and safe for travel. This Statute cannot be given a construction that would relieve a township or other municipality, upon which a burden is cast to keep its highways in repair and reasonably safe for travel, from liability by saying that it had adopted a method of construction and had built according to the plan.

Municipalities cannot construct a dangerous and unsafe road,—one not safe and convenient for public travel,—and shield themselves behind their legislative powers to adopt a plan and method of building and constructing in accordance therewith. The negligence consists, not in the plan of the work or the manner in which it is done, but in the failure to provide suitable protection against accident after the embankment has been made. The Statute is imperative to make a road reasonably safe, and whether it is in that condition of safety and fit for travel must be a question for the jury, under proper circumstances.

If this roadway was built at such height between hills, and so narrow, that it required barriers to make it reasonably safe, it became the duty of the Township to erect them, and, failing in this, the Township must be held to suffer the consequences of such neglect. It seems to be uniformly held that the absence of railings or barriers at dangerous places along a public highway is a defect for which the town is liable. *Harris v. Clinton Twp.* 64 Mich. 447; *Adams v. Natick*, 13 Allen, 429; *Alger v. Lowell*, 8 Allen, 402; *Palmer v. Andover*, 2 Cush. 600; *Woodman v. Nottingham*, 49 N. H. 6 L. R. A.

387; *Joliet v. Verley*, 85 Ill. 58; *Whart. Neg.* § 976.

In a note to 9 Am. & Eng. Cyclop. Law, p. 381, title *Highways*, it is laid down as a rule of law that in those cases where the erection of railings or barriers along the highway is a reasonable and necessary precaution to guard travelers against injury, the municipality is bound to provide such safeguards, and will be held liable for a failure in this regard, citing *Haskell v. New Gloucester*, 70 Me. 305; *Stork v. Portsmouth*, 52 N. H. 221; *Davis v. Hill*, 41 N. H. 329; *Palmer v. Andover*, 2 Cush. 600; *Rowell v. Lowell*, 7 Gray, 100; *Babson v. Rockport*, 101 Mass. 98; *Freeport v. Isbell*, 83 Ill. 440; *Koester v. Ottumwa*, 34 Iowa, 41; *Brasett v. St. Joseph*, 53 Mo. 290; *Kennedy v. Mayor*, 78 N. Y. 365; *Atlanta v. Wilson*, 59 Ga. 544; *O'Leary v. Mankato*, 21 Minn. 65; *Pittston v. Hart*, 89 Pa. 389, and other cases.

If the Township could not make this embankment there reasonably safe and fit for travel in adopting a plan of construction, it was not compelled to construct a highway over the place, or to maintain it, and it could have been closed to public travel until put in safe condition. But having constructed it, and invited the public to travel over it, its duty under the Statute was plain. It appears that the direct and immediate cause of the injury was the unguarded condition of this high embankment. If any sort of barriers had been placed along its sides, so that the hind wheels of the vehicle could not have traveled so far over the side, no accident, apparently, would have happened. It is true that no complaint was made to the officers of the Township whose duty it was to maintain the road in a safe condition, yet, as we have stated, it did appear that they lived in close proximity to the place, and some of them frequently passed over it, and must be held to have had such knowledge or notice of its defective condition as the Statute requires to fix the liability. It is contended that the evidence shows that the occurrence was a pure accident. We do not so regard it. It was a question for the jury to find whether it would have occurred if the highway had been in proper condition, and this question was left to them under the charge of the court.

It is also claimed that a sleigh was the only proper vehicle to be used on that highway at that season of the year. The evidence, however, shows that at many places along the highway out from the city that night the snow had melted off so that the ground was bare in places, and that a vehicle on wheels was better and more easily drawn.

It is also claimed that this particular vehicle was unsuitable, and not roadworthy, being unwieldy and unmanageable. This question was left to the jury under the charge of the court, and they have determined otherwise. It was a question of fact for them.

The court, also, in a very full charge, and in which we find no error, left the question of the contributory negligence of the deceased and of the driver to the jury. We shall not, therefore, discuss these questions raised under the assignments of error relating to that branch of the case further than to say that if by the carelessness of the defendant in constructing

and maintaining a dangerous highway there,—one not fit and safe for public travel,—and by reason of such defects and dangerous condition the hind wheels of the wagon slid over the embankment, and the wagon was liable to be overturned, and the parties then and there in the wagon, under the charge of the deceased, liable to meet with great bodily injuries, it was not negligence on the part of the deceased to use all due care to prevent the overturning and consequent injury to the parties in his charge. The fact that he alighted and placed his shoulder to the vehicle to prevent the accident could not be charged as negligence. If it was the negligence of the defendant in not repairing the highway which placed the deceased and those under his charge in a perilous position, no negligence could be imputed to the deceased, if, acting upon that occasion, as it appeared to him to be, for the safety of himself and the party in his charge, he did not take the precaution which upon consideration a more prudent man might have taken. At least it was a question for the jury, and fairly submitted.

Counsel for defendant has devoted great space in his brief to the assignment, and urged the same in his oral argument here, that the court erred in refusing to permit defendant to give in evidence the custom and usage generally as to placing barriers or railings on the sides of similar embankments on highways; and it is contended that travelers have no right to expect more than the usual and customary safeguards, and that it would be unreasonable to expect any township to use extraordinary or unusual means to insure safety to travelers. Under the circumstances here stated, we think that there is no force in this contention. The Statute itself imposes the duty, and the municipality cannot be heard to say that because some other municipality has failed in its duty it can be excused from liability arising from such neglect. Neither do we see how the action of the officers of some other locality could in any way have influenced the officers of the Township in constructing this embankment. But, however that may have been, their duty was plain, and no such excuse could avail.

Complaint is also made of the charge of the court upon the measure of damages. We have read the charge, and do not think it open to criticism. We do not need to discuss all the errors assigned, or the refusal of the court to give defendant's requests in charge to the jury. The charge as given was fair and very full, submitting all proper questions to the jury, and we find no error in the refusal to charge the requests. Many of them were covered by the general charge, and in so far as they were not so covered we do not think there was error in refusing them. Upon the whole record we may add that we think the case very fairly tried, and fully and fairly submitted, and we see no good reason for disturbing the verdict.

The judgment must be affirmed, with costs.

Sherwood, Ch. J., and Morse, J., concurred with **Long, J.**

Campbell, J., dissenting:

I do not think that plaintiff made out a case for recovery. It is hardly necessary to enlarge

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on the reasons why I do of my Brother Long, of their general tenor. This causeway between high side, appears to have a quite as wide as is usual differs from the common needling and having no existed a long time, and the strongest reasons which regarded as negligent in far as appears, has been I do not understand that 1887 purport to impose authorities of changing particular. Neither do can dictate to highway barriers on a road border stream, which are very very few persons would up in such a place. The pended here would have just as probably and just the same width bordered ceased was perfectly far and knew, if anyone capable of causing mischief.

Common highways are hicles, and a township make a roadway so wide space for the siddings and so long that it would wit possible to turn aside, to ing around, in twice the law for any roadway. center of the road was not at the season, but it was ceased, and it was his driver, to keep an eye which the wagon was moving properly driven. The movement of the wagon the failure of deceased and if they were excusable instead of runners at such with such an unwieldy bound to look to their clear that the condition of proximate cause of the death he had been killed or the wagon, this might traced directly to that sound stayed in the wagon could been thrown from the safe to stand, he could blame but himself. But injury by attempting to be mous wagon up a slope by a thing that was prepos which was certain to sweet slip. It is impossible, that he did not directly and he was in fact not meet its primary cause.

I am not prepared to receive to be the settled law that the proper or best roads is among the presentments of average jurors, with that discretion are seen to act on their best judgment believe their judgment is open so monstrously perverted

never used their discretion at all. We have no laws that require perfect roads, or perfect safeguards. It is not negligence to do what is usually done in similar cases, until some statute intervenes to require it specifically. We have no statute that requires roads in dry places to be guarded by barriers. The Law of 1877, which provided for them, was repealed in 1881, except as to roads bordering on streams. There is some reason for holding bridges to have their approaches made different from ordinary roads, partly because it is usual, and therefore expected, and practically required by statute, and partly because a road approaching is narrowed to correspond with the width of the bridge, and vehicles are more likely to miss the way, and animals are not unlikely to need looking after in driving them on it. But it is not at all usual to put up guards beside roads of even width, and with roadway as wide as our turnpikes and plank or gravel roads are required to be. And no one would think of fencing between the roadway and the ditches, which, as before suggested, would have created the same difficulty for this wagon that existed on the highway in question. I think there should be judgment for defendant of reversal.

Champlin, J., took no part in the decision of this case.

Eulalia HARRIS

v.

Albert SMITH, Admr. of John S. Smith,
Deceased, *Appt.*

(....Mich....)

1. In an action by a woman to recover compensation for services rendered in the family of her step-father, with whom she lived, it is error to instruct the jury that she could recover if they should find that there was an implied promise on the part of the step-father to pay for such services, where there is nothing in the facts and circumstances of the case to overcome the presumption of law that there was no such promise.

NOTE.—Contract, when promise not implied; late cases.

The step-daughter of a deceased person, who was a member of his family, cannot recover against his estate for her services without proving an express promise or agreement on his part to pay her therefor. *Ellis v. Cary*, 4 L. R. A. 55, 74 Wis. 176.

A young woman twenty-two years of age, performing services in her father's family without any contract, has no legal claim to the joint savings of the family or to land purchased therewith, although the title is taken in the name of her brother. *Spitzmiller v. Fisher* (Iowa) 42 N. W. Rep. 197.

A girl who lived with her grandfather for nine years as a member of his family, without any contract as regards compensation, cannot recover against his estate for services rendered, although she calculated his interest for him on loans and did some work out of doors, as well as took care of his house, and he is shown to have made declarations that she was useful to him and should be well paid for her services. *Barhite's App.* 126 Pa. 404, 24 W. N. C. 64.

An old man without a home, who has at various times lived with an old friend and neighbor who kept a livery-stable, assisting him about his work, without any bargain for compensation, being per- 6 L. R. A.

2. A promise by a woman to her daughter, that she shall receive compensation if she will live in the family of, and render services to, the mother's husband, who is step-father to the daughter, which promise is made in the presence of the step-father, will not bind him to pay for such services unless it appears that he knew they were rendered in reliance upon the promise.

(December 23, 1899.)

ERROR to the Circuit Court for Kent County to review a judgment in favor of plaintiff in an action brought to recover compensation for services rendered by plaintiff to her step-father. *Reversed.*

The facts sufficiently appear in the opinion. *Messrs. Ward & Ward* for defendant, appellant.

Mr. Clark H. Gleason for plaintiff, appellee.

Morse, J., delivered the opinion of the court:

Plaintiff was a step-daughter of John S. Smith, deceased. On November 13, 1866, when plaintiff was about nine years of age, her mother married Mr. Smith, then a widower, and went to live with him. Each of the parties had separate estates. The wife owned eighty acres of land, and personal property where she had lived before her marriage to Mr. Smith, and her husband owned eighty acres where he lived, and some considerable personal property, and another forty acres of land. At the time of the marriage the husband had five sons and three daughters, all of whom lived at home, more or less, after the marriage. The wife had four sons and two daughters, by a former marriage, some of whom, also, made it their home there. The plaintiff lived there continuously until of age, June 24, 1878, and continued to live there thereafter, and to assist her mother, until she was married, December 21, 1883. Plaintiff claims she remained there from her arrival at age until her marriage, assisting about the household duties as defendant's hired servant, working for him with the

mittit to purchase clothes and other articles upon the other's credit, and receiving money whenever he wanted it, but without making any charges or giving any credits, although he kept a diary; and who, after going to another State, when, without making any claim for wages, he was given \$25 or more, and told to come back and have a home if he wanted to, returned in about six months, and went on as before, except that, without the knowledge of the other party, he made credits on his diary for everything he received,—is not entitled to any wages under any agreement, express or implied. *Coval v. Turner* (Mich.) 41 N. W. Rep. 1061.

But one who, after having submitted a proposition to employ another to perform certain services, which is at first declined and afterwards accepted by the latter, who informs the former that he is proceeding to the transaction of the business; and the employer, instead of notifying him that the offer is withdrawn, silently permits him to go on, and receives the benefit of his labor,—is liable for the amount which he proposed to pay. *Emery v. Cobbe* (Neb.) 43 N. W. Rep. 410.

That agreements may arise by implication, see *Minneapolis Mill Co. v. Goodnow*, 4 L. R. A. 202, note, 40 Minn. 497.

expectation, on her part, of receiving a compensation, and, on his part, to pay the same. Suit was commenced to recover therefor during the lifetime of John S. Smith; but, he having died, the suit was revived in the name of the administrator, and on the trial plaintiff had verdict and judgment for \$500.17.

Defendant's first contention is that plaintiff could only recover upon an express promise to pay, and that the trial court was in error in submitting the case to the jury upon the question of an implied promise. Upon this question the court charged the jury: "The relationship existing between the plaintiff and her step-father at the time this claim accrued raises a presumption of law that her services were gratuitous, or, at least, rendered in return for parental care and support; but such presumption is not conclusive against her legal right to recover, in the absence of an express promise to pay for the services. Therefore, if you find that there was no express promise to pay, and yet find, from all the facts and circumstances as shown by the evidence, that her services were rendered in the expectation by her of receiving compensation therefor, and, by the deceased, of paying therefor, she is entitled to recover."

We need not state the evidence given on the trial, under which plaintiff's counsel contends that this instruction is correct. We are satisfied the instruction cannot be upheld. The simple fact that services are rendered, under the circumstances claimed, does not raise a liability on the part of the person for whom they were rendered to pay therefor. *Bartholomew v. Jackson*, 20 Johns. 28; *St. Jude's Church v. Van Denberg*, 31 Mich. 287; *Hertzog v. Hertzog*, 29 Pa. 465; *Woods v. Ayres*, 39 Mich. 351.

Where the services are rendered to one standing *in loco parentis*, there is no implied promise to pay for them, though such presumption may be overcome by the facts and circumstances of the case. *Frost's App.* 105 Pa. 258.

We find nothing in this case, in the facts and circumstances, to overcome this presumption. The plaintiff lived in the family of deceased from the time she was nine years of age, was cared for as one of the family until the time of her arrival at age, and from that time forward the relationship continued up to the time of her marriage. She performed the same duties, and dwelt there as a member of the family, as she had done before her becoming

of age; had her board, clothing, and maintenance, to time, was given more than her majority. No account was rendered by her party, and there is certain evidence of the part of the plaintiff to pay for services rendered for the same.

It is claimed that there was no express promise. The majority of the two brothers, brother Ernest says that he was living over there; and he was there when the mother was staying, when the mother would be well paid for her work at this time the step-father ought to have heard it, whether he did or not. 1878. Plaintiff's brother heard his mother say that she would have her pay, and that she would pay it; and that this was the promise of the step-father. No child was deceased, by any word of promise; but it is insisted that the mother made by the mother in the lifetime of her husband, that she was paid, was binding upon the step-father, would be true, with some force. If the mother made the promise, and hearing of her husband should pay the plaintiff for her services, and the husband continued her service in reliance upon it, it would be such an arrangement on his part that he would be bound by it, the same as though he had promised himself. This would be an express authority on his part to the wife, acting as agent for him, to bind him by her contract for services.

In *Clark v. Cox*, 32 Md. 311, it was held that the wife had no express promise to purchase necessaries, and that the husband, where it did not appear that the husband had himself neglected to purchase necessaries as were suitable for the family.

The judgment must be reversed and a new trial ordered.

**Sherwood, Ch. J., and
and Champlin, J.J., con-**

GEORGIA SUPREME COURT

John A. SUTTON *et al.*, *Plffs. in Err.*,
v.

HIRAM LODGE, No. 51.

(....Ga....)

1. A lease for the space of twenty years or during the lessees' natural lives is a lease for twenty years only, provided the lessees live that long; and if they die before the expiration of that time, the lease expires.

2. After the expiration of the twenty years, the lease expires.

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years the lessees in such cases at sufferance.

(November 21)

ERROR to the Superior Court to review a judgment of the Superior Court in an action of ejectment against the plaintiff in error.

Messrs. W. M. & M. F. Hardema plaintiffs in error.
Mr. S. H. Hardema defendant in error.

by the defendant in error against the plaintiffs in error to recover certain land situated in the Village of Danburg, in the County of Wilkes. The defendant in error on the trial below relied upon a certain instrument in writing, which is as follows:

Georgia, Wilkes County.

The undersigned, in consideration the Masonic Lodge at Danburg, in said county, known as "Hiram Lodge No. 51," has allowed them to remove and use as a storehouse their lodge building, and still allows them to use the same, which they have fitted up partly for a store-room, and removed to a lot in Danburg belonging to the undersigned, do agree, in consideration of the premises, to keep said building in good order and condition outwardly, excepting the blinds of the upper or lodge room, which are to be furnished by said Lodge, and afterwards kept in repair by us, and to keep the same insured at a sufficient amount to replace the property if destroyed or damaged by fire, giving to said Lodge at all times the right of ingress or egress to and from said lodge room, for which we are to have the use and control of the lower room of said building for the space of twenty years, or during our natural lives, at which time our rights, not only in the building, but also in the lot of land upon which it has been removed and now stands, shall cease, and shall become exclusively the property of said Lodge, to which we bargain and sell the same according to the above conditions, and will warrant and defend the title of the same to said Lodge against any and all persons whatever Signed, sealed, and delivered in presence of

J. S. Womak,
E. W. Anderson, J. P.
John A. Sutton. [L. s.]
Z. W. Anderson. [L. s.]

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ing our natural lives;" some of the witnesses testifying on behalf of the Lodge that the meaning of the contract was that the plaintiffs in error should have a lease for twenty years, and no longer, if the plaintiffs in error should live that long, but that if the plaintiffs in error should die before the expiration of the twenty years the lease should expire. Other witnesses introduced testified to the contrary; that the meaning was that the plaintiffs in error should have the lease for twenty years, and at the expiration of that time, at their option, as long as the plaintiffs in error should live. The jury found in favor of the plaintiff in the court below, and a motion for a new trial was made by the defendants, which was overruled, and they excepted.

We think that, without more, the paper which was introduced gave to the plaintiffs in error a lease in the premises for twenty years only, provided they should live that long, and if they should die before the expiration of the twenty years the lease should expire; and so it appears the court held.

2. But it is further contended by the plaintiffs in error that, after the expiration of the lease, the plaintiffs in error remained a year longer in possession of the premises, without objection on the part of the defendant in error, and that therefore they had a right to a further term until the expiration of their lives. If we are right in the construction we have placed upon this instrument, after the expiration of the lease of twenty years the plaintiffs in error were merely tenants holding over, and could have been turned out of possession, under section 4077 of the Code. They were merely tenants at sufferance after the expiration of the lease. Wood, Land, and Ten. 20.

Judgment affirmed.

a guardian for the infant, these appeals cannot be entertained by this court.

It is a well-settled principle in the law of domestic relations, in this country at least, that as between the mother and the putative father of a natural child, the mother is the natural guardian, and has the right to the care and control of the child during the age of minority, unless it be otherwise expressly provided by statute. *Wright v. Wright*, 2 Mass. 109; *Somerset v. Dighton*, 12 Mass. 387; *Petersham v. Dana*, Id. 433; *People v. Kling*, 6 Barb. 366; *Reeve*, Dom. Rel. 815.

And therefore, as the appointment of a testamentary guardian under the Statute of 12 Charles II. supersedes the claims and control of any and all other guardians, and extends to the person and estate of the child, and places the person appointed *in loco parentis*, it follows that the father of a natural child, in the absence of express statutory authority, cannot appoint a testamentary guardian for such child; and such has been the uniform decision of the courts ever since the Statute of Charles II. was passed.

It is held that the terms of the Statute, conferring power upon the father to appoint guardians, do not confer power to appoint guardians to his illegitimate children. *Ward v. St. Paul*, 2 Bro. Ch. 553; *Peckham v. Peckham*, 2 Cox, Ch. 46; *Barry v. Barry*, 1 Moll. 213; *Alex. Brit. Stat. 463*; *Reeve*, Dom. Rel. 815; 2 Kent, Com. 224.

And as the father has no such power of appointment for his natural children, it follows necessarily that he could not delegate power to a third person to make such appointment.

It is true, it has been the practice of the court of chancery to adopt the nomination of a guardian, made by a putative father for his natural child, in cases where he has left it an estate, and the person nominated is in all respects proper. But this is simply in deference to the wishes of the deceased, and not as matter of right which the court is bound to respect. *Ward v. St. Paul* and *Peckham v. Peckham*, *supra*; *Chatteris v. Young*, 1 Jac. & W. 106.

And so it would be very proper, in cases where no objection can be made to the nominee, and no superior claims are presented by other parties, for the orphans' court to adopt the nomination of the putative father, and appoint the person designated by him; but this is a matter entirely within the discretion of the orphans' court. And being so in the discretion of the court, it could not, in this case, be required to direct a plenary proceeding, as there were no facts in contest, and nothing to be determined by such proceeding that would in any way bind or conclude the action and discretion of the court. *Cain v. Warford*, 3 Md. 464.

The mother, being the natural guardian of the child, was deemed by the court to be a fit and proper person to act, and was therefore appointed guardian [Code, art. 93, § 146]; and it has long since been settled that from an order making such appointment no appeal will lie to this court. *Compton v. Compton*, 2 Gill, 241; *Johnson v. Brannaman*, 10 Md. 495.

These appeals must all be dismissed.

Appeals dismissed, with costs.

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BALTIMORE & OHIO R. CO., *Appt.*,

v.

STATE of Maryland, Use of Lucy A. WILEY *et al.*

(....Md....)

For a postal clerk to ride in a mail car while off duty, in the absence of any rule of the railroad company forbidding him to do so, is not contributory negligence which will prevent recovery of damages for his death caused by a collision of trains.

(February 5, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Howard County in favor of plaintiffs in an action to recover damages for personal injuries resulting in death, and alleged to have been caused by defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

Argued before Alvey, Ch. J., Robinson, Stone, McSherry, Fowler and Irving, JJ.

Messrs. Henry E. Wooten, John K. Cowen and W. Irvine Cross, for appellant:

The baggage car is a place of danger, which an intelligent man accustomed to railroad travel must be presumed to know.

Pennsylvania R. Co. v. Langdon, 92 Pa. 27; *O'Donnell v. Allegheny Valley R. Co.* 59 Pa. 239.

The bare license of the conductor was no excuse for the negligence.

Hickey v. Boston & Lowell R. Co. 14 Allen, 429. See also *Baltimore & P. R. Co. v. Jones*, 95 U. S. 439 (24 L. ed. 506); *McClure v. Philadelphia, W. & B. R. Co.* 84 Md. 533.

Messrs. H. V. D. Johns and William A. Hammond for appellees.

Irving, J., delivered the opinion of the court:

This suit was brought in the name of the State, for the use of Lucy A. Wiley *et al.*, to recover damages for the death of William H. Wiley, her husband, and father of the equitable plaintiffs, occasioned by collision of appellant's trains going in opposite directions. The negligence of the appellant's officers is conceded, and appellant relies wholly on what it claims to have been contributory negligence on the part of the deceased as its defense to the action.

The deceased was chief postal clerk in the United States railway mail service. He held what is known as a "photograph commission" from the government. His route was from Baltimore to Grafton. He was entitled under his commission to ride as a passenger on the appellant's trains by virtue of his commission while in the active discharge of duty, or in going from and returning home. At the time of the accident he was not in active duty, but was returning to his home until he should be called to duty again, in a few days. He rode on the occasion of the accident in the smoking car from Baltimore to Washington; and the conductor saw and recognized his commission as entitling him to ride in the cars; and the conductor testifies he did not see him any more.

He had left the smoking car, and gone into the postal car, where, after chatting a while with those on duty in that car, he lay down upon the mail matter and went to sleep. The collision came. The postal car was crushed and the dead body of the deceased was found in the *debris*. The witnesses say if he had remained in the smoking car he would probably not have been killed, as nobody was hurt in it. His presence was not required in the postal car, as he was off duty and returning home, subject to call into active service within six days, or sooner, if needed.

The evidence shows that no one was allowed to ride in the postal car but such as had a photographic commission or a permit, and those who held the permit had to pay fare. It was the custom of the conductors to allow persons holding photographic commissions to ride either in the postal car or in any part of the passenger cars. Sometimes they would ride in one and sometimes the other, and the conductor testifies he made no objection. The conductor was not admitted into the postal car, but it was the duty of the postal clerk in charge there to report to him the presence of anyone chargeable with fare; and that when notified that clerks not on duty were in that car he made no objection. It was also in proof that the deceased had, before that time, upon his photographic commission, been permitted on previous occasions to ride in the postal car when going or returning from duty.

Two exceptions were taken to the admission of evidence as to the custom of the conductor in giving permission of that sort; but they were waived at the hearing in this court, so that the sole question intended to be raised by those exceptions is left as presented by appellant's prayer, which goes to the effect of that evidence. It was rejected by the court below. That prayer is as follows, viz.: "If the jury find that the deceased, at the time of his death, was a clerk in the railway mail service, and on the 8th of October last entered the train of the defendant at Baltimore and rode to Washington, in the smoking car attached to said train, and upon reaching Washington he left the smoking car and entered the postal car at Washington attached to said train, as testified to by the witness Atkinson, and continued to remain in said postal car until the time of the accident, and was in said car when he met his death, and that from its position in the train the postal car was subject to greater risk of danger than the cars intended for the transportation of passengers; and further find that when said deceased entered said postal car, he was not on duty as postal mail clerk, and had no official duties to discharge in said car, but was returning to his home at Grafton, where he would have remained six days unless sooner called into active service, and that if the deceased had remained in the smoking car or been seated in any other car attached to said train intended for the transportation of passengers, he would not have been killed,—then their verdict must be for the defendant, notwithstanding the jury may further find that the deceased had with him a pass, in the evidence called a photographic commission, entitling him to free transportation on said train, which was offered in evidence by the plaintiff."

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In effect this prayer a matter of law, that postal car was the place dinarily remained and was as a passenger, when in postal duties, still if he of his official duties, it was negligence for him to be the conductor was in the to be in that car when r when he was not on d case which would justify reason and authority lead of the circuit court was jecting this prayer.

It may be that the loca was, by reason of its gre engine, a place of greater ing car or other passenger car for the occupancy of entitled to ride as such be position or connection wi partment of the governm fare and were connected v There was no rule of the the deceased to enter that same, if he was not in act his habit to occupy it wh from duty, whenever he ductor, who is conceded t of the Company, not only but permitted him from t There are cases, no doubt, or permission of the condi tect a man in running a r ously dangerous that a p not think of incurring it.

Accident Law, 276, and ca

To justify a court in say per se contributory neglig present some such featur would leave no opportunit opinion as to its impruder ordinarily prudent men. Co. v. Kane, 69 Md. 21, Cumberland Valley R. Co. v. 61; Baltimore & O. R. Co. Md. 46; Baltimore & P. R. 655.

Here the deceased was, actually required to do fo his time on the cars, and w the rest of his time when c provided for his occupanc postal clerk, and his not be make the car more dangero therefore in no way contril which happened.

A case precisely like it, postal clerk not on duty an and injured while there by t of the company's agents, is p. 578,—Carroll v. New Yor The plaintiff in that case was the permission of the cond allowed to recover damages.

The same principles wer O'Donnell v. Allegheny Valley and Creed v. Pennsylvania In the last case, the court sa presumption of negligence ar that the passenger was in a for passengers.

In *Pennsylvania R. Co. v. Langdon*, 92 Pa. 27, cited by appellant's counsel, there was an emphatic rule of the company forbidding a passenger to ride in a baggage car, which was controlling.

We can find nothing in the decided cases inconsistent with the view entertained by the circuit court in rejecting the appellant's prayer, and the judgment will be affirmed.

COLORADO SUPREME COURT.

Dennis FALLON, *Pff. in Err.*,

R. Harry WORTHINGTON.

Dennis FALLON, *Appt.*,

Thomas J. O'DONNELL.

(....Colo.....)

1. A specific lien upon property sold, for payment of the purchase money, with no defeasance provided for by forfeiture or otherwise, is not a right, title or interest in the property itself subject to sale under execution.
2. An execution sale may constitute an equitable assignment or transfer of a lien owned by the judgment debtor, on the principles of estoppel, although the debtor's interest is not subject to sale under execution, where he acquiesces in the sale knowing what was intended to be sold, and, being present at the sale, consents to the application of the proceeds to the satisfaction of the judgment against him, and receives the surplus and demands collateral securities which had been pledged for the payment of the judgment debt.

(December 24, 1892.)

ERROR to, and appeal from, the District Court for Clear Creek County to review a judgment in favor of defendants in an action brought to enforce an alleged lien upon a certain mining claim. *Affirmed.*

Commissioner's opinion.

The facts are fully stated in the opinion.

Messrs. L. C. Rockwell and Luke Palmer, Jr., for plaintiff in error and appellant: Worthington cannot abandon his contract and retain the property.

Toombs v. Consolidated Poe Min. Co. 15 Nev. 444; *Payne v. Avery*, 21 Mich. 524; *Wolf v. Marsh*, 54 Cal. 228.

A lien may secure the performance of any lawful covenant or undertaking agreed upon.

Chase v. Peck, 21 N. Y. 581; *Harvey v. Kelly*, 41 Miss. 490; *Jordan v. Wimer*, 45 Iowa, 65; *Dubois v. Hull*, 43 Barb. 26; 1 Jones, Mort. § 229.

This lien is expressly reserved by contract duly recorded, and comes within the rule that no particular form is necessary to constitute a mortgage.

1 Jones, Mort. § 60; *Woodworth v. Guzman*, 1 Cal. 203; *De Leon v. Higuera*, 15 Cal. 483.

It may be enforced as a mortgage.

1 Jones, Mort. §§ 228, 239; 3 Pom. Eq. Jur. §§ 1255-1259, and notes; *Markoe v. Andras*, 67 Ill. 84; *Dingley v. Bank of Ventura*, 57 Cal. 467.

If the lien be regarded as that of a mortgagee, the interest is not an interest in land, but simply an interest in the debt, and cannot be taken on execution.

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Freeman, Executions, § 184; *Jackson v. Willard*, 4 Johns. 41; *Blanchard v. Colburn*, 16 Mass. 846; *Rickett v. Maderia*, 1 Rawle, 825; *Baldwin v. Thompson*, 15 Iowa, 504; *Tally v. Reed*, 72 N. C. 836; *Hoiger v. Bowles*, 72 N. C. 608; *Rorer, Jud. Sales*, §§ 628, 642; *Watson v. Dodd*, 72 N. C. 240; *Moore v. Byers*, 65 N. C. 240; *Courtney v. Carr*, 6 Iowa, 238; *Bell v. Evans*, 10 Iowa, 853; 2 Washb. Real Prop. 4th ed. p. 87, § 10.

The defendants are in no better situation if the lien, although expressly mentioned in the contract, be treated as in the nature of a vendor's lien.

Baum v. Grigsby, 21 Cal. 173; *Brush v. Kinsley*, 14 Ohio, 20; *McLaurie v. Thomas*, 39 Ill. 294; 1 Jones, Mort. §§ 212, 219; 2 Washb. Real Prop. 4th ed. p. 92, § 18; *Ross v. Heintzen*, 36 Cal. 313.

The sheriff could not sell this conditional promise to pay money under the guise of selling Fallon's interest in the Muscovite Lode under the contract.

Worden v. Dodge, 4 Denio, 159.

The elements necessary to constitute an estoppel are not present in this case.

Bigelow, Estoppel, 484; *Patterson v. Hitchcock*, 8 Colo. 584.

O'Donnell must be subject to the rule common to all judicial sales,—*caveat emptor*.

Freeman, Executions, §§ 801, 835.

The sale, being void, was incapable of ratification.

Ewell's Evans, Ag. pp. 49, 63.

No ratification is effectual unless the act has been done by the agent on behalf of the person who ratifies.

Ewell's Evans, Ag. 54; *Collins v. Waggoner*, 1 Ill. 26; *Beveridge v. Rawson*, 51 Ill. 504; *Grund v. Van Vleck*, 69 Ill. 479; *Roby v. Cossitt*, 78 Ill. 638; *Vanderbilt v. Richmond Turnpike Co.* 2 N. Y. 479; *Brainerd v. Dunning*, 30 N. Y. 211; 1 Wait, Act. and Def. 283, and cases cited; *Condit v. Baldwin*, 21 N. Y. 219.

Messrs. T. J. O'Donnell and Hugh Butler, with *Mr. C. S. Wilson*, for defendant in error and appellee:

The vendor who takes another form of security waives his right to a lien.

Baum v. Grigsby, 21 Cal. 173.

But even if Fallon's interest was a vendor's lien, it might be taken on execution.

Fisher v. Johnson, 5 Ind. 492; *Brumfield v. Palmer*, 7 Blackf. (Ind.) 227; *Lagow v. Badollet*, 1 Blackf. 416; *Edwards v. Bohannon*, 3 Dana, 98; *Johnson v. Gwathmey*, 4 Litt. (Ky.) 318; *Re Paterson's Estate*, 25 Pa. 71.

Everything of a tangible nature, excepting such things as the humanity of the law preserves to the debtor, may be subjected to the satisfaction of his debt.

Freeman, Executions, § 110; *Handy v. Dobbin*, 12 Johns. 220; Gen. Stat. § 1683.

All kinds of property of the debtor, which can at law be by him made the subject of a voluntary transfer of title, can by execution be made the subject of an involuntary transfer.

Freeman, Executions, §§ 110, 172. See *Graham v. Henry*, 17 Tex. 164; *Fore v. Manlove*, 18 Cal. 436.

This interest of Fallon must have been either a chose in action or an interest in real estate. That it was not a chose in action see that title, Comyns, Dig. and Chitty, Eq. Dig.

In none of the following cases were the essential elements of estoppel or ratification present; nevertheless the parties were held bound by their acts:

McConnell v. People, 71 Ill. 481; *TenEick v. Simpson*, 1 Sandf. Ch. 244; *Carr v. Wallace*, 7 Watts, 394; *McDonald v. Lindall*, 3 Rawle, 492; *Byrne v. Doughty*, 13 Ga. 46; *Forsyth v. Day*, 46 Me. 194; *Woodbury v. Larned*, 5 Minn. 339; *Livingston v. Wiler*, 32 Ill. 387; *Commercial Bank v. Warren*, 15 N. Y. 580; *Culver v. Ashley*, 19 Pick. 300; *Hay v. Bough*, 77 Ill. 500; *Barnaby v. Barnaby*, 1 Pick. 221; *Hefner v. Vandolah*, 62 Ill. 483, 14 Am. Rep. 106; *Story*, Ag. §§ 239, 253; *Hefner v. Dawson*, 63 Ill. 403, 14 Am. Rep. 123; *Negley v. Lindsay*, 67 Pa. 217, 5 Am. Rep. 427.

Pattison, C., delivered the following opinion:

The questions presented in the above-entitled cases are practically identical. They were consolidated, argued and submitted together, and may be considered and decided as one case. The issue between the parties is clearly and well defined. Although many questions are suggested, only so much of the history of the litigation will be given as may be necessary to an understanding of the legal propositions upon which the rights of the parties depend.

December 10, 1880, Dennis Fallon sold and conveyed to R. Harry Worthington the Muscovite Lode mining claim, situate in Cascade mining district, Clear Creek County, Colo. The consideration of the sale and conveyance was the sum of \$30,000, of which \$5,000 was paid. For the balance of the purchase price eighty-four notes were given, eighty-three of which were for \$300 each, and one for \$100. These notes were payable monthly. To secure their payment, a trust deed was given upon the premises conveyed. By the terms of the notes and trust deed payment was to be made from the proceeds of the property, no personal liability being assumed by Worthington. Under the conveyance Worthington entered into possession of and began working the property, and from the proceeds paid two of the notes. Afterwards, and prior to May 11, 1881, the parties entered into the agreement out of which this controversy arose. The trust deed, which has been mentioned, was released and discharged, and the agreement substituted therefor.

As the rights of the parties are dependent in some measure, if not wholly, upon the construction and legal effect of this instrument, it is here recited: "This agreement, made and entered into this 11th day of May, A. D. 1881, by and between R. Harry Worthington, of the County of Arapahoe and State of Colorado, party of the first part, and Dennis Fallon, of

the County of Clear Creek, in said State, party of the second part, witnesseth: That whereas, the said Dennis Fallon has a claim against and upon the Muscovite Lode mine or mining claim, situate in Cascade mining district, county and State last aforesaid, owned by R. Harry Worthington aforesaid, said claim amounting to the sum of \$25,000, therefore, in consideration of the premises, and of one dollar to him in hand paid, the said R. Harry Worthington, for himself and his heirs and assigns, does covenant and agree to and with the said Dennis Fallon to proceed to the organization of a mining company, and to convey to said mining company, so to be organized by him, upon its organization, the said Muscovite Lode, upon condition that the said company, so to be organized as aforesaid, shall proceed to work and develop said Muscovite Lode, and from the proceeds thereof, except as hereinafter provided, pay or cause to be paid to the said Dennis Fallon, or to his use, the said sum of \$25,000, with interest thereon at the rate of five per cent per annum; it being herein and hereby understood that the expenses of organizing said company so to be organized, as aforesaid, shall not be charged against said mine or its proceeds, but that the same shall be wholly borne and satisfied by said Worthington or said company. And the said R. Harry Worthington agrees to prosecute immediately the work mentioned in a certain contract, made by him with said Dennis Fallon, bearing even date herewith, and to furnish the money to pay for the same without reference to the organization of said proposed company, and whether the same shall be organized or not, and to devote all the net proceeds thereof to the payment of said indebtedness to said Fallon until the same shall have been wholly paid and satisfied. And the said Dennis Fallon, in consideration of the covenants and agreements aforesaid, to be kept and performed by the party of the first part, and of one dollar to him in hand paid, does herein and hereby covenant and agree for himself, his heirs and assigns, that the said R. Harry Worthington, his heirs and assigns, may work all of said Muscovite Lode or mine east of a point 100 feet, surface measurement, below the lower drift, as at present established, and below an imaginary line running or drawn upon said lode or vein, and the length thereof from said point 100 feet below the lower drift, as aforesaid—the same to be worked by said Worthington or his assigns at his or their sole expense, and not at the expense of any profits that may arise from the working of the remainder of said lode, being above said point; and all profit that may be derived from said work, so to be carried on at the sole expense of the party of the first part, and from the portion of the lode or vein first aforesaid, shall belong solely to, and be the property of, said party of the first part or his assigns, and shall not be liable to be applied to the payment of the indebtedness due said Fallon, as aforesaid. And the said R. Harry Worthington does covenant and agree that he will cause said Dennis Fallon to be engaged as superintendent of such work as shall be carried on by the company herein proposed to be organized, after the expiration and completion of the contract herein-

made liable for the indebtedness aforesaid, at a monthly salary, at the rate of \$1,000 per annum; the said Fallon agreeing upon his part faithfully and well to perform the duties of such superintendent for the best interests of said proposed company. And it is herein and hereby mutually agreed that for the payment of the money herein provided to be paid, as herein in manner and form provided for, the said Dennis Fallon shall have and is hereby given a lien upon said mine; he, the said Dennis Fallon, herein and hereby expressly waiving and releasing the said R. Harry Worthington and his assigns from all claim and demand therefor or by reason of anything contained herein, except to the extent of the property of the party of the first part or his assigns in said lode or mine."

To this instrument an addition was made upon the following day, called an "*addendum*," which is as follows: "After the completion of said contract, the prosecution of the work on said mine, and the method thereof, under the superintendence of said Fallon, shall depend upon the will and pleasure of said Worthington, being reasonably exercised; provided the same does not operate in defeating said Fallon in obtaining the amount of his lien against said mine in a reasonable time and under reasonable circumstances. The said Worthington or the said company not being able to furnish the money to prosecute the work will be sufficient reason for not prosecuting the same on said mine."

The contract and the *addendum* were each duly signed, sealed, acknowledged and recorded.

The contract referred to in this instrument provided for the driving of a drift or tunnel upon the property, upon certain terms therein stated. As nothing was done under this contract it need not be further considered.

The suit was begun September 11, 1882. Very little had been done under the contract by either Worthington or Fallon. The drift had been driven under a contract with a third party, but whether mineral was found or proceeds realized does not appear. Worthington did not organize the mining company, and did not employ Fallon as superintendent, as required by the contract. These omissions and other things were alleged as violations of the agreement, and the relief asked was that Fallon be adjudged to have a lien upon the property for the sum of \$25,000, with interest as provided by the contract; that Worthington be ordered to pay said sum within a reasonable time; and that, in default of payment, the property be sold, etc.

The only defense interposed which requires consideration arose out of the following transactions: In September, 1881, Charles R. Fish recovered a judgment against the appellant for about \$1,900, and caused an execution to be issued and delivered to the sheriff of Clear Creek County. The sheriff levied the execution upon all the right, title and interest of Fallon in the Muscovite Lode, either in law or in equity, and also "upon all the right, title or interest, either in law or in equity, of said Dennis Fallon in and to the Muscovite Lode mining

by and between R. Harry Worthington and said Dennis Fallon, on the 11th day of May, A. D. 1881, and recorded," etc. Under this levy the property was advertised and sold to O'Donnell for the sum of \$2,140, which sum was duly paid by him to the sheriff on the day of the sale.

It appears that appellant was advised of the levy, and of the sale to be had under it; that his attorney was present at the sale; that neither Fallon nor his attorney made any objection or protest, either before or at the time the sale was made; that the money paid by O'Donnell was applied in satisfaction of the judgment and costs, leaving a small surplus of about \$15; that some time after the sale Fallon, either in person or by attorney, demanded and received from Fish, or his attorney, certain notes and a trust deed which had been deposited with Fish as collateral to secure payment of the note upon which the judgment was recovered; that his attorney afterwards applied to the sheriff for the surplus of \$15; that that sum was applied in payment of a sheriff's bill then outstanding against Fallon, with the consent of the attorney and the subsequent acquiescence of Fallon; that Fallon never redeemed nor offered to redeem, from the sale, and deeds in due form were executed and delivered to O'Donnell after the equity of redemption had expired. Under these deeds, O'Donnell claimed to be the owner of the interest of Fallon, not only in the property itself, but in the contract entered into between Fallon and Worthington.

This was the situation of the parties at the time the bill was filed. O'Donnell was made a defendant to the bill, on account of the interest claimed by him under the conveyance made by the sheriff, and set up as a defense the transactions which have been recited. Worthington alleged, among other things, that Fallon was without interest in the contract, or in the property, having been divested of all interest by the sale under execution. This was the only issue tried by the court. The court found the facts as to the recovery of the judgment by Fish, the issuance of execution, the sale of the property, and the conduct of Fallon and his attorney as above stated. Upon these findings the decree was predicated. It was adjudged that by virtue of the sale O'Donnell became the owner of all the right, title and interest of Fallon in the property, whether existing by virtue of the contract or otherwise; that O'Donnell was entitled to be substituted for Fallon to all his right, interest and estate under the said agreement; and that the defendant had no cause of action against the said Worthington, etc.

Can this decree be sustained? This question presents two propositions: *First*. Was Fallon vested with an interest in the property, subject to seizure and sale under execution? *Second*. If he was not seised of such an interest, then did his conduct prior to, at the time of, and subsequent to the sale work an estoppel, or quasi estoppel, by acquiescence, election or otherwise?

Section 1835, Gen. Stat., declares that "all and singular the goods and chattels, lands, tenements and real estate, of every person against

estate in this section shall be construed to include all interest of the defendant, or any person to his use, held or claimed by virtue of any deed, bond, covenant or otherwise, for a conveyance, or as mortgagor of lands in fee, for life, or for years." Under this provision it is clear that if appellant was vested with any interest in the property, either legal or equitable, then such interest was liable to seizure and sale under the execution. It must appear, however, that the interest was a vested interest, which attached to the body of the land itself, and was held by him under a legal or equitable title, within the meaning of the law. Such an interest can only be predicated upon the provisions of the contract upon which this suit was brought.

It appears that in December, 1880, Fallon conveyed the property in question. The deed is not contained in the record, but it may be assumed that it was in the usual form, and that upon its delivery Worthington was vested with the title to the premises in fee. That conveyance was in full force at the time the contract was made. If Worthington conveyed or Fallon acquired any title, interest or estate in the property, either legal or equitable, it was by force of the contract. It is first necessary, therefore, to consider and determine the legal effect of this instrument. The contract first expressly recognizes Fallon's claim upon the mine, to the amount of \$25,000, and Worthington's ownership of the property. The intent of the parties is clear and unmistakable. The object sought to be attained by Fallon was security for the amount of his claim, and its final payment out of the proceeds of the property. Worthington desired to accomplish this object without incurring personal liability. The agreement obligated him, or the company which he might organize, to devote the net proceeds realized from a certain part of the property to the payment of Fallon's claim. Fallon's claim was made a charge upon the property. The agreement to employ Fallon as superintendent, and to provide money for a drift, were independent personal covenants. The real purpose and chief object of the instrument was to secure application of the net proceeds to the payment of Fallon's claim. To secure such application it was "mutually agreed that for the payment of the money herein provided to be paid, as herein in manner and form provided for, the said Dennis Fallon shall have, and is hereby given, a lien upon said mine." Extraordinary and unusual as are its terms, it seems clear that, under the contract, it was the duty of Worthington, either by himself or through corporate organization, to develop and work the property with reasonable diligence, and, if proceeds were realized, to devote the same to the payment of Fallon's claim. If the property was barren, Fallon would have no right of action. If proceeds were realized which Fallon might properly claim, and such proceeds were appropriated by Worthington, or by the company organized by him, then Fallon would have a right of action for breach of contract, in the enforcement of which he might resort to the lien created by the agreement.

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The entire legal title was in Worthington. He was in possession of the property. Fallon reserved no interest or estate in the land whatsoever. There was no defeasance provided for by forfeiture or otherwise. Fallon's right, under the contract, was a chose in action, to enforce which he had a right to a lien.

No extended discussion of the nature of the lien is necessary. It was defined by the parties themselves. It was a lien by contract,—an equitable lien. "An equitable lien arises either from a written contract, which shows an intention to charge some particular property with a debt or obligation, or is declared by a court of equity, out of general considerations of right and justice, as applied to the relations of the parties and the circumstances of their dealings." 1 Jones, Liens, § 27.

A lien necessarily excludes any idea of ownership by the party claiming it. "A lien, whether implied or by contract, confers no right of property upon the holder. It is neither *jus ad rem* nor *jus in re*. It is neither a right of property in the thing, nor a right of action for the thing. It is simply a right of detainer. 'Liens are not founded on property,' says Mr. Justice Buller [*Lichbarrow v. Mason*, 6 East, 21, 24 note], 'but they necessarily suppose the property to be in some other person, and not in him who sets up the right.' Consequently the interest of the lienholder is not attachable, either as personal property or as a chose in action." Id. § 10.

The same author, at section 28, says: "Equitable liens do not depend upon possession, as do liens at law. Possession by the creditor is not essential to his acquiring and enforcing a lien. But the other incidents of a lien at common law must exist to constitute an equitable lien. In courts of equity the term 'lien' is used as synonymous with a 'charge' or 'incumbrance' upon a thing, where there is neither *jus in re* nor *ad rem*, nor possession of the thing. The term is applied as well to charges arising by express engagement of the owner of property and to a duty or intention implied on his part to make the property answerable for a specific debt or engagement."

Under the contract, the only interest which Fallon retained in the property was the right to a lien to enforce its provisions. It necessarily follows that he had no interest in the property itself, and that no right, title or interest was vested in him, either under the contract or otherwise, which was subject to execution. Nothing, therefore, was seized under the writ of execution, and in law nothing passed to O'Donnell by the sale. "It is always indispensable that the property sold should be subject to the license, decree or writ under which the sale is made. . . . If property of the defendant is sold, it must be subject to the execution levied upon it, or the proceeding will be entirely inoperative upon his title." Freeman, Jud. Sales, § 35.

"If property is not subject to execution, a levy thereon, and a sale thereof based on such levy, are utterly void." Freeman, Executions, § 109.

In the light of these principles, the conclu-

sion is irresistible that the sale under which O'Donnell claims to be entitled to the rights of appellant under the contract was utterly void.

The question which remains to be considered is whether the conduct of appellant, prior to, at the time of and subsequent to the sale, was such as to make it inequitable for him to take advantage of this void proceeding. It is a well-settled elementary principle that a void judicial sale is an exception to the rule that "a confirmation or ratification cannot strengthen a void estate." Freeman, Jud. Sales, § 50, and cases cited.

This exception, however, has ordinarily been applied to cases in which the sale was void because of some irregularity in the proceeding, or in the judgment under which it was made, rather than to cases in which the property attempted to be sold was not subject to execution. No case has been found in which the facts are either parallel or analogous with the facts in this case. It would seem, however, that this rule might well be applied to all void judicial sales, without reference to the reasons or principles upon which their invalidity is predicated. The rule is based upon the beneficial principles of equitable estoppel. May it not be applied to this case, if the right of Fallon, under the contract, is assignable, either by his own act or by operation of law? As has already been stated, the right secured to him was in the nature of a chose in action, upon which suit might be maintained by him whenever Worthington or his assigns should realize proceeds from the property properly applicable to his claim, and refuse to deliver them to him. Having neither title to the property nor its proceeds, a legal or equitable action would be his only remedy. That a chose in action, whether dependent upon a contingent or an absolute covenant or promise, is assignable, cannot be controverted. The question then is whether, under the circumstances of this case, the sale, in connection with the conduct of the parties, did not constitute an equitable assignment or transfer to O'Donnell of Fallon's interest, under his agreement with Worthington.

It is true that the ordinary elements of an estoppel *in pais* are not present in this transaction. These elements are clearly defined in *Griffith v. Wright*, 6 Colo. 248. There was neither misrepresentation nor concealment of material facts upon which O'Donnell was induced to act. On the contrary, O'Donnell had full knowledge of all the facts, for it appears that he prepared the contract between the parties. It further appears that Fallon's attorney participated in the negotiations which led up to the agreement, and was fully advised of its contents. The parties, therefore, must be deemed to have acted with full knowledge of their rights in the premises. This being the case, in view of the fact that Fallon and his attorney knew that the levy had been made, knew what was intended to be sold, were present at the sale, consented to the application of the proceeds to the satisfaction of the judgment, received the surplus, and demanded other collateral which had been pledged for the payment of the debt, it cannot be doubted that Fallon acquiesced in the sale. During all the interval

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between the levy and the sale he had full opportunity to protest against it. Had he done so, and had O'Donnell, in spite of his protest and against his objection, paid the money to satisfy the judgment, then he would have been a mere volunteer, and the proceeding would have been held to be without force or effect. The case is one, therefore, in which a party has changed his position through the failure of another to exercise a right which he might have exercised. The principles of estoppel by acquiescence or election are clearly applicable. "Wherever the rights of other parties have intervened, or the rights of the party alleging the estoppel have been otherwise affected by reason of a man's conduct, or acquiescence in a state of things about which he had an election, and his conduct or acquiescence, or even laches, was based on a knowledge of the facts and of his rights, he will be deemed to have made an effectual election, and he will not be permitted to disturb the state of things, whatever may have been his rights at first." Bigelow, *Estop.* 4th ed. 651.

"In like manner, if one, without actually inducing another to act in a particular way, assent to the thing done, and seek to derive benefit from it, he cannot, in case of disappointment, deny the validity of the act assented to." *Id.* 661.

The correctness of these principles has been recognized by this court in *Yates v. Hurd*, 8 Colo. 349.

Freeman, on Void Judicial Sales, at section 50, says, among other things: "These sales may be ratified either directly or by a course of conduct which estops the party from denying their validity. Thus, if the defendant in execution, after a void sale of his property has been made, claims and receives the surplus proceeds of the sale, with a full knowledge of his rights, his act must thereafter be treated as an irrevocable confirmation of the sale." Again, in the same section, he says: "Perhaps it is not essential that the defendant in execution should have directly received any part of the proceeds of the sale. If he knows of the sale, makes no objections thereto and permits the proceeds to be applied to the payment of his debts, he will, at least in Pennsylvania, be precluded from denying its validity."

In *Smith v. Warden*, 19 Pa. 425, it is held that "equitable estoppels . . . have place as well where the proceeds arise from sale by authority of law as where they spring from the act of the party. . . . The application of this principle does not depend upon any supposed distinction between a void and voidable sale."

The same proposition is clearly decided in *Deford v. Mercer*, 24 Iowa, 118; *Maple v. Kusart*, 58 Pa. 349; *McConnell v. People*, 71 Ill. 481. These principles are clearly applicable to this case.

As the findings of the court were abundantly sustained by the evidence, it follows that the decree based thereon was correct, and should be affirmed.

Reed and Richmond, OO., concur.

Per Curiam:

For the reasons stated in the foregoing opinion, the judgment is affirmed.

- *1. The interest which disqualifies a judge under section 28, p. 337, McClel. Dig., is a property interest in the action or its result, in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror.
2. Affinity is the tie between a husband and the blood relations of the wife, and between a wife and the blood relations of the husband, but it does not exist between the blood relations of either party to the marriage and those of the other party; and hence there is no affinity between a brother of a wife and the brother of her husband, and the latter is not disqualified by affinity to preside in the trial of the former for a crime.
3. That a judge has boarded with his sister-in-law, and that she is and has been a daily visitor to his home, remaining there sometimes for days, and the judge has always been a great admirer and friend of a brother of the sister-in-law, and has always regarded him as scrupulously honest, and these considerations lead him to fear that he might not be able to do the State justice, do not disqualify the judge from presiding in the trial of such brother for a criminal offense.
4. Where a party is in custody under an information charging him with a bailable felony, and the judge of the criminal court of record before which he is charged refuses to take any action whatever in the case, either as to bail or trial, on the ground that he is disqualified by reason of interest and affinity to act, and it does not appear to the supreme court on a habeas corpus proceeding that the judge is disqualified, bail conditioned for the party's appearance before the criminal court of record will be allowed.

(January 18, 1890.)

PETITION for a writ of habeas corpus to obtain petitioner's discharge from custody or his release on bail. On return to rule to show cause. *Decree for petitioner.*

The case fully appears in the opinion.

Messrs. Frank W. Pope and O. J. H. Summers for petitioner.

Mr. William B. Lamar, Atty-Gen., for the State.

Raney, Ch. J., delivered the opinion of the court:

The petitioner was arrested on a charge of robbery, and an information was filed against him in the Criminal Court of Record of Duval County, and he was brought into that court for arraignment; whereupon the judge, the *Honorable* Lo'on M. Jones, refused to take any action in the cause, either to try him or to admit him to bail, although the petitioner announced his willingness and readiness to be tried, and offered bail with good and sufficient sureties. The reasons given by the judge for his course are that he is the brother of the husband of a sister of petitioner, and is therefore disqualified to take any action in the cause; and, further, he has boarded with his said sister-in-law, and

she is and has been a daily visitor to his home, remaining there sometimes for days, and petitioner has also been a visitor to his house, and he, the judge, has always been a great admirer and friend of the petitioner, and has always regarded him as scrupulously honest, and these considerations lead him to fear that he might not be able to do the State justice.

Being in the custody of the sheriff on *capias* issued upon the information, under the above circumstances, Harris applied to one of the justices of this court for a writ of habeas corpus, which he issued, making it returnable before the court, and the sheriff has made a return in keeping with the above facts, stated in the petition.

The petitioner asks to be discharged or admitted to bail.

The Act of December 4, 1863, provides that "no judge of any court or justice of the peace shall sit or preside in any cause to which he is a party, or in which he is interested, or in which he would be excluded from being a juror by reason of interest, consanguinity or affinity to either of the parties, nor shall he entertain any motion in the cause other than to have the same tried." It also makes it the duty of the judge or justice so incompetent to retire of his own motion without waiting for an application to that effect, and declares void all judgments, decrees or orders made by a justice so disqualified. McClel. Dig. §§ 28, 29, p. 337.

Judge Jones is not a party to this proceeding, nor is it the proper remedy for obtaining an adjudication between the State and him, or the prisoner and the judge, upon the question of his qualification in the premises or power to try the petitioner, and directing him to proceed in the cause as it is his duty to do, if he is not disqualified. *State v. Walker*, 25 Fla. —, 6 So. Rep. 169, 172.

Still it is urged on behalf of petitioner that the judge is disqualified, and for this reason he should be discharged or bailed, as, under the circumstances, his detention will amount to indefinite imprisonment. If he is disqualified to hear the cause, and such disqualification is ground for the petitioner's discharge, he should be given his liberty; so, without meaning to conclude *Judge Jones* upon the question in any direct proceeding against him, but merely as an answer to petitioner's claim, we must give our views on the subject.

The interest that disqualifies a judge under the Statute is a property interest in the action or its result, in contradistinction to an interest of feeling or sympathy or bias, that would disqualify a juror. *Sauls v. Freeman*, 24 Fla. 209; *Ochus v. Sheldon*, 12 Fla. 138.

There is, of course, no consanguinity between Harris and *Judge Jones*. Is there any affinity? Not according to any law we can find on the subject. Affinity is the tie arising from marriage, between the husband and the blood relations of the wife, and between the wife and the blood relations of the husband; but there is no affinity between the kinsmen of the wife and those of the husband, or *vice versa*. Thus, say the books, the husband's brother and the wife's sister have no affinity. The same may be true

*Head notes by **RANEY, Ch. J.**

Tomlin, Bouvier, Abbott, Rapalje & Lawrence. There is no affinity between the blood relatives of the husband and blood relatives of the wife. *Praddock v. Wells*, 2 Barb. Ch. 331; *Carman v. Newell*, 1 Denio, 25; *Spear v. Robinson*, 29 Me. 531; *Waterhouse v. Martin*, Peck (Tenn.) 374.

These authorities and those cited in them show beyond question that there is no affinity between *Judge Jones* and the prisoner.

Moreover, in view of the doctrine in the *Case of Leefe*, 2 Barb. Ch. 39, by Chancellor Walworth, citing *Moore v. White*, 6 Johns. Ch. 360, by Chancellor Kent, it is questionable whether the Statute operates as to affinity in a case like this, where the Constitution has created a court, and made no provision for a trial by another judge or tribunal. The other circumstances upon which the judge bases his fear

as disqualifies him, nor is the presence of the apprehension any good evidence that he will not be careful or able to do justice.

The offense is bailable under our Constitution and laws, and the prisoner should not, under the circumstances, be denied the right of bail, particularly as no steps have been taken by the State to test the correctness of *Judge Jones'* position. The proper order will, if it shall be necessary, be made, on application of counsel for petitioner, for inquiry into the circumstances of the alleged offense, with a view to fixing the amount of the bail, which will be conditioned, in the form usual and proper in such cases, for his appearance before the Criminal Court of Record of Duval County at the time or times to be specified, under our direction, in the bail-piece.

It will be ordered accordingly.

ARKANSAS SUPREME COURT.

J. H. FORD *et al.*, Appts.,

JUDSONIA MERCANTILE CO. *et al.*

(.....Ark.....)

1. A sheriff's custody of attached property cannot be disturbed by a court of chancery, and the property transferred to the custody of its receiver, in a suit by the attachment defendant, unless by consent of all parties.

(February 1, 1880.)

A PPEAL from a decree of the Chancery Court, White County, in favor of complainant on demurrer to complaint. *Reversed.*

The complaint was filed by one of the appellees, the Judsonia Mercantile Co., whose property was in possession of the sheriff, J. H. Ford, one of the appellants, under attachment. G. W. Henson, another appellee, and trustee in a deed of assignment by the Mercantile Co., was appointed receiver of the property by Hon. D. W. Carroll, Chancellor of the First District of Arkansas, at his chambers in Little Rock, without notice to the appellants, who subsequently, to protect their interest, appeared and filed a demurrer, which was overruled, and thereupon a final decree was rendered against them.

Messrs. McRae, Rives & Rives and J. W. House, for appellants:

Where two courts possess equal and concurrent jurisdiction of a subject matter, that court in which jurisdiction first attaches will retain the case for final determination.

Merrill v. Lake, 16 Ohio, 373; *Estes v. Martin*, 34 Ark. 410; *Price v. State Bank*, 14 Ark. 50.

In cases of concurrent jurisdiction in different courts, the first exercising jurisdiction rightfully acquires control to the exclusion of the other.

State v. Devers, 34 Ark. 183.

NOTE.—Jurisdiction concurrent; priority of right obtained by actual seizure. See *Tefft v. Sternberg*, 5 L. R. A. 223, note.
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Messrs. DeBois & Coody, for appellees:

When the concurrent jurisdiction is between law and equity courts, a party has his election in which court he will seek his remedies, or submit his rights for trial.

Bently v. Dillard, 6 Ark. 85; *Hempstead v. Watkins*, Id. 317; *Andrews v. Fenter*, 1 Ark. 186; *Harlan v. Wingate*, 2 J. J. Marsh. 188; *Saunders v. Jennings*, Id. 513; *State Bank v. Noland*, 13 Ark. 302; *Jamison v. May*, Id. 600.

The trustee of an express trust such as Henson has the right to seek the assistance of equity.

Ex parte Conway, 4 Ark. 303; *Jones v. Arkansas Mech. & Agr. Co.* 38 Ark. 25.

A court of equity having jurisdiction for one purpose will retain it for the settlement of all rights between the parties, growing out of the controversy, whether legal or equitable.

Conger v. Cotton, 37 Ark. 287; *Kimberling v. Hartly*, 1 McCrary, 136.

All parties having elected a court of equity, they are bound by the decree in this case, and cannot question the jurisdiction.

Burton v. Hynson, 14 Ark. 32.

Hemingway, J., delivered the opinion of the court:

When the complaint was filed and the application for a receiver presented, the property involved was in the custody of the sheriff, who had seized and held it under writs of attachment from the White Circuit Court, against the property of the Judsonia Mercantile Company.

It appears from the complaint that the property belonged to the defendant in the suits. It was therefore rightly seized in obedience thereto. In this respect, the facts differ from those presented in the case of *Willis v. Reinhardt*, decided during the present term, in which we ruled that a stranger in an attachment might maintain replevin against an officer who seized his goods under a writ against the goods of the defendant in the suit.

The goods belonging to the defendant in the suits, and being properly held by the sheriff

session could not be disturbed without interfering with that court in the exercise of its jurisdiction. But authority to do this appertains only to courts of supervisory or appellate powers; and as the chancery court has no supervisory control over the circuit court, it follows that it could not take this property from the sheriff into the custody of its receiver. Such a practice would cause an unseemly clash of jurisdiction, that should be exercised in perfect harmony; and there is neither reason nor authority to justify it. *Buck v. Colbath*, 70 U. S. 3 Wall. 334 [18 L. ed. 257]; *Thompson v. Van Vleet*, 5 Duer, 618; *Verel v. Duprez*, L. R. 6 Eq. 329; *Hitchen v. Birks*, L. R. 10 Eq. 471; *Wilmer v. Atlanta & B. A. L. R. Co.* 2 Woods, 409.

Such a bill might be entertained if all parties representing the conflicting interests consented, by so drafting orders as to avoid the improper interference by one court with property in the custody of another. We are advised that such a practice has prevailed, and observation satisfies us that it has proven salutary; but it can only be approved where the consent of parties obviates the difficulty indicated.

The bill presents no other ground for equitable relief, and, for the reasons indicated, the demurrer to the complaint should have been sustained.

The judgment will be reversed, and the cause remanded, with directions to sustain the demurrer.

J. D. GARNER, *Appt.*,

v.

G. N. WRIGHT.

(.....Ark.....)

1. The law of Arkansas will be applied in an attachment suit in that State on an interplea by a person claiming the chattels attached under a mortgage given in the Indian Territory, where there is no proof of the laws of the Territory.
2. Delivery of chattels to a mortgagee cures all defects in the mortgage.
3. A mortgagee of chattels who has them in possession does not lose his security by lending them to the mortgagor, although the mortgage is not filed or recorded.

(January 11, 1890.)

A PPEAL by claimant from a judgment of the Circuit Court for Sebastian County, Fort Smith District, in favor of plaintiff, giving him possession of certain chattels which he had attached to secure a debt due him by R. A. Brown *Reversed*.

The facts are fully stated in the opinion.

Messrs. Cooke, Luce & Hill, for appellant:

The common law exists in the Indian Territory between whites.

1 Kent, Com. p. 348; Story, Conf. L. 5th ed. 421; *Arnold v. Munday*, 6 N. J. L. 1; *Bloom v. Richards*, 2 Ohio St. 387; *Robinson v. Campbell*, 4 L. R. A.

But in case it does not, then this case is to be decided by the *lex fori*.

The Scotland, 105 U. S. 24 (26 L. ed. 1001).

Either registration or delivery is sufficient to make a chattel mortgage valid.

Jones, Chat. Mort. § 176; *Morrow v. Reed*, 30 Wis. 81; *Humphries v. Bartee*, 10 Smedes & M. 282.

Possession by the vendor of chattels for temporary purposes does not invalidate the former validity of the transfer.

See *Martin v. Ogden*, 41 Ark. 186; *Richmond v. Crudup*, Meigs, 581, 33 Am. Dec. 164; *French v. Hall*, 9 N. H. 137, 32 Am. Dec. 341; Jones, Chat. Mort. § 178; *Applewhite v. Harrell Mill Co.* 49 Ark. 279.

This action is transitory and may be maintained in any forum in which the plaintiff (in this case an interpleader) may find the defendant or his property, upon which to base the action.

Bouvier, L. Dict. Transitory Action; Bacon, Abr. title *Actions, Local and Transitory*; *Smith v. Clark*, 1 Ark. 68; *Chapman v. Robertson*, 6 Paige, 627, 31 Am. Dec. 264; *French v. Hall*, 9 N. H. 137, 32 Am. Dec. 341.

And it makes no difference whether the cause of action arose without the jurisdiction of the State where the forum is situated.

Penn v. Lord Baltimore, 1 Ves. Sr. 444; *Masie v. Watts*, 10 U. S. 6 Cranch, 143 (3 L. ed. 181); *Ackerson v. Erie R. Co.* 31 N. J. L. 309.

Mr. E. E. Bryant, for appellee:

At common law possession by the mortgagee was essential to the validity of the mortgage as against third parties.

Watson v. Thompson Lumber Co. 49 Ark. 83; *Main v. Alexander*, 9 Ark. 112; *Martin v. Ogden*, 41 Ark. 186; *Hannah v. Carrington*, 18 Ark. 105; *Jacoway v. Gault*, 20 Ark. 190; *Carnall v. Duval*, 22 Ark. 136; *Fry v. Martin*, 33 Ark. 203; *Heft's App.* (Pa.) 7 Cent. Rep. 592; *Clou v. Woods*, 5 Serg. & R. 275, 9 Am. Dec. 846; *Porter v. Dement*, 35 Ill. 478; *Crooks v. Stuart*, 2 McCrary, 13; *Russell v. Fillmore*, 15 Vt. 130; *Case v. Winship*, 4 Blackf. 425, 30 Am. Dec. 664; *Golden v. Cockril*, 1 Kan. 259, 31 Am. Dec. 510; *Morrill v. Sanford*, 49 Me. 566; *Bullock v. Williams*, 16 Pick. 34; *Rocheblave v. Potter*, 1 Mo. 561; *Leland v. The Medora*, 2 Wood. & M. 103; *Field v. Baker*, 12 Blatchf. 438; *Call v. Gray*, 37 N. H. 428, 75 Am. Dec. 143; Jones, Chat. Mort. § 176; Boone, Mortg. § 245.

The change of possession must be continued during the life of the mortgage, for possession of the mortgagor by delivery back is as deceptive as original detention, and even more so, as leading third persons to believe the lien discharged.

Jones, Chat. Mort. §§ 176, 180, 181, 185-187; *Look v. Comstock*, 15 Wend. 244; *Sturterant v. Ballard*, 9 Johns. 337; *Bullock v. Williams*, *supra*; *Mills v. Warner*, 19 Vt. 609; *Swiggett v. Dodson*, 38 Kan. 702; *Morris v. Hyde*, 8 Vt. 352, 30 Am. Dec. 475; *Fletcher v. Howard*, 2 Aikens (Vt.) 115, 16 Am. Dec. 686.

The common law does not exist in the Indian Territory between whites.

Du Val v. Marshall, 30 Ark. 230; *Carter v. Goode*, 50 Ark. 155.

In determining the merits of his claim, it is essential to know by what law the validity of the mortgage is to be determined. As a rule, when rights arise in a particular country, they are to be determined by the laws of that country, and the party who would avail himself of them should prove them. The mortgage in controversy was executed in the Indian Territory. No proof was offered of the laws in force there applicable to the matter, but it was agreed between the parties that there was no local Indian law that was pertinent. This absence of proof cannot be supplied by presumption. In similar cases the courts of this State will generally presume the common law to be in force in another State. *Cox v. Morrow*, 14 Ark. 603; *Thorn v. Weatherly*, 50 Ark. 243. But this presumption is indulged as to those States only that have taken the common law as a basis of their jurisprudence. Such a presumption would not be indulged as to the laws of the State of Louisiana or Texas, because we know that their jurisprudence is founded upon a different system. The same reason forbids such a presumption as to the laws of the Indian

Under our law, if a mortgagee took possession of the mortgaged chattels before any other right or lien attaches, his title under the mortgage is good against everybody, if it was previously valid between the parties, although it be not acknowledged and recorded. The delivery cures all such defects. *Jones, Chat. Mort.* § 178, and cases cited; *Applewhite v. Harrell Mill Co.* 49 Ark. 279; *Cameron v. Marvin.* 26 Kan. 625; *Hutton v. Arnett*, 51 Ill. 198.

While the mortgaged chattels are in the custody of the mortgagee, he may lend or hire them, and they continue in his possession constructively; and there is nothing in the relation which he sustains to the mortgagor that forbids to him the offices of ordinary kindness or good neighborhood. Therefore the mortgagee may lend the mortgaged chattels to the mortgagor for occasional temporary use, without prejudice to his security. In a case very similar to this, the Supreme Court of Vermont so ruled. *Farnsworth v. Shepard*, 6 Vt. 521.

The learned judge of the circuit court held that appellant's mortgage was void for want of filing and record; but it follows from the principles herein announced that he was mistaken in this. If the transactions of delivery and loan were had bona fide, the mortgage should be sustained.

The judgment is reversed, and the cause remanded.

27

(.....N.H.)

- 1. Unsworn admissions or declarations** made by an insolvent, after a controversy has arisen between his attaching creditors and petitioners in insolvency proceedings upon his estate, are not admissible in a suit between such parties, for the purpose of determining the question of his residence.
- 2. For jurisdictional purposes a legal domicile** once existing continues until another is acquired elsewhere.
- 3. Domicil or residence, to give jurisdiction** to the probate court in insolvency proceedings, is not lost by departure from the State, until another is gained.

(December 24, 1839.)

A PPEAL in insolvency proceedings. *Dismissed.*

The controversy arises between creditors of the defendant Weeks having attachments of his property made October 5, 1888, and other creditors who filed a petition against him in insolvency February 1, 1889; and the only question is whether Weeks, at the time of the petition, was a resident of this State so as to give the probate court jurisdiction of the insolvency proceedings.

October 5, 1888, Weeks was residing and doing business in Great Falls, but on that day he left with his wife and all his household goods for the west, and has never returned to this State since. His attorney who is also attorney for the petitioning creditors, offered in

evidence a document containing nine interrogatories addressed by him to Weeks in December, 1888, and the answers thereto, in which Weeks states his residence to be Somersworth N. H.; that his absence is temporary; that he intends to return, etc. The paper was not sworn to.

If this document is competent evidence upon the question of the defendant's residence, it is found that he was at the time of the filing of the petition, and ever since has been, a resident of Somersworth. If it is not evidence, it is found that he left Somersworth, October 5, 1888, with the intention never to return, but that he has not acquired a domicile or residence elsewhere.

Messrs. Russell & Boyer for appellant.
Mr. Matthews for appellee.

Clark, J., delivered the opinion of the court.

The case raises a question of jurisdiction which depends upon whether Weeks, the debtor, had a legal residence in Somersworth when the insolvency proceedings were instituted. This is mainly a question of fact. *Foss v. Foss*, 58 N. H. 283.

In a proceeding against Weeks the paper offered in evidence would be admissible as containing admissions made by him. But although Weeks' name appears upon the record he is in no sense a party to the controversy between the attaching creditors and the petitioning creditors in the insolvency proceedings, and his admissions or agreement to abide the orders and decrees of the insolvency court could not confer jurisdiction if it did not otherwise exist. As to the plaintiffs, the paper is merely a statement of declarations made by Weeks since the controversy arose, relating in part to past transactions and in part to his present and future purposes. Declara-

tions, written or verbal, are sometimes received in connection with acts done, as explanatory of such acts, and on questions of residence or domicile as evidence of intention, but in such cases the declarations, to be admissible, must have been made in the ordinary course of business at a time when the party had no interest to make evidence and before any controversy. *Doe v. Arkwright*, 5 Car. & P. 576; *Thorndike v. Boston*, 1 Met. 242, 247.

We think the document was not competent evidence on the question of Weeks' residence.

But, excluding the evidence upon the facts found, the legal residence of Weeks was in Somersworth. Although the words "residence" and "domicil" are not always convertible terms, and have not always precisely the same meaning, we are of the opinion that the residence, upon which jurisdiction depends under the Insolvency Statute, is a legal residence equivalent to domicile. And whatever rule may be adopted in cases involving questions of pauper settlement, voting and taxation, the principle is well settled that for purposes of jurisdiction and judicial administration a person must have a domicile somewhere, and that he can have but one, and therefore a domicile once existing continues until another is acquired elsewhere.

The case shows that Weeks' domicile was in Somersworth, and the fact is found that he had not acquired a domicile or residence elsewhere. The fact that he left Somersworth with the intention never to return did not destroy his domicile there. Until he had gained a domicile elsewhere he remained a resident within the jurisdiction of the insolvency court, and liable to be proceeded against in insolvency. *Cobb v. Rice*, 130 Mass. 231, 234.

Appeal dismissed.

Carpenter, J., did not sit; the others concurred.

PENNSYLVANIA SUPREME COURT.

Mary GRIMM'S APPEAL.

(....Pa....)

1. No marriage is shown by a man's acknowledgment of a woman as his wife in the presence of others, and by their liv-

ing together as man and wife for one week prior to his death, where their intention was to have a marriage ceremony performed the next week, and this was prevented by his death.

2. A relation illicit at its commencement, and known to be so by the parties, raises no presumption of marriage.

NOTE.—Proof of marriage.

In the absence of direct proof, marriage cannot be proved by cohabitation alone. *Com. v. Stump*, 53 Pa. 132.

The mere fact that the man, under particular circumstances, may have attempted to give to his mistress a different character from the meretricious one which she in fact sustained toward him is not sufficient. *Rose v. Clark*, 8 Paige, 574.

Rule in case of meretricious relations.

The mere fact of living together and carrying on illicit intercourse is wholly insufficient to raise a legal presumption. Such presumption can arise only when the parties not only live together as man and wife but hold themselves out as sustaining that relation. *Durand v. Durand*, 2 Sweeney, 322.

6 L. R. A.

Relations with decedent, illicit at the outset, must be presumed to have continued to possess that character until the marriage of the latter. *Stanley v. Stanley*, 4 Dem. 421; *Clayton v. Wardell*, 4 N. Y. 226; *Brinkley v. Brinkley*, 50 N. Y. 198; *Cunningham v. Cunningham*, 2 Dow, P. C. 482; *Lapeley v. Grierson*, 1 H. L. Cas. 498.

Relations which are meretricious cannot ripen into connubial relations, but are characterized as immoral until a change of purpose is in some manner manifested. This change of purpose may not require direct proof to render relations innocent, but may be found in circumstances and inferred from them. *Wilcox v. Wilcox*, 46 Hun. 40; *Caujolle v. Ferrie*, 23 N. Y. 90; *Badger v. Badger*, 8 N. Y. 548. See *Starr v. Peck*, 1 Hill, 270.

Reputation of marriage, to be effective, must be general and consistent with matrimonial cohabitation. *Dysart Peerage Case*, L. R. 6 App. Cas. 514.

See also 17 L. R. A. 847, 848.

APPEAL by petition from a decree of the Orphans' Court of Allegheny County disallowing her claim as widow to a portion of the goods and chattels of Gotfried Grimm, deceased. *Affirmed.*

The case sufficiently appears in the opinion.

Mr. John R. Large, for appellant:

Marriage being a civil contract, it is and ought to be established upon the basis of other civil contracts and obligations. Cohabitation as man and wife proved by living witnesses, when not rebutted, is sufficient to establish the fact.

Covert v. Hertzog, 4 Pa. 145.

Mr. A. J. Kirschner, for appellee:

Neither cohabitation nor reputation of marriage is marriage.

Yardley's Estate, 75 Pa. 211; *Hunt's App.* 86 Pa. 296; *Reading F. Ins. & T. Co. v. Riegel*, 4 Cent. Rep. 678, 113 Pa. 204; *Richard v. Brehm*, 73 Pa. 140.

Paxson, Ch. J., delivered the opinion of the court:

This case is peculiar. The appellant filed her petition in the court below, claiming to be the widow of Gotfried Grimm, and asking that \$300 worth of property be appraised and set apart to her out of the estate of said decedent. The court below disallowed her claim.

The evidence upon which her claim to widowhood was based amounts to this: That the appellant and the deceased cohabited together as man and wife for one week prior to the death of the latter, that the marriage ceremony was to have been performed the following week, but that it was prevented by the sudden death of the decedent.

The appellant was sworn and examined under objection, and her testimony was as follows: "I knew Gotfried Grimm since last Christmas, and lived together as man and wife a week before he died; the arrangement be-

should be mine and my children get \$300 each. We cohabited as man and wife; he acknowledged me in the presence of others as his wife; the ceremony was to be performed the next week after he died; he was to have everything fixed the next week, and we were to have been married the Tuesday after he was killed; he was to get the license; we lived together, and he treated me as a wife from the time he came over."

In the face of this clear statement that no marriage had taken place the mere fact that Mr. Grimm acknowledged her as his wife in the presence of witnesses has little significance. Neither cohabitation nor reputation of marriage is marriage. When conjoined they are evidence from which a presumption of marriage arises. *Yardley's Estate*, 75 Pa. 207.

"The presumption of marriage arising from such facts may always be rebutted, and wholly disappears in the face of proof that no marriage in fact had taken place. Again, the cohabitation was illicit at its commencement. It may not have been meretricious so far as the appellee is concerned. There is evidence to show that she was deceived, but it was clearly illegal. The general rule is that a relation shown to have been illicit at its commencement raises no presumption of marriage." *Hunt's App.* 86 Pa. 294.

In the case in hand the relation between these parties was illicit at its commencement, and known to be such by the parties. There was no marriage in law or in fact. They were to have been married the next week, according to the appellant's own testimony. That it was prevented by the death of Mr. Grimm, if the fact be so, was a misfortune to the appellant. It would have been better for her had the cohabitation been later or the marriage earlier.

The decree is affirmed, and the appeal dismissed at the costs of the appellant.

RHODE ISLAND SUPREME COURT.

BAKER

v.

BRASLIN.

(...R. L....)

A suit for a tort, brought against a husband and wife jointly, does not abate upon the death of the husband during its pendency, but may proceed against the wife alone.

(November 2, 1899.)

NOTE.—Torts by married women.

Where a wrong is committed by a married woman in the presence of her husband, the presumption is that it was committed under his influence, and consequently is his wrong for which he should be sued alone (*Kosminsky v. Goldberg*, 44 Ark. 401; *Baker v. Young*, 44 Ill. 42; *Ball v. Bennett*, 21 Ind. 427; *Brazil v. Moran*, 8 Minn. 236; *Quick v. Miller*, 103 Pa. 67); but this presumption may be rebutted, and each may be deemed in law the wrong-doer (*State v. Cleaves*, 59 Me. 298; *Warner v. Moran*, 60 6 L. R. A.

ON plaintiff's exceptions to a judgment of the Court of Common Pleas for Providence County sustaining a motion in arrest of judgment after verdict for plaintiff in an action to recover damages for assault and battery. *Sustained.*

The case sufficiently appears in the opinion.

Messrs. Charles H. Page and Franklin P. Owen for plaintiff.

Mr. George J. West for defendant.

Me. 227; Tobey v. Smith, 15 Gray, 536; *Carleton v. Haywood*, 49 N. H. 314.

If she survives him the suit may proceed against her separately. *Smith v. Taylor*, 11 Ga. 22; *Hawk v. Harman*, 5 Blinn. 43.

They may be held jointly liable for a tort committed by her in his absence if done at his instigation. *Yeates v. Reed*, 4 Blackf. 463; *Roadcap v. Sipe*, 6 Gratt. 213; *Vine v. Saunders*, 4 Bing. N. C. 96; *Keyworth v. Hill*, 3 Barn. & Ald. 686; *Drury v. Dennis*, 106; 2 Addison, Torts, § 1313.

Durfee, Ch. J., delivered the opinion of the court:

This is trespass for assault and battery, brought and tried in the court of common pleas. The defendants were husband and wife, and were declared against jointly. The husband died, and his death was suggested of record before trial. The plaintiff prosecuted his case afterwards against the wife alone, and recovered a verdict against her. She then moved in arrest of judgment, on the ground that the action had abated before verdict by her husband's death. The court sustained the motion, and the plaintiff excepted.

We think the court erred. The action is in form an action against the two, for assault and battery committed by both jointly. We think it is settled by the preponderance of authority that at common law an action against two in tort, as in trespass, ejectment, trover, conspiracy, and the like, is not abated by the death of one of them, but may be prosecuted against the survivor, each being answerable *in solido* for the wrong. 1 Com. Dig. 125; *Spenser v. Earl of Rutland*, Yelv. 208; *Hill v. Tempest*, Cro. Eliz. 145; *Bennion v. Watson*, Id. 625; *Rigley v. Lee*, Cro. Jac. 356; *Sumner v. Tilton*, 4 Pick. 308; *Hendrickson v. Herbert*, 38 N. J. L. 296; *King v. Bell*, 18 Neb. 409; *Treat v. Dvinel*, 59 Me. 341.

We see no reason why the rule should not apply when the two are husband and wife. It is true that where husband and wife join in committing a tort the presumption is that she acts under marital coercion; but this presumption is *prima facie* only, and may be rebutted by proof that she acted of her own free will. *Cooley, Torts*, 115, 116; *Simmons v. Brown*, 5 R. I. 299; *Marshall v. Oakes*, 51 Me. 308; *Handy v. Foley*, 121 Mass. 258; *Cassin v. Delany*, 38 N. Y. 178.

It is also true that a married woman cannot be sued separately from her husband for a tort committed by them jointly, so long as she is under coverture; but this is not because the tort is joint, but because the law requires the joinder by reason of the coverture. There is nothing to prevent her being sued alone for such a tort after her husband dies, the same as if she were originally discover; and, this being so, we see no reason why a suit for such tort, begun against her and her husband, should not proceed against her alone, if her husband dies during its pendency. And so the law has been laid down.

In *Rigley v. Lee*, Cro. Jac. 356, the action was ejectment against husband and wife. The husband died after verdict; and the question was whether the action should abate, or stand against the wife. The court decided that, because it was in the nature of an action of trespass, and the wife was charged for her own fault, the judgment should be entered against her alone. It was suggested at the bar that the tort was really committed by the wife alone, the husband being joined in the action for conformity. The declaration does not show this; but, if it did, we think the ruling of the court below would nevertheless have been erroneous. *Cooley, Torts*, 115; *Capel v. Powell*, 17 C. B. N. S. 744; *Estill v. Fort*, 2 Dana, 237; *Douge v. Pearce*, 13 Ala. 127, 129.

Exceptions sustained.

6 L. R. A.

Francis L. O'REILLY

v.

NEW YORK & NEW

(....R. I.

1. An action may be State by the personal repr by the negligent act of a other State to recover fro resulting from such negli of action survives to the by the statutes of the Stat similar statute exists in tl is brought.

2. The pendency of a same cause of action is abatement of an action ur sequent actions are both p risdiction.

3. A statute providi ministration is take: is passed upon the estate dent, the estate found the primarily to the payment will not prevent the adm ing suit wherever he can which accrued in such St reason of the negligent ac causing personal injury to

(December 1

ACTION of trespass on damages for fatal plaintiff's intestate caused alleged negligence. On declaration, and on motion for abatement. Motion dismissed.

The case sufficiently appears. Messrs. H. Eugene B. Saltonstall and Frank defendant, in support of demurrer. Messrs. Nicholas and Charles E. Gorman for

Durfee, Ch. J., delivered the court:

Since our decision given in *term* [5 L. R. A. 36] amended the first count in alleging therein the existence of a Statute under which declared on survives in the State. The defendant demurs. I murther it is argued that the cause of action survive can be maintained in this State is not the original action survive, but a new action is created. The Massachusetts Statute in addition to the actions which law, the following shall also be actions "of tort for a imprisonment or other dam-

NOTE.—Liability for death where injuries were inflicted within limits; right of action and damages. West Jersey R. Co. 4 L. R. A. 385. Statutory action. Cleveland, 3 L. R. A. 385, 46 Ohio St. & C. R. Co. v. Buck, 2 L. R. A.

common law, and we see no reason why the purpose should not have effect. If the action kept alive by the Statute is to be regarded as utterly new, it follows logically that it will be entitled to a new term of limitation under the Statute of Limitations; but we are not aware that this has ever been claimed. But whether the effect of the Statute be to create a new action or to give continuance to the old, the result for the purposes of this case is, in our opinion, the same. Of course a cause of action created by statute may be purely local, or it may be penal, or, if simply personal, it may be too peculiar in proceeding or character for enforcement elsewhere; but ordinarily the rule which seems to us to be the better established is that a right of action created by statute in one State may be prosecuted in another, when the two States have statutes relating to the subject which are substantially similar. *Cooley, Torts*, 2d ed. *266; *Leonard v. Columbia Steam Nav. Co.* 84 N. Y. 48; *Debenoise v. New York, L. E. & W. R. Co.* 98 N. Y. 379, 50 Am. Rep. 688; *Morris v. Chicago, R. I. & P. R. Co.* 65 Iowa, 727, 54 Am. Rep. 89; *Chicago, St. L. & N. O. R. Co. v. Doyle*, 60 Miss. 977; *Burns v. Grand Rapids & I. R. Co.* 113 Ind. 169, 12 West. Rep. 688; *Knight v. West Jersey R. Co.* 108 Pa. 250; *Missouri P. R. Co. v. Lewis*, 24 Neb. 848; *Herrick v. Minneapolis & St. L. R. Co.* 81 Minn. 11; *Scott v. Seymour*, 1 Hurlst. & C. 219.

So much seems to be due from one State to another as a matter of comity, which, out of regard for the State's honor and good name, the courts of a State are bound to respect. There are courts which go further and hold that the action is maintainable without regard to similarity of legislation if it be not contrary to the law or policy of the State where it is brought. *Dennick v. Central R. Co.* 103 U. S. 11 [26 L. ed. 439]; *Stoeckman v. Terre Haute & I. R. Co.* 15 Mo. App. 508.

The more guarded rule suffices for the case at bar, since our Statute of Survivorship relating to actions like this is substantially the same as that of Massachusetts. The demurrer is overruled.

The defendant makes a motion for leave to file a plea in abatement as of a day prior to the filing of the demurrer to the amended declaration. The proposed plea accompanies the motion and alleges two causes for abatement. The first is that the plaintiff on December 18, 1888, brought an action against the defendant in the Superior Court for the County of Suffolk in Massachusetts for the same cause for which the action here was brought. The declaration, as originally filed in the action here, was declared to be bad on demurrer May 4, 1889, and was not amended so as to remedy the fault until July 31, 1889. It is argued that the Massachusetts action is the prior action because it was brought prior to the amendment. We do not consider it material to decide whether it is or not, since it is well settled that prior pendency is not cause for abatement unless the prior and subsequent actions are both pending in the same jurisdiction. *West v. McConnell*, 5 6 L. R. A.

84 Am. Dec. 448 and note; *White v. Whitman*, 1 Curt. 494, 496; *Boune v. Joy*, 9 Johns. 221; *Walsh v. Durkin*, 12 Johns. 99.

The second cause alleged is that October 9, 1888, the plaintiff applied to a probate court of Massachusetts to be appointed administrator in that State on the estate of his intestate, and that October 16, 1888, he was so appointed, and that his appointment is still in force; that by the Statute Law of Massachusetts when administration is taken there on the estate of a nonresident decedent the estate found there is to be applied there primarily to the payment of the Massachusetts creditors, and that only the residue remaining after such creditors are paid is either to be sent for administration to the State of the domicile or to be distributed there according to the laws of the State of the domicile. The plaintiff's intestate was an inhabitant of Rhode Island. The defendant contends that the cause of action in suit here accrued to said intestate in Massachusetts, that it is a Massachusetts asset, that it is the duty of the plaintiff as administrator in Massachusetts to reduce it to possession there for disposition under said Statute Law; and that, having power to do so, he has no right to prosecute his action in this State. According to this construction, if a foreign administrator takes out ancillary administration in Massachusetts for the purpose of prosecuting there a cause of action which accrued there to his intestate, he has no right afterwards, so long as he can prosecute it there under his appointment, to prosecute it elsewhere, even in the State of the decedent's domicile, though he may find it greatly to his convenience to do so. We do not think that this is what the Massachusetts Statute means. It is "the estate found" in Massachusetts that is to be applied primarily to the payment of the Massachusetts creditors, and it does not seem to us that a chose in action can be regarded as found there within the meaning of the Statute so long as it may be reduced to possession elsewhere. It certainly cannot be applied to the payment of creditors pursuant to the Massachusetts Statute so long as it is unreduced. In other words, we do not think the Statute can be regarded as intended to restrict or as restricting the right of the principal administrator to recover wherever he can the assets of his intestate, but only to establish a rule for the disposition of such of them as are recovered in Massachusetts by the administrator there appointed. Moreover, the Statute was intended for the benefit of Massachusetts creditors, and it does not appear that the intestate had any such creditors. The Statute referred to is Mass. Pub. Stat., chap. 188, §§ 1-5.

The counsel for the defendant in their brief, referring to the fact that the plaintiff has besides his action in Massachusetts before mentioned also brought an action there to recover for the death of his intestate, contend that both actions are not maintainable. We find nothing, however, in the pleadings on which such a question can be raised.

The motion is denied, and the demurrer overruled.

E. H. DICKINSON, *Appt.*,

v.

John EICHORN.

(....Iowa....)

A decree for an injunction, and the abatement of a saloon nuisance, obtained by one citizen of a county, although not enforced, is a bar to a suit for the same purpose against the same defendant by another citizen of the same county, in the absence of anything to show why such first decree remains unenforced.

(Granger and Beck, JJ., dissent.)

(October 20, 1899.)

APPEAL by plaintiff from a judgment of the District Court for Dubuque County in favor of defendant in an action to abate a saloon nuisance. *Affirmed.*

Defendant, among other defenses, set up that there was an existing decree in favor of one Lundbeck granting him the same relief which was sought in this action. The court thereupon

dismissed the petition and plaintiff took this appeal.

Further facts appear in the opinion.

Mr. S. P. Adams for appellant.

Messrs. Fouke & Lyon and *McCeney & O'Donnell*, for appellee:

When plaintiff obtained, in the first case, an order for a perpetual injunction against defendant, he got the full relief which under the law the court can give; and defendant should not be further harassed by other suits to accomplish the same end.

Schmidt v. Zahensdorf, 80 Iowa, 498; *Eas Saginaw Street R. Co. v. Wildman*, 58 Mich. 286; *Livingston v. Gibbons*, 4 Johns. Ch. 571; *State v. Layton*, 25 Iowa, 193.

Plaintiff stands as a representative of the public, and while he is prosecuting, no other member of that public can institute another prosecution for the same cause any more than the public prosecutor could maintain two indictments.

Littleton v. Fritz, 65 Iowa, 496; *State v. Layton*, *supra*.

NOTE.—Abatement of saloon for sale of liquor.

A State may declare that any place maintained for the illegal manufacture and sale of liquors shall be deemed a common nuisance and be abated, and at the same time provide for the indictment and trial of the offender. *Mugler v. Kansas*, 123 U. S. 623 (31 L. ed. 206).

An injunction against selling any intoxicating liquors on "part of lot No. 2" in a certain section, etc., sufficiently describes the real estate to make the party guilty of contempt for disregarding it; and the mandate will be violated by selling on any part of that lot. *Ver Straeten v. Lewis* (Iowa) 41 N. W. Rep. 594.

Where a bill brought to abate a liquor nuisance was removed to the circuit court on the ground that the statutes under which the proceedings were had, although declared valid by the highest court of the State, were in violation of the Civil Rights Law and the Federal Constitution, a decree remanding the cause, as presenting no federal question, was affirmed by a divided court. *Schmidt v. Cobb*, 119 U. S. 226 (30 L. ed. 321).

Where petitions for abatement of nuisances kept in violation of the Prohibitory Liquor Law contain the necessary averments, and no answers were filed, the averments stand admitted (Code, § 2712), and no evidence is necessary to entitle plaintiffs to the relief demanded. *Bloomer v. Glendy*, 70 Iowa, 757.

Place for sale of intoxicating liquors, a nuisance.

A public and disorderly liquor and store house in a town, in and about which dissolute persons are permitted, for lucre, to remain at night and in the daytime, drinking, tippling, carousing, swearing, hallooing, etc., to the damage, disturbance, etc., is a nuisance. *State v. Bertheol*, 6 Blackf. 474; *Bloomhuff v. State*, 8 Blackf. 205; *State v. Buckley*, 5 Harr. (Del.) 508.

A nuisance is anything which worketh hurt, inconvenience or damage to another; as, if one does an act, in itself lawful, which, being done in a particular place, necessarily tends to the damage of another's property, it is a nuisance. *Coker v. Birge*, 9 Ga. 425; *Norcross v. Thoms*, 51 Me. 503.

Disorderly inns, gaming-houses, and the like, ordinarily erected in such places as are densely populated, or much frequented, are public nuisances. *Hackney v. State*, 8 Ind. 494.

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The Legislature has the power to declare a place where intoxicating liquors are sold in violation of law, to be drank on the premises, a nuisance. *McLaughlin v. State*, 45 Ind. 838.

One who sold at his farm house wine of his own manufacture, and the buyers became intoxicated thereon, is not liable to conviction under the Iowa Code for keeping a nuisance. *State v. Dieffenbach*, 47 Iowa, 638.

When a statute pronounces saloons in which intoxicating liquor is sold nuisances, and provides that they may be shut up and abated, equity will not enjoin their maintenance. *State v. Crawford*, 28 Kan. 723, 42 Am. Rep. 182.

A distillery is not enjoined as a nuisance, when it was established under permit from the authorities of the city, and is not shown to be conducted in violation of any police regulations. *Lewis v. Behan*, 28 La. Ann. 130.

The General Statutes imposing a punishment for maintaining a building used for the illegal sale of liquors being repealed by a later statute, no punishment can be imposed therefor under the common law, although declared by law to be a common nuisance. *Com. v. McDonough*, 18 Allen, 561; *Com. v. Marshall*, 11 Pick. 350.

Without reference to city ordinances, a house in which unlawful sales of liquor are habitually made is an indictable nuisance. *Meyer v. State*, 41 N. J. L. 6.

A house in which liquor is illegally sold habitually is an indictable nuisance, although there is a city ordinance prescribing penalties for such sales, as such traffic is forbidden by the state law as well as by the city law. *Meyer v. State*, 42 N. J. L. 145.

A public saloon at which persons play pool and bagatelle, sometimes for the use of the apparatus, sometimes for drinks, is a nuisance under the Code. *People v. Cutler*, 28 Hun, 465.

No order to shut up or abate the place where liquors are sold, under the Ohio Act of May 1, 1851, can rightfully be made, unless the nuisance continues to exist at the time such order is made. *Miller v. State*, 3 Ohio St. 475.

Under a statute which declared "all buildings, places or tenements" used for certain enumerated purposes to be "common nuisances," maintaining a grog-shop, or tippling-shop, is within the statute. *State v. Towler*, 13 R. I. 661.

Rothrock, J., delivered the opinion of the court:

It is not denied by the appellant that the keeping of the identical saloon was enjoined by a decree of the district court, entered on the 4th day of September, 1888, and that said decree is still in full force; and there is neither allegation nor proof tending to show that said decree may not be fully enforced. In addition to this state of the record, the plaintiff and the defendant entered into the following written stipulation of facts, to wit:

"It is stipulated that heretofore, to wit, in the September Term, 1885, of this court, a suit was commenced in the name of J. B. Lundbeck against the present defendant; that the petition was filed August 4, 1885; that the objects of said suit and the present one are the same, to wit, the suppression of the sale of intoxicating liquors upon said premises as a saloon; that, whilst the nominal plaintiff is different, the suits were instituted at the instance of the Citizens' Law and Order League of Dubuque, an unincorporated society, whose object was the suppression of the saloons of Dubuque as a public nuisance; that the attorney in both suits is the same, and that no one is personally responsible for attorney's fees in said suits, said attorney looking solely to what may be obtained by way of costs in said suits for his compensation; that no change had been made in the business of said defendant from the time said first suit commenced down to the time of the trial of the present action; that no new saloon had been established upon said premises since the commencement of the present action; that said first suit was tried at the May Term, 1888, of this court, and decree rendered therein on the 4th day of September, 1888, of which the following is a copy: 'Decree and writ of injunction as prayed, restraining defendant from maintaining the nuisance described in plaintiff's petition, and restraining the use of the building described for the purposes of said nuisance, and that said nuisance be abated in the manner provided by law. Judgment against defendant for costs, including attorney fee of \$35. Execution.'"

The foregoing stipulation of facts was introduced in evidence upon the trial. The question for determination is, Can this second action be maintained and another decree entered for precisely the same thing? that is, for enjoining and abating the same nuisance which is already enjoined and ordered to be abated. It is to be observed that it is conceded that the former decree is in full force, and no reason is stated anywhere in the record, nor even suggested in argument, why it has not been enforced. If a showing were made that the decree was obtained by collusion with the defendant, for the purpose of allowing it to remain without enforcement, and that the same is therefore a fraud upon the court, and intended as an evasion of the law, there might be some ground for maintaining this action; but we need not determine that question, because it is not presented in this record.

Counsel for appellant appear to be of opinion that the action may be maintained because the time alleged in the petition during which the nuisance was maintained is not the same as in the first action. The rule invoked has no application in an action like this. If, in an action to recover damages for a nuisance, the plaintiff recovers a judgment, and that defendant continues to maintain the nuisance, successive actions may be maintained; but it is apparent that in this class of actions one valid injunction is as effective as a thousand would be.

In *Livingston v. Gibbons*, 4 Johns. Ch. 571, it was held that, where an injunction has been already granted, a second injunction will not be granted while the first is in force. It is true that the plaintiffs in the two actions are not the same, but it is stipulated by the parties that both are prosecuted in the same interest, and the attorney for the plaintiffs in both of the actions is the same. It is not stipulated that the attorney was the same in both actions, but that he is now the attorney in both. It is therefore a pertinent inquiry, Why does he not order process upon the decree he already controls? It is to be remembered that these are not actions for private nuisances. The plaintiff, as a citizen of the county, stands for and represents the public. *Littleton v. Fritz*, 65 Iowa, 488.

If the claim made by counsel for appellant should be sustained, every citizen of a county might maintain an action for an injunction at the same time, and each demand a decree in his action enjoining and abating the same liquor nuisance. We cannot consent to establish a rule which might lead to a multiplicity of suits when one action will accomplish the same result.

It is said that the defendant is a persistent violator of the law. If so, the decree entered more than one year ago should have been enforced instead of seeking another decree, which will be of no more binding force than the first. Because a defendant is a criminal, is no reason why the plainest principles of the law of former adjudication should be disregarded.

Affirmed.

Granger, J., dissenting:

I am unable to concur in the conclusion announced in the majority opinion. I think the opinion fairly announces the question to be determined in the case, which is: Is a decree for an injunction, and the abatement of a saloon nuisance, obtained by a citizen of a county, which is not enforced, a bar to a suit for the same purpose by another citizen of the county for the abatement of the same nuisance? To have the case well in mind let the facts be again briefly stated: Lundbeck obtained a decree for an injunction, and the abatement of the nuisance in question, against this defendant. That decree, so far as the record discloses, is enforceable, but not enforced, and the record makes no showing why it is not done. The nuisance still continues. The theory of the majority opinion is that Lundbeck, in obtaining the decree, acted on behalf of the public, and that one decree or injunction is as good as a thousand. I readily accede to the proposition that, as a general rule, a judgment on behalf of a party, whether obtained by himself, or another in his interest, is a bar to another proceeding in the interest of the same plaintiff against the same defendant for the same purpose, and for the reason stated in the majority opinion, that one judgment is as "effective as a thou-

sand;" and if that statement is true, as applied to this class of cases, then, on principle, the holding of the majority in this case is right. The case of *Livingston v. Gibbons*, cited from Johnson's Chancery Reports, is only as to individual interests, and the rule in such cases is not questioned.

I do not accept the statement as to the efficiency of a judgment as correct, when applied to this class of cases, and my reasons will appear further on in the opinion. To a logical determination of the question, I think we should first look to the law authorizing a citizen to maintain such a suit, and in its construction we should recur to the history of its enactment, and the evil which it seeks to remedy.

For many years the enforcement of the law against the sale of intoxicating liquors devolved, in the main, upon public officials, and it is a matter of common knowledge that in parts of the State the law stood unenforced because of a sentiment against the law and its enforcement. Grand juries would not indict, even when testimony before them was conclusive; and it is equally true that petit juries, in many cases with a like showing, would not convict. It was to meet these conditions, and avoid the influence of such a sentiment, that a change in the law was made. A necessity was apparent for escaping such questionable conduct on the parts of juries, and provide a means by which those friendly to the law, even if in a minority, could enforce it. To do this the Legislature provided, what has been regarded as an extraordinary remedy, that any citizen of a county where a saloon nuisance existed might maintain a suit in his own name for its abatement, and enjoin its further continuance. The law is that any citizen may maintain such a suit. Now I do not desire to place any strained construction on the words "any citizen," for I can imagine cases where a right or privilege might be given or confided to "any citizen of a county," and, in the very nature of the case, the right or privilege would be available to but one, who might be the first to act or accept. But, unless thus limited by circumstances, the rule of construction is broader, and the language is to be construed in its ordinary acceptance. I think no reader of the legislative history of Iowa will question that the purpose of the legislation in question was the abatement of the nuisance, and that the door for prosecutions was to be opened sufficiently wide for its accomplishment. In fact, in legislative councils the query has been, What character of a law will prove efficient to close the saloon? and that purpose has been the guiding star of legislation on that subject. I think the courts should be very careful in construing the law not to close the very door which the Legislature opened with a view to render the law effective.

The majority opinion holds, in effect, that, under the provisions of the law, if one citizen of a county acts, and procures a judgment, it stands as a bar to all other citizens of the county from maintaining a suit for the same purpose, even though the judgment is not enforced. The effect of such a holding is manifest in the case at bar. Lundbeck has a judgment which, for reasons unknown to us, he does not enforce. The defendant says he is still maintaining the nuisance in violation of a decree for injunction;

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See also 8 L. R. A. 570.

and just as long as Lundbeck will permit the judgment to stand unenforced, other citizens of the county, and the public, so far as this remedy is concerned, must submit to the prevalence of a nuisance in their midst. It seems to me that such a holding is plausible only because the saloon nuisance is one that is in a measure tolerable. Let us suppose that a sentiment was equally favorable to the maintaining of distilleries in localities where the stench from decaying substances was spreading disease and death in communities, and, with like difficulties for their suppression, the Legislature had provided the same laws for their abatement, and some citizen should obtain a judgment for their abatement, and neglect its enforcement, would it then be held that such a judgment must stand as a bar to other proceedings of a like character, and thus jeopardize the lives and health of the people? It would, in such a case, be plainly understood that the Legislature intended to invest any citizen with the right to see that the lives and health of the people were protected from the ravages of the nuisance, and, in such a case, I do not think the word "any" would, in effect, be construed to mean the one who might first assume to act. The more reasonable construction is that, as long as the nuisance exists, any citizen has the right to employ the means devoted by the law for its abatement, and, in my judgment, suits may be instituted and multiplied till the result is accomplished. The saloon in contemplation of law is as veritable a nuisance as a slaughterhouse or distillery, so situated as to be dangerous to the health or enjoyment of a community.

In cases of obstructions to highways, or other nuisances, any person having an interest distinct from that of the public may maintain a suit for its abatement; and in such a case as many persons as are thus affected may maintain a suit for the same purpose, and it would not be contended in such a case that a suit by one would bar the others. One judgment for abatement enforced in such a case would be as effective as a thousand, and the same would be true of one not enforced. But a judgment not enforced at the suit of one would not be as good as one at the suit of another that would be enforced; and hence any person whose interest is such that he may maintain a suit is not deprived of that right except upon one plea, and that is the abatement of the nuisance. I know it can be said that in such cases the plaintiffs have a personal interest distinct from the public, which is the basis of the right of each to sue; but if the Statute should remove that requirement as to the distinctive interest, and leave the right to any citizen to sue for the abatement, is there any reasoning upon which it can be said that a suit by one of those, who might be especially interested, would bar the right of another to sue? Now I think the Statute in these nuisance cases simply removes the requirement as to a distinctive interest, and assumes an interest on the part of any citizen of a county, in the interest of his own and the public welfare, to maintain such a suit. I regard the law as an invitation to such persons to aid the public in the enforcement of the law, and I do not think the invitation ceases merely because one makes the attempt and fails, from neglect or for any other cause.

It has been held that another citizen of the county has not such an interest as will permit him to intervene in this class of cases, because he has not that private interest therein that is contemplated by the Statute governing interventions. *Conley v. Zerber*, 74 Iowa, 699.

If this is true what is there to prevent one friendly to continuing the saloon from bringing the suit, and, with the right to control it, leave a judgment as a shield to the violator of the law? I know the majority opinion is guarded by a statement that, if a showing were made of collusion with the defendant to defraud the court, there might be some ground for maintaining the action. But why devolve the burden of such a showing on the plaintiff in this suit? He knows of the Lundbeck judgment. He knows it stands unenforced, and that this nuisance continues. In fewer words, he knows that the law and the judgment of the court is in fact evaded. What better prima facie showing of a fraud on the court should be required? It is an express provision of the law on this subject that courts shall so construe it as to prevent evasion, and to my mind the case at bar calls loudly for the application of the rule.

To the point that one decree is as effective as a thousand, I can only say that it assumes that, because one plaintiff refuses, or, for some cause, neglects, the enforcement of his judgment, others will do the same. Such an inference does not necessarily follow. I have no reason for saying or believing that the plaintiff in this suit will fail of his duty because others

torney in this case is also attorney in the *Lundbeck Case*, and submits a query why he does not order process upon the decree he already controls. There is nothing in the record from which we should infer that the attorney controls the actions of his client in this matter, and, if he does in that case, it by no means follows that he can in this. The argument of the case on the part of the defendant makes no reference whatever to bad faith or neglect on the part of the attorney, and my observation is much at fault if the parties in these cases, as in others, leave unsaid any truths that will avail their cause. The arguments of the case present but a single fact in support of this defense, and that is that the Lundbeck judgment, without regard to misconduct or fraud, is a legal defense.

I attach importance to the fact that in this case the defendant stands before the court a confessed violator of the law, and of a decree of the court which he is legally bound to respect. He seems to understand that he can disregard the present decree with impunity, and asks that it be made a barrier against other interference. To my mind the situation plainly illustrates the effect of the rule announced in the majority opinion.

The equities of the case demand a rule more in harmony with the enforcement of the law and the protection of the public against such wrongs. I would reverse the judgment.

Mr. Justice Beck concurs in this dissent.

Petition for rehearing overruled February 18, 1890.

TENNESSEE SUPREME COURT.

PEOPLE'S BANK of Springfield, Tennessee, *Appl.*,
v.

FRANKLIN BANK of Clarksville, Tennessee.

(....Tenn.....)

Where one bank accepts and cashes a check drawn on a bank in another county, to which the signatures of the drawer and payee have both been forged, without either requiring identification of the parties to whom payment is made or taking steps to preserve any evidence of their identity, the bank on which it was drawn and by which it is paid upon its transmission thereto by the former bank can, upon discovering the forgery, recover back the amount so paid.

(December 31, 1890.)

A PPEAL by complainant from a decree of the Chancery Court for Montgomery County in favor of defendant in an action to recover back the amount paid upon a forged check. *Reversed.*

The facts fully appear in the opinion.

Messrs. Stark & Stark, for appellant:

The Franklin Bank, having lost no right to proceed against the party from whom it obtained the check, is bound to refund the amount to the People's Bank.

Chitty, Bills, 12th Am. ed. 431, 485; 2 Parsons, Notes and Bills, 80; 2 Daniel, Neg. Inst. § 1655; *National Bank v. Bungs*, 106 Mass. 441; *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628; *Irving Bank v. Wetherald*, 36 N. Y. 335.

The Franklin Bank is liable upon its guaranty of the genuineness of the indorsement of Morgan, implied in its indorsement of the check.

NOTE.—Banking; obligations of banker.

A bank is bound to know the signature of a depositor who draws a check upon it; and it has been said that the bank "is even more bound" to know such depositor's handwriting than a drawee is bound to know a drawer's. *Smith v. Mercer*, 6 Taunt. 76; *Daniel*, Neg. Inst. 568.

But it is not bound to know more than the signature of the drawer of the check; to require this

would greatly embarrass commercial transactions. *Redington v. Woods*, 45 Cal. 406.

A bank must know its customer's signature, and if it pays out money on a forged check it cannot recover back the amount from the party to whom it was paid. *Levy v. Bank of U. S.* 4 U. S. 4 Dall. 234 (1 L. ed. 814); *Bank of U. S. v. Bank of Ga.* 23 U. S. 10 Wheat. 333 (6 L. ed. 334). See *Atlanta Nat. Bank v. Burke*, 2 L. R. A. 98, 81 Ga. 597.

Canal Bank v. Bank of Albany, 1 Hill, 287; *National Bank v. Bangs*, 106 Mass. 441; *Graves v. American Exch. Bank*, 17 N. Y. 205; *Morgan v. State Bank*, 11 N. Y. 404; *Vanbibber v. Bank of Louisiana*, 14 La. Ann. 488; *Talbot v. Bank of Rochester*, 1 Hill, 295.

The Franklin Bank was negligent in taking said check, and cannot retain the money of complainant received thereon.

Ellis v. Ohio L. Ins. & T. Co. 4 Ohio St. 652; *National Bank v. Bangs*, *supra*; *Wilkinson v. Johnston*, 8 Barn. & C. 429; *Bolles, Banks, & Ss* 195, 207; *Lead Cases Bills of Exch. and Prom. Notes*; *Canal Bank v. Bank of Albany*, *supra*; *Bank of Commerce v. Union Bank*, 8 N. Y. 280; *Parsons, Notes and Bills*, 18th Am. ed. 80.

Messrs. Leech & Savage for appellee.

Folkes, J., delivered the opinion of the court:

Young was a depositor of the complainant Bank. His name was forged to a check drawn on the complainant, payable to the order of one Morgan. Morgan's name was also forged as an indorser on the check. This check, with the forged name of Young, the maker, and of Morgan, the indorser, was presented to the defendant, the Franklin Bank, and was cashed, or purchased by the defendant, and transmitted, after indorsement, by the defendant to the complainant Bank by mail. The complainant Bank had and kept an account with the defendant Bank, and upon the receipt of the check passed the amount thereof to the credit of the defendant Bank. The complainant Bank was located and did business at Springfield, in the County of Robertson; the defendant Bank was located and did business at Clarksville, in Montgomery County. The check which had been received by the complainant Bank and passed to the credit of defendant Bank, as above stated, on December 8, 1888, was ascertained nineteen days thereafter to be a forgery, this discovery being made by the depositor, Young, when he came to examine his pass-book, together with the checks returned therewith. Thereupon the complainant Bank canceled the charge against Young, the depositor, and at once notified the defendant Bank of the forgery, and demanded that the same be made good by the defendant Bank. Upon refusal, complainant filed this bill to recover the amount of the check, as having been paid by it through mistake upon the forged check, charging in the bill the facts above stated, and also the further fact that when presented the check bore the indorsement of the defendant Bank, and that upon the faith of such indorsement the complainant's teller accepted the check, and gave credit to the defendant Bank, with less careful scrutiny of the genuineness of the drawer's signature, by reason of the confidence reposed in the genuineness of the paper, as evidenced by the indorsement of the defendant Bank. The defendant answered the bill, admitting that it had received and cashed the check as charged, and stating that it was unable to furnish the names of the party or parties by whom the check had been presented, and to whom it had been paid by it, but presumed that it had required identification; but of this they do not remember. The allegations of the bill were sustained by the proof; but the chancellor,

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being of opinion that the peril, know the genuineness of its depositor, refused and dismissed complaints. Complainant has appealed.

The general rule under which a bank has, at its peril, to look to the signature of its depositor, if it is a forged check, the loss of the bank, and not upon the depositor, where the negligence of the depositor is induced or brought about by the bank. This duty with respect to a check may be said to be an exception to the general rule that money paid by a bank is not recoverable, and to the general rule that equally well-settled rule, that a forged paper conveys no title, that the deposit of a coin created no indebtedness to the depositor's account, and that payment in such material as a debt, and cannot create a liability not only responsible to the depositor, with the depositor's signature, but paid by the bank, except in cases where the bank has been guilty of negligence in leading the bank, but the bank is recovering from a party to whom the check has been paid, who, without fault, would be required to refund to the bank the duty of determining the genuineness of the depositor's signature, and some conflict of authority as to the duty of the bank in a careful investigation of the genuineness of the signature. The text-books leads us to the conclusion that the bank can recover of a party to whom the check has been paid, if the party to whom paid has been guilty of negligence in receiving and indorsing the check, standing the negligence of the bank. The paying bank has been negligent in receiving the forged check without detecting the signature of its depositor, and it may happen, that the party to whom the check has been paid is made guilty of negligence in purchasing and indorsing the check. The bank upon whom the check has been paid, the practical administration of the business, may well be lulled to sleep by the tiny of its depositor's signature, where the same is indorsed by the bank, with which it is in correspondence of business, than in accepting and paying the check, indorsed, to a stranger. The check by the payee may be said to be a guaranty of the genuineness of the indorsements theretofore on the check, of the genuineness of the signature of the subject, perhaps, to some extent, in cases, as, for instance, where the indorsement is made after the genuineness of the signature has been ascertained by the paying bank.

Applying these principles to the facts of this case, we are of opinion, and so are the majority of the court, that the bank was at fault with the defendant in accepting and cashing a check drawn on another county to which the drawer and the payee had both

ing any evidence of the identity of such parties for the benefit of itself or of others who might be injured by such forgery. The complainant Bank, upon receiving such check in due course of mail for deposit to the credit of defendant, might well rely upon the exercise of due prudence and diligence on the part of its depositor, the defendant Bank, and might well regard the latter's indorsement of the check as significant of the fact that such prudence had been exercised, and, if not, that the indorsement would stand as a guaranty to the paying Bank from loss that might otherwise fall upon it by reason of its passing the amount of the check to the credit of such indorser. Such would not only seem to be sound in theory, and supported by authority, but is in accordance with the proof in this case; and it is a matter of such general information that perhaps the court might be warranted in taking judicial knowledge of it, that, in dealings between banks, and especially with reference to clearings and clearing-houses, banks will adjust and pay differences between each other, or between themselves and the clearing-house, upon the faith of the indorsement by other banks of the checks involved in such settlement, before they examine the signature of the check involved or embraced in the settlement, relying on such indorsements as protecting them in such payment, should a subsequent and more careful scrutiny of the signatures disclose forgeries in the making and indorsing of the checks so paid.

Mr. Daniel, in his work on Negotiable Instruments, after discussing and criticising the cases that are supposed to hold a bank liable at all hazard, and to the last extremity, where it pays the check with the signature of its depositor forged, lays down the rule substantially as we have stated it. 2 Daniel, Neg. Inst. §§ 1655, 1657, with cases cited in the notes.

And the rule is stated by the learned contributor to the article on *Forged Checks* in 3 Am. & Eng. Cyclop. Law. 223, as follows: "Where, however, the loss has been traced to the fault or negligence of the drawer or holder, it will be fixed upon him." See cases cited in note 1. And on page 225 of 3 Am. & Eng. Cyclop. Law it is said: "Also the holder by indorsing a check warrants the genuineness of all prior indorsements." See note 1, citing numerous cases, among which is the case of *Harris v. Bradley*, 7 Yerg. 310, where Judge Green lays down the doctrine as to the effect of an indorsement in guaranteeing the genuineness of prior indorsements, in the language as quoted. It is true that in the Tennessee case the language was used with reference to a note, and not a check, and such may also be the case with other of the authorities cited in said note which we have not examined.

Now, while we concede there is quite a difference between this rule, as applicable to indorsers on commercial paper, and as applied to checks, so far as the liability of the drawer is concerned, yet we see no reason why the bank should not have the benefit of such rule where the indorsement is made under circumstances which establish or impute negligence to the indorser. The case of *Levy v. Bank of U. S.* 4

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judgment of the chancellor in the case at bar. The facts of the case in 4 Dallas are so briefly stated as to leave us uninformed as to the manner in which the question was presented. The case of *Bank of U. S. v. Bank of Georgia*, 23 U. S. 10 Wheat. 333 [6 L. ed. 334], was where a forgery was by raising the notes of the defendant bank. The notes, coming in due course to the United States Bank, were presented to the Bank of Georgia, and passed to the credit of the United States Bank. Nineteen days thereafter the forgery was discovered and notice given. Upon refusal of the United States Bank to make good the loss, the credit was, by the Georgia Bank, withdrawn from the account, and the United States Bank brought suit for money had and received. It was held that the plaintiff could recover. While the reasoning of the learned judge, and much of the argument, tends to sustain the contention of the defendant here, still the court put its judgment in that case distinctly upon the ground that the defendants were bound to know their own notes, and, having received them without objection, they cannot recall their assent.

While these two cases are criticised by Mr. Daniel as unsound, that criticism, so far as the latter case is concerned, may be well confined to the argument contained in the opinion; for the point decided is in no manner hostile, as we understand it, to the principle announced by Mr. Daniel, and adopted by us in the disposition of the case at bar; for there is nothing to show that there had been any negligence on the part of the United States Bank in receiving the notes of the Georgia Bank; and we can well understand how there could and ought to be a higher obligation upon the bank to show the genuineness of its notes of issue, passing current as money, than rests upon it to know the signature of the depositor, on a check indorsed by a solvent correspondent. But, putting them both on the same footing, there is wanting in the report of the case in 10 Wheaton any evidence of negligence on the part of the United States Bank.

The views we have expressed, and the principle upon which we reverse the chancellor, and award judgment here for the complainant, are not only sustained by Mr. Daniel, but also by Mr. Chitty, Mr. Parsons and Mr. Bolles, who fortify their conclusions by ample authority. See Chitty, Bills, 13th Am. ed. *431, 485; 2 Parsons, Notes and Bills, 80; Bolles, Banks, § 189; *Hardy v. Chesapeake Bank*, 51 Md. 535; *Leather Manufacturers Nat. Bank v. Morgan*, 117 U. S. 96, 112 [29 L. ed. 811, 817]; *Ellis v. Ohio L. Ins. & T. Co.* 4 Ohio St. 628; *McKleroy v. Southern Bank*, 14 La. Ann. 462; *National Bank v. Bangs*, 106 Mass. 441; *Rouvent v. San Antonio Nat. Bank*, 63 Tex. 610; *First Nat. Bank v. Ricker*, 71 Ill. 439.

It results, therefore, that *the decree of the chancellor must be reversed, and judgment rendered here for the amount of the check, with interest and cost.*

Snodgrass, J., dissenting:

I concur in the result reached on account of

the negligence of the indorsing Bank; but I do not agree to what may be implied from the argument of the opinion, that this Bank would have been liable had it not been negligent, but had taken the check from a known and good-faith indorser. This is the point determined in the case in 4 Dallas, referred to. I am of opinion that the view is a sound one. As between itself and good-faith indorsers, the paying bank should be the place of final settlement, where all prior mistakes and forgeries should be corrected, and, if not then corrected, the action of acceptance and payment should be treated as final. There must be a time and place to adjust and end these things as to innocent indorsers, and, if the paying bank and date of payment are not that time and place, I do not see what can be or should be. Certainly there are no better or more appropriate ones. It is the last time and last place the check is presented. It is to the paying bank, after it has gone through every hand it can, when all opportunity for mistake and forgery is over. It is to the depository of the signature as well as the funds of the drawer. It is the place selected by him, and trusted by all, to correct any mistakes and reject forgeries. Every interest and duty to itself, to its depositor, and to all indorsers and parties interested, require that the paying bank should settle any question which could arise on it. If it fail to do this, it should take the consequences. See 3 Am. & Eng. Cyclop. Law, 222, and cases cited.

It will not do to say that this bank does not injure the indorsing bank by payment and delay. Days are of great moment in transactions of this kind; any delay may, and much delay must, be injurious. Nor does the clearing-house arrangement affect this question. Banks are represented there, as well as at their own counters, in an arrangement satisfactory to them. If not safe, they should change it, but not escape liability for failure to exercise the usual care to detect errors and forgeries in consequence of exercising one more desirable to them, but less safe.

Motion for rehearing denied.

HANNA, *Appt.*,

v.

CHATTANOOGA & NASHVILLE R. CO.

(....Tenn....)

Where a shipper by consent of a railroad company undertakes with the help of his own employees alone to run cars down a grade to the place where they are needed for loading, and while so employed one of such employees is injured by the negligence of his co-employees, the railroad company is not liable to an action for damages on account of such injuries.

(December 31, 1880.)

A PPEAL by plaintiff from a judgment of the Circuit Court for Sumner County in favor of defendant in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

The facts are fully stated in the opinion.

6 L. R. A.

Messrs. S. F. Wilson and George W. Boddie for appellant.

Mr. J. J. Turner for appellee.

Folkes, J., delivered the opinion of the court:

This was an action brought by the plaintiff to recover damages for a personal injury. The declaration contains two counts: first for negligence of the Company through the superior of the plaintiff, and in not notifying the plaintiff of the dangers incident to the employment; second, for negligence in associating the plaintiff with other employes known to the defendant to be incompetent, and injury resulting therefrom. There was a verdict and judgment for the defendant, and plaintiff has appealed in error.

The record discloses the following facts: The plaintiff was employed by Settle & Link, who were dealers in cross-ties, wood, etc., to accompany Link and other hands employed by him, to bring empty cars from another station by grade, for the purpose of being loaded, preparatory to being turned over to the Railroad Company for shipment. The plaintiff was to be paid by Settle & Link for loading the cars at the rate of forty cents per car, it requiring five men to properly load the car with wood or cross-ties, each of whom received forty cents, making \$2 for loading a car. Link, one of the firm of Settle & Link, was also railroad or station agent, and the store of his firm was used as a station or depot. Neither plaintiff nor those associated with him were experienced as railroad hands and were not instructed or warned, but were known to each other to be without such instruction and experience. The plaintiff, in his own testimony, states that he was employed by Settle & Link, and was to be paid by them, and not by the Railroad Company. When Settle & Link asked for cars to move their cross-ties and wood, they were told that the Company had some flat cars up at another station, a few miles distant, and that if they would go up and bring them down, (which they could do, on account of the grade, by merely handling the brakes, without any motive power other than that of gravity), they could have the cars for the purpose of moving their freight, and that, after they had brought them down and loaded them, the defendant would then take charge of and move the cars in regular trains to the desired destination. Under the arrangements with Settle & Link, the Railroad Company carried Link and his crew of hands on a passenger train, without charge, up to the station from which the cars were to be brought. Link and his crew brought the cars to the station at which they were to be loaded. Just before reaching the station, Link instructed the plaintiff, with two of his associates, who were upon the front car, to disconnect that car, and run it on a side track, where it was to be loaded by the plaintiff and others with wood. Plaintiff, sitting on the front of the car, after it had been detached from the other cars, relying on his two associate laborers to properly handle the brakes, jumped off in front of the moving car (or after the car was stopped, as some of the testimony tends to show) when, by the negligence of his two associates at the brakes, the cars were allowed

sists that it was the duty of the Railroad Company to move its cars from one station to another, and that it could not devolve this duty upon another, so as to escape liability. This is a very correct rule, so far as applicable to a stranger who might have been injured by the cars, or to a passenger, on other cars, injured by the negligence of the persons thus permitted to take charge of the cars of the defendant Company, upon the principle, well established, that the Company owes a duty to the public, by reason of its franchises, from which it cannot absolve itself by turning over its road, or the management of its trains thereon, to others, whether corporations or individuals, without legislative sanction and exemption. But this rule does not apply in favor of the parties themselves who receive from the Company their cars with the understanding and agreement that they are personally to move or operate them for themselves or for their employer. In such case, the Company assumes no duty and no contract relation towards the parties so put in possession of the cars, except the duty to furnish sound and safe cars.

So far as this plaintiff is concerned, he had undertaken, in connection with others equally inexperienced with himself, to move these cars, not for the Company, but for Settle & Link, to whom alone they looked for compensation for their services, and he was injured by a fellow servant in the employ of Settle & Link. We are wholly at a loss to discover any principle upon which the Railroad can be held liable for an injury so inflicted. The Company's liability for an injury to a servant must rest upon some wrong or negligence as the occasion of the injury, and there is nothing in the record to show any negligence or wrong on the part of the Company which can be said to be the prime or proximate cause of such injury. Certainly the mere turning over of its empty cars to a

resulted from the negligence of the two men at the brakes, and these two men were not in the employ of the Railroad Company, but, like the plaintiff, were under the employ of Settle & Link, and were known to the plaintiff to be as ignorant and inexperienced as the plaintiff himself was,—the fact being that the plaintiff and his associates were countrymen, living in the neighborhood of the depot, who had been in the habit of loading cars.

Indeed, under the proof in this case, it might well be doubted whether the plaintiff could recover for the incompetency of his fellow servants, even if they had all been in the employ of the defendant, where, as shown in this record, the plaintiff was acquainted with the inexperience and want of skill on the part of his associates; unless, perhaps, he had been instructed, under some special emergency, to act with such incompetent associates. See *Nashville, C. & St. L. R. Co. v. Handman*, 13 Lea, 423, where the true rule is stated to be that an employé working knowingly with defective machinery or tools, or with incompetent associates, takes the risk thereof, and, both being in fault, the plaintiff cannot recover.

Under the views above expressed, it is unnecessary for us to consider in detail each of the special charges given or refused. There is nothing in the charge of which plaintiff can complain; for, as we have already seen, under his own statement of his case, the Company was not liable for the injury received by him as the result of the negligence of his associates. We deem it therefore unnecessary to consider the several criticisms in the assignment of errors, passed upon the charge, which contains more of error against the defendant than against the plaintiff, in a case where, under a proper charge, the trial must necessarily result in a verdict for defendant.

Let the judgment be affirmed.

NEW YORK COURT OF APPEALS.

Thomas LACY, *Resp't.*,

v.

Sophonria GETMAN, *Exrx.*, etc., *App't.*

(.....N. Y.....)

A contract between master and servant for the rendition of personal services is dissolved by the death of the master; at least where the services were to be rendered under the master's daily personal direction and supervision.

(January 14, 1890.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court,

Fourth Department, affirming a judgment of the Jefferson Circuit in favor of plaintiff in an action to recover compensation for personal services rendered under a contract with defendant's intestate. *Reversed.*

The case sufficiently appears in the opinion. **Mr. Elon R. Brown**, for appellant:

Where performance of a contract for personal service is rendered impossible by the death of one of the parties, no recovery can be had for services not already rendered, for the reason that the contract terminated by an implied condition.

So held where the employer died.

Furrow v. Wilson, L. R. 4 C. P. 744; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 174; *Bab-*

NOTE—Master and servant, service terminated by death of master.

A contract for service from year to year, providing that, if the relation of employer and employé should be terminated by death, the "rate of compensation for the expired time of the year 6 L. R. A.

should be at the prorated sum of \$2,000 per annum," requires payment at those rates up to the day of the employé's death, and not merely to the day in the same year on which he is obliged by sickness to cease work. *Dunlap v. Montgomery*, 123 Pa. 27. See also *Griggs v. Swift*, 5 L. R. A. 465.

cock v. Goodrich, 8 How. Pr. N. S. 58; *Lacy v. Getman*, 8 How. Pr. N. S. 250; *Austin v. Monroe*, 4 Lans. 67, 47 N. Y. 360.

So held where the employé died.

Boast v. Firth, L. R. 4 C. P. 1; *Wolfe v. Howes*, 20 N. Y. 197, 24 Barb. 174, 666; *Fahy v. North*, 19 Barb. 341; *Clark v. Gilbert*, 32 Barb. 576, 581, reversed, 26 N. Y. 279; *Spalding v. Rosa*, 71 N. Y. 40, 44; *Seymour v. Caggar*, 18 Hun, 29.

Mr. W. A. Nims, for respondent:

The death of the employer did not terminate the contract. Death was a condition which would not affect the contract except by express stipulation.

Tompkins v. Dudley, 25 N. Y. 272; *Williams v. Vanderbilt*, 28 N. Y. 217; *Booth v. Spuyten Duyvil Rolling Mill Co.* 60 N. Y. 487; *Dexter v. Norton*, 47 N. Y. 62; *Wheeler v. Connecticut Mut. L. Ins. Co.* 82 N. Y. 543. See also *Devlin v. New York*, 63 N. Y. 14-18.

The only exception to the rule of law above stated is in the case of a contract contemplating skilled personal services.

Wolfe v. Howes, 20 N. Y. 197; *Spalding v. Rosa*, 71 N. Y. 40; *Devlin v. New York*, *supra*; *People v. Globe Mut. L. Ins. Co.* 91 N. Y. 179, 180; 1 Parsons, Cont. 7th ed. p. 145.

A contract with an author to write a book, a painter to paint a picture, or an actor to give an entertainment, is an example of what is contemplated by the term "skilled personal services."

Spalding v. Rosa, *supra*; *Martin v. Hunt*, 1 Allen, 418.

A contract to build a house is binding upon the executors of the person so contracting.

Quick v. Ludburrow, 8 Bulst. 30; *Wentworth v. Cock*, 10 Ad. & El. 42.

When the contract is executory in its nature, and a personal representative can fairly and sufficiently execute all that the original contractor could have done, it is not terminated by the death of either of the contracting parties.

1 Parsons, Cont. 7th ed. p. 145; *Martin v. Hunt*, *Wentworth v. Cock*, *Wolfe v. Howes*, *Spalding v. Rosa* and *Wheeler v. Connecticut Mut. L. Ins. Co. supra*; 8 Wms. Exrs. 7th ed. pp. 1826, 1827.

Finch, J., delivered the opinion of the court:

The relation of master and servant is no longer bounded by its original limits. It has broadened with the advance of civilization, until the law recognizes its existence in new areas of social and business life, and yields in many directions to the influence and necessities of its later surroundings. When, therefore, it is said generally, as the commentators mostly agree in saying, that the contract relations of principal and agent and of master and servant are dissolved by the death of either party, it is very certain that the statement must be limited to cases in which the relation may be deemed purely personal, and involves neither property rights nor independent action. Beyond that, a further limitation of the doctrine is asserted, which approaches very near to its utter destruction, and is claimed to be the result of modern adjudication. That limitation is that the rule applies only to the contract of the serv-

ant, and not to that of the master, and not at all, unless the service employed is that of skilled labor, peculiar to the capacity and experience of the servant employed, and not the common possession of men in general; and it is proposed to adopt, as a standard or test of the limitation, an inquiry in each case whether the contract on the side of the master can be performed after his death by his representatives, substantially and in all its terms and requirements, or cannot be so performed without violence to some of its inherent elements. The agitation of that question has kept the present case passing, like a shuttle, between the trial and the appellate courts, until it has been tried four times at the circuit, and reviewed four times at general term, and at last has been sent here in the hope of securing a final repose. The facts are few and undisputed on this appeal.

The plaintiff, Lacy, contracted orally with defendant's testator, McMahan, to work for the latter upon his farm, doing its appropriate and ordinary work, for a period of one year, at a compensation of \$200. Lacy entered upon the service in March, doing from day to day the work of the farm under the direction of its owner, until about the middle of July, when McMahan died. By his will he made the defendant executrix, but devised and bequeathed to his widow a life estate in the farm, and the use and control of all his personal property whatsoever, in the house and on the farm, during the term of her natural life. Lacy knew in a general way the terms of the will. He testifies that he knew that it gave to the widow the use of the farm, and that she talked with him about the personal property. It is admitted that the executrix did not hire or employ him, but he continued on to the close of the year, doing the farm work, under the direction of the widow, until the end of his full year. He sued the executrix upon his contract with the testator, and has recovered the full amount of his year's wages. From that decision the executrix appeals, claiming that the judgment should have been limited to the proportionate amount earned at the death of McMahan, and that the death of the master dissolved the contract.

It is obvious at once that an element has come into the case, as now presented, which was not there when the general term first held that the contract survived. It now appears that the executrix could not have performed her side of the contract at all after the death of McMahan, by force of her official authority, because she had neither the possession of the farm, nor personal property upon it, and no right to such possession during the life of the widow. She had no power to put her servant upon the land, or employ him about it, and in her representative character she had not the slightest interest in his service, and could derive no possible benefit from it. The plaintiff's labor, after the death of McMahan, was necessarily on the farm of the widow, by her consent, for her benefit, and under her direction and control, and equitably and justly should be a charge against her alone. The test of power to perform on the part of the personal representative of the deceased fails in the emergency presented by the facts, except

der his direction and control, which could not be performed because of his death, transmuted into a contract to work for Mrs. Getman upon a farm which she did not possess, and had no right to enter, and performed by working for the widow, and under her direction and control alone; and this, because of the supposed rule that the contract survived the death of the master, and remained binding upon his personal representatives. It is true that some interest in the personal property on the farm is claimed to have vested in the executrix, notwithstanding the terms of the will, and the inventory filed by her is appealed to, and the necessity of a resort to the personal property with which to pay debts; but there is no proof that the testator owed any debts, and the inventory covers nothing as to which Lacy's labor was requisite or necessary, except, possibly, some corn on the ground valued at \$18. All the grain inventoried was in the barn, needing only to be threshed, and must be assumed to have been there when testator died; and the other property consisted of farm tools and a cow and horse, to the use of which the widow was entitled, and which, if sold to pay possible debts, would have left the servant without means of doing his work, and with nothing to do unless for the widow. So that the bald question is presented whether the contract survived the testator's death, and bound his executrix, who was without power or authority of her own to perform, and had no interest in performance.

It seems to be conceded that the death of the servant dissolves the contract. *Wolfe v. Howes*, 20 N. Y. 197; *Spalding v. Rosa*, 71 N. Y. 40; *Devlin v. New York*, 83 N. Y. 14; *Fahy v. North*, 19 Barb. 341; *Clark v. Gilbert*, 32 Barb. 576; *Seymour v. Cugger*, 13 Hun, 29; *Boast v. Firth*, L. R. 4 C. P. 1.

Almost all of these cases were marked by the circumstances that the services belonged to the class of skilled labor. In such instances the impossibility of a substituted service by the representative of the servant is very apparent. The master has selected the servant by reason of his personal qualifications, and ought not, when he dies, to abide the choice of another, or accept a service which he does not want. While these cases possess, with a single exception, that characteristic, I do not think they depend upon it.

Fahy v. North was a contract for farm labor, ended by the sickness of the servant, and quite uniformly the general rule stated is that the servant's agreement to render personal services is dissolved by his death. There happens a total inability to perform. It is without the servant's fault, and so further performance is excused, and the contract is apportioned. If, in this case, Lacy had died on that day in July, his representative could not have performed his contract. McMahan, surviving, would have been free to say that he bargained for Lacy's services, and not for those of another, selected and chosen by strangers, and either the contract would be broken or else dissolved. I have no doubt that it must be deemed dissolved, and that the death of the

servant involves skilled or common labor; for, even as it respects the latter, the servant's character, habits, capacity, industry and temper, all enter into and affect the contract which the master makes, and are material and essential, where the service rendered is to be personal, and subject to the daily direction and choice and control of the master. He was willing to hire Lacy for a year; but Lacy's personal representative or a laborer tendered by him he might not want at all, and at least not for a fixed period, preventing a discharge. And so it must be conceded that the death of the servant, employed to render personal services under the master's daily direction, dissolves the contract. *Babcock v. Goodrich*, 8 How. Pr. N. S. 53.

But, if that be so, on what principle shall the master be differently and more closely bound? And why shall not his death also dissolve the contract? There is no logic and no justice in a contrary rule. The same reasoning which relieves the servant's estate relieves also the master's, for the relation constituted is personal on both sides, and contemplates no substitution. If the master selects the servant, the servant chooses the master. It is not everyone to whom he will bind himself for a year, knowing that he must be obedient and render the service required. Submission to the master's will is the law of the contract which he meditates making. He knows that a promise by the servant to obey the lawful and reasonable orders of his master, within the scope of his contract, is implied by law; and a breach of this promise in a material matter justifies the master in discharging him. *Rea v. St. John*, 9 Barn. & C. 890.

One does not put himself in such relation for a fixed period without some choice as to whom he will serve. The master's habits, character and temper enter into the consideration of the servant before he binds himself to the service, just as his own personal characteristics materially affect the choice of the master. The service, the choice, the contract, are personal upon both sides, and more or less dependent upon the individuality of the contracting parties, and the rule applicable to one should be the rule which governs the other. If, now, to such a case,—that is, to the simple and normal relation of master and servant, involving daily obedience on one side, and constant direction on the other,—we apply the suggested test of possibility of performance in substantial accord with the contract, the result is not different. It is said that if the master dies his representatives have only to pay, and anyone may do that. But under the contract that is by no means all that remains to be done. They must take the place of the master in ordering and directing the work of the farm, and requiring the stipulated obedience. That may prove to effect a radical change in the situation of the servant, as it seems to have done in the present case, leading the plaintiff to the verge of refusing to work further for either widow or executrix, whose views apparently jangled. The new master cannot perform the employer's side of the contract as the deceased would have

make the situation of the servant materially and seriously different from that which he contemplated and for which he contracted. We are therefore of opinion that in the case at bar the contract of service was dissolved by

his death.

*The judgment should
trial granted, with costs
All concur.*

NEW YORK COURT OF APPEALS (2d Div)

Catherine WRIGHT, *Resp't.*,

MUTUAL BENEFIT LIFE ASSOCIATION of America, *App't.*

(....N. Y.....)

A provision in a life insurance certificate that "no question as to the validity of an application or certificate of membership shall be raised unless . . . within two years" from date of the certificate, and during the life of the insured, includes the defenses of fraud in obtaining the insurance, and lack of insurable interest in the beneficiary.

(January 14, 1890.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Fourth Department, affirming a judgment of the Oswego Special Term in favor of plaintiff in an action upon a policy of life insurance. *Affirmed.*

Statement by **Potter, J.**:

This is an appeal from a judgment of the General Term of the Fourth Department affirming a judgment entered upon a verdict directed for the plaintiff at Special Term in Oswego County. The action is upon a certificate of life insurance or policy, dated December 6, 1883, and issued by the appellant upon the life of Charles F. Wright. The certificate was payable to Byron D. Houghton, and was for the sum of \$5,000. The assured died June 4, 1885. In December, 1885, or January, 1886, Houghton assigned his interest in the certificate to Catherine Wright by written assignment. Catherine Wright was the wife of the deceased, Charles F. Wright. Houghton paid all dues and assessments from the first, either directly or by advancing the necessary amounts, and charging them to said Charles F. Wright. The application upon which the certificate was issued contained an agreement on the part of the applicant "that if any misrepresentation or fraudulent or untrue answer or statement has been made, or if any fact which should have been stated to the association be suppressed," the agreement of assurance should be null and void. The applicant warranted the truth of the statements in his application.

Houghton stated in his proof of loss that at the time of his death the deceased owed him \$2,823.02, and the proof in the case shows that a considerable portion of that indebtedness existed at the time of the issuance of the policy, and increased until it reached the above amount. The defendant alleged in the answer that false and untrue statements were made by Wright in

his application with a view to the action of the defendant; also that Wright knew the falsity of the statements made by the defendant was cheated and that Wright and Houghton conspired to keep the truth in regard to the insurance from the applicant had been stated. Insurance would have been trial the defendant offered that the certificate was issued by Houghton and Wright upon the part of Wright, and defendant excepted, and defendant excepted court directed a verdict for \$5,200 damages, for which judgment was entered.

Mr. G. H. Crawford

An indisputable policy of insurance, for it leaves no room for doubt whether the statement of the plaintiff was fraudulent or not.

Bunyon, Life Assur. 8

A right of action cannot be maintained, and no court will lend its aid to found his cause of action upon an illegal act.

Collins v. Blantyre, 1881, 10 N. Y. 2d 100.

Analogous questions have been presented by the special terms and common carriers, and though the common carrier contracts to the extent of his liability, yet that this is given to a contract generally.

New York Cent. R. v. 17 Wall. 357 (21 L. 1873).

Syracuse, B. & N. Y. R. Co. v. 17 Wall. 357 (21 L. 1873).

Mr. Francis E. H.

ent: The clause under which the company defendant presents defenses which it offered, of fraud, or because it is a fraud on the part of the plaintiff. The law will not presume as illegal or against public policy a construction consistent with the law.

Ormes v. Dauchy, 8 N. Y. 2d 100.

Gokey, 68 N. Y. 804.

Courts will strive to uphold and valid within the law.

Coleman v. Beach, 8 N. Y. 2d 100.

McClure, 47 Barb. 206.

A party may waive constitutional, provis-

v. *Tillotson*, 24 Wend. 387; *Cooley*, Const. Lim. 181.

This clause has created what might properly be termed a short Statute of Limitations in favor of the insured, which is not against public policy.

Ripley v. Aetna Ins. Co. 30 N. Y. 136; *Mayor of N. Y. v. Hamilton F. Ins. Co.* 39 N. Y. 45; *Wilkinson v. First Nat. F. Ins. Co.* 72 N. Y. 499.

The Company defendant is estopped from denying the legality and force of the clause above quoted under the maxim that "no man should take advantage of his own wrong."

Calanan v. McClure, 47 Barb. 206; *Welland Canal Co. v. Hathaway*, 8 Wend. 480; *Broom, Legal Max.* 279; *Hill v. Epley*, 31 Pa. 331; *Titus v. Morse*, 40 Me. 348.

Potter, J., delivered the opinion of the court:

This is an action to recover of the defendant the amount it agreed to pay under a policy or certificate insuring the life of Charles F. Wright. Upon the trial, after the plaintiff had introduced the necessary proofs to entitle her to a recovery, the defendant offered to prove as a defense to the action that the deceased, Charles F. Wright, and Byron D. Houghton, the beneficiary named in the policy, for the purpose of obtaining the policy and of defrauding the defendant, falsely represented to the defendant that Wright, the insured, was not then suffering, and never had been suffering, from certain diseases which had seriously impaired his health, for the purpose of inducing and by means whereof defendant was induced to issue the policy insuring the life of said Wright, and that such representations were false, etc. This evidence was objected to by the plaintiff, that such proof was inadmissible under the provision of the policy that "no question as to the validity of an application or certificate of membership shall be raised unless such question be raised within the first two years from and after the date of such certificate of membership, and during the life of the member therein named;" and the objection was sustained, and defendant excepted. The defendant also offered to show that the beneficiary, Houghton, had no insurable interest in the life of the insured; in short, that it was a speculative and fraudulent scheme, devised and practiced by Houghton to secure an advantage to himself upon the life of Wright, which must soon terminate from the disease he was then afflicted with. This was also objected to by the plaintiff, and excluded by the court, and defendant excepted; the court holding that the defendant could not show any such thing, unless, during the life of the assured, or during the period of two years from the date of the policy, such question had been raised.

These rulings present the main question upon this appeal, and, inasmuch as I have reached the conclusion that the judgment should be affirmed, there is but little, if any, occasion to add anything to the reasons contained in the opinion of the general term affirming the judgment of the trial court in this case. 48 Hun, 61.

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not content that the language of the stipulation or waiver is not plain and comprehensive of everything which can constitute a defense, nor that the stipulation, though indorsed upon the certificate, does not form a part of the contract of insurance. But he argues, from certain supposed analogies to stipulations releasing carriers from liability, and which have been held not to exempt the carrier from liability for negligence, that it must have been intended between the defendant and the insured to except the defense of fraud from the operation of the stipulation in question. *Mynard v. Syracuse, B. & N. Y. R. Co.* 71 N. Y. 180; *Holsapple v. Rome, W. & O. R. Co.* 86 N. Y. 275.

It does not seem to me that there is any analogy between the two classes of liability, and nothing is more misleading than an assumed analogy. The liability of a common carrier of persons or property for injury or loss was adopted at a very early period, in view of the peculiar exigencies of the carrying trade, as a rule of public policy. The degree and extent of the liability of the carrier for negligence was fixed by law, and not by the terms of a contract between the parties. There were numerous contingencies incident to the carrying business, other than the negligence of the carrier, which might result in loss or injury to the person or goods carried, and for which the liability of the carrier would depend upon the facts to be established upon a trial. It might well be held, in construing an agreement of exemption in general terms, that its office and effect were to relieve from those grounds of liability which depended upon the evidence, and not the liability which was fixed by law. The rule laid down in the cases referred to by the appellant's counsel is merely a rule of the construction of the terms and effect of an agreement. It by no means holds that liability for negligence may not be stipulated away, for the contrary has been repeatedly held, but that the terms of the stipulation in those cases did not provide exemption from liability for negligence.

The case under consideration is an alleged fraud in making a private contract between the parties to it. The contract contains a great number of material representations in relation to the past and present condition of the insured, and of course they are variable with every applicant for insurance and every person insured. Such representations, if untrue, constitute a breach of warranty which will avoid the contract of insurance. If the representations are known by the party making them to be untrue when made, they would also constitute a fraud, and avoid the contract of insurance. The difference between the representations and the proof of them upon a trial to avoid the contract would be only the fact whether the party knew the representation was false when he made it. It is to be presumed that the defendant had some purpose when it offered to the insured a contract containing the stipulation, and that the stipulation itself had some meaning. The court is asked to hold that the parties to the stipulation understood (for unless the insured so understood the stipulation the defendant was

practicing a fraud upon him) that, while the stipulation embraced all representations that were untrue, it did not embrace the same representations if known by the party making them to be untrue. The practical difference or effect of this would be that upon a trial to enforce the contract the proofs of the representations, their materiality and untruth, would have to be made all the same; but the stipulation would come in as a defense to all representations, save those the insured knew to be false. While I might, perhaps, entertain the idea that the insurer so understood the stipulation, I am very confident that the insured did not so understand it. It seems to me the analogy is based upon an entire misconception of the object and meaning of the stipulation. It is not a stipulation absolute to waive all defenses, and to "condone fraud." On the contrary, it recognizes fraud and all other defenses, but it provides ample time and opportunity within which they may be, but beyond which they may not be, established. It is in the nature of, and serves a similar purpose, as Statutes of Limitations and Repose, the wisdom of which is apparent to all reasonable minds. It is exemplified in the Statute giving a certain period after the discovery of a fraud in which to apply for redress on account of it, and in the law requiring prompt application after its discovery, if one would be relieved from a contract infected with fraud. The parties to a contract may provide for a shorter limitation thereon than that fixed by law; and such an agreement is in accord with the policy of statutes of that character. *Wilkinson v. First Nat. F. Ins. Co.* 72 N. Y. 499, 502.

No doubt the defendant held it out as an inducement to insurance by removing the hesitation in the minds of many prudent men against

paying ill-afforded premiums for a series of years; and in the end, and after the payment of premiums, the death of the insured, and the loss of his and the testimony of others, the claimant, instead of receiving the promised insurance, is met by an expensive lawsuit to determine that the insurance which the deceased has been paying for through many years has not, and never had, an existence except in name. While fraud is obnoxious, and should justly vitiate all contracts, the courts should exercise care that fraud and imposition should not be successful in annulling an agreement to the effect that if cause be not found and charged within a reasonable and specific time, establishing the invalidity of the contract of insurance, it should thereafter be treated as valid. Hence I fail to perceive any error in the disposition made of this question in the court below. The right of the plaintiff, as the assignee of the payee specified in the policy, to recover the whole amount provided by the policy, is well settled, even if the debt owing the payee by the person whose life was insured was less than the sum insured, or had been paid in the lifetime of the insured, or if a portion of the sum provided by the policy was designed by the payee in a contingency for the benefit of some other than the payee under the policy. *Olmsted v. Keyes*, 85 N. Y. 593, 599, and cases cited.

If there is a legitimate *cestui que trust* (of which there is serious question), the plaintiff is the trustee, and their rights can be adjusted without involving or imperiling the defendant. Section 449, Code Civ. Proc.; *Hutchings v. Miner*, 46 N. Y. 456.

I think the judgment should be affirmed, with costs.

All concur (*Haignt, J.*, in result), except *Follett, Ch. J.*, and *Vann, J.*, not sitting.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Charles CIRIACK
v.
MERCHANTS WOOLEN CO

(....Mass.....)

1. A master is not bound to warn his servant, a boy twelve years of age, of the danger of injury in case he comes in contact with rapidly revolving cog-wheels in plain sight upon machinery into the immediate vicinity of which he is about to be sent, where he has been employed about the machinery for nearly two months and possesses the intelligence common to boys of his age.

2. If, however, the boy possesses less than average intelligence, which the master ought to have known, and is sent on an errand requiring haste to a dimly lighted place between machinery with gearing so arranged that it is likely to catch his clothing and draw him into it and injure him, and there has been nothing in his

previous employment to cause him to consider the danger of an accident happening in that way, there is evidence which will justify a jury in finding the master negligent in failing to give him warning, in an action to recover damages for injuries received in that way.

(February 26, 1890.)

ON report from the Superior Court for Suffolk County of a case brought to recover damages for personal injuries alleged to have resulted from defendant's negligence, in which a verdict had been found for plaintiff. *Judgment on the verdict.*

At the conclusion of the evidence defendant requested the court to charge that upon all the evidence the jury would not be justified in finding a verdict for plaintiff. The court refused to make this ruling, but submitted the case to the jury upon instructions to which no exception was taken, and the jury returned a verdict for plaintiff.

He then, by agreement of the parties, reported the case for the determination of the Supreme Judicial Court, judgment to be entered for defendant if the ruling was wrong; otherwise judgment to be entered on the verdict.

NOTE.—As to the duty of the master to inform his servant of risks to which the latter is subjected in the course of his employment, see *Brasil Block Coal Co. v. Gaffney*, 4 L. R. A. 850, note.

What risks are assumed. *Foley v. Pettes Mach. Works*, 4 L. R. A. 51, 149 Mass. 294.

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See also 7 L. R. A. 283.

Greenhood, for plaintiff.

An employer who exposes to danger, even with his own assent, a servant who is, in fact, immature in years, wanting in experience, ignorant or deficient in ordinary capacity, and for one or more of these reasons incapable of fully appreciating the dangers of his situation, must give him such instructions and cautions as will enable such servant, under all the circumstances surrounding such exposure, to properly guard himself against such dangers, while carrying out the directions given him.

Coombs v. New Bedford Cordage Co. 102 Mass. 572; *Sullivan v. India Mfg. Co.* 113 Mass. 396.

This obligation is an absolute one, and the employer is not relieved from it until the servant understands, in fact, the dangerous character of his situation by fully appreciating the nature of the dangers and the consequences of a failure to avoid them.

Hickey v. Taafe, 105 N. Y. 26, 7 Cent. Rep. 72; *Finnerty v. Prentice*, 75 N. Y. 615.

The same rules apply where the "necessity for immediate action" or manifest temporary mental confusion, or the form of the order given to the servant, are such that instructions or cautions may be essential.

Lawless v. Connecticut R. Co. 136 Mass. 1; *Russell v. Tylotson*, 140 Mass. 201; *Coombs v. New Bedford Cordage Co.* *supra*.

The obligation is plainly stronger where the servant is immature in years, inexperienced, ignorant, wanting in ordinary capacity, or suffering from temporary mental confusion, and the danger is a secret or peculiar one, which nothing short of knowledge gained by experience and use of judgment can make apparent to him.

Wheeler v. Wason Mfg. Co. 135 Mass. 294; *O'Connor v. Adams*, 120 Mass. 427; *Glozier v. Dwight Mfg. Co.* 148 Mass. 22; *White v. Nonantum Worsted Co.* 144 Mass. 297, 3 New Eng. Rep. 899; *Ferren v. Old Colony R. Co.* 143 Mass. 197.

The evidence was sufficient to justify the jury in finding that the source of danger injuring plaintiff was a secret and peculiar one, of which plaintiff neither knew nor was bound nor expected to know anything, and which he failed to avoid, through no fault of his own, but through the neglect of defendant in failing to warn him against it.

Davis v. Cent. Cong. Society, 129 Mass. 367; *Learoyd v. Godfrey*, 138 Mass. 315; *White v. Nonantum Worsted Co.* 144 Mass. 276, 3 New Eng. Rep. 899; *Spicer v. South Boston Iron Co.* 138 Mass. 426; *O'Brien v. McGlinchy*, 68 Me. 552; *Western Maryland R. Co. v. Stanley*, 61 Md. 266.

The defendant had no right to assume that the plaintiff had any knowledge, which it was bound to impart to him, unless he actually had such knowledge, or said or did something which led the defendant to reasonably believe that he possessed such knowledge.

Atkins v. Merrick Thread Co. 142 Mass. 431.

To assume that plaintiff, a mere boy of twelve years of age, who knew nothing about machinery, ought to have appreciated the existence of this secret and peculiar source of danger, and

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South Boston Iron Co. v. O'Connor v. Adams and Ferren v. Old Colony R. Co. supra.

Had the source of danger not been a secret and peculiar one, the evidence showing (1) plaintiff's tender age, (2) failure to receive any instructions of any sort, at any time, plaintiff's ignorance of the dangers of revolving machinery, and the evidence as to want of light, were sufficient to justify the jury in finding the plaintiff in no fault, and the defendant guilty of negligence.

Plumley v. Birge, 124 Mass. 57; *Washington & G. R. Co. v. Gladmore*, 82 U. S. 15 Wall 401, 408 (21 L. ed. 114); *Swoboda v. Ward*, 40 Mich. 420, 424; *Conroy v. Vulcan Iron Works*, 62 Mo. 35, 38; *Hill v. Gust*, 55 Ind. 45; *Coombs v. New Bedford Cordage Co. supra*.

The absence of instructions and the denial of knowledge, coupled with proof of tender age, always makes it "a question for the jury to determine from all the facts" whether the failure to avoid even dangers in plain sight is due to the neglect of the employer or not.

Hill v. Gust, supra; *Dowling v. Allen*, 74 Mo. 13; *Sherman v. Chicago, M. & St. P. R. Co.* 34 Minn. 259; *Barbo v. Bassett*, 35 Minn. 485.

No court has assumed that a boy of tender age, of even ordinary intelligence, in a given time, would, in the exercise of reasonable care, have acquired knowledge and appreciation of the dangers of revolving machinery, even in plain sight, in the face of direct and positive evidence that he had not done so.

Plumley v. Birge and Coombs v. New Bedford Cordage Co. supra; *Hutzege v. Cutler & S. Lumber Co.* 51 Mich. 272; *Dowling v. Allen, supra*; *Evans v. Fitchburg R. Co.* 111 Mass. 142; *Columbus & I. C. R. Co. v. Arnold*, 31 Ind. 174; *Swoboda v. Ward*, 40 Mich. 420, 423; *Gould v. McKenna*, 86 Pa. 297; *Maguire v. Spence*, 91 N. Y. 303; *Hall v. Union P. R. Co.* (Colo.) 16 Fed. Rep. 744; *East Tennessee, V. & G. R. Co. v. Bayless*, 74 Ala. 150; *Conroy v. Vulcan Iron Works*, 62 Mo. 35, 38; *Chicago & A. R. Co. v. Becker*, 76 Ill. 25, 33.

Youth, excitement, haste and strict obedience, when present all at one time, are recognized as conditions in which proper memory and reasonable judgment are not expected, and excuse what in their absence would be gross neglect.

O'Connor v. Adams, supra; *Haley v. Case*, 142 Mass. 316; *Louisville, N. A. & C. R. Co. v. Frawley*, 7 West. Rep. 44, 110 Ind. 18; *Patton v. Western N. C. R. Co.* 96 N. C. 455; *Mann v. Oriental P. Works*, 11 R. I. 152; *Cassidy v. Angell*, 12 R. I. 447; *Kain v. Smith*, 89 N. Y. 375; *Linnahan v. Sampson*, 126 Mass. 506, 511; *Lee v. Woolsey*, 109 Pa. 124; *Chaplin v. Hawes*, 3 Car. & P. 554.

Messrs. R. M. Morse, Jr., Henry G. Nichols and Charles K. Cobb, for defendant.

It is not suggested that the plaintiff was "of manifest imbecility," and "the foreman was entitled to assume that the plaintiff would protect himself by whatever precautions were necessary."

Russell v. Tylotson, 140 Mass. 201.

Assuming the plaintiff to have had the intelligence and understanding which are usual

with boys of his age, there was no want of due care on the part of the defendant.

Ciriack v. Merchants Woollen Co. 146 Mass. 182, 5 New Eng. Rep. 728; *Crowley v. Pacific Mills*, 148 Mass. 228; *Probert v. Phipps*, 149 Mass. 258; *O'Keefe v. Thorn* (Pa.) 24 W. N. C. 879.

If, on account of his lack of intelligence, there was any negligence in not giving instructions, it was the negligence of the foreman, a fellow servant of the plaintiff, not that of the defendant.

Ford v. Fitchburg R. Co. 110 Mass. 261; *Huddleston v. Lowell Machine Shop*, 106 Mass. 282, 285; *Coombs v. New Bedford Cordage Co.* 102 Mass. 572; *Duffy v. C'pton*, 118 Mass. 544; *O'Connor v. Roberts*, 120 Mass. 227; *Zeigler v. Day*, 123 Mass. 152; *Felch v. Allen*, 98 Mass. 572; *Flynn v. Salem*, 134 Mass. 351; *Johnson v. Boston*, 118 Mass. 114.

Knowlton, J., delivered the opinion of the court:

This case has once before been considered by this court (see 146 Mass. 182, 5 New Eng. Rep. 728), and on the testimony then presented it was not easy to determine, as it is not now upon slightly different testimony, whether there was any evidence of negligence on the part of the defendant. The only negligence alleged is the failure to warn the plaintiff of the dangers to which he was subjected in doing his work.

An employer is under no obligation to warn an employe of dangers which are obvious, nor to instruct him in matters which he may fairly be supposed thoroughly to understand. Nor is it the duty of the master to admonish his servant to be careful, when the servant well knows his danger, and the importance of using care to avoid it.

It is the duty of the servant to exercise care proportionate to the danger of his situation as he understands it, and if he fails to do so the fault is his and not his master's. But where the work of a servant exposes him to danger of which he is ignorant, and which, from youth or inexperience, he is manifestly incapable of comprehending without assistance, it is the duty of his master, if he knows or ought to know of it, to give him such warning and instruction as is necessary for his safety. In determining the master's duty in such a case, the inquiry is, What instruction does the servant appear to need; is there reason to believe him ignorant of anything which for his protection he ought to know, or incapable of appreciating the risks from what he sees around him? In the absence of anything to show the contrary, the master has a right to assume that he knows those facts of common experience, with which ordinary persons of his age and appearance are familiar.

In hiring a boy twelve years of age, and apparently of average intelligence, an employer is not called upon to tell him that if he holds his hand in fire it will be burned, or strikes it with a sharp instrument it will be cut, or thrusts it between the teeth of a revolving cog-wheel in the gearing of a mill, it will be crushed. From infancy, and through childhood, as well as in later life, we are all making observations and experiments with material substances, and

every person of ordinary faculties acquires knowledge, at an early age, of those familiar facts which force themselves on our attention through our senses.

There is nothing in this case to warrant a jury in finding the defendant negligent in omitting to tell the plaintiff that there were cog-wheels on the gig, or that the machinery would injure him if he allowed his hand or arm to get into the gearing, or in failing to repeat a warning which had once been given, or to inform him of risks which he understood himself. *Russell v. Tillotson*, 140 Mass. 201; *Crowley v. Pacific Mills*, 148 Mass. 228; *Williams v. Churchill*, 187 Mass. 248; *Buckley v. Guita Percha & R. Mfg. Co.* 118 N. Y. 540.

But the case presents itself in an aspect somewhat different from that which it wore at the former hearing. Besides some difference in the details of the testimony, at the last trial, evidence was introduced from numerous witnesses, which, though contradicted, would warrant a jury in finding that the plaintiff was a boy of less than the average intelligence of boys of his age, and that the defendant knew it, or from his appearance ought to have known it, before the accident. There was additional evidence that the place where he was injured was dimly lighted. The undisputed testimony at the former trial tended to show that he possessed at least the intelligence usual in boys of his age, and that fact was referred to in the opinion as one of the grounds of the decision.

It now appears that, while he had worked for a considerable time in the room where the gearing was plainly visible, so that he was undoubtedly familiar with it in a general way, he had never worked so near it as to have occasion specially to consider the risk of getting his clothing caught in it, or the danger of being drawn into it and seriously injured, if some loose part of one of his garments should come in contact with it. There was evidence that a sleeve of his jacket was caught, and that his arm was thus drawn between the wheels. It seems to have been his duty to obey the overseer, who, as he testifies, told him to pick up the punch. The work took him to a place where he had never had occasion to work before; the order was imperative, calling for haste. He had had no instruction, and it is not clear that he had had any observation or experience, which showed the danger, that in getting down and looking under the machine and getting up again some part of his clothing might come in contact with the gearing and be caught, and draw his hand or arm between the wheels.

On the whole, we are of opinion that there was some evidence to submit to the jury on the question, whether the plaintiff was not obviously in need of information as to this risk. On similar grounds, the plaintiff was allowed to go to the jury and receive a verdict in *Coombs v. New Bedford Cordage Co.* 102 Mass. 572. See also *Wheeler v. Watson Mfg. Co.* 135 Mass. 294; *Glover v. Dwight Mfg. Co.* 148 Mass. 22; *Swo-boda v. Ward*, 40 Mich. 420; *Douling v. Allen*, 74 Mo. 13; *Huizaga v. Cutler & S. Lumber Co.* 51 Mich. 272.

There was evidence for the jury upon the question whether the plaintiff was in the exercise of due care.

Judgment on the verdict.

1. The attempt to seduce and debauch the wife of another man upon the latter's own premises will not sustain an action of trespass for breaking and entering plaintiff's close, in which such attempt is alleged merely by way of aggravation, if the defendant had license to go upon the premises.
2. A person who enters another's premises under an express license, if it was not fraudulently obtained, does not become a trespasser *ab initio* by wrongful acts while upon the premises, although he would become such if he had entered by authority conferred by law.
3. An averment characterizing as fraudulent a representation by a defendant in trespass that he wanted to enter the premises and obtain a shovel, is insufficient to raise the question of fraud therein without averring facts necessary to establish fraud.

(December 11, 1893.)

APPEAL by plaintiff from a judgment of the Circuit Court for Clinton County in favor of defendant in an action of trespass *quare clausum fregit* in which the attempt to debauch plaintiff's wife was alleged by way of aggravation. *Affirmed.*

The facts sufficiently appear in the opinion.

Messrs. Charles M. Zion and James N. Sines for appellant.

Messrs. Palmer & Palmer for appellee.

Mitchell, Ch. J., delivered the opinion of the court:

Bennett sued McIntire in trespass, alleging that the latter, with force and arms, entered upon the plaintiff's premises, and into his dwelling-house thereon situate, to his damage. By way of aggravation, the plaintiff charged that the defendant, having so wrongfully entered upon his premises, attempted to seduce and debauch the plaintiff's wife, by wickedly soliciting and attempting to persuade her to submit to illicit carnal intercourse, whereby the plaintiff was greatly grieved and damaged.

The defendant, after pleading the general issue, answered in justification to the effect that he entered upon the plaintiff's premises by his leave and license, for the purpose of obtaining possession of a shovel which the plaintiff had theretofore borrowed from him, and that he did no injury or damage to any property, real or personal, belonging to the plaintiff, and that this was the identical trespass mentioned, etc.

The plaintiff replied, in substance admitting the license, but averred that the defendant abused the privilege conferred by misconducting himself as above alleged, and charged that he obtained the plaintiff's consent to enter upon his premises by fraudulently representing that he wanted to use his shovel, which the plaintiff had theretofore borrowed, but that in truth he did not want to use that implement at all, but intended from the beginning to seduce and

debauch the plaintiff's wife, and that the pretense that he wanted to use his shovel was fraudulently resorted to, merely as a pretext to obtain plaintiff's consent to enter upon his premises. The court sustained a demurrer to the reply.

It is very clear that the gravamen of the action is trespass for forcibly breaking and entering the plaintiff's close. The averments relating to the defendant's improper conduct belong to the description of the trespass, and are only laid by way of aggravation of damages, and not as the ground of the action. It was decided in England, more than 100 years ago, that an action of trespass would lie when the defendant entered the plaintiff's house without leave and debauched his daughter (*Bennett v. Allcott*, 2 T. R. 166); and in an early case in Connecticut it was held that an action of trespass for breaking and entering the plaintiff's house with intent to ravish the plaintiff's wife would lie, and that evidence that the latter was a lewd and abandoned character was not admissible in mitigation of damages. *Datenport v. Russell*, 5 Day, 145.

In the case last cited, it was said, in effect, that the breaking and entering the house were the ground of the action, and that the other acts done in pursuance of the unlawful intent, not having been laid *per quod consortium amissit*, were merely descriptive to show the nature and enormity of the trespass. The action being trespass for breaking the plaintiff's close, "if the trespass fall to the ground, that which is a consequence must necessarily fall with it."

Thus it is said in *Razor v. Qualls*, 4 Blackf. 286: "In trespass for breaking and entering the plaintiff's house, debauching his daughter, and getting her with child, *per quod consortium amissit*, if the defendant can justify the entering of the house, he defeats the action." *Taylor v. Cole*, 3 T. R. 292.

The answer shows leave and license from the plaintiff to go upon his premises, and was therefore sufficient. As we have seen, the gravamen of the action being the breaking and entering the plaintiff's close, the defendant's lascivious conduct having been alleged merely by way of aggravation, the answer fully justified the entry, by showing leave from the plaintiff. It was therefore incumbent on the plaintiff to now assign, by way of replication, such special matter as to make it appear, if he could, that the defendant was a trespasser *ab initio*, notwithstanding the license. *Taylor v. Cole*, *supra*. This he attempted to do.

One of the questions decided in *Six Carpenters' Case*, 8 Coke, 146a, 1 Smith, Lead. Cas. *216, 7th Am. ed. 274, was that "when an entry, authority or license is given to anyone by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but where an entry, authority or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*."

The defendant here entered in pursuance of express authority conferred by the plaintiff, and not under authority conferred by law, and, according to all the cases, when the plain-

convert that which was originally done under the sanction of his own license into a trespass, but must seek his remedy for the acts done in excess of the authority by some other appropriate action. *Dingley v. Buffum*, 57 Me. 379; *Bradley v. Davis*, 14 Me. 44; *Jewell v. Mahood*, 44 N. H. 474; *Smith v. Pierce*, 110 Mass. 85; *Waterman, Trespass*, §§ 790, 791.

The reason for the rule is that, where the law has given an authority, it seems reasonable, in order to secure such persons as are the objects thereof, that it should make void everything done by the abuse of that authority, when it is abused, and leave the abuser in the same situation as if he had done everything without any authority. In the other case, where a man who is under no necessity of giving an authority does so, and the person receiving the authority abuses it, there is no reason why the law should interpose to make void everything done by such abuse, because it was the man's own folly to trust another with an authority who has shown himself not fit to be trusted therewith. *Bacon, Abr.* 451, title *Trespass*.

If either paragraph of the reply had stated facts sufficient to justify the conclusion that the license had been obtained by fraud, or under a false pretense, we should have a different question. But, while the pleader draws the conclusion that the defendant's representation that he desired to obtain his shovel, which

been declared that one lie upon fraud must do the facts necessary to that simply to characterize fraudulent is not sufficient false representation, in a cause of action or of some existing or past false promise as to future. *Richter v. Irwin*, 28 Ind. 348; *Caylor v. Roe*. It does not appear that representation concerning fact which was untrue, replies was properly sustained.

The court sustained a plaintiff's evidence. Without the evidence, it is sufficient appeared therein that borrowed the defendant's alter, being a neighbor, entered upon the plaintiff's consent and authority, the borrowed utensil. sion would have been in tions which the parties o other, without any affirm was therefore no evidence ference could have been fendant was a trespasser plaintiff's land.

Judgment affirmed, writ

PENNSYLVANIA SUPREME COURT.

John McCLAIN *et al.*, Appts.,

CITY OF NEW CASTLE.

(.....Pa.....)

A mill-dam, which, if a nuisance at all, has become so by the gradual growth of a city around it, will not be abated in equity as a nuisance, where the fact that it is a nuisance has not been established at law.

(January 6, 1890.)

APPEAL by defendants from a decree of the Court of Common Pleas of Lawrence County in favor of plaintiff in an action to enjoin the maintenance of a certain mill-dam, and to have the same declared a public nuisance and abated. *Reversed*.

The case was referred to a master, who reported in favor of plaintiff. Exceptions having been filed to his report, the case came on for hearing in the court below and the judge also found for plaintiff, stating the point at issue as follows:

"The defendants are owners of a grist mill. They get power for its operation from a dam built across the Neshannock Creek, within the limits of the City of New Castle. They and their predecessors have been in the enjoyment of this privilege since about 1817, and there is no evidence to justify a doubt as to their title.

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But the plaintiff complains that the dam has become a public nuisance and constantly repeated damage.

"The facts alleged in complaint are of three classes: gravel, dirt, muck, filth accumulated in the bed of the water in low stages; impure, unwholesome, dangerous to the public health; causes a frequent flooding of highways, as well as of a in the vicinity of the stream other drift in the streets making them impassable, inconvenience to the citizens and injury to the health of the property, business of the inhabitants of the great injury to the public lots, buildings, cellars, portion of the City; and of the stream is impeded at times flooded, and drainage of a large port ferred with and prevented.

"The defendants in their general averments of nuisance in plaintiff's bill; but the particular facts averred avoidance thereof, their

have been erected and made since the erection of said dam and the building of their mill, and with full knowledge of the facts; that said water-power was private property, and necessary to the working of the said mill; that the destruction of the dam would cause great loss and damage to them, and would entirely deprive them of their water-power, which itself is of great value; that if the dam is being filled with unhealthy material, this is being done by persons who have voluntarily settled upon the line of said creek, and for which defendants are not answerable; and, finally, they cannot be deprived of the dam and water power without just compensation first made or secured by the plaintiff."

Defendants thereupon appealed to this court.
Mr. R. B. McComb for Raney and McClain, appellants.

Mr. W. D. Wallace for Etna Iron Works, appellant.

Messrs. Winternitz, McConahy & Brown, for heirs of William H. Brown, deceased, appellants:

If the witnesses contradict each other in relation to the facts constituting a public wrong, equity will refuse to interfere, and to secure redress the parties must have recourse to their remedy at law.

Rhodes v. Dunbar, 57 Pa. 274; *Crowder v. Tinkler*, 76 Ves. Jr. 617; *Story*, Eq. Jur. § 924; *Hagner v. Heyberger*, 7 Watts & S. 107; *Richards' App.* 57 Pa. 105; *McCaffrey's App.* 105 Pa. 253; *Grey v. Ohio & P. R. Co.* 1 Grant, Cas. 412.

The City can have the wrongs alleged tried by a jury, but can have them redressed in no other way.

Atty-Gen. v. Cleaver, 18 Ves. Jr. 211; *Knoll v. Light*, 76 Pa. 268; *Wier's App.* 74 Pa. 241; *Moyamensing v. Long*, 1 Pars. Eq. Cas. 146; *Com. v. Rush*, 14 Pa. 186.

The mere diminution of value of property by the nuisance, without irreparable mischief, will not furnish grounds for equitable relief.

Brightly, Eq. p. 249, § 293.

Messrs. W. T. Burns, D. B. Kurtz and L. T. Kurtz, for appellee:

A public nuisance is a violation of public right; it is sufficient if it produces that which is offensive to the senses, and which renders the enjoyment of life or property uncomfortable.

Wood, Nuis. §§ 17, 495; *Smith v. Cummings*, 2 Pars. Eq. Cas. 92; *Dennis v. Eckhardt*, 3 Grant, Cas. 390.

Penning back the water of a stream so as to render it stagnant or prejudicial to the health of the neighborhood is a nuisance.

Wood, Nuis. §§ 75, 76, 120, 698.

If the injuries complained of constitute a nuisance, the jurisdiction in equity clearly attaches.

Stockdale v. Ullery, 87 Pa. 486; *Wood, Nuis.* § 772; *Brightly*, Eq. §§ 288, 290, 292, 293; 3 *Pom. Eq. Jur.* § 1394; *Bispham*, Eq. Jur. § 439; *Biddle v. Ash*, 2 Ashm. 211; *Com. v. Rush*, 14 Pa. 186; *Moyamensing v. Long*, 1 Pars. Eq. Cas. 148.

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Pa. 496; *Bunnell's App.* 69 Pa. 59; *Hacks' App.* 101 Pa. 245; *Rankin's App.* (Pa.) 2 L. R. A. 429.

The facts that the dam is useful, that it is valuable, that it was erected by authority of law, and that it has been of long continuance, do not prevent its becoming or being a nuisance.

Wier's App. 74 Pa. 230.

Prescription, whatever the length of time, has no application.

Northwestern Fertilizing Co. v. Hyde Park, 97 U. S. 659 (24 L. ed. 1086).

The decree in this case is not an infringement of the defendant's constitutional rights, as claimed under secs. 6 and 9, art. 1.

Byers v. Com. 42 Pa. 89; 3 *Story*, Com. Const. pp. 264, 661; *Den v. Hoboken Land & Imp. Co.* 59 U. S. 18 How. 272 (15 L. ed. 872).

Paxson, Ch. J., delivered the opinion of the court:

The mill-dam in this case is not a nuisance *per se*. The master so finds, and the evidence fully warrants it. If a nuisance at all it has become so by the gradual growth of the City of New Castle around it, and the emptying of cesspools into it. The dam in some shape has been in existence for over half a century, and the water-power therefrom has been used for milling and manufacturing purposes. At present it is only used for a flour mill, which in times of low water is operated by steam. It is not denied that the water-power is valuable, and that its destruction would entail a serious loss on the owner. The City of New Castle filed this bill, praying the court below to decree the dam a nuisance and order its removal. The bill avers that it is "a public and common nuisance; is greatly injurious to the public streets, highways, safety, health and general welfare of said City, and seriously affects and damages the inhabitants thereof in their property, business and occupations, and interferes with and prevents the proper drainage of a large part of the territory."

The learned master has found the dam to be a public nuisance, which finding was approved by the learned court below, and a decree entered for its removal. From this decree the defendants have appealed.

While it may be conceded that a business which is useful and necessary may become a nuisance by reason of the growth of a village or town around it, yet there is a manifest distinction between such a case and that of a man who seeks to establish an offensive business in a thickly populated neighborhood.

It was said by *Justice Sharswood* in *Wier's App.* 74 Pa. 230: "There is a very marked distinction to be observed in reason and equity between the case of business long established in a particular locality, which has become a nuisance from the growth of population and the erection of dwellings in proximity to it, and that of a new erection threatened in such a vicinity. Carrying on an offensive trade for any number of years in a place remote from buildings and public roads does not entitle the owner to con-

upon which it is a nuisance. As the City extends, such nuisances should be removed to the vacant grounds beyond the immediate neighborhood of the residences of the citizens. . . . It certainly ought to be a much clearer case, however, to justify a court of equity in stretching forth the strong arm of injunction to compel a man to remove an establishment in which he has invested his capital, and been carrying on business for a long period of time, from that of one who comes into a neighborhood proposing to establish such a business for the first time, and who is met at the threshold of his enterprise by a remonstrance and notice that if he persists in his purpose application will be made to a court of equity to prevent him."

We may supplement these well-considered remarks by saying that they apply with especial force to a case where the property alleged to be a nuisance cannot be removed, and a decree to abate it means its destruction. In such cases a court of equity should move slowly, and decline to act upon conflicting evidence.

We do not question the power of a court of equity to restrain and abate public nuisances. This is settled by a line of decisions. But the authorities uniformly limit the jurisdiction to cases where the right has first been established at law, or is conceded. It was never intended, and I do not know of a case in the books, where a chancellor has usurped the functions of a jury, and attempted to decide disputed questions of fact, and pass upon conflicting evidence in such cases. The learned master below held that "the right at law need not be first established," and cites in support of his ruling *Com. v. Rush*, 14 Pa. 186, and *Bunnell's App.* 69 Pa. 59. It requires but a glance at those cases to see that they are not authority for such position. In *Com. v. Rush* the aid of equity was invoked to restrain the erection of a dwelling-house upon a public square of the city, and the facts were admitted by the pleadings. There was no disputed question of fact. Such an erection was a nuisance *per se*. The learned judge who heard the case below in *Com. v. Rush* delivered an elaborate opinion in which he discusses this subject, and cites numerous authorities, after which he said: "The principle, then, appears to be that where the bill is filed by the Attorney-General, and the right is clear, and the threatened injury irreparable, an injunction will be awarded, although the right has not been established at law. And that this is in accordance with the fifth clause of the Act of Assembly, above referred to, giving equity jurisdiction to this court, is clearly stated in the case of *Hagner v. Heyberger*, 7 Watts & S. 107, by Mr. Justice Sergeant, who says: 'The object of this clause was to provide adequate redress in cases where, although an action at law was maintainable, yet the injury might be irreparable, and it was necessary to justice to step in and prevent its being committed by a summary process. Thus if there were sufficient ground to believe, in consequence of threats or otherwise, that an individual was about committing waste in timber, etc., or that a corporation was grossly abusing

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done, for which damage compensate, and the legal remedy tardy and inefficient, while of misfeasance, nuisance, destruction of property, and so on, to law and injurious to individuals, a summary resort to the strong arm of an injunction to prevent its being done."

I have quoted this extract of the court below in *Com. v. Rush* as was affirmed here up to it thus became in a manner a court. It promulgates a rule, and denies, that where a court of equity may in a case of irreparable injury is threatened and prompt action is necessary by an injunction, and speedy remedy can be obtained to a mill-dam which has been over half a century.

In *Bunnell's App.* the court correctly indicates the point decided. "A road was laid out in 1868; in 1868 he erected a building what was alleged to be the nuisance, and a special injunction in equity to restrain him from the erection, etc., alleging that the evidence was conflicting. The road had been opened by the city, it had been opened, and the road had been frequently used. The proceeding in equity was maintained: (1) because of the location of the road; (2) because a full remedy at law; (3) that the injury was not permanent and irreparable."

In that case it was said by the court that "the mere fact that the injury is at law by indictment or action does not prevent the exercise of the jurisdiction. It is a reason why the jurisdiction should be confined to cases of irreparable injury, when the injury is irreparable, it is not await the slow progress of the law."

No one doubts the jurisdiction of equity in the case of a nuisance as a bone-boiling establishment, or pig sty, or other similar nuisance, with obstructions to public health as before observed, this mill-dam case *per se*. Whether it depends upon the testimony of the witnesses. This is especially so in the matter of the health of the citizens of repute who reside in New Castle testify that the increased sickness of the people as healthy in the vicinity of other parts of the City. This is finding out that it is a nuisance waiting all these years, it is a truth that there is any such thing as the severe and summary remedy until the character of the nuisance has been passed upon by a jury. A short way for the City to go involves no compensation to

one of them testifies that it could benefit his property to the amount of \$2,000; others have doubtless testified under the bias which self-interest creates. We think that under all the circumstances of this case the defendants are entitled to a trial by jury before their property shall be condemned as a nuisance and destroyed. The City may, if it sees proper, proceed against the defendants by an indictment or by a suit at common law. When the right is thus settled, then and not till then will jurisdiction attach in equity. *Non constat* that the defendants, after a verdict, should one be rendered against

if we sustain this bill it can hardly imagine a case in which we could deny the jurisdiction, no matter how disputed the facts may be, or contradictory the testimony. Heretofore the jurisdiction of equity has been confined to nuisances *per se*, or where the right is clear, or has been settled by the verdict of a jury. We think it better to adhere to the beaten track.

The decree is reversed, and the bill dismissed at the cost of the appellees, but without prejudice to their right to proceed by indictment or suit at common law.

WEST VIRGINIA SUPREME COURT OF APPEALS.

DARBY & Co. *et al.*, and Michael Reilly
et al., Appts.,
v.

John J. GILLIGAN *et al.*

(... W. Va.)

***Where one member of a mercantile firm purchases the interest of the other member, and in consideration thereof assumes to pay all the partnership debts, the firm and both members being at the time insolvent, or on the eve of insolvency, and shortly thereafter the pur-**

***Head note by SNYDER, P.**

NOTE.—Partnership property to be applied to partnership debts.

The *corpus* of the effects is joint property, and neither partner separately has anything in that *corpus*; but the interest of each is only his share of what remains after the partnership debts are paid and accounts are taken. *Witter v. Richards*, 10 Conn. 37; *Beecher v. Stevens*, 43 Conn. 587; *Pieroe v. Jackson*, 6 Mass. 243; *Doner v. Stauffer*, 1 Pen. & W. 198; *Crane v. French*, 1 Wend. 311; *Place v. Sweetzer*, 16 Ohio, 142; *Hurley v. Walton*, 63 Ill. 200; *Taft v. Schwamb*, 80 Ill. 239; *Williams v. Gage*, 49 Miss. 777; *Gaines v. Coney*, 51 Miss. 323; *California Furniture Co. v. Halsey*, 54 Cal. 315; *Matlock v. Matlock*, 5 Ind. 403; *Swallow v. Thomas*, 15 Kan. 69; *Hall v. Claggett*, 48 Md. 223; *Melly v. Wood*, 71 Pa. 488; *Staats v. Bristow*, 73 N. Y. 204; *Field v. —*, 4 Ves. Jr. 396; *West v. Skip*, 1 Ves. Sr. 239; *Fox v. Hanbury*, Cowp. 445; *Taylor v. Fields*, 15 Ves. Jr. 539, *note*; 2 Kent, Com. 11th ed. 78, *note*; *Collyer*, Partn. 3d Am. ed. (Perkins) *notes* to § 822, pp. 704-710; *Story*, Partn. *notes* to §§ 231-233.

Without the assent of the copartners the partnership assets cannot be applied to the individual debt of one of the members. *Todd v. Lorah*, 75 Pa. 155; *Atkin v. Berry*, 1 Lea, 91; *Corwin v. Suydam*, 24 Ohio St. 209; *Perry v. Butt*, 14 Ga. 699; *Fille v. Phelps*, 18 Conn. 300; *Lanier v. McCabe*, 2 Fla. 32; *Furman v. Fisher*, 4 Coldw. 626; *Smith v. Andrews*, 49 Ill. 26; *Caldwell v. Scott*, 54 N. H. 414; *Flanagan v. Alexander*, 50 Mo. 50; *Ross v. Henderson*, 77 N. C. 172; *Blodgett v. Sleeper*, 37 Me. 500; *Williams v. Barnett*, 10 Kan. 455; *Hamilton v. Hodges*, 30 La. Ann. 1290.

It is well settled that partnership property cannot be holden to pay the separate debts of an individual partner until all the partnership debts are paid.

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chasing partner, without paying any of the firm debts, conveys the whole of the assets of the late firm to a trustee, in such a manner as to devote the whole thereof to the payment of his individual debts.—*Held*, such sale, being without any valuable consideration, is ineffectual to convert the social assets into individual property; and, as to the equitable rights of the firm creditors, such trust deed is fraudulent and void.

(November 20, 1889.)

A PPEAL by plaintiffs from a decree of the Circuit Court for Taylor County in favor of defendants in a suit brought to set aside a

All that can be taken is the interest of the debtor in the firm, not the partnership effects themselves, but the rights of the partner to a share of the surplus that may remain after all the debts are paid. *Tappan v. Blaisdell*, 5 N. H. 190.

The partners have a lien on the partnership property for the payment of the partnership debts, and for the surplus due to each partner after the settlement of the partnership liabilities; and creditors, as such, have no lien thereon, and must work out their rights through the equities of the partners. *Rice v. Barnard*, 20 Vt. 479; *Freeman v. Stewart*, 41 Miss. 139; *Sigler v. Knox Co. Bank*, 8 Ohio St. 511; *Hawk Eye Woolen Mills v. Conklin*, 26 Iowa, 422; *O'Bannon v. Miller*, 4 Bush, 25; *Cope's App.* 39 Pa. 284; *Houseal's App.* 45 Pa. 485; *Foster v. Barnes*, 81 Pa. 377; *Day v. Wetherby*, 29 Wis. 363; *Fain v. Jones*, 3 Head, 308; *Case v. Beauregard*, 99 U. S. 119 (25 L. ed. 370); *Campbell v. Mullett*, 2 Swanst. 551; *Ex parte Ruffin*, 6 Ves. Jr. 119.

The principle is well settled that because of this lien of the partners, the firm's debts must be paid out of the firm's assets before the personal debts of the individual members of the firm can be paid therefrom. *Pease v. Rush*, 2 Minn. 112; *Chase v. Steel*, 9 Cal. 64; *Bullock v. Hubbard*, 23 Cal. 501; *Lucas v. Atwood*, 2 Stew. (Ala.) 378; *Bridge v. McCullough*, 27 Ala. 661; *Camp v. Mayer*, 47 Ga. 414; *Fille v. Phelps*, 18 Conn. 300; *Clark v. Allee*, 3 Harr. (Del.) 80; *Conant v. Frary*, 49 Ind. 530; *Cox v. Russell*, 44 Iowa, 560; *Roberts v. Oldham*, 63 N. C. 238; *French v. Lovejoy*, 12 N. H. 453; *Bass v. Estill*, 50 Miss. 300; *Williams v. Gage*, 49 Miss. 777; *Phelps v. McNeely*, 66 Mo. 558; *Frow, Jacobs & Co's Estate* 78 Pa. 459; *Carper v. Hawkins*, 8 W. Va. 291; *Converse v. McKee*, 14 Tex. 30; *Johnson v. King*, 6 Humph. 233; *Christian v. Ellis*, 1 Gratt. 206; *Washburn v. Bellows Falls Bank*, 19 Vt. 273.

See also 12 L. R. A. 254; 30 L. R. A. 549; 34 L. R. A. 378.

certain trust deed of property, and to have the property applied to the payment of debts due the plaintiffs.

The facts are sufficiently stated in the opinion.

Mr. Frank Woods, for appellants:

A partner has a lien on the partnership property for the payment of all the firm debts.

Story, Partn. §§ 97, 358, 360.

As long as this lien of the partner continues, the creditors of the firm have a lien, or quasi lien as it is sometimes called, which is said to be "worked out" through the continuing lien of the partner.

Story, Partn. § 360; Bates, Partn. § 820.

This lien of the partner, and consequently the lien of the firm creditors, continues always until it has been expressly waived.

Story, Partn. § 360.

As in this case the contract of dissolution does not waive this lien, it would continue for the benefit of the firm creditors, even if the firm had been solvent at the time Burns sold out.

Shackelford v. Shackelford, 32 Gratt. 503; *Olsen v. Morrison*, 29 Mich. 395; *Conroy v. Woods*, 13 Cal. 626; *Phelps v. McNeely*, 66 Mo. 554; *Tenney v. Johnson*, 43 N. H. 144.

As the firm of Gilligan & Co. was insolvent and both the partners were insolvent, the sale by Burns to his copartner Gilligan is presumptively fraudulent as to the firm creditors and a court of equity will set the sale aside and distribute the property as firm property.

Re Cook, 8 Biss. 122.

In such a case, a partner has no right by an assignment of his interest to take from the firm creditors the right to have their claims satisfied out of the firm property: and all the firm property continues liable for the firm debts as before the assignment.

Menagh v. Whitwell, 52 N. Y. 147; *Washburn v. Bank of Bellows Falls*, 19 Vt. 279.

Mr. M. H. Dent for appellees.

Snyder, P., delivered the opinion of the court:

Appeal from a decree of the Circuit Court of Taylor County, pronounced March 28, 1887, in the suit of Darby & Co. and others against John J. Gilligan and others. The suit was brought to set aside a trust deed made by said Gilligan to John T. McGraw, trustee; to enjoin said trustee from disposing of the property thus conveyed to him; and to have the same applied to the payment of the plaintiffs' debts. On September 17, 1883, the said Gilligan and James Burns entered into an agreement in writing, whereby they agreed to form a partnership for conducting a general merchandising business in the Town of Grafton, Taylor County, Gilligan having prior to that time been merchandising at the same place, and having then on hand a stock of goods, which he put into the firm, of the value of \$2,000; and Burns paid into the firm \$1,000. Upon this capital stock; they agreed that Gilligan should have a two-thirds and Burns a one-third interest in the assets, business and profits of the partnership. At the time this partnership was formed, Gilligan was indebted to the First National Bank of Grafton and others in the sum of \$1,100, for money borrowed and put into the mercantile business while he was conducting it alone.

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During the carrying on of the business by the firm, the firm contracted debts to the plaintiffs and others, and the partners so managed the business that they and the firm became indebted, to insolvency. Afterwards, on February 27, 1885, by a contract in writing, the partnership was dissolved, upon the terms that in consideration of \$1,000, for which Gilligan executed to Burns his note, payable one year from that date, Burns withdrew from the firm, and Gilligan assumed, and agreed to pay, all the then existing indebtedness of the firm. About two months after, on April 24, 1885, Gilligan conveyed to John T. McGraw the whole of the assets of the late firm, in trust, to secure all his debts, including the debts due the plaintiffs and others by said firm; but in said conveyance he preferred the aforesaid \$1,100 due to the Grafton Bank and others, the note for \$1,000 given to Burns as aforesaid, which had been assigned by him to Anna Burns, and other individual debts, amounting in the aggregate to more than the value of the assets conveyed. Upon these facts the plaintiffs, the appellants here, contend that this attempt of Gilligan to prefer and pay his individual debts out of the said assets is a fraud upon the firm creditors, which, according to well-settled principles, a court of equity will not permit.

Ordinarily the partnership estate is liable for the payment of the firm debts in preference to the individual debts of the partners. This is the right of the partners *inter se*. The creditors of the partnership have no such right of priority over the creditors of the partners individually, otherwise than by substitution to the rights of the partners *inter se*. The partners may release this right, and, if they do so bona fide, the creditors of the partnership cannot complain; for it is not their right, except subject to the proper disposition and control of the partners themselves, to whom it belongs. This right is generally called the "partner's lien." It differs from a common-law lien in that it is not dependent on possession, and any single partner can convey a good title to specific chattels by a bona fide sale in the course of trade; and a lien does not involve the right to deal with the property, whereas the partner's equity is a right to have it applied for certain purposes, and the one partner cannot assert the lien as a sole plaintiff. The existence of this equity may be explained in a variety of ways, as on an implied contract that the assets shall not be used for private purposes; on the doctrine of suretyship, since each partner is liable *in solido* for the debts, and therefore, *inter se*, virtually a surety for the copartners for their proportions, and entitled to have the assets applied so as to relieve him. The partners have jointly the same right of absolute disposition of their joint property that any individual has. They may sell it, pledge it, convert it into other forms, divide it up among themselves, devote it to the payment of all or part of the debts, or exercise other ownership over it, subject only to each other's rights, and to the operation of statutes forbidding voluntary or fraudulent conveyances, to hinder, delay and defraud creditors. It is clear from what has preceded that while the partnership is solvent and going on the partners may, by unanimous

est to the other, bona fide, for a valuable consideration, or an agreement to pay the debts of the firm, and indemnify against them, this will change the joint into a separate property. The only question is upon the bona fides of the transaction. If such an arrangement could not be made, a partner never could retire. Bates, Partn. §§ 559, 820, 824; Story, Partn. §§ 97, 360.

On the other hand, according to the better reason and the weight of authority, if the firm is insolvent, or on the eve of insolvency, and both of the partners are insolvent, a purchase by one partner of the interest of the other, in consideration of the former's assumption of all the debts of the firm, will be regarded as a purchase upon a consideration which is of no value whatever; and, no equivalent having been given, the transfer is in effect voluntary, and its only effect, if sustained, would be to hinder partnership creditors, and hence is deemed ineffectual to convert the joint property into separate property, as against the firm creditors. *Ex parte Mayou*, 4 DeG. J. & S. 664, 11 Jur. N. S. 433, 12 L. T. N. S. 254; *Sanderson v. Stockdale*, 11 Md. 563; *Phelps v. McNeely*, 66 Mo. 554; *Tenney v. Johnson*, 48 N. H. 144; *Marsh v. Bennett*, 5 McLean, 117; *Roop v. Herron*, 15 Neb. 78; *Re Cook*, 3 Biss. 122; *Conroy v. Woods*, 13 Cal. 626; *Ransom v. Van Derenter*, 41 Barb. 807; *Menagh v. Whitwell*, 52 N. Y. 146, 163; *Shackelford v. Shackelford*, 32 Gratt. 503; *Farmers Bank v. Smith*, 26 W. Va. 541.

was made, by the terms of which Gilligan assumed to pay, not only the debts of the firm, but \$1,000 to Burns. As the firm and Gilligan were then both insolvent, there was no valuable consideration for either this assumption of the firm debts or said \$1,000. Less than two months after this transaction, Gilligan, without paying a single firm debt, so far as the record shows, assigned all the assets in such a manner as to devote the whole of them to the payment of his individual debts. It seems to me plain that to uphold this scheme against the rights of the social creditors, would violate not only the general principles of equity, but the express provisions of our Statute against voluntary and fraudulent conveyances. It is, however, claimed for the appellees that if this transaction is held void as to the firm creditors, then, for the like reasons, the act of Gilligan in putting his own stock of goods into the firm must be held void as to his individual creditors. But there is no analogy in the two transactions. It does not appear that either Burns or Gilligan was insolvent at that time, and it does appear that Burns paid into the concern \$1,000, and also that the debts due the plaintiffs and others were contracted by the firm on the faith of the social assets.

For these reasons the decree of the Circuit Court is reversed, and the cause remanded.

English and Brannon, JJ., concurred; **Green, J.**, absent.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF MISSOURI

UNITED STATES

v.

George A. BAYLE.

(40 Fed. Rep. 664.)

1. **A postal-card on which is written a demand for the payment of a debt**, and a threat to sue or place the demand in the hands of a lawyer for suit if the debt is not paid, is not mailable matter. Persons sending such postal-cards are liable to indictment under the Act of Congress of September 26, 1888.
2. **A postal-card, saying "Please call and settle account**, which is long past due and for which our collector has called several times, and oblige,"—is not of a threatening character, or intended to reflect injury upon the person addressed, within the meaning of the Act of Congress as to unmailable matter.

(December 14, 1889.)

INDICTMENT for depositing non-mailable matter in the mails. On demurrer to indictment. *Sustained as to first, and overruled as to second and third, counts.*

The case sufficiently appears in the opinion. **Mr. D. P. Dyer** for defendant, in support of the demurrer.

Mr. George D. Reynolds, U. S. Dist. Atty., for the United States, *contra*.

6 L. R. A.

Thayer, J., delivered the following opinion:

This is an indictment in three counts, under the Act of September 26, 1888 (25 U. S. Stat. 496) for depositing postal-cards of an alleged non-mailable character in the mails. The postal-cards in question were each addressed to John Greb, 2201 Franklin Avenue, St. Louis, and are of the following tenor.

St. Louis, April 12th, 1889.

Please call and settle account, which is long past due, and for which our collector has called several times, and oblige,

Respectfully, St. Louis Pretzel Co.

St. Louis, April 18th, 1889.

You owe us \$1.80. We have called several times for same. If not paid at once, we shall place same with our law agency for collection.

Respectfully, St. Louis Pretzel Co.

St. Louis, May 1st, 1889.

You owe us \$1.80, long past due. We have called several times for the amount. If it is not paid at once, we shall place same with our lawyer for collection.

Respectfully, St. Louis Pretzel Co.

Section 1 of the Act of September 26, 1888, provides "that all matter, otherwise mailable by law, upon the envelope or outside cover or wrapper of which, or any postal-card upon

which any delineations, epithets, terms or language of any indecent, lewd, lascivious, obscene, libelous, scurrilous, defamatory or threatening character, or calculated by the terms or manner or style of display, and obviously intended, to reflect injuriously upon the character or conduct of another, may be written or printed, or otherwise impressed or apparent, are hereby declared non-mailable matter, and shall not be conveyed in the mails," etc.

If the postal-cards in question are non-mailable, it is because they contain language of a "threatening character," within the meaning of the law, or because they contain language "calculated . . . and obviously intended to reflect injuriously upon the character or conduct" of the person to whom they were addressed. It is clear that they fall within no clause of the Statute unless they are within the clauses last referred to. Two of the cards, as it will be observed, contain a demand for the payment of money alleged to be due, and a threat to place the demand in the hands of a lawyer for collection, if not paid at once. The question, therefore, arises, whether Congress intended to prohibit the mailing of postal-cards containing or on which are written threats of that kind. The language of the Statute is very general, and certainly may be construed as a prohibition against mailing postal-cards which contain threats to bring suits if debts are not paid, as well as being a prohibition against mailing cards containing threats of personal violence or threats of any other character. It is most probable, I think, that Congress intended the Act should receive that construction. It is a well-known fact that prior to the passage of the law some persons had made a practice of enforcing the payment of debts by mailing postal-cards or letters bearing offensive, threatening or abusive matter, which was open to the inspection of all persons through whose hands such postal-cards or letters happened to pass. In some quarters the practice alluded to of sending communications through the mail that were both calculated and intended to humiliate and injure the persons addressed in public estimation had become one of the recognized methods of compelling the payment of

debts. Congress evidently intended by the Act of September 26, 1888, to utterly suppress the practice in question. It has not only declared that libelous, scurrilous and defamatory matter written on postal-cards, or on envelopes containing letters, shall not be disseminated through the mails, but that no matter of a "threatening character," or that is even "calculated . . . and . . . intended to reflect injuriously upon character or conduct," shall be so disseminated, if written on postal cards, or on the envelopes of letters, and hence is open to public inspection. I conclude that a postal-card on which is written a demand for the payment of a debt, and a threat to sue, or to place the demand in the hand of a lawyer for suit if the debt is not paid, is now non-mailable matter. Henceforth persons writing such demands and threats must enclose them in sealed envelopes, or subject themselves to criminal prosecution.

The demurrer to the second and third counts is not well taken, and is therefore overruled as to those counts.

The language employed in the postal-card described in the first count is not of a threatening character, and, in my opinion, no jury would be warranted in finding, in view of its contents, that it was obviously intended by the writer to reflect injuriously on the character or conduct of the person addressed, or to injure or degrade him in the eyes of the public. It is true that it contains a demand for the payment of a debt, and says that it is long past due, and that a collector has called several times; but it is couched in respectful terms, and no intent is apparent to put it in such form as to attract public notice, or to make it offensive to the person addressed. Congress has not declared that postal-cards shall not be used to make such demands, and a construction of the Act ought not to be adopted that will unnecessarily restrict their use for business purposes. The card in question cannot be held to be non-mailable, without being over-critical and extremely punctilious in the choice of language which men may lawfully use in their daily transactions.

The demurrer is accordingly sustained as to the first count.

SOUTH CAROLINA SUPREME COURT.

STATE OF SOUTH CAROLINA

v.

BARNES, *Appt.*

(...S. C....)

1. **A pardon on condition** that the prisoner "leave the State within forty-eight hours, never to return," may be lawfully granted by a governor who has authority under the State Constitution to grant pardon on such terms, and under such restrictions, as he shall think proper.
2. **On forfeiture of a pardon by breach** of the conditions, a convict becomes liable to serve that part which he has not already served of the term of imprisonment for which he was sentenced, although the original term has long since expired.

(January 7, 1890.)

6 L. R. A.

A PPEAL by defendant from a judgment of the General Sessions Circuit Court for Richland County remanding him to imprisonment for breach of the conditions of the pardon under which he was released therefrom. *Affirmed.*

The case sufficiently appears in the opinion.
Mr. M. H. Moore for appellant.
Mr. P. H. Nelson for the State.

McIver, J., delivered the opinion of the court:

In this case the appellant, having been convicted of grand larceny, was sentenced to imprisonment at hard labor, in the penitentiary, for the term of two years. After suffering a portion of the punishment thus imposed, the appellant was pardoned by the governor, "upon

court of sessions to the effect that appellant had violated the condition of his pardon by returning to the State, a rule was issued requiring him to show cause why he should not be remanded to the penitentiary to serve out the balance of the sentence which had been imposed upon him. The appellant appeared, and made return: *first*, that he had been pardoned by the governor; *second*, that his term of imprisonment under the sentence of the court had expired. The circuit judge adjudged the return insufficient, and ordered that appellant be remanded to the penitentiary, to serve out the balance of the sentence originally imposed upon him. From this adjudication and order defendant appeals upon two grounds, as follows: "*First*. That the condition of the pardon granted the defendant by the governor of South Carolina on December 24, 1883, was illegal and void, while the pardon itself remains absolute; and that his honor erred in holding otherwise. *Second*. That the term of imprisonment to which the defendant was sentenced in 1883 has expired; and that his honor erred in holding otherwise."

Inasmuch as our Constitution, by section 11, art. 3, expressly invests the governor with power to grant pardons after conviction, except in cases of impeachment, "in such manner, on such terms, and under such restrictions as he shall think proper," it will not be necessary to look further for his authority to grant a conditional pardon, though it seems to be well settled that such a pardon could be granted in that country from whence we derive a large part of our legal principles. 1 Chitty, Cr. L. 778; 1 Bishop, Cr. L. 6th ed. § 914.

These authorities show that a pardon may be granted either upon a precedent or a subsequent condition. If the former, then the pardon does not take effect until the condition has been performed; but, if the latter, then the pardon takes effect at once, but becomes void whenever the condition is violated, and the offender may be again brought to the bar, and remanded to suffer his original sentence. But, while this is conceded, it is contended that a pardon granted upon a condition subsequent which is illegal, immoral or impossible to be performed, becomes an absolute pardon, such a condition being absolutely void; and the contention in this case is that the condition upon which the pardon here was granted—to leave the State, never to return—was illegal, inasmuch as there is no such punishment known to our laws as that of banishment or transportation for life, or a period of years. Inasmuch as we think it quite clear that the condition annexed to the pardon granted in this case was neither illegal, immoral nor impossible to be performed, we need not consider what would be the effect of annexing such a condition to a pardon. It is not pretended that the condition here in question was either immoral or impossible to be performed; and the fact that our laws do not prescribe banishment from the State, or transportation for life or for a period of years, as the punishment for any offense, cannot have the effect of making the condition imposed in this case illegal.

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vision that the offender shall leave the State, and never return; and, in the absence of any such law, we do not see how the condition upon which the pardon was granted in this case can be regarded as illegal. So far from there being any law forbidding the imposition of such a condition as was annexed to the pardon granted in this case, we find that its legality has been frequently recognized in this State.

In *State v. Fuller*, 1 McCord, L. 178, the defendant, who had been convicted of a mere misdemeanor, was pardoned upon condition that she would leave the State in the course of two weeks; and, upon her failure to comply with the required condition, she was brought up for sentence, and the court held that the pardon upon which she relied was void for want of compliance with the condition upon which it was granted. That is a much stronger case than this, for there the defendant was a married woman; and it was contended that she could not perform the required condition without the consent of her husband. But the court held that the condition was one that was capable of performance, and a failure to perform it rendered the pardon void.

In *State v. Smith*, 1 Bailey, L. 283, the foregoing case was expressly recognized, and it was there held that the governor may annex to a pardon a condition that the offender shall leave the State, and never return; and, if any part of the condition is violated, the pardon is forfeited, and execution of the original sentence will be enforced by the court of sessions. In that case the whole subject is fully and most ably discussed by that eminent judge, the late David Johnson.

Again, in *State v. Addington*, 2 Bailey, L. 516, the same doctrine was held, upon the authority of *State v. Smith*, *supra*, which was expressly recognized and affirmed; and again, in *State v. Chancellor*, 1 Strob. L. 347, the same rule was laid down.

In view of these repeated and direct adjudications in this State, we do not think that the question can any longer be regarded as open for discussion.

As to the second ground of appeal, we think the authorities above cited show that it cannot be sustained. While it is quite true that the term of two years' imprisonment, to which the defendant had been sentenced in 1883, has long since expired, yet it is equally true that the defendant has not yet suffered imprisonment for that length of time; and, as the pardon which he pleads has been adjudged insufficient to relieve him from suffering the whole punishment originally imposed upon him, it follows necessarily that he is still liable to be required to complete the term of imprisonment originally imposed, just as if he had escaped during that term; and such is the clear result of the authorities, both English and American.

The judgment of this Court is that the judgment of the Circuit Court be affirmed.

Simpson, Ch. J., and McGowan, J., concur.

ILLINOIS SUPREME COURT.

Augusta W. DeHAVEN, *Appt.*,
v.

Francis T. SHERMAN *et al.*

(...Ill....)

1. Under a will creating a trust for the testator's widow and children, in the remainder of the rents and profits of certain real estate during their lives, the fee to be conveyed by the trustees to his grandchildren, when the youngest became twenty-one years of age, a son acquires no interest in the real estate.
2. The devise of an annuity or yearly portion out of the net rents and profits of a trust estate carries no interest in the realty where the donee can never assert any right of possession, control or ownership during his lifetime unless as tenant of the trustee.
3. There is no such devise of rents and profits as will constitute a devise of the land where a yearly sum contingent upon the exigencies of the trust is given, to be paid by a trustee out of the net rents that may accrue from lands in his possession, devised to him in fee with the use and possession in trust to hold the same and dispose of the income as directed during the lives of certain persons, and after their death to transfer the fee to others.
4. An annuity given by a will is not made a rent charge upon trust lands from the rents of which it is to be paid, where there are no words creating a legal rent charge and no power given to distrain if the annuity be not paid.

(November 26, 1890.)

APPEAL by complainant, in a cross-bill filed in a suit brought to obtain the construction of a certain will, from a decree of the Circuit Court for Cook County dismissing such bill. *Dismissed.*

Francis C. Sherman died November 7, 1870, leaving a will by which he devised certain real estate to a trustee, Joshua L. Marsh, in trust for the lives of testator's wife and three children to pay certain charges out of the rents and profits, and then to pay the remainder thereof to such wife and children, and, after the death of such persons and the arrival of testator's youngest grandchild at the age of twenty-one years, to convey such premises to such grandchildren in fee.

Subsequently Francis T. Sherman, a son of testator, filed his petition in bankruptcy, and inventoried among his assets his interest under his father's will, and such interest was duly sold in the bankruptcy proceedings and the title under such sale became vested after sundry mesne conveyances in Augusta W. DeHaven.

Henry W. Leman was substituted as trustee in place of Marsh. From 1871 to 1883 the income of the property was insufficient to pay all the claims, the payment of which was charged by the will upon the rents and profits before anything was to be paid to the widow and children. Thereafter there was a surplus after paying current charges and Leman brought a suit for the construction of the will seeking instructions as to whether or not such surplus could be applied by him to the payment of such defaulted claims.

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Augusta W. DeHaven thereupon filed a cross-bill claiming the share of such surplus which belonged to Francis T. Sherman by the terms of the will, by reason of the title vested in her under the bankruptcy proceedings, and demanding that the same be paid to her. The court below dismissed the cross-bill and she appealed to this court.

The other facts appear in the opinion.

Messrs. Paddock & Aldis, for appellant:

Occupying by tenants for years and having the pendency of the profits for their natural lives through the agency of their trustee, the widow and children became the beneficiaries of an equitable life estate. Francis T. Sherman, being one of those children, became, at the death of his father, seised in equity of an undivided two ninths of the entire Sherman-House property. In law, the renting of the hotel by the trustee to tenants for years was but a mode whereby the real owners, who were the life tenants, used and possessed the property. They had a freehold in the reversion.

The term "freehold" denotes an estate of a given quantity, or rather of a peculiar quality, as opposed to the term "chattel."

1 Preston, *Estates*, Lond. ed. 1820, 200.

A devise of the net income of an estate to the wife and children of the testator during their lives "is a devise of the property to them during their lives."

Mather v. Mather, 103 Ill. 613; *Handberry v. Doolittle*, 38 Ill. 202; *Okefen v. Okefen*, 1 Atk. 552; *Hall v. Carter*, 2 Atk. 858; *Mills v. Banks*, 8 P. Wms. 7.

The seisin of Marsh, the trustee, was in equity the seisin of the widow and children, according to the form of the will; that is to say, during the lives of the widow and children, until it became the duty of the trustee to make conveyance of the fee to the grandchildren, as directed.

Perry, Tr. §§ 438, 863; *Atty-Gen. v. Munro*, 2 DeG. & S. 163; *Stone v. Godfrey*, 5 DeG. M. & G. 76; *Frith v. Carlond*, 2 Hem. & M. 417; *Pomfret v. Windsor*, 2 Ves. Sr. 476; *Kennedy v. Daly*, 1 Sch. & Lef. 381.

Under such a will it would be entirely competent for the court in a proper case and upon proper terms to let the *cestuis que trust* into actual possession.

Blake v. Bunbury, 4 Bro. Ch. 21; *Williamson v. Wilkins*, 14 Ga. 416.

Messrs. Wilson & Moore, for appellees:

An annuity payable out of rents is neither rent nor real estate.

2 Greenl. *Cruise*, Real Prop. pp. 75, 76, §§ 16, 17; *Stafford v. Buckley*, 2 Ves. Sr. 177.

The mere fact that the money which a party is entitled to receive is the proceeds or profits of real estate does not make money real estate, nor the party entitled to receive the money the owner of real estate.

People v. Haskins, 7 Wend. 465; *Baker v. Copendarger*, 15 Ill. 108; *Jennings v. Smith*, 29 Ill. 116, 121.

Real estate may be held by trustees for the benefit of others without such beneficiaries having any equitable estate in the land.

Nicoll v. Ogden, 29 Ill. 383.

What did White, the purchaser at the assignee's sale, take and acquire by his purchase? It is obvious that the rights of appellant are only those acquired by White under and by virtue of the assignee's deed of conveyance. The authority of the assignee to sell was the order of the Bankrupt Court of September 28, 1875. By that order he was directed to sell the assets, debts and real and personal estate of the bankrupts, as in the assignee's "petition described and set forth."

In his petition the assignee had represented that Francis T. Sherman had scheduled, "as his personal property, a two-ninths interest in the net income to be derived from the estate of F. C. Sherman, deceased, after the debts of the estate" were paid; the nature of which interest was fully explained by the provisions of the will of F. C. Sherman, as copied in the petition. The order of the court was as broad as the petition, but no broader. And, although in the same petition the assignee asked "the court to adjudge whether the said interest in the said Sherman-House property is in the nature of personal property, or of realty," the court does not appear to have passed upon the question thus submitted; so that, so far as we can see or know, the assignee was left free to place his own construction upon the provisions of the will, and to determine for himself whether, under the will, the bankrupt had, when his petition in bankruptcy was filed, an estate or interest in the two Sherman-House lots. It is apparent that the assignee determined that the bankrupt had an interest in the realty; for he reported to the bankrupt court that he did, at the time and place of sale, after proper advertisement, offer "for sale the interest of Francis T. Sherman in the Sherman-House property, known," etc., as the same is set forth and appears by the will of Francis C. Sherman. And it was this interest that was sold and conveyed to the purchaser, and which was afterwards acquired by the appellant, and which alone forms the basis for the relief sought by her under her cross-bill.

It may, we think, be assumed, for the purposes of this case, that, under the operation of the Bankrupt Law and the proceedings in bankruptcy instituted by Francis T. Sherman, his estate, both real and personal, legal and equitable, passed to and vested in his assignee. Nor could the bankrupt, by scheduling as personal property any interest in real estate that may have been vested in him by his father's will, thereby change its character, or defeat the transfer to his assignee of that interest, whatever its character. It matters not what of the bankrupt's estate the assignee may have acquired, nor what of that estate he may have been authorized to sell, nor what of such estate he may have sold and conveyed, unless he acquired, was authorized to, and in fact did, sell and convey the property rights and interests secured to his bankrupt under the will in the net income arising out of the trust estate devised to and vested in Joshua L. Marsh and his successors, in trust. And, if we further assume that Francis T. Sherman had, at the time he was adjudged a bankrupt, an estate or interest

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purchaser, White, and that, as to such estate, appellant has shown a clear right and title, still, the substantial and controlling question, whether, under the will, Francis took an estate or interest in the realty, remains unsolved, and can only be determined from a construction of the provisions of the will itself. By the will, the Sherman-House property was devised to Joshua L. Marsh and his successors, in trust, for the lives of the testator's wife and three children, and until the youngest child of any of the testator's children should attain the age of twenty-one years, when conveyance of the premises was to be made by the trustee to such grandchildren and their heirs.

During the continuance of the trust, the property was to be held by the trustee entire. He was to lease it. He might, if necessary to repair or rebuild in case of injury or destruction, incur it. From the rents he was to pay interest on incumbrances, taxes, insurance, repairs, trust expenses. The expense of the care of testator's cemetery lot, not exceeding \$250 a year, was made a charge on the rents; and, until the incumbrances for improvements or repair or rebuilding should be paid, the residue of the rents and profits were to be paid, \$6,000 per annum, in monthly installments, to the testator's widow, if living, and \$3,000 per annum, also in monthly installments, to each of his three children, or the heirs of their body, and the excess to be applied on the indebtedness. But when the indebtedness should be fully paid, the remainder of the rents and profits were to be paid, in monthly installments, one third thereof to testator's widow, while living, and the two thirds, in equal parts, to his three children, or the heirs of their body. The will took effect November 7, 1870.

Without stopping to determine fully the relation the trustee sustained towards this property, it is to be observed that he took therein an estate in fee, upon trusts determinable upon the happening of the contingencies named,—that is, the death of Electa Sherman, and of the three children of the testator, and at the attaining the age of twenty-one years of the youngest grandchild,—at which time he was required, in further execution of the trusts upon which he held the estate, to convey the lands to the testator's grandchildren; and the effect of such final conveyance would be, unquestionably, to vest the fee in such grantees.

The general principle which regulates the quantity of estate is that the trustee takes "exactly that quantity of interest which the purposes of the trust require;" and the question, in every such case, is "whether the exigencies of the trust, as they appear on the face of the will, without reference to events subsequent to the testator's death, demand the fee simple, or can be satisfied by any, and what, less estate." 2 Jarman, Wills, 805, 806, and cases cited.

The requirements and necessities of the trust here could be satisfied with nothing less than the vesting of the fee in the trustee. One of the contingencies provided for arose. The hotel building was destroyed by fire, and to rebuild necessitated the incumbering of the property by mortgage to a large amount. This

the trustee could only do by being able to convey the fee. And the final contingencies upon which the trust should terminate were certain to arise, when the trustee would be required, in the execution of the trust, to convey to the grandchildren of the testator the estate in fee,—the same quantity of interest vested in him by the will. Both these exigencies of the trust appear on the face of the will; and it is clear that the trustee took the fee, now holds it, and will continue to hold it until the termination of the trust in the manner and at the time fixed by the instrument declaring the trust. This being so, it seems equally clear that Francis T. Sherman did not take or acquire, under the will, any interest in this property; the whole estate vesting in the trustee, upon uses and trusts, for a term beyond the life of Francis.

But it is insisted that, by the devise to Francis T. Sherman of an annuity or yearly portion of the net rents and profits of the trust estate, he thereby acquired an interest in the realty, and which interest has passed to and is now vested in appellant. The general doctrine undoubtedly is that a devise of the rents and profits of land is equivalent to a devise of the land itself, and will carry the legal as well as the beneficial interests therein. 2 Jarman, Wills, 609.

And we are cited to the cases of *Handberry v. Doolittle*, 88 Ill. 202, and *Mather v. Mather*, 103 Ill. 607, where this court has recognized and applied the rule. But a brief analysis of those cases is all that is necessary, as it seems to us, to show how clearly they are distinguishable from the case at bar.

In the *Handberry Case* the devise of one fourth of the testator's estate was to the children of his brother, Rawley, but with the provision that Rawley should "have uncontrolled and absolute management and disposal of all such part of my estate his said children at my decease shall become entitled to, until the youngest of said children shall become of full age, to use said means at his discretion," and without accounting therefor; and in the event of the death of Rawley's children, the same portion of his estate was bequeathed to another brother, Amaziah, "for the use of said Rawley; the said Rawley, however, to have the use and control of the same." And it was there held that Rawley took an estate in the land terminable on the coming of age of his youngest child. "What is this," the court asks, "but a devise to him of the property, to have and hold until the youngest child shall come of age?" and then answers the question by saying that under a demise or conveyance by Rawley the lessee or grantee would take and hold the premises, against the children, until the youngest became of age. Of the case at bar it must be said that there never has been, since his father's death, and there never can be while he may live, a time when Francis T. Sherman could or can, under this will, have asserted or assert over this Sherman-House property any right of possession, control or ownership, unless as the tenant of the trustee. He is powerless, by virtue of the will, to personally use and occupy, to lease and collect and appropriate rents, or to convey any interest therein which could be maintained against the trustee or his ultimate grantees.

"An interest in lands," said this court in 6 L. R. A.

Jennings v. Smith, 29 Ill. 116, 121, "is manifestly something which may be enjoyed in connection with the land itself."

In the *Handberry Case* every element of ownership was present; here, every element is wanting.

In the *Mather Case* the will provided, after the payment of debts, that the residue of testator's estate should remain as his estate as long as he had a living child. The rents, use and interest of his estate were given, one third of the net income to his widow during life, and the remaining two thirds of the net income, during his widow's life, to his children; after his widow's death, the whole net income to his children during their lives. The final distribution of the estate was postponed to the time of the death of his last surviving child, when the estate was to be equally divided between the testator's grandchildren. The will, it was contended, was invalid, because by its terms no title to the property left by the testator was to pass to anyone so long as there was a living child,—only the net income being bequeathed to his children during their lives,—and so there was no freehold to keep the seisin for the remaindermen. But the court held that the devise of the net income of the estate to the testator's widow and children during their lives was a devise of the property to them during their lives; that on the death of the testator a particular estate vested in his children, sufficient to support the remainder in the grandchildren, and which particular estate prevented the estate devised to the grandchildren from vesting in possession at the testator's death. And thus after-born grandchildren were let in. There, as will be perceived, while the period of distribution was postponed until the death of the last surviving child of the testator,—not unlike the case at bar,—and, until final distribution, the wife and children of the testator were given the net income of the estate, there was also, as a closer inspection shows, by the express provisions of the will, given to the wife and children the "use and interest of my estate, both real and personal," for the same period. The widow and children clearly took, not only an interest and estate in the real estate, but the right of possession. And, although the court invoked the rule of law that a devise of rents and profits will pass the land, the decision was not made to rest alone upon such rule, for the court adds: "It is clear this [a devise of the property to his widow and children for their lives] was the intention of the testator; and, without the aid of technical terms, applicable to such matters, it is hardly possible that intention could have been more certainly expressed."

And so we now say. The devise to one of the use and possession of real estate passes an estate in the land. But how marked the distinction between that case and the one at bar! Here, as we have seen, the trustee took the fee, and will hold it, certainly until after the death of Francis T. Sherman and Mrs. Marsh. The possession and use of the hotel premises were especially vested in him.

In the *Mather Case*, the rule of law was invoked to support the testator's intention, while here, if it is to be applied, the manifest intention of the testator would be defeated, the trust broken down, and the possession, management

pass into hands other and different from those selected by the testator. These cases, in our judgment, fall far short of sustaining appellant's contention.

But does this record present a case for the application of the doctrine that a devise of rents and profits is a devise of the land? In other words, is there here a devise to Francis T. Sherman of the rents and profits issuing out of lots 7 and 8, within the meaning of the rule? Rents are a species of incorporeal hereditaments. The word, from *redditus*, signifies a compensation or return given for the possession of some corporeal inheritance; and it is defined to be a certain profit issuing yearly out of lands or tenements corporeal. 2 Bl. Com. 41.

It must issue, not only out of some corporeal inheritance whereunto the owner or grantee of the rent may have recourse to distrain (*Ibid.*; 3 Kent, Com. 460), but out of the thing granted, and not be a part of the thing itself. 3 Greenl. Cruise, 70, 73.

The devise to Francis T. Sherman was of a certain sum, during the life of his mother and of himself, and subject to the uses and exigencies of the trust in the same instrument declared, payable yearly, arising out of rents. The rents themselves, as such, were devised to the trustee upon uses. To say that there was a devise of rents to Francis carries with it, by necessary implication, the assumption that he was the owner of the rents and could distrain therefor. It is not contended that he possessed any such right; nor did he. To hold that there was here a devise of rents would also require us to hold that a rent could issue out of a rent; and this, as has been ruled from the earliest time, cannot be. 1 Rolle, Abr. 227, par. 1, 20.

As there said: "If a rent of £20 be granted, to be paid out of customs assigned to the grantor by the King, this cannot be a rent, for a rent does not issue out of a rent. In such case, it shall be an annuity. The case put by Lord Chancellor Hardwicke in *Stafford v. Buckley*, 2 Ves. Sr. 177, namely, that King Charles I. had granted the Barbadoes Islands to Lord Carlisle, with a reservation of a strict rent of 4 per cent *in specie* on the product of the islands, and afterward King Charles II. had granted £1,000 per annum in money, out of the product of that rent, to Lord Kinnon and his heirs, is to the same effect. As there observed by the Lord Chancellor, 'this would have been a mere annuity, . . . because a rent cannot be reserved or granted out of a rent. Part of a rent may be granted, indeed; but a new rent cannot be reserved or granted thereout, because no distress can be or assize taken of it, as there is nothing to be put in view of recognizers of the assize; which, the rule is, is necessary, and has been so determined.'" See also 3 Greenl. Cruise, Real Prop. 74.

It is thus, as we think, made clearly to appear from the authorities that the devise of a yearly sum, to be paid by a trustee to whom lands are devised, upon uses and out of the net rents that may accrue from the lands in his possession, and which sum is contingent upon the exigencies of the trust, is in no sense a devise of rents issuing out of such lands, but is in the nature of an annuity. And hence it follows, as it seems to us, that the legatee neither

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real estate. This must certainly be true, unless the annuity bequeathed was made a charge upon the lands; in which case it became a rent charge, descendible, in general, to the heirs of the devisee, as real estate. 3 Kent, Com. 460.

That the annuity bequeathed to Francis was not made a rent charge upon the trust lands seems also clear to us, upon authority. There are not only no words creating a legal rent charge, but there is entirely wanting a power to distrain if the annuity be not paid; and, according to all the definitions and authorities, the distinctive characteristic of a rent charge is the right of distraint. 2 Bl. Com. 42; 3 Kent, Com. 460; *People v. Haskins*, 7 Wend. 469.

A grant, by deed, that A may distrain land for a rent, is a rent charge; for the land is charged with it by way of distress. Co. Litt. § 221.

So, if it is said that A, if not paid so much per annum, shall distrain for it in the manner of B. *Ibid.*

So, a devise of rent, with power to distrain at the usual feasts, will be a rent charge, though no particular lands are mentioned. *Kingswell v. Cawdrey*, F. Moore, 592.

So, a grant of rent out of B, and, by the same or another deed, distress is granted for it in other lands. It is a rent charge, issuing solely out of B, though distress be in other lands. Co. Litt. 147a.

So, too, a grant or reservation of rent, with power of distress or re-entry, were held to create a rent charge. *Hurat v. Lithgow*, 2 Yeates, 24; *Bantleon v. Smith*, 3 Binn. 146; *Gordon v. Correy*, 5 Binn. 552.

And herein lies the distinction between rent charge and rentseck. The latter was where rent was reserved or created without clause for distress; and hence the name "rentseck" (*redditus siccus*)—a dry rent. Co. Litt. §§ 217, 218. And, if not paid, the grantee's only remedy was an action at law therefor.

The bequest in this case, as we have seen, having been, not of the lands themselves, nor of the rents and profits thereout arising, nor yet of a rent charge upon the lands, but of an annuity payable to the legatee personally, and terminable at his death, and the remedy for nonpayment thereof being, in general, by a personal action of debt or covenant on the instrument creating the annuity (3 Kent, Com. 460), or by bill against the trustee to compel an account; and, as the assignee in bankruptcy did not, as we have seen, assume to sell the annuity of his bankrupt, nor the purchaser to buy it; and, further, as appellant relies solely upon the rights acquired by the purchaser at the assignee's sale,—the conclusion is irresistible that her cross-bill was without equity, and was properly dismissed. The decree of the circuit court is therefore affirmed.

A petition for rehearing was subsequently granted and after argument, on November 26, 1889, *Schofield, J.*, delivered the following opinion:

Very clearly, the payments which the will directs the trustee to make to the widow and the children are not a rent charge. 1 Thom. Co. Litt. 849 (148b); 3 Greenl. Cruise, 71, 72; 3 Kent, Com. 12th ed. 595, 496.

They are simply annuities to be paid from

the annual rents contemplated to accrue from the leasing of the Sherman House. 1 Broom & H. Com. Wait's notes, 459 (*55); 1 Thom. Co. Litt. 352 (144b); 3 Kent, Com. 12th ed. 595.

It could not have been intended by the testator that the payment of these annuities are a charge against the *corpus* of the estate, because that might have defeated the power expressly given to the trustee to borrow money to rebuild and secure the loan by mortgage on the property, and his expressed intention that his trustee "shall have, hold and manage the Sherman-House property, entire and undivided," and appropriate the rents, issues and profits in the manner thereinbefore directed, during the natural life of his wife and children, and until the death of the survivor of them. The rule is that, unless it appears that it was intended by the testator to charge the payment of the annuities upon the *corpus* of the estate, they can only be enforced against the trustee personally, so far as he has received the rents.

The fee in the realty, whether for life or for years, cannot be sold for their payment. *Irvine v. Wollpert*, 128 Ill. 527; *Delaney v. Van Aulen*, 84 N. Y. 16; *Nudd v. Powers*, 136 Mass. 276; *Baker v. Baker*, 6 H. L. Cas. 616.

Whatever, therefore, may, in other respects, be the effect of the deed of assignment of Francis T. Sherman, the deed of the assignee in bankruptcy to Hugh A. White, and the deed of Hugh A. White to De Haven, it is impossible that they can have the effect of passing a freehold in the Sherman-House property to De Haven. It hence follows that, under the eighty-ninth section of the Practice Act (2 Starr & C. Stat. 1842), the appeal should have been to the Appellate Court of the First District, instead of to this court. The appeal is accordingly dismissed, at appellant's costs, and leave is given to her, if she shall so desire, to withdraw record, abstracts and briefs, for the purpose of filing them in the appellate court.

Appeal dismissed.

OHIO SUPREME COURT.

Basil A. GORDON, *Plff. in Err.*,

v.

STATE OF OHIO.

Dominico SANTORO, *Plff. in Err.*,

v.

STATE OF OHIO.

(....Ohio St....)

"The Act entitled "An Act to Further Provide Against the Evils Resulting from the Traffic in Intoxicating Liquors by Local Option in Any Township in the State of Ohio," passed March 3, 1888, is not in conflict with the Constitution, and is a valid law.

(December 10, 1889.)

*Head note by the Court.

NOTE.—Intoxicating liquors; late decisions under Ohio Statutes.

The General Assembly may provide against the evils resulting from the sale of intoxicating liquors; and this applies to the wholesale as well as the retail traffic. *Senior v. Batterman*, 9 West. Rep. 419, 44 Ohio St. 661.

An ordinance of a municipal corporation in Ohio, passed under the provisions of the Ohio Act called the "Dow Law," is not in conflict with the 14th Amendment to the Constitution of the United States. *Tanner v. Alliance*, 20 Fed. Rep. 196.

The supplying of intoxicating liquors to a minor to be drank by him is a furnishing of the liquor to such minor within the meaning of the Act of April 4, 1886. *State v. Munson*, 25 Ohio St. 381.

Under the "Adair Law of 1870 (67 Ohio Laws, 101) no civil action for damages against the seller of intoxicating liquors can be maintained by the wife injured in her means of support. *Granger v. Knipper*, 2 Cinn. Super. Ct. (Ohio) 480.

The Ohio Act of April 5, 1882, is within the inhibition of the Ohio Constitution providing "that no license to traffic in intoxicating liquors shall hereafter be granted in this State," and is void. *State v. Hipp*, 38 Ohio St. 190.

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ERROR to the Court of Common Pleas of Perry County to review a judgment convicting Basil A. Gordon of violating the provisions of the Act of March 3, 1888, and inflicting a penalty upon him therefor. *Affirmed.*

ERROR to the Circuit Court for Portage County to review a judgment affirming a judgment of the Court of Common Pleas convicting Dominico Santoro of violating the provisions of the Act of March 3, 1888, and inflicting a penalty upon him therefor. *Affirmed.*

The Act of March 3, 1888, is entitled "An Act to Further Provide Against the Evils Resulting from the Traffic in Intoxicating Liquors by Local Option in Any Township in the State of Ohio," and provides as follows:

"Whoever sells intoxicating liquors within two miles of the place where an agricultural fair is being held . . . shall be fined," etc., contained in Rev. Stat., § 6048, as amended May 2, 1885 (82 Ohio Laws, 222), includes sales made by one whose place of business is permanently located within such distance, is not in conflict with any provision of the Constitution, and is a valid law. *Heck v. State*, 44 Ohio St. 530, 6 West. Rep. 814.

The Act of May 14, 1886 (83 Ohio Laws, 157), imposing a tax upon the business of trafficking in intoxicating liquors, or upon certain forms thereof, which tax shall attach as a lien on the property in which it is conducted—such tax and provision for lien not constituting a license, within Const., art. 15, § 9—and providing that the tax may be collected by the county treasurer, as other taxes are collected; and imposing penalties for nonpayment and refusal of the person engaged in business, on assessor's demand, to sign and verify the statement of the return—is not in violation of Const., art. 2, § 23, providing for uniformity of laws, or of Bill of Rights, § 16, securing due process of law, or of the 14th Amendment of the Federal Constitution. *Adler v. Whitbeck*, 44 Ohio St. 539, 7 West. Rep. 201; *Anderson v. Brewster*, 44 Ohio St. 576, 7 West. Rep. 210.

incorporation shall petition the trustees thereof for the privilege to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited within the limits of such township, and without the limits of any such municipal incorporation, such trustees shall order a special election for the purpose, to be held at the usual place or places for holding township elections, and notice shall be given, and the election conducted, in all respects as provided by law for the election of township trustees, and only those electors shall be entitled to vote at such election who reside within the township, and without the limits of any such municipal incorporation. A record of the result of such election shall be kept by the township clerk in the record of the proceedings of township trustees; and in all trials for violation of this Act, the original entry of said record, or a copy thereof certified by the township clerk, provided that it shows or states that a majority was against the sale, shall be prima facie evidence that the selling, furnishing, giving away or keeping a place, if it took place from and after thirty days from the day of the holding of said election, was then and there prohibited and unlawful.

"Sec. 2. Persons voting at any election held under the provisions of this Act, who are opposed to the sale of intoxicating liquors as a beverage, shall have written or printed on their ballots, 'Against the sale,' and those who favor the sale of such liquors shall have written or printed on their ballots, 'For the sale,' and if a majority of the votes cast at such election shall be 'against the sale,' then, from and after thirty days from the day of the holding of said election, it shall be unlawful for any person within the limits of such township, and without the limits of such municipal corporation, to sell, furnish or give away any intoxicating liquors to be used as a beverage, or to keep a place where such liquors are kept for sale, given away or furnished; and whoever sells, furnishes or gives away any intoxicating liquors as a beverage, or keeps a place where such liquors are kept for sale, given away or furnished, shall be fined not more than \$500, nor less than \$50, and imprisoned in the county jail not exceeding six months; but nothing in this section shall be construed so as to prevent the manufacture and sale of cider, or sale of wine manufactured from the pure juice of the grape, cultivated in this State, nor to prevent [a] legally registered druggist from selling or furnishing pure wines or liquors for exclusively known medicinal, art, scientific, mechanical or sacramental purposes; but this provision shall not be construed to authorize the keeping of a place where wine, cider or other intoxicating liquors are sold, kept for sale, furnished or given away as a beverage.

"Sec. 3. In indictments for violations of this Act it shall not be necessary to set forth the facts showing that the township has availed itself of the provisions of this Act, but it shall be sufficient to plead simply that said selling, furnishing, giving away or keeping a place was then and there prohibited and unlawful."

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such election shall be against the sale.

Section 5 provides for biennial elections under the Act.

Section 6 prescribes what shall be deemed a sufficient entry and record of the result of an election under the Act.

Section 7 provides for the disposition of fines.

"Sec. 8. This Act shall take effect and be in force from and after its passage."

In the first case the indictment charged that Gordon, on the 22d day of December, 1888, in the Township of Pleasant, in the County of Perry, unlawfully sold intoxicating liquors other than cider, or wine manufactured from the pure juice of the grape cultivated in this State, as a beverage, to divers persons whose names to the jurors were unknown, said selling being then and there prohibited and unlawful, and said selling not being for exclusively known medicinal, art, scientific, mechanical or sacramental purposes.

Gordon moved to quash the indictment for alleged defects in the form of the indictment, and in the manner in which the offense was charged, which motion was overruled, and the ruling excepted to. He then demurred to the indictment, on the ground that the facts therein stated did not constitute an offense against the laws of the State, and that the above-entitled Act of March 3, 1888, is unconstitutional.

The demurrer was overruled, and exception taken, whereupon he was put upon trial. The jury returned a verdict of guilty, and he was sentenced to pay a fine of \$50 and costs of prosecution, and to be imprisoned for the term of fifteen days.

The petition in error filed in this court prays that the above-entitled Act may be declared unconstitutional, and that the judgment of the court of common pleas may be reversed.

In the other case the indictment charged that Santoro, on or about the 13th day of December, 1888, within Mantua Township, in the County of Portage, then and there not being a legally registered druggist, unlawfully sold certain intoxicating liquors, to wit, whisky, to one Frank Kriser, which selling was then and there prohibited and unlawful. Santoro demurred to the indictment. The demurrer was overruled and exception noted. He was then put upon trial. The jury returned a verdict of guilty, and he was sentenced to pay a fine and to be imprisoned.

The circuit court affirmed the judgment of the court of common pleas, and the case was brought to this court to reverse the judgment of the circuit court, on the ground that the Act of March 3, 1888, is unconstitutional and void.

Messrs. Ferguson & Johnston, James D. Retallic and Matthews & Greve, for Gordon, plaintiff in error:

A statute to be submitted to the voters of each county, and to be in force or not in the particular county according to their votes, is not uniform in its operation.

Gebrick v. State, 5 Iowa, 491. See also *Maize v. State*, 4 Ind. 342; *Kelley v. State*, 6 Ohio St. 269; *Ex parte Van Hagan*, 25 Ohio St. 426.

Such legislation as the Act in question is in conflict with the second clause of § 26, art. 2, of the Constitution, which provides that no Act shall be passed to take effect upon the approval of any other authority than the General Assembly.

Cincinnati, W. & Z. R. Co. v. Clinton Co. 1 Ohio St. 77; *Rice v. Foster*, 4 Harr. (Del.) 479; *Parker v. Com.* 6 Barr, 507; *State v. Weir*, 88 Iowa, 184; *Gebrick v. State*, 5 Iowa, 492. See also *Lammert v. Lidwell*, 62 Mo. 188; *State v. Morris Co.* 86 N. J. L. 72; *Ex parte Wall*, 48 Cal. 279, 17 Am. Rep. 425.

Where so-called Local Option Laws have been sustained they have made it unlawful to sell liquors without a license, and prescribed a penalty for so doing, and made it a condition of granting a license that there should be a majority vote.

Gloversville v. Howell, 70 N. Y. 287.

The legislative authority is incapable of delegation; it cannot be conferred by the Legislature upon any other body or upon any person or persons.

Groesch v. State, 42 Ind. 547; *Locke's App.* 72 Pa. 491, 13 Am. Rep. 716; *State v. Wilcox*, 42 Conn. 364, 19 Am. Rep. 536; *Boyd v. Bryant*, 35 Ark. 69, 87 Am. Rep. 6; *Barto v. Himrod*, 8 N. Y. 483; *Cooley*, Const. Lim. 5th ed. 139, and cases there cited.

Our Constitution grants to the Legislature the power to regulate, not to destroy, the traffic in intoxicating liquors.

Miller v. State, 3 Ohio St. 476.

The Act is also void because nothing but a record of the result of the election is required to be kept, and it is only made prima facie evidence of the truth of the matter therein stated, and whether or not the Act was in force, would be a question of fact in every case, leaving every step taken and act done under it open to contest and interminable litigation.

Re Hauck, 14 West. Rep. 471, 70 Mich. —.

Mr. I. T. Siddall, for Santoro, plaintiff in error:

The General Assembly cannot delegate any part of its authority, or thrust it back upon the people.

Cincinnati, W. & Z. R. Co. v. Clinton Co. 1 Ohio St. 87; *State v. Field*, 17 Mo. 529; *State v. Morris Co.* 86 N. J. L. 72; *Santo v. State*, 2 Iowa, 203; *Gebrick v. State*, 5 Iowa, 492; *Mishmeier v. State*, 11 Ind. 482; *Thorne v. Cramer*, 15 Barb. 113; *Bradley v. Baxter*, 15 Barb. 123; *Chenango Bank v. Brown*, 26 N. Y. 472; *State v. Copeland*, 3 R. I. 33; *State v. Beneke*, 9 Iowa, 203; *Parker v. Com.* 6 Pa. 507; *State v. Frame*, 89 Ohio St. 407.

The Legislature has no power to make the operation or enforcement of a law dependent on the will of the people.

Lammert v. Lidwell, 62 Mo. 188; *Brewer Brick Co. v. Brewer*, 63 Me. 62; *Ex parte Wall*, 48 Cal. 279; *State v. Weir*, 83 Iowa, 134; *Maize v. State*, 4 Ind. 342; *Barto v. Himrod*, 8 N. Y. 492; *Rice v. Foster*, 4 Harr. (Del.) 479; *State v. Swisher*, 17 Tex. 441; *Mishmeier v. State*, 11 Ind. 482; *Smith v. Janesville*, 26 Wis. 291.

All laws defining crime of any character are laws of a general nature and must have a uniform operation throughout the State.

Cass v. Dillon, 2 Ohio St. 617; *Ex parte Van Hagan*, 25 Ohio St. 481; *Kelley v. State*, 6 6 L. R. A.

Ohio St. 269; *McGill v. State*, 81 Ohio St. 258; *State v. Winch*, 45 Ohio St. 663. See also *Mishmeier v. State*, 11 Ind. 482; *Maize v. State*, 4 Ind. 342; *Shultz v. Cambridge*, 88 Ohio St. 663.

The constitutionality of a statute depends upon its operation, and not upon the form it may be made to assume.

State v. Hipp, 88 Ohio St. 199; *State v. Frame*, 89 Ohio St. 412; *Butzman v. Whitbeck*, 42 Ohio St. 223.

To have a uniform operation throughout the State, an Act, if enforced at all, must be enforced "wherever the right hand of the law can reach to enforce it.

Ex parte Van Hagan, 25 Ohio St. 481; *Kelley v. State*, *supra*; *Durkee v. Janesville*, 26 Wis. 697; *McGregor v. Baylies*, 19 Iowa, 43; *Gebrick v. State*, 5 Iowa, 491; *People v. Chautauqua Co.* 43 N. Y. 10; *Robinson v. Perry*, 17 Kan. 248; *State v. Morris Co.* 86 N. J. L. 72; *Kerrigan v. Clement*, 68 N. Y. 381; *State v. Weir*, 88 Iowa, 184; *Ex parte Wall*, 48 Cal. 279; *Maize v. State* and *Mishmeier v. State*, *supra*.

The only States having Constitutions similar to ours have declared "local option" unconstitutional.

State v. Weir, 88 Iowa, 184; *Ex parte Wall*, *Maize v. State* and *Mishmeier v. State*, *supra*. See also 1 Cent. L. J. pp. 25, 592; 10 Cent. L. J. p. 203.

Messrs. David K. Watson, Atty.-Gen., E. W. Maxson and Maurice A. Donahue, Pros. Atty's., and R. Butler, for the State:

There is no delegation of legislative authority. The Legislature did not delegate to the citizens of the township the power to legislate.

Cincinnati, W. & Z. R. Co. v. Clinton Co. 1 Ohio St. 77.

There is nothing in the Constitution of the State which prevents the question, whether a law shall be enforced or not, being left to the votes of the electors of the State, or any locality of the State.

Cass v. Dillon, 2 Ohio St. 607; *Thompson v. Kelley*, 2 Ohio St. 647; *Steubenville & I. R. Co. v. North Top.* 1 Ohio St. 105; *Loomis v. Spencer*, 1 Ohio St. 153.

The fact that a law must be submitted to the vote of the people before it can be executed does not make such law unconstitutional.

Weaver v. Cherry, 8 Ohio St. 564; *State v. Board of Education*, 88 Ohio St. 8.

This law is uniform in its application within the meaning of the Constitution.

State v. Pursons, 40 N. J. L. 123; *Ex parte Falk*, 42 Ohio St. 644; *McGill v. State*, 84 Ohio St. 228; *State v. Powers*, 83 Ohio St. 54; *State v. Gloucester Co. Circuit Ct.* 13 Cent. Rep. 324, 50 N. J. L. 585.

Dickman, J., delivered the opinion of the court:

In the case of *Gordon v. State* there was a motion to quash the indictment, on the ground that it did not set forth the name or names of any person or persons to whom the sale of intoxicating liquors was made, and that it was objectionable for duplicity. The indictment alleged that the accused unlawfully sold intoxicating liquors as a beverage to divers persons whose names to the jurors were unknown.

This we deem sufficient. In those cases in which the names of third persons cannot be ascertained, they may be thus designated, in the usual form, as "persons whose names are to the jurors unknown." Thus, an indictment for harboring thieves unknown is sufficient from the necessity of the case, upon the fair presumption that the names cannot be discovered; and in indictments for assault, for felonious homicides, and the like, the person injured or killed may be mentioned as unknown, if such is the fact: 1 Chitty, Cr. L. 211, 212; 2 Hawk. P. C. 231; *Com. v. Hitchings*, 5 Gray, 482; *Blodget v. State*, 8 Ind. 408; *People v. Adams*, 17 Wend. 475; *Reed v. State*, 16 Ark. 499; *Reg. v. Campbell*, 1 Car. & K. 82; *Reg. v. Stroud*, 2 Moody, Cr. Cas. 270.

The indictment was not bad for duplicity because it charged that on the 22d day of December, 1888, the accused sold intoxicating liquors to divers persons whose names to the jurors were unknown. For aught that appears upon the record, the offense charged in the indictment may be deemed a single transaction, occurring at the time and place set forth, and a conviction may be had upon proof of sale to one person.

Upon the subject of duplicity, Waite, J., in *Barnes v. State*, 20 Conn. 232, observed: "No matters, however multifarious, will operate to make a declaration or information double, provided that all taken together constitute but one connected charge, or one transaction." A man may accordingly be indicted for the battery of two or more persons in the same count, or for a libel upon two or more persons, when the publication is one single act, or for selling liquor to two or more persons, without rendering the count bad for duplicity. *State v. Anderson*, 8 Rich. L. 172; *Rez v. Benfield*, 2 Burr. 980, 984; *Rez v. Jenour*, 7 Mod. 400.

In *Rez v. Benfield* the question was asked: "Cannot the King call a man to account for a breach of the peace because he broke two heads instead of one? How many informations have been for libels upon the King and his ministers?"

But the further objection is raised that the Statute upon which the indictment was founded is so defective in its provisions that it cannot be properly executed, and therefore has no validity as a law. The grounds of objection are that the Act does not provide adequate means for determining whether the signatures on the petition to the township trustees for an election are genuine, and whether the signers constitute one fourth of the qualified electors of the township; that there is no provision for the filing and preservation of the petition; and that, as the record of the result of the election is made only prima facie evidence that the selling of intoxicating liquors is prohibited and unlawful, it will become an issue of fact in every prosecution under the law, whether the law is in force or not. It may be fairly presumed that the township trustees will not order a special election, as provided in the Statute, until they have satisfactory evidence that the petition to them has been signed by the requisite number of the qualified voters of the township. Nor is it to be presumed that the township officers, in whom the people have reposed so much trust and confidence, will neg-

lect to file and preserve the petition presented to them in their official capacity; and, although the record of the result of the election is not made conclusive evidence, the Statute is not thereby rendered inoperative.

An Act, though not clear and definite—though vague and indefinite—as to its method of enforcement, may nevertheless be valid. It will not be declared void because it is difficult of execution, or because it fails to accomplish its purposes as fully as the Legislature designed. As decided in *Cochran v. Loring*, 17 Ohio, 409, 427: "Though a law is imperfect in its details, it is not void, unless it is so imperfect as to render it utterly impossible to execute it." The objection, therefore, above stated, does not impair the validity of the Statute in question.

It is claimed, however, in the cases at bar, that there are constitutional objections which are fatal to the validity of the Act of March 3, 1888. In the first place it is contended that the Act is of a general nature, and has not a uniform operation throughout the State, and is therefore in conflict with section 26, art. 2, Const. Conceding, for the purpose of this inquiry, that the Act under consideration is a law of a general nature, it satisfies, in our view, the constitutional requirement that it shall be of uniform operation. It is an Act "to Further Provide Against the Evils Resulting from the Traffic in Intoxicating Liquors by Local Option in Any Township in the State of Ohio." One fourth of the qualified electors of any township may petition the trustees for the privilege of determining by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited. The election is to be conducted in all respects the same in every township, and if the result of the vote is against the sale, the same penalty is attached in every township for carrying on the traffic. The provisions of the Act are bounded only by the limits of the State, and uniformity in its operation is not destroyed because the electors in one or more townships may not see fit to avail themselves of its provisions. The Act makes no discrimination between localities to the exclusion of any township. Every township in the State comes within the purview of the law, and may have the advantage of its provisions by complying with its terms. The operation of the Statute is the same in all parts of the State, under the same circumstances and conditions.

By the Municipal Code of May 7, 1869, section 199, it was declared that all cities and incorporated villages should, among other things, have the power, and might provide by ordinance for the exercise of such power, "to regulate, restrain and prohibit ale, beer and porter houses or shops, and houses and places of notorious or habitual resort for tipping or intemperance." The uniformity in the operation of this law of a general nature was not measured and fixed by the number of cities and incorporated villages that might exercise the granted power. One or many might, like the Village of McConnellsville, pass the needful ordinances, but the provision of the Code was none the less of uniform operation throughout the State. The feature of uniformity in the Local Option Law under consideration would no more be marred because the qualified electors of the

Townships generally fail to adopt its provisions, than the above enactment of the Municipal Code would have ceased to operate uniformly, because cities and incorporated villages did not generally pass ordinances to prevent ale, beer and porter houses.

A clause in the Constitution of California, like that in the Constitution of this State, provides that "all laws of a general nature shall have a uniform operation." In *People v. Judge*, 17 Cal. 554, Baldwin, J., referring to this provision, says: "The language must be carefully noted. . . . The expression is, that these laws 'of a general nature' shall be 'uniform in their operation,'—that is, that such laws shall bear equally in their burdens and benefits upon persons standing in the same category."

In *Brooks v. Hyde*, 37 Cal. 375, it was said by Sanderson, J.: "By a 'uniform operation,' I understand . . . an operation which is equal in its effect upon all persons or things upon which the law is designed to operate at all." The meaning of the provision was there held to be, "that every law shall have a uniform operation upon all the citizens, or persons, or things of any class upon whom or which it purports to take effect, and that it shall not grant to any citizen, or class of citizens, privileges which, upon the same terms, shall not equally belong to all citizens."

Section 17, art. 2, of the Constitution of Kansas also requires that "all laws of a general nature shall have a uniform operation throughout the State."

In *Leavenworth Co. v. Miller*, 7 Kan. 479, it was held that where the provisions of an Act are designed for the whole State, and every part thereof, such Act has, in contemplation, a uniform operation throughout the State, notwithstanding the condition or circumstances of the State may be such as not to give the Act any actual or practical operation in every part thereof. In that case, there came under review an Act of the Legislature which provided that the board of county commissioners of any county to, into, through, from or near which any railroad might be located, might subscribe to the capital stock of any such railroad corporation, in the name and for the benefit of the county, to an amount not exceeding the sum of \$300,000, in any one corporation, and might issue bonds of the county in payment for the stock; but no such bonds should be issued until the question was first submitted to a vote of the qualified electors of the county, at some general or some special election. The commissioners of Leavenworth County called a special election to determine, by vote of the electors, whether the board of commissioners should subscribe \$250,000 to the capital stock of the "Union Pacific Railway Co., Eastern Division," and issue the bonds of the county in payment for the stock. Miller sued the commissioners upon one of the bonds issued, and it was set up in defense that the Act under which the bonds were issued was unconstitutional; that the bonds were therefore issued without authority, and were void. On this point the language of the court was: "We scarcely think it necessary to say anything with reference to section 17, art. 2, of the Constitution. The Act under consideration is so obviously in harmony with this section that the question attempted to be raised

upon its supposed incongruity needs no elucidation from us. All the provisions of said Act are expressly enacted for the whole State, and for every part of the State; and it is no more necessary that the same amount of stock be taken in each and every county of the State, in order that the Act shall have a uniform operation therein, than that the same number of men shall be executed in each county of the State, in order that the law punishing murder in the first degree shall have uniform operation throughout the State."

We cannot reach the conclusion that, because the electors of one township may decline to petition the trustees to order a special election to determine by ballot whether the sale of intoxicating liquors as a beverage shall be prohibited, every other township in the State shall be deprived of that privilege, on the ground that the Act is not capable of a uniform operation. Without seeking an authoritative definition of the term "law of a general nature," in its constitutional sense, we are of the opinion that the Act of March 3, 1888, is not open to the objection that it is not susceptible of the uniform operation contemplated in the Constitution. But it is further contended that the Act is a delegation of legislative power to the people, and therefore in contravention of section 1, art. 2, of the Constitution. That section provides that the legislative power of the State shall be vested in a General Assembly, which shall consist of a Senate and House of Representatives. It is a general rule that the agent whose employment and trust are personal cannot, without express or implied authority from his principal, delegate his power. And it is a settled maxim that when the people, in their sovereign capacity, have, by the Constitution, conferred the law-making power upon the Legislature, that department cannot delegate such power to any other body. The power must remain where located, and laws must be enacted through the established agency, until there is a change in the Constitution itself. Yet, while the principle may be universally recognized that the Legislature cannot evade its constitutional trust as the law-making agent, difficulty may arise in determining whether, by any special Act, the Legislature has, directly or indirectly, sought to divest itself of its constitutional authority and obligation. The natural tendency of the legislative department is to encroachment, and we may well be inclined, in the first instance, to question whether it has relinquished any portion of its power.

In the exercise of the duties devolved upon the legislative branch of the state government, it is manifest that discretion and judgment are required, not only in determining the subject matter of legislation, but not unfrequently in ordering the conditions or contingencies upon which laws are to be carried into effect. It may be deemed expedient in one case to provide for preliminary action before a law is executed, which, under other circumstances, would not be adopted. In requiring such proceedings prior to the enforcement of a law, the Legislature need not be prevented from keeping within the strict line of its authority. It is evident, we think, that the Act whose constitutional validity is called in question was a complete law when it had passed through the

several stages of legislative enactment, and derived none of its validity from a vote of the people. In all its parts it is an expression of the will of the Legislature, and its execution is made dependent upon a condition prescribed by the legislative department of the State. By its terms it was made to take effect from and after its passage. The qualified electors derive their authority to petition the trustees, and the trustees obtain their authority to order a special election, directly from the Legislature. The right of the electors to register their votes for or against the sale of intoxicating liquors is conferred by the same body. If a majority of the votes cast at such election should be against the sale, the traffic in intoxicating liquors is thereby prohibited and made unlawful, by virtue of the Act of the General Assembly, which may at once, if a change should come over the legislative will, repeal the law, and avoid the result of the election. So far from the vote of the electors breathing life into the Statute, it is only through the Statute that the electors are entitled to vote at the special election. While they are free to cast their votes, the consequence of their aggregate vote is fixed and declared by the Act of the Legislature. The penal sanction of the Act is subject to no modification by the action of the electors, and it is an elementary principle that "the main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws." 1 Bl. Com. 57. In some of the authorities which we have examined the idea is prominent that when the voters are called on to express by their ballots their opinion as to the subject matter of the law, they declare no consequence, prescribe no penalties, and exercise no legislative functions. The consequences, it is said, are declared in the law, and are exclusively the result of the legislative will.

In *Com. v. Weller*, 14 Bush, 218, an Act to prohibit the sale of intoxicating liquors in the County of Bullitt provided that "it shall take effect whenever it shall be ratified by a majority of the voters of said county." The view taken by the court in construing the Act was that the Legislature was not attempting to delegate its authority to a new agency; that when the Act passed the Legislature, and was signed by the executive, it became a law, and, by reason of the law, the people interested in its passage were authorized to vote for or against its provisions; that the making its operation to depend on the popular vote was a part of the law itself, and its going into operation on the contingency that the people voted for it was the legislative will on the subject.

In the well-known case of *Cincinnati, W. & Z. R. Co. v. Clinton Co.* 1 Ohio St. 77, the county commissioners were authorized by an Act of the General Assembly to subscribe to the capital stock of the company, the question of subscription having been first submitted to the qualified electors of the county. "We think it," says Ranney, J., in delivering the opinion of the court, "undeniable that the complete exercise of legislative power by the General Assembly does not necessarily require the Act to so apply its provisions to the subject matter as to compel their employment without the intervening assent of other persons, or to prevent

their taking effect only upon the performance of conditions expressed in the law."

The Local Option Act under consideration is virtually a law to prohibit the sale of intoxicating liquors upon the contingency that a majority of the qualified electors of any township shall vote against the sale. Practically, it is to go into operation upon such contingency.

"Many laws," says Scott, J., in *Pack v. Weddell*, 17 Ohio St. 371, "can only operate upon the happening of certain contingencies; yet they are nevertheless valid."

Indeed, the doctrine is generally accepted that it is within the scope of the legislative power to enact laws which shall not take effect until the happening of some particular event, or in some contingency thereafter to arise, or upon the performance of some specified condition. May not the execution of a law depend upon the condition of a popular vote, as well as upon any other fair and reasonable contingency?

The language of Redfield, Ch. J., in *State v. Parker*, 26 Vt. 357, carries with it great force. "After a full examination," says he, "of the arguments by which it is attempted to be maintained that statutes made dependent upon such contingencies are not valid laws, and a good deal of study and reflection, I must declare that I am fully convinced, although at first, without much examination, somewhat inclined to the same opinion, that the opinion is the result of false analogies, and so founded upon a latent fallacy. It seems to me that the distinction attempted between the contingency of a popular vote and other future uncertainties is without all just foundation in sound policy or sound reasoning, and that it has too often been made more from necessity than choice; rather to escape from an overwhelming analogy than from any obvious difference in principle in the two classes of cases; for . . . one may find any number of cases in the legislation of Congress, where statutes have been made dependent upon the shifting character of the Revenue Laws, or the Navigation Laws, or commercial rules, edicts or restrictions of other countries." The Act of Congress which came under review before the Supreme Court of the United States, in the case of *The Aurora v. United States*, 11 U. S. 7 Cranch, 382 [3 L. ed. 378], is a familiar example of our federal legislation.

In the case of *Smith v. Jancerville*, 26 Wis. 291, Dixon, Ch. J., in discussing this subject, thus observes: "It is said that the Act is void, or at least so much of it as pertains to the taxation of shares in national banks, because it was submitted to a vote of the people, or provided that it should take effect only after approval by a majority of the electors voting on the subject at the next general election. This was no more than providing that the Act should take effect on the happening of a certain future contingency, that contingency being a popular vote in its favor. No one doubts the general power of the Legislature to make such regulations and conditions as it pleases with regard to the taking effect or operation of laws. They may be absolute, or conditional and contingent; and if the latter, they may take effect on the happening of any event which is future and uncertain. Instances of this kind of legislation are not unfrequent. . . . We are ac-

strained to hold, therefore, that this Act is and was in all respects valid from the time it took effect, . . . and consequently that there was no want of authority for the levy and collection of the taxes in question."

We are aware that there are adjudged cases which, it is urged, militate against the views we herein advance. The cases of *Rice v. Foster*, 4 Harr. (Del.) 479, and *Parker v. Com.* 6 Pa. 507, are mainly relied upon; but in *Cincinnati, W. & Z. R. Co. v. Clinton Co. supra*, this court drew the distinction that the voters in those cases were not called upon to determine on the execution of a law under and in conformity to its provisions, but whether the law itself should continue to exist. And in *Locke's App.* 72 Pa. 491, the case of *Parker v. Com.* was held to have been overruled soon after it was decided; not in express terms, but by undermining its foundation in holding that laws could constitutionally be made dependent on a popular vote for their operation. Agnew, J., said: "This popular vote is but the law's appointed means of determining a result, which the law enacts, in an alternative form, shall be the contingency of its operation. . . . The true distinction I conceive is this: The Legislature cannot delegate its power to make a law; but it can make a law to delegate a power to determine some fact or state of things upon which the law makes, or intends to make, its own action depend."

There have been numerous decisions and much discussion concerning the validity of statutes denominated "Local Option Laws," and the subject of contingent legislation has given rise to wide debate and many adjudications; but we do not consider it necessary, in this branch of our inquiry, to make further citation of cases or opinions.

It is argued, however, that the Act of March 3, 1888, seeks to prohibit the liquor traffic, while the Legislature has power only to regulate it, and is therefore in conflict with the Constitution. The 9th section of article 15 of the Constitution, which is the same as section 18 of the schedule, is as follows: "No license to traffic in intoxicating liquors shall hereafter be granted in this State; but the General Assembly may by law provide against evils resulting therefrom." Suppose that section were eliminated from the Constitution, it would not be easy to establish that the Legislature might not, under the broad grant of legislative power, sanction or prohibit, at its pleasure, the traffic in intoxicating liquors as a beverage. "The legislative power of this State shall be vested in a General Assembly," is the language of the Constitution, and in the provisions of that section of the schedule we can find no implied limitation upon the legislative power, whereby the General Assembly would be forbidden to legislate for the prohibition of such traffic in intoxicating liquors. Whether, under the ordinary constitutional limitations, the absolute prohibition of the liquor trade is a constitutional exercise of legislative authority, is a question that has largely engaged the attention of judicial tribunals. The question involves a consideration of the police power, and the department of government which can and does exercise that power is the Legislature; and it is among the limitations upon the legis-

lative power that we are to seek the limitations upon the police power over the liquor traffic.

In the recent case of *Mugler v. Kansas*, 128 U. S. 623 [31 L. ed. 205], it was recognized as a fundamental rule that it belongs to the legislative branch of the government to exert what are known as the police powers of the State, and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health, or the public safety. Justice Harlan, in pronouncing the opinion of the court in that case, says: "If, therefore, a State deems the absolute prohibition of the manufacture and sale within her limits of intoxicating liquors for other than medical, scientific and mechanical purposes, to be necessary to the peace and security of society, the courts cannot, without usurping legislative functions, override the will of the people as thus expressed by their chosen representatives. They have nothing to do with the mere policy of legislation."

In Tiedeman on Limitations, § 103, this subject has been treated with much research and ability. The numerous cases are there collected, and it is stated by that author as evident that the decisions of the courts in different parts of the country have generally sustained laws for the prohibition of the sale of intoxicating liquors in any manner, form or bulk whatever, and on the ground that the trade works an injury to society, and may therefore be prohibited. The grant of legislative power in the present Constitution is found in very nearly the same words in the Constitution adopted in 1802. But, in view of the practice under the former Constitution, which contained no provisions relative to the subject of intoxicating liquors, and under which many Acts called "License Acts" were passed by the General Assembly, the framers of the present Constitution inserted the section of the schedule which, when adopted and made part of the Constitution, would prevent the granting of licenses to traffic in intoxicating liquors, and empower the General Assembly to provide against the evils resulting therefrom. The restriction upon the legislative power which forbids the granting of any such license cannot, we conceive, be construed into a definitive settlement of the extent to which the Legislature may go, in the direction of prohibiting the traffic in intoxicating liquors as a beverage. To say that no license shall be granted is not to say, by implication, that such traffic may not be prohibited. The refusal to license is obviously not out of the direct line of prohibition. The adoption by the people, as part of the Constitution, of a provision which placed under interdiction the license to trade in liquor, was an expression of the popular will that the State should not thereafter, by its affirmative action, through the General Assembly, extend favor or encouragement to the traffic. But, though the authority of the Legislature was thereby abridged to the extent of forbidding the passage of any Act to license the traffic, the ample grant of legislative power to the General Assembly remained sufficient, when called into exercise, for all the purposes of prohibiting the sale of intoxicating liquors as a beverage. If any doubt, however, was to arise in the future as to the authority conferred by

the General Assembly may by law provide against the evils resulting from the traffic.

When the General Assembly was clothed with authority by the Constitution to provide by law against the evils resulting from the traffic in intoxicating liquors, it was left to its discretion, subject to such express limitations as the Constitution imposed, to select the means whereby those evils might be avoided. The Legislature, in the plenitude of its discretion, having determined upon the methods of providing against such resulting evils, it would not be for the judicial branch of the state government to interfere.

"If," says McIlvaine, J., in *State v. Frame*, 89 Ohio St. 399, "in the judgment of the General Assembly, it be necessary, in order to prevent evils resulting from the traffic, that the sale and use of intoxicating liquors as a beverage be absolutely prohibited, we can see no constitutional ground upon which such exercise of its judgment and discretion can be reviewed." And if, in view of diminishing those evils, a system of regulation is adopted which practically prohibits the sale of intoxicating liquors as a beverage, it is not for this court to say there has been a misuse of legislative discretion.

This court has held, in *Adler v. Whitbeck*, 44 Ohio St. 539, 7 West. Rep. 201, that the General Assembly is vested with the power, in regulating the traffic in intoxicating liquors, to levy a tax upon the business; but, while the tax is fully authorized, it may, from its magnitude, prove so onerous as virtually to amount to a prohibition of such business. A tax thus

the municipal corporations of the State. But it is contended that there is no authority to directly prohibit the sale in townships, whatever may be the power of the General Assembly in regard to municipal corporations, through the medium of city or village ordinances. In our judgment, when it is conceded that, in providing against the evils resulting from the traffic in intoxicating liquors as a beverage, the Legislature may, without infringing the Constitution, prohibit the sale, such prohibition may extend to townships as well as to other divisions of the State. Whatever legislation may be legitimate and necessary for the mitigation or suppression of the evils resulting from the traffic should reach localities where such evils may exist, whether townships or municipal corporations.

After examining the many authorities cited, and giving due weight to the arguments of counsel, we are unable to reach the conclusion that the Statute under review is void for repugnancy to the Constitution on any ground that has been taken. Certainly, we do not feel that clear and strong conviction of the incompatibility of the Constitution and the law with each other, which, as Chief Justice Marshall said, should always exist before the Legislature is to be pronounced to have transcended its powers, and its Acts to be considered as void.

The judgment, therefore, of the Court of Common Pleas in Gordon v. State, and of the Circuit Court in Santoro v. State, should be affirmed.

Judgment accordingly.

CALIFORNIA SUPREME COURT.

SPRING VALLEY WATER WORKS, *Respt.,* *v.* CITY AND COUNTY OF SAN FRANCISCO *et al., Appts.*

(....Cal....)

1. A suit for relief against an ordinance fixing unreasonable water rates is an equitable one, and is within the jurisdiction of the superior courts of California.
 2. An arbitrary fixing of water rates by the board of supervisors without any exercise of their judgment or discretion is not a compliance with their duty under Const., art. 14, § 1, giving them power to fix such rates, and it may be set aside by the courts as a fraud on the rights of the company.
 3. The reasonableness of water rates fixed by the board of supervisors after full and fair investigation cannot be reviewed by courts unless there was actual fraud in fixing the rates, or they were so palpably and grossly unreasonable as to amount to the same thing.
 4. The board of supervisors is not so far a part of the legislative department of the State as to be entirely independent of any
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judicial control in the exercise of its duty under the Constitution in fixing water rates.

5. The mayor of the city is not a necessary party to a suit to set aside the water rates established by the board of supervisors.
6. Notice to a water company of an intention to fix water rates by the board of supervisors is not necessary under the Constitution.
7. The fact that one price is fixed for the consumer who has a meter, and a different price for one who has none, does not make an ordinance fixing water rates uncertain and indefinite.
8. A requirement that a water company shall furnish meters to those who desire to have the water used by them measured is not unreasonable.

(January 1, 1900.)

APPEAL by defendants from a judgment of the Superior Court for the City and County of San Francisco overruling a demurrer to the complaint in an action brought to set aside a certain ordinance fixing water rates, and to enjoin the taking of any action thereunder, and to enforce the passage of another ordinance for the purpose of fixing reasonable water rates. *Affirmed.*

W. Foote for appellants.
Messrs. William F. Herring and Barber, Boalt & Bishop for respondent.

Works, J., delivered the opinion of the court:

This action is brought to set aside and declare void an ordinance of the board of supervisors of the City and County of San Francisco fixing water rates to be charged for water to be furnished to said City and its inhabitants for the year commencing July 1, 1889. The complaint, after alleging the plaintiff's corporate existence, and its object and purpose, viz., to furnish water to said City and County, and other preliminary and technical matters, avers that it has, for the purpose mentioned, "constructed aqueducts and pumping and other works, and laid many miles of water pipe for distributing water to its consumers, and that its aforesaid lands, water rights, works, buildings and improvements necessary to enable it to fulfill the said purposes of its incorporation, are of very great value, to wit, of a value exceeding \$25,000,000." That it has projected, and has now in course of construction, large additions to its works, necessary to meet the demands of said City and its inhabitants, and, in order to meet the wants of said City and its inhabitants, and "to meet the expenses and pay the cost of the said additions to its works and improvements, it will be necessary for the plaintiff to lay out and expend, during the year ending June 30, 1890, very large sums of money amounting in the aggregate to more than \$1,500,000." That for these purposes it has borrowed large sums of money, amounting, in the aggregate, to more than \$9,600,000, and has an aggregate interest-bearing indebtedness, secured by mortgage on its property, of \$9,000,000. That the interest which will accrue and have to be paid during the year ending June 30, 1890, will amount, in the aggregate, to \$498,000. That the operating expenses of the plaintiff's business for said year will amount to \$390,000, and the taxes to be paid by it will amount to \$70,600. That its capital stock is \$10,000,000, is divided into 100,000 shares, and held by more than 1,100 shareholders, and that the holders of said stock are reasonably entitled to receive, in dividends upon their said stock, not less than 7 per cent per annum upon the par value of said stock. That the plaintiff is entitled to receive a reasonable and just compensation for the services rendered, "and that, if so fixed, its aggregate annual income from such rates would be sufficient to pay the interest on its indebtedness, the taxes upon its property, and its operating and other fixed expenses, and to pay dividends to its stockholders amounting to at least 7 per cent upon the par value of their stock; and that to this end it was and is entitled to have its rates for the year commencing July 1, 1889, and ending June 30, 1890, so fixed and established that its gross income for said year will amount to at least \$1,670,000." That, as required by law, the plaintiff furnished said board of supervisors, and filed with the clerk thereof, a detailed statement, verified by the oath of the president and

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payer during the year preceding the date of such statement, and also showing all revenue derived by said plaintiff from all sources during said year, and an itemized statement of expenditures made by plaintiff for supplying water during said time. "That from said statement it appeared, and so the fact is, that the receipts and expenditures made by the plaintiff from furnishing and for supplying water during said time were as follows, viz.: Receipts—from water-rates, \$1,421,751.39; from other sources, \$12,498.25; total, \$1,434,249.64. Disbursements—for operating expenses, \$361,653.65; for interest, \$443,257.85; for taxes, \$70,624.40; for dividends, \$600,000; total, \$1,475,535.90. Balance, expenditures over receipts, \$41,286.26."

The complaint further alleges "that said board of supervisors did not, during said month of February, 1889, so fix and prescribe said rates for said year, and have not at any time lawfully or duly fixed or prescribed any rates whatever for supplying fresh water to said City and County, and its inhabitants, during said year; that on the 28th day of February, 1889, the said board of supervisors assumed and pretended to pass a certain pretended ordinance or order, purporting to fix the maximum rates to be charged for furnishing fresh water to said City and County, and its inhabitants, for the said year commencing July 1, 1889, and ending June 30, 1890, a true and full copy of which said ordinance or order is hereto annexed, marked 'Exhibit A,' and made a part of its complaint. That the said ordinance or order purports to fix the rates to be charged for supplying fresh water to said City and County, and its inhabitants, for said year; but that the same is, in fact, null and void, and of no effect, and that the rates pretended thereby to be fixed are wholly illegal and unauthorized. That the said ordinance or order was passed, or pretended to be passed, without any notice or opportunity to be heard against it on the part of the plaintiff or other person interested. That said order was first introduced in said board of supervisors without any previous notice to plaintiff or hearing accorded to plaintiff with reference to the subject matter thereof, at a meeting of said board of supervisors held on the 21st day of February, A. D. 1889, and was thereafter called up for final passage at a meeting of said board of supervisors held on the 28th day of February, A. D. 1889. That the first information which the plaintiff received thereof was through the public newspapers, and on said 21st day of February, and that the first opportunity which the plaintiff had to object to said order, or to offer to introduce evidence before said board of supervisors, showing that said order was unreasonable and unjust, was at said meeting of February 28, A. D. 1889.

"That at said meeting, and at the first opportunity, and before the passage of said order, the plaintiff offered to produce and introduce evidence and testimony before said board showing that said order was unreasonable and unjust, in that it would not allow the plaintiff to collect sufficient revenue to pay its necessary operating expenses, interest on its indebtedness,

tered by the said plaintiff, to show that the said ordinance or order was, and that the rates pretended to be fixed thereby were, unreasonable, unjust and oppressive, and refused to allow, and did not allow, any evidence whatever to be introduced respecting the reasonableness and justice of the said ordinance or order, and of the rates purported to be fixed thereby, but immediately passed and adopted said order without giving the plaintiff any opportunity to be heard whatever.

"That the rates purporting to be fixed by said ordinance or order were fixed arbitrarily, at random, and by mere guess-work, without any consideration of or regard to the right of plaintiff to a reasonable compensation for supplying water to the said City and County, and its inhabitants, or to a reasonable income, or any income, upon its investment, and without any consideration of, or regard to, the value of the plaintiff's works and property, or the amount of its interest-bearing indebtedness, and the annual interest charge thereon, or its operating expenses, or the amount of taxes which it would be required to pay, or the right of the plaintiff's stockholders to reasonable or any dividends upon their stock, and without any reference to, or consideration of, the actual cost of supplying said water, but in total disregard of all such matters; and that in the passage or pretended passage of said ordinance or order the said board of supervisors acted wholly without jurisdiction, power or authority, and in excess of their lawful jurisdiction, power or authority. That the said ordinance or order is, and the rates purporting to be prescribed and fixed thereby are, grossly unjust, unreasonable and oppressive.

"That said rates do not permit of nor provide for a just or fair or reasonable compensation for the water to be supplied during said year by this plaintiff to said City and County, and the inhabitants thereof; and that if said ordinance or order is enforced, and if the plaintiff is prevented from charging and collecting any other or greater rates than those prescribed, its gross income from the said rates for the year commencing July 1, 1889, and ending June 30, 1890, will not and cannot possibly exceed the sum of \$750,000; and it will be wholly insufficient to pay the interest on plaintiff's indebtedness, its operating expenses and taxes; and not only will not and cannot yield any dividend to its stockholders, but will render it necessary to levy heavy assessments upon said stockholders to pay said interest, expenses and taxes."

It is further averred that the defendants are about to enforce said ordinance; that its passage has already impaired the plaintiff's credit and depreciated the value of its property, and, if enforced, it will greatly impair, if not entirely destroy, the plaintiff's credit, as well as the value of its property and capital stock, and prevent it from constructing and completing the work necessary to supply water to the City and its inhabitants; and that the ordinance operates, and will operate, to take away the plaintiff's property without due process of law, and deprive the plaintiff of the equal protection of the laws, and that the plaintiff has no

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The prayer of the complaint is as follows: "Wherefore, the plaintiff prays the judgment and decree of this court: (1) That the said pretended ordinance or order of the board of supervisors of said City and County is utterly null and void, and of no effect in law. (2) That the plaintiff is entitled to have the rates for supplying fresh water to said City and County and its inhabitants, for the year commencing July 1, 1889, and ending June 30, 1890, and for other years, so fixed that they will, in the aggregate, afford a reasonable and just compensation for the service rendered, and will yield a sufficient annual income to pay the interest on its indebtedness, its running expenses and taxes, and to the plaintiff's stockholders a dividend of not less than 7 per cent per annum upon the face value of their stock. (3) That the court issue its mandatory injunction or other peremptory process requiring the said board of supervisors forthwith to fix the rates for supplying water to said City and County, and its inhabitants, for the year commencing July 1, 1889, and ending June 30, 1890, in accordance with the foregoing principles; to give plaintiff and all other persons interested due notice and an opportunity to be heard before the said board prior to the final adoption of any order fixing such rates; and to allow the plaintiff and others interested to introduce evidence respecting the reasonableness and justice of such proposed order; and to make, by their counsel, such argument upon the subject as they may see fit. (4) That each and all of said defendants be personally enjoined from any attempt to enforce, or to cause to be enforced, the said pretended ordinance or order, or from bringing, or causing to be brought, any action or suit against the plaintiff in law or in equity, to enforce any forfeiture of the plaintiff's franchise or works, or for any other purpose, for any refusal or failure of the plaintiff to obey the said pretended ordinance or order, or to conform to the rates thereby prescribed, and from any attempt, directly or indirectly, to compel the plaintiff to furnish water at any other rates than those fixed by the board of supervisors, in obedience to the decree and mandate of this court. (5) That the plaintiff's rights in the premises be forever quieted against each and all of the defendants. (6) That the plaintiff have such other and further relief as to the court may seem meet and conformable to equity and good conscience, together with the costs of this suit."

There was a demurrer to the complaint, which was overruled, and, the defendants declining to answer, judgment was rendered in favor of the plaintiff, that the rates and compensation "are grossly unreasonable, unjust and oppressive, and amount to the taking of the property of the plaintiff for public use without just compensation, and without due process of law;" that said ordinance "is outside and in excess of the jurisdiction of the board of supervisors, as conferred by article 14, § 1, of the Constitution of the State of California, and not a compliance with the provisions of said article and section, and is, and ever has been, illegal, unauthorized and void."

It was further decreed that the ordinance be set aside and vacated, that the defendants be enjoined from enforcing the same, and that they be enjoined from bringing any action against the plaintiff to enforce any forfeiture of its franchise and works on account of any past or future refusal to obey said pretended ordinance, or to conform to said rates, or any of them, quieting plaintiff's rights in the premises, and directing that the board of supervisors proceed forthwith to fix said rates and compensation as provided by the Constitution.

The appellants having seen fit to rest their case upon the facts as stated in the complaint, instead of answering and attempting to show that the board of supervisors had endeavored to comply with the provisions of the Constitution by an honest and fair effort to ascertain and fix a fair and reasonable rate for water to be furnished, the only question for us to determine is whether, under the allegations of the complaint, which are by the demurrer admitted to be true, the plaintiff is entitled to any relief. If so, the judgment must be affirmed. The appellants take the broad ground that the Constitution has conferred upon the board of supervisors the absolute and exclusive right to fix water rates, and that under no circumstances have the courts any jurisdiction to interfere with or control such authority; while the respondent contends that there is a limitation on the power of the board which compels the board to fix reasonable rates or compensation, and that whether the rates or compensation fixed by such board are reasonable or not the courts have the power and jurisdiction to determine. The Constitution (article 14) provides: "Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law, provided, that the rates or compensation to be collected by any person, company or corporation in this State, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town council or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative Acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the Legislature may prescribe. Any person, company or corporation collecting water rates in any city and county, or city or town, in this State, otherwise than as so established, shall forfeit the franchises and water-works of such person, company or corporation to the city and county, or city or town, where the same are collected, for the public use. Sec. 2. The right to collect rates or compensation for the use of water

supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law."

The first point made as to the jurisdiction of the court below is that, conceding the complaint states a cause of action, no jurisdiction to hear and determine the question raised thereby is vested in the superior courts by the Constitution or laws of this State. There is no force in this contention. If any cause of action is stated in the complaint, it is an equitable one, and of such cases superior courts are given jurisdiction in the broadest terms, by the Constitution of this State. Const. art. 6, § 5.

We pass, therefore, to the only real question in the case, viz., whether there is any power on the part of any court, no matter how broad and comprehensive its grant of jurisdiction may be, to review, interfere with, or set aside the action of the board of supervisors, or whether the power and authority of such board is exclusive and beyond the reach of the courts, under any and all circumstances. It must be conceded, in the outset, that the use of water for sale is a public use, and that the price at which it shall be sold is a matter within the power of the board of supervisors to determine. *Munn v. Illinois*, 94 U. S. 113 [24 L. ed. 77]; *Spring Valley Water Works v. Schottler*, 110 U. S. 347 [28 L. ed. 173].

Indeed, this is not controverted by the respondent. The Constitution does not, in terms, confer upon the courts of the State any power or jurisdiction to control, supervise or set aside any action of the board in respect to such rates. It may also be conceded, for the purposes of this case, that when the board of supervisors have fairly investigated and exercised their discretion in fixing the rates the courts have no right to interfere on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable. That such is the case is attested by numerous authorities. *Nesbitt v. Greenwich Dist. Board of Works*, L. R. 10 Q. B. 465, 14 Moak, Eng. Rep. 287; *Davis v. New York*, 1 Duer, 451-497; *Munn v. Illinois*, *supra*; *Spring Valley Water Works v. Schottler*, *supra*; *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866.

But it seems to us that this complaint presents an entirely different question from this. The whole gist of the complaint is that the board of supervisors have not exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardized should not be without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the Constitution, and their pretended action

work injustice to one or the other. The Constitution does not contemplate any such mode of fixing rates. It is not a matter of guess work or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the Constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty, and within the jurisdiction, of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing. The right of the plaintiff to dispose of the water collected in its reservoirs at reasonable rates, is the only value it has, and is the only thing that can bring the plaintiff any return for the money expended for reservoirs for its storage and pipes for its distribution. Not only reservoirs, pipes and other works and improvements necessary to carry out the objects of its incorporation, but the water itself, is property which cannot be taken without just compensation. The fact that the right to store and dispose of the water is a public use, subject to the control of the State, and that its regulation is provided for by the Constitution of this State does not affect the question.

"Regulation," as provided for in the Constitution, does not mean "confiscation," or a taking without just compensation. If it does, then our Constitution is clearly in violation of the Constitution of the United States, which provides that this shall not be done. The ground taken by the appellant is that the fixing of rates is a legislative act; that by the terms of the Constitution the board of supervisors are made a part of the legislative department of the state government, and exclusive power given to them, which cannot be encroached upon by the courts. In other words, the board of supervisors, for the purpose of fixing these water rates, is a part of one of the co-ordinate and independent departments of the state government, and as such beyond and independent of any control by the judicial department. This court has held that the fixing of water rates is a legislative act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of controlling judicial action. *Spring Valley Water Works v. Bryant*, 52 Cal. 132; *Spring Valley Water Works v. San Francisco*, Id. 111; *Spring Valley Water Works v. Bartlett*, 63 Cal. 245.

There are other cases holding the Act to be legislative, but whether it is judicial, legislative or administrative is immaterial. Let it be which it may, it is not above the control of the courts, in proper cases. It has also been held

by mandamus. *Berryman v. Perkins*, 55 Cal. 483.

The right and jurisdiction in this respect are fully and accurately stated in *Davis v. New York*, 1 Duer, 451-497, as follows: "Notwithstanding these observations, the question still remains, Has this court, or any court of equity, the power to interfere with the legislative discretion of the common council of this city, or of any other municipal corporation? And to this question I at once reply, 'Certainly not, if the term "discretion" be properly limited and understood;' and, thus understood, I carry the proposition much further than the counsel who advanced it. This court has no right to interfere with and control the exercise, not merely of the legislative, but of any other discretionary, power that the law has vested in the corporation of the city; and hence I deem it quite immaterial, whether the resolution in favor of Jacob Sharp and his associates be termed a 'by-law,' a 'grant' or 'contract,' or whether the power exercised in passing it be termed 'legislative,' 'judicial' or 'executive;' for, if the corporation had the power of granting at all the extraordinary privileges which the resolution confers, the propriety of exercising the power, and, perhaps, even the form of its exercise, rested entirely in its discretion. Nor is this all. A court of equity has no right to interfere with and control in any case the exercise of a discretionary power, no matter in whom it may be vested,—a corporate body, or individuals, the aldermen of a city, the directors of a bank, a trustee, executor or guardian; and I add that the meaning and principle of the rule, and the limitations to which it is subject, are, in all the cases to which it applies, exactly the same. The meaning and principle of the rule are that the court will not substitute its own judgment for that of the party in whom the discretion is vested, and thus assume to itself a power which the law had given to another; and the limitations to which it is subject are that the discretion must be exercised, within its proper limits, for the purposes for which it was given, and from the motives by which alone those who gave the discretion intended that its exercise should be governed."

We are not inclined to the doctrine asserted by the appellants in this case, that every subordinate body of officers to whom the Legislature delegates what may be regarded as legislative power thereby becomes a part of the legislative branch of the state government, and beyond judicial control.

In the case of *Davis v. New York*, *supra*, it is said: "It is this construction, therefore, that I adopt; and, for the purposes of this opinion, I shall treat the resolution as an ordinance or by-law, and its reconsideration and adoption as properly acts of legislation, in the fullest sense in which the term 'legislation' can be justly applied to the acts of a corporate body. Making these concessions, the denial of the jurisdiction of this court amounts to this: that a court of equity, of general jurisdiction, has no power, in any case or for any purpose, to re-

strain the legislative action of a municipal corporation, nor in any manner to interfere with or control its legislative discretion, no matter to what subject the action may be directed, nor how manifest and gross the violation of law, even of the provisions of its own charter, that it may involve, and no matter by what motives of fear, partiality or corruption its discretion may be governed, nor how extensive and irreparable the mischief that in the particular case may be certain to result to individuals or the public from its threatened exercise. If this be true, as a proposition of law, then the injunction order of this court, from the want of jurisdiction manifest on its face, was wholly void. If the proposition be not true, the order was valid, and should have been obeyed. . . . In reply to a question put by the court, it was expressly affirmed by one of the counsel that, should the common council attempt, by an ordinance, and from motives manifestly corrupt, to convey, for a grossly inadequate or merely nominal consideration, all the corporate property of the city, neither this nor any other court would have power to suppress by an injunction the meditated fraud, or, when consummated, to rescind the grant, or punish its authors, or devert them of its fruits. There could be no remedy, we were told, but from the force of public opinion, and the action of the people at an ensuing election; and all this upon the ground that neither the propriety nor the honesty of the proceedings of a legislative body, nor, while they are pending, even their legality, can ever be made a subject of judicial inquiry. This, it must be confessed, is a startling doctrine. We all felt it to be so when announced, and I rejoice that we are now able to say, with an entire conviction, that, applied to a municipal corporation, it is just as groundless in law as it seems to us it is wrong in its principle, and certainly would be pernicious in its effects. The doctrine, exactly as stated, may be true when applied to the Legislature of the State, which, as a co-ordinate branch of the government, representing and exercising, in its sphere, the sovereignty of the people, is, for political reasons of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it, true, when applied to a subordinate municipal body, which, although clothed to some extent with legislative and even political powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice to legal process, legal restraint and legal correction as any other body or person, natural or artificial. The supposition that there exists an important distinction, or any distinction whatever, between a municipal corporation and any other corporation aggregate, in respect to the powers of courts of justice over its proceedings, is entirely gratuitous, and, as it seems to me, is as destitute of reason as it certainly is of authority. The counsel could refer us to no case, nor have we found any, in which the judgment of the court has proceeded upon such a distinction, nor, in our researches, which have not been limited, have we been able to discover that, by any judge or jurist, the existence of such a distinction has ever been asserted or intimated." Pages 494, 495.

This case was affirmed by the Court of Appeals of New York, in *People v. Sturtevant*, 9 N. Y. 288, and the doctrine announced meets with our approval.

Counsel for appellants rely, mainly, in support of their position, on the decision of the Supreme Court of the United States in what are known as the "Granger Cases," the leading one of which is the case of *Munn v. Illinois*, 94 U. S. 118 [24 L. ed. 77]; but, while there may be some language used in the opinion in that case tending to maintain their contention, there was no such question presented as we have here, and the point made in this case was not decided. The question there presented is clearly stated by the learned chief justice in his opinion: "The question to be determined in this case is whether the General Assembly of Illinois can, under the limitations upon the legislative power of the States imposed by the Constitution of the United States, fix by law the maximum of charges of the storage of grain in warehouses at Chicago and other places in the State having not less than 100,000 inhabitants, 'in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved.'" Page 123. See also, for a statement of the questions passed upon in this case, *Wabash, St. L. & P. R. Co. v. Illinois*, 118 U. S. 557-568 [30 L. ed. 244-248].

It will be observed from this statement that the only question there was whether the power to regulate prices rested in the Legislature of the State of Illinois at all, and not whether, if it did exist, it was exclusive, and beyond judicial inquiry and control. That there was no intention to decide that the courts have no jurisdiction to interfere in this class of cases, upon a proper showing is clearly indicated by what is said by the same court in later decisions, and by judges of other federal courts. In the case of *Spring Valley Water-Works v. Schottler*, 110 U. S. 347 [28 L. ed. 173], Chief Justice Waite, who delivered the opinion in *Munn v. Illinois*, said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question was settled by what was decided on full consideration in *Munn v. Illinois*, 94 U. S. 118 [24 L. ed. 77]. As was said in that case, such regulations do not deprive a person of his property without due process of law. What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all. By the Constitution and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the Legislature for such a purpose, their duties are judicial in their nature, and they are bound, in morals and in law, to exercise an honest judgment as to all matters submitted for their official determination." *Spring Valley Water-*

116 U. S. 331 [29 L. ed. 636, 644], *Chief Justice* Waite said: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the State cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the Statute of Mississippi expressly provides 'that in all trials of cases brought for a violation of any tariff or charges, as fixed by the commission, it may be shown in defense that such tariff, so fixed, is unjust.'" See also *Dow v. Beidelman*, 125 U. S. 680 [31 L. ed. 841].

In the case of *Georgia R. & Bkg. Co. v. Smith*, 128 U. S. 174-179 [32 L. ed. 377-380], *Mr. Justice* Field sums up the former decisions of that court as follows: "It has been adjudged by this court, in numerous instances, that the Legislature of a State has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or interstate commerce." 128 U. S. 179 [32 L. ed. 380].

It will be observed that in all the decisions of the Supreme Court of the United States, while the power of the State to regulate these charges is recognized, the power is so limited as to authorize just what it is contended should be done by the court in this case. This same limitation, so necessary to the rights and property of corporations and individuals vested with a public use, is fully recognized by *Brewer, J.*, now one of the justices of the Supreme Court of the United States, in *Chicago & N. W. R. Co. v. Dey*, 35 Fed. Rep. 866, 877. After reviewing the *Granger Cases*, and other cases above cited, he says: "It is obvious from these last quotations that the mere fact that the Legislature has pursued the forms of law in prescribing a schedule of rates does not prevent inquiry by the courts; and the question is open, and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or mere proceedings, which, in the end, if not restrained, will work a confiscation of the property of complainant. Of course, some rule must exist, fixed and definite, to control the action of the courts; for it cannot be that a chancellor is at liberty to substitute his discretion as to the reasonableness of rates for that of the Legislature. The Legislature has the discretion, and the general rule is that, where any officer or board has discretion, its acts, within the limits of that discretion, are not subject to review by the courts. Counsel for complain-

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investment at least equal to the lowest current rate of interest, say 8 per cent. Decisions of the supreme court seem to forbid such a limit to the power of the Legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the Legislature is the sole judge." Page 878. See further, as supporting this view, *Pensacola & A. R. Co. v. State* (Fla.) 8 L. R. A. 661.

Counsel on both sides have shown great industry and research in the presentation of this case, and many authorities are cited bearing more or less directly on this question, but we cannot extend this opinion by noticing or even citing them all. We have cited sufficient, we think, to sustain fully our view that the court below had jurisdiction, and that the complaint presented a case sufficient to call for the interposition of the court in the matter. The conclusion we have reached on this question is decisive of the case, but there are other points made and argued in the briefs which it is proper we should notice.

On the part of the appellant, it is contended that a part of the allegations of the complaint necessary to make out a cause of action are of mere conclusions of law, and should not be considered. We think, however, that the allegations referred to, or enough of them to entitle the plaintiff to the relief demanded, are well pleaded. There are other objections to the form of the complaint, and the manner of alleging the facts, which are equally groundless. It is further claimed that the mayor of the City should have been made a party, but we do not regard this as necessary.

On the part of the respondent, it is contended, in support of the decision of the court below, that notice to the plaintiff of an intention to fix the rates was necessary, and that without such notice being given the action of the board was a taking of its property without due process of law. But the Constitution is self-executing, and, as it does not require notice, we think no notice was necessary. It does not follow, however, that, because no notice is necessary, the board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligibly and fairly in fixing the rates. This is its plain duty, and a failure to make the proper effort to procure all necessary information from whatever source may defeat its action. Both the corporation and the individuals furnishing the water, as well as the public, who must pay for its use, are entitled to a careful and honest effort on the part of the board to obtain such information and to have it act accordingly.

It is objected to the ordinance that it gives every householder an option to require a meter upon his premises, and to pay for the water furnished at water rates, which are different

from the house rate. It is contended that this does not fix the rate as the Constitution requires, but leaves it indefinite and uncertain. We do not think the ordinance is defective in this respect. The rates are definitely fixed, and the fact that there may be one price for the consumer who has a meter and a different price for one who has none does not render the ordinance uncertain. It is also contended that the requirement that meters shall be furnished by the plaintiff is unreasonable, and cannot be enforced; but we think otherwise. The requirement that the party furnishing water shall provide the means necessary for its measurement, so that the quantity furnished and to be paid for may be known, is not an unreasonable regulation. The expense of the meter could not be imposed on the consumer. *State v. Jersey City*, 45 N. J. L. 246.

There are other objections to the ordinance which we need not notice specifically. It is enough to say that, in our opinion, none of them are well taken.

Finally, we are asked by the respondent to lay down some basis upon which the board must proceed in fixing rates. But we do not feel that we should attempt to lay down such a rule in advance. This must be left to the board to determine.

Judgment affirmed.

We concur: **Beatty, Ch. J.; McFarland, J.; Sharpstein, J., Paterson, J.**

I dissent: **Thornton, J.**

Fox, J., being disqualified, did not participate in the decision of this case.

MINNESOTA SUPREME COURT.

VILLAGE OF PINE CITY, *Resp't.*,

v.

MUNCH *et al.*, *Appts.*

(....Minn....)

*1. Where a municipal corporation is, by its charter, authorized, by ordinances or by laws, "to remove and abate any nuisance injurious to the public health," and "to do all acts and make all regulations which may be necessary and expedient for the preservation of health, or the suppression of disease," it may, at its election, in cases falling within some recognized head of equity jurisdiction, resort to a court of equity to aid it in enforcing its public duties to preserve the public health of its inhabitants, and maintain in its own name an action to abate a public nuisance within its corporate limits affecting the public health of the municipality.

*Head notes by MITCHELL, J.

2. In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power. If the authorized act does not necessarily or naturally create a nuisance, but such result flows from a particular manner of doing the act, the legislative license is no defense.

(January 14, 1890.)

APPEAL by defendants from an order of the District Court for Pine County overruling a demurrer to the complaint in an action brought to enjoin the maintenance of a public nuisance. *Affirmed.*

The facts sufficiently appear in the opinion. **Messrs. J. M. Gilman and W. S. Moore** for appellants.

Mr. Gordon E. Cole for respondent.

NOTE.—Public nuisances, abatement of.

The police power of the State is adequate to give an effectual remedy against nuisances. *Northwestern Fertilizing Co. v. Hyde Park*, 97 U. S. 659 (24 L. ed. 1086).

But a municipal corporation cannot, by its mere declaration, that a structure is a nuisance, subject it to removal. *Yates v. Milwaukee*, 77 U. S. 10 Wall. 497 (19 L. ed. 984).

A village incorporated by a charter authorizing it to abate nuisances may, by an ordinance, abate a nuisance. *Northwestern Fertilizing Co. v. Hyde Park*, *supra*.

That which is declared by a valid statute to be a nuisance is deemed in law to be a nuisance in fact, and should be dealt with as such. *Carleton v. Rugg*, 5 L. R. A. 193, 149 Mass. 550.

A bill in equity to abate a public nuisance may be filed by one who has sustained special damages. *Mississippi & Mo. R. R. Co. v. Ward*, 67 U. S. 2 Black, 485 (17 L. ed. 811).

In Massachusetts the right to proceed in equity to abate public nuisances, in the exercise of the police power, where necessary for the protection of the public, has been fully recognized. *Carleton v. Rugg*, *supra*.

That municipal corporations may restrain nuisances, see *Watertown v. Cowen*, 4 Paige, 510; *Williams v. Smith*, 22 Wis. 600; *Greenwich v. Easton & A. R. Co.* 24 N. J. Eq. 221; *Potter v. Chapin*, 6 Paige, 660; *Burlington v. Schwarzman*, 52 Conn. 182; *New Haven v. Sargent*, 38 Conn. 50; *Derby v. Alling*, 40 Conn. 410.

It is necessary in all populous towns and crowded harbors to regulate matters of nuisances by police ordinance, and public policy requires that the corporation or conservators of the court should not be disturbed in the exercise of those powers unless they have clearly transcended their authority. *Baumgartner v. Hasty*, 100 Ind. 578, 50 Am. Rep. 832; *North Chicago C. R. Co. v. Lake View*, 105 Ill. 207, 44 Am. Rep. 788.

There is a distinction between temporary and permanent obstruction of streets. *Pettus v. Johnson*, 56 Ind. 148; *Langsdale v. Bonton*, 12 Ind. 467; *People v. Cunningham*, 1 Denio, 524.

A city may summarily tear down a wooden structure, erected within designated fire limits, and dangerous on account of fires. *Baumgartner v. Hasty* and *North Chicago C. R. Co. v. Lake View*, *supra*; *Monroe v. Gerspach*, 33 La. Ann. 1011; *Baker v. Boston*, 12 Pick. 184; *First Municipality of New Orleans v. Blinneau*, 3 La. Ann. 680; *Kennedy v. Phelps*, 10 La. Ann. 227; *Monroe v. Hoffman*, 29 La. Ann. 651.

a public nuisance injuriously affecting the lives and health of the inhabitants of the Village; and the principal question is the right of the plaintiff to maintain such an action. The appeal is from an order overruling a demurrer to the complaint. The nuisance complained of is that the defendants (who have erected and maintained a dam across Snake River, within the corporate limits of the Village, to accumulate water in a pond to aid in sluicing logs, and by means of which large tracts of flat land within the Village are overflowed when the pond is full), in the hot months of the summer, open the gates and sluices in the dam, and draw off nearly all the water in the pond, thereby converting these overflowed lands into marshes and swamps, when the mass of decaying vegetable matter with which the land is covered decomposes in the heat of the sun, filling the air with malaria and miasma, which causes wide spread sickness and death among the inhabitants of the Village. Part of the relief asked is that defendants may be enjoined from so operating the dam as to draw off the water in the pond, and lay bare these submerged lands, at seasons injuriously affecting the public health of the Village. The contention of the defendants is that an action to abate a public nuisance cannot be maintained by a private individual unless he sustains special injury different in kind from that suffered by the public at large, and that the plaintiff in this case stands upon the same footing as to this nuisance as a private person not sustaining any special injury, inasmuch as the Village in its corporate capacity does not sustain any such injury. It is undoubted law that, except in the case of a private person sustaining injury special in kind, a bill to restrain an existing or threatened public nuisance by injunction will only lie at the suit of the State, or of some proper officer or body, as the authorized representative of the State. It must also be conceded that a municipal corporation has no control over nuisances within its corporate limits, except such as is conferred upon it by its charter or general laws.

But these propositions are not, in our judgment, decisive of this case. The plaintiff is a Village incorporated under Special Laws 1881, chap. 33. Chapter 4 of this Act, which defines the general powers of the common council of the Village, provides that they shall have authority, by ordinances, resolutions or by-laws: "(25) To remove and abate any nuisance injurious to the public health;" "(27) To do all acts and make all regulations which may be necessary and expedient for the preservation of health or the suppression of disease." And section 5 of chapter 4 of the Act provides that "the powers conferred upon the council to provide for the abatement of any nuisances shall not bar or hinder suits, prosecutions or proceedings in court according to law."

Under these grants of power, undoubtedly the common council could pass an ordinance prohibiting or abating the nuisance complained of, and provide for its enforcement by appropriate penalties. In fact, they did pass an ordinance prohibiting drawing off the water in

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abatement of a nuisance in such cases, limited to the enforcement of the penalties prescribed by ordinance, or may it resort to a court of equity to restrain or abate it?

Municipal corporations are governmental agencies, created to assist in the civil government of the county in the district incorporated, and within that district, to the extent of the powers granted, they are in fact the agents and representatives of the State. To this Village, as is usual in the case of municipal corporations of that class, is given the power, and intrusted the duty, of preserving and protecting the health of its inhabitants, by providing for the removal of all public nuisances of the kind here complained of. To this extent it is the agent of the State. A "public" nuisance does not necessarily mean one affecting the government or the whole community of the State. Very few nuisances are thus extended in their effects. It is "public" if it affects the surrounding community generally or the people of some local neighborhood. Such is the character of the nuisance in this case. It affects the inhabitants of this Village. It is one of the very class of nuisances which the common council, as a sort of local health board, has been authorized, as a governmental agency, to abate in order to protect the health of the inhabitants of the incorporated district. Under such circumstances, we can see no valid reason why, in proper cases falling within some recognized head of equity jurisdiction, a municipal corporation, as the representative of the State, *pro hac vice*, may not, at its election, resort to a court of equity to aid in enforcing its public duties to preserve the health of its inhabitants. As there is, in analogous cases, a judicial remedy in favor of the citizen, it would seem, on principle, that the corporate authorities should be allowed to resort to the courts to aid them when the citizen is in the wrong. Limited strictly to such cases, we do not see that this right at all impinges upon the rule that a private person cannot maintain an action to abate a public nuisance not causing injury special in kind to himself. Neither would this be the exercise by the corporation of a control over nuisances not granted by its charter, but merely resorting to the courts for a more effectual judicial remedy to aid in enforcing its granted powers. There are many cases, of which this would seem to be one, where the remedy by injunction would be much more efficacious than by enforcing the penalties of an ordinance; and where the nuisance is one affecting only or principally the inhabitants of the municipality, and its abatement is among the powers granted or duties imposed upon it, there would seem to be no good reason why the action to abate might not be brought in the name of the municipality, as well as in the name of the State itself by the Attorney-General. Such seem to be the views of Dillon, the leading authority in this country, upon powers of municipal corporations. 1 Dillon, Mun. Corp. §§ 379, 405, note 2. The authorities on this question are meager in number, but, as bearing somewhat upon it, see 8 Pom. Eq. Jur. § 1849; *London v. Bolt*, 5 Ves. Jr. 129; *Rochester v*

Brickson, 46 Barb. 92; *Winthrop v. Farrar*, 11 Allen, 398; *Watertown v. Mayo*, 109 Mass. 315; *Taunton v. Taylor*, 116 Mass. 262. Also remarks of Bacon, *V. O.*, in *Nuneaton Local Board v. General Sewage Co.* L. R. 20 Eq. 127; *Baltimore v. Marriott*, 9 Md. 174.

It is suggested that this dam was erected by authority of law, and that whatever is authorized by the Legislature or its authority cannot be abated as a nuisance. This question is not raised by the demurrer, but, if the fact be as claimed by the defendants, it might be a reason why the dam itself could not be abated, but none why the defendants should not be enjoined from so operating it as to create a public nuisance.

If the Legislature expressly authorizes an act which must inevitably result in public injury, what would otherwise be a nuisance may be said to be legalized; but if they authorized an erection which does not necessarily produce such a result, but such result flows from the manner of construction or operation, the legislative license is no defense. In order to justify a nuisance by legislative authority, it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power. *Wood*, Nuis. 853-861.

Order affirmed.

NEW YORK COURT OF APPEALS (3d Div.).

William M. ALBERTI, *Respt.*,
v.

NEW YORK, LAKE ERIE & WESTERN
R. CO., *Appt.*

(.....N. Y.)

1. Evidence that plaintiff was dependent upon his earnings for the support of himself and wife, although not admissible upon the question of damages in an action to recover damages for personal injuries, is admissible as tending to show that he was unable to employ a physician of special skill from a distant city, to rebut a claim that he had not used ordinary care to cure and restore himself, where defendant had, on cross-examination of plaintiff's witnesses, shown that he had employed only local physicians with no special skill in respect to such injuries, and had communicated with, but had not employed, a physician of special skill in the city.

(*Follett, Ch. J., and Potter, J., dissent.*)

2. An attorney may waive the privilege of his client as to information acquired by a physician in attending him, and may call the physician as a witness.

3. The opinion of a physician may be given as to what will be the result of a disease in the natural and ordinary course.

4. A physician may testify as to the length of time that a person suffering from disease will live, although stating that he can only give the probability from the history of other similar cases.

5. A photograph of a person, showing the manner in which his limbs have been contracted, is admissible in an action to recover damages for personal injuries, where a physician has testified that the photograph was taken in his presence and accurately represented the condition of the limbs.

(December 17, 1889.)

A PPEAL by defendant from a judgment of the General Term of the Supreme Court, Second Department, affirming a judgment of the Orange Circuit, entered on a verdict in favor of plaintiff for \$25,000 in an action to recover damages for personal injuries alleged to have resulted from defendant's negligence. *Affirmed.*

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The facts are fully stated in the opinions.

Mr. Lewis E. Carr, for appellant:

The evidence that plaintiff was dependent on his earnings is of the precise character of the testimony condemned in *Leeds v. Metropolitan Gas Light Co.* 90 N. Y. 28, and *Staal v. Grand Street & N. R. Co.* 9 Cent. Rep. 452, 107 N. Y. 625.

Neither the poverty nor wealth of the plaintiff can be shown, to affect the damages, nor the number of persons who are dependent on him for support.

Wood, Railway Law, p. 1248. See also *Thomp. Neg.* p. 1263; *Abb. Tr. Ev.* 601; *Shearm. & Redf. Neg.* 664; *Moody v. Osgood*, 50 Barb. 638; *Myers v. Malcolm*, 6 Hill, 292; *Stockton v. Frey*, 4 Gill, 406; *Shaw v. Boston & W. R. Co.* 8 Gray, 45; *Missouri Pac. R. Co. v. Lyde*, 57 Tex. 505, 11 Am. & Eng. R. R. Cas. 188; *Pennsylvania Co. v. Roy*, 1 Am. & Eng. R. R. Cas. 225, 103 U. S. 451 (26 L. ed. 141); *Houston & T. O. R. Co. v. Burke*, 55 Tex. 823, 9 Am. & Eng. R. R. Cas. 871, note; *Chicago & N. W. R. Co. v. Bayfield*, 87 Mich. 205.

The testimony of Dr. Shepard, the plaintiff's attending physician, was within the privilege of section 834 of the Code of Civil Procedure. This prohibition applies to statements of the patient to the physician, statements of others present at the time, and to what he learned by his own examination and observation of the patient.

Edington v. Mutual L. Ins. Co. 67 N. Y. 185; *Dilleber v. Home L. Ins. Co.* 69 N. Y. 256; *Grattan v. Metropolitan L. Ins. Co.* 80 N. Y. 281; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56; *Renihan v. Dennin*, 5 Cent. Rep. 416, 103 N. Y. 573.

It was competent for the defendant to raise the objection, and the error in the ruling is available to it.

Westover v. Aetna L. Ins. Co. and *Grattan v. Metropolitan L. Ins. Co.* *supra*; *People v. Murphy*, 2 Cent. Rep. 107, 101 N. Y. 126.

There must be an express waiver, not one that may be implied.

Re Coleman, 111 N. Y. 220.

The attorney is not the party, nor does he represent the party, in such way or to such extent as to enable him to waive a privilege purely personal to the party.

the client so as to make him competent to testify.

East River Bank v. Kennedy, 9 Bosw. 543; *Murray v. House*, 11 Johns. 464; *Ball v. State Bank*, 8 Ala. 590; *Stocking's Succession*, 6 La. Ann. 232; *Shores v. Caswell*, 18 Met. 413; 2 Greenl. Ev. § 141, note 11, p. 123; *Clark v. Randall*, 9 Wis. 185, 76 Am. Dec. 252.

Mr. P. B. McLennan, for respondent:

The evidence that plaintiff was dependent upon his own exertions for support was competent for the purpose of showing that the plaintiff used ordinary care to cure and restore himself, that he acted in good faith, and resorted to such means as were reasonably within his reach to make his damages as small as he could.

See *Lyons v. Erie R. Co.* 57 N. Y. 490.

The privilege created by section 684 of the Code of Civil Procedure may be waived by the patient, and the physician may be examined.

Johnson v. Johnson, 14 Wend. 637.

The attorney represents the client.

Gaillard v. Smart, 6 Cow. 885; *Mark v. Bufalo*, 87 N. Y. 188. See also *Barrett v. Third Ave. R. Co.* 45 N. Y. 630; *Westover v. Aetna L. Ins. Co.* 99 N. Y. 56.

Haight, J., delivered the opinion of the court:

This action was brought to recover damages for a personal injury. In July, 1885, the plaintiff was a passenger upon the defendant's express train, and was seated in one of the sleeping cars. When the train was near Oxford, in the County of Orange, it came into collision with a partially displaced door of a freight car, going in the opposite direction, which broke the windows, and the partition between them, at which the plaintiff was sitting. He was struck by the broken pieces of glass and timber, and so injured that the muscles of the legs contracted in such a way as to draw both legs up against his body, and render him helpless. No question is made but that there was sufficient evidence to take the case to the jury upon the main elements of the cause of action. It is claimed, however, that errors were committed in the rejection and exclusion of evidence, which entitle the defendant to a new trial.

The plaintiff and his wife gave testimony to the effect that he was dependent upon his earnings for the support of himself and wife. This was given under the objection and exception of the defendant. As bearing upon the question of damages, we think this testimony was incompetent. The rule of recovery is, compensation for the injuries sustained. Pain and suffering, loss of time, the expense of medical, surgical and other attendance, and the diminished capacity to earn in the future, are all proper elements to be taken into consideration by the jury in determining the amount of the compensation that should be awarded. But in this regard the law is not a respecter of persons. It makes no distinction between the rich or the poor, and a jury has no right to consider that element in determining the amount of the pecuniary compensation.

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granted in this case for the error of the judge in admitting evidence of the wealth of one of the defendants. This was clearly inadmissible, and it is impossible to say what effect it may have had upon the verdict."

In the case of *Moody v. Osgood*, 50 Barb. 628, *Barnard, P. J.*, says: "Damages in these cases are not to be estimated by or proportioned to the wealth of the defendant. Indirect proof of the wealth of the defendant is just as inadmissible as direct proof, and for the same reasons."

To the same effect are the decisions of the Supreme Court of the United States, and the courts of other States. See *Pennsylvania Co. v. Roy*, 102 U. S. 451-459 [26 L. ed. 141, 145]; *Shaw v. Boston & W. R. Corp.* 8 Gray. 45; *Chicago & N. W. R. Co. v. Bayfield*, 87 Mich. 205; *Stockton v. Frey*, 4 Gill, 406. See also 2 Thomp. Neg. 1263; *Abb. Tr. Ev.* 601; *Wood, Railway Law*, 1242.

It does not appear to us that this evidence was competent, as bearing upon the earning capacity of the plaintiff prior to the injury. It is true that the jury heard the plaintiff's condition described, and saw his wife in the courtroom, but there was no evidence before them showing the style or manner in which they lived, or the amount that was annually expended in their support, and this could not very well be determined by the jury by a mere inspection of the plaintiff's wife in the courtroom. The plaintiff had already stated the character and nature of his business before his injury, and subsequently stated the amount of salary that he received. His earning capacity was thus fully made to appear by direct and competent evidence. Nor are we inclined to sustain the admissibility of this testimony upon the theory that it was competent, as tending to prove that the plaintiff, after the accident, was unable to perform any labor. There was but little dispute in reference to his actual condition. It was made to appear from the testimony of eye-witnesses and expert physicians who had examined and satisfied themselves as to his condition.

We are aware that in the case of *Caldwell v. Murphy*, 11 N. Y. 416, the court there sustained this character of testimony upon the theory that having a family dependent upon him for support, and being without means of support except his labor and the charity of his friends, his omission to employ himself had a bearing upon the extent to which he had been disabled. But we regard that case as carrying the rule to the outside limit, and do not feel justified in following it in this case.

We are thus brought to the inquiry as to whether this evidence was competent for the purpose of showing that the plaintiff used ordinary care to cure and restore himself; that he acted in good faith, and resorted to such means as were reasonably within his reach to make his damages as small as possible. It doubtless would be, in case any such issue was tendered by the pleadings or raised by the testimony. A person who receives an injury through the carelessness of another is bound to act in good faith, and to resort to such means and adopt

such methods as are reasonably within his reach to cure and restore himself. *Lyons v. Erie R. Co.* 57 N. Y. 489.

The answer denied any knowledge or information sufficient to form a belief as to the extent and seriousness of the injury complained of. The first witness sworn upon the trial on behalf of the plaintiff was Jonathan Allen, the plaintiff's father-in-law, at whose residence he had been since the injury. He testified as to the condition of the plaintiff upon his arrival, and on down to the time of the trial, and gave the names of the doctors that had treated him. Upon the cross-examination he was asked if the plaintiff at any time since the injury had been under the charge of any physician especially skilled in this class of cases, and he answered that he had not, any more than those he had mentioned, and it appeared that they were ordinary practitioners in the country Villages of Andover and Alfred. It was after this testimony was given that the evidence objected to was called out. We do not understand for what purpose the defendant called for this testimony, unless it was his purpose to show that the plaintiff had not had proper care and treatment. The physicians who testified on behalf of the plaintiff were cross examined by the defendant's counsel, and made to admit that they had never seen a case of this kind before, and consequently had no experience in treating such a case. It further appeared that there was an eminent physician in New York by the name of Dr. Seguin, who was skilled in the treatment of diseases of this character.

It was undoubtedly proper for the defendant to cross-examine the plaintiff's physicians as to their skill and experience in treating diseases of this character, as bearing upon the weight which should be given by the jury to the opinions expressed by them in reference to the durability of the disease, and that evidence did not necessarily tender the issue as to whether the plaintiff had made use of the means reasonably within his reach to cure himself. But no such claim can be made as to the testimony called out from the witness Allen. He was not a physician, and had not been called upon to express any opinion as an expert. The defendant had previously shown by the testimony of this witness that Dr. Seguin was especially skilled in that class of cases, and that he had not been called to treat the plaintiff, thus giving point and character to the testimony that the plaintiff had not been treated by anyone especially skilled in such cases. It appears to us that this evidence was sufficient to raise such an issue, and that the trial court was justified in admitting evidence that would tend to rebut and disprove such claim, and that this was done by showing that he was poor and dependent upon his earnings, and was consequently not able to employ or pay a skilled physician to visit him from the City of New York. Upon this theory we are of the opinion that the evidence objected to was permissible.

Dr. Shepard was called as a witness for the plaintiff, and asked to describe to the jury the condition in which he found the plaintiff on the morning after the accident, and what his condition had been from that time until the present. This was objected to, upon the ground that the question comes within the pro-

hibition of the Code, as a question of privilege. The counsel for the plaintiff conducting the trial then stated that as his attorney he waived the privilege. The objection was then overruled, and an exception was taken by the defendant, and the doctor proceeded to state the condition of the plaintiff. The Code of Civil Procedure provides that a clergyman, or other minister of any religion, shall not be allowed to disclose a confession made to him, in his professional character, in the course of discipline, enjoined by the rules or practice of the religious body to which he belongs. Section 833. And that a person, duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity. Section 834. And that an attorney or counselor at law shall not be allowed to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment. Section 835. Section 836 then provides: "The last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, the patient or the client."

So that, under the provisions of the later section, there must be an express waiver by the patient in order to make the testimony competent. The question then, is, Can such express waiver be made by an attorney of a person in his lifetime. The death of the client would undoubtedly terminate such agency, and no one would then be permitted to speak for him, and the prohibition provided for by the Code would then doubtless continue forever. *Westover v. Etna L. Ins. Co.* 99 N. Y. 56.

But although dead, he may leave behind him evidence which indicates an express intention to waive the privilege; as, for instance, where he requests his attorney to sign the attestation clause of his will, he by so doing expressly waives the provisions of the Statutes, and makes him a competent witness to testify as to the circumstances attending its execution, including the mental condition of the testator at the time. *Re Coleman*, 111 N. Y. 220.

Ruger, *Ch. J.*, in delivering the opinion of the court in that case, says: "It cannot be doubted that if a client, in his lifetime, should call his attorney as a witness in a legal proceeding to testify to transactions taking place between himself and his attorney while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the Statute; and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts learned through their professional relations upon a judicial proceeding to take place after his death? We think not."

If the calling of an attorney as a witness in behalf of his client is an express waiver of the seal of secrecy imposed by the Statute, is not also the calling of a physician as a witness by his patient such a waiver? It is true that these remarks of the chief judge may not have been necessary in the decision of that case, and may have been made by way of illustration; still the force of the argument is such as to commend

the patient, but his counsel who was conducting the trial in his behalf in open court expressly waived the prohibition of the Statute. The attorney, in conducting the trial, stood in the place and stead of his client, representing him as his duly authorized agent. All that properly related to the conduct of the trial devolved upon the attorney. It was for him to determine what should or should not be presented as evidence, and it appears to us that he must be deemed to so far represent the client as to be authorized in his behalf to waive the privilege, and remove the seal of secrecy to the evidence that he in his judgment saw fit to offer for and on behalf of his client.

The power of an attorney to represent his client was considered in the case of *Mark v. Buffalo*, 87 N. Y. 184. In that case the attorneys of the parties had agreed upon the amount that should be paid to the referees before whom the case was tried. The Code fixed the fees of referees at \$6 for each day spent in the business of the reference, unless at or before the commencement of the trial a different rate of compensation is fixed by the consent of the parties. The parties had not agreed upon a greater rate than that provided for by the Statute, but their attorneys had, and it was held, that under their employment, they had the power to so agree, and that their clients were bound by their agreement.

Dr. Lewis, another witness sworn on behalf of the plaintiff, was asked to state what, in his opinion, would be the result of the disease, in the natural and ordinary course. This was objected to, on the ground that there was too much speculation connected with it. The objection was overruled, and an exception taken, and the witness gave it as his opinion that the patient would never be any better, and that he never would be able to straighten his limbs. He was then asked to state the length of time that the plaintiff may live, in the natural and ordinary course of events. This was objected to, and the court ruled that he might answer if he could speak with reasonable certainty in reference thereto. The doctor answered that he could only give the probability from the history of other similar cases, and this he was permitted to do, under the objection and exception of the defendant. It will be observed that as to the latter answer the answer was as to the probability, and that in the former question he was called upon to express his opinion in reference to the result of the disease in the natural and ordinary course. It is claimed that this evidence is objectionable, under the case of *Strohm v. New York, L. E. & W. R. Co.* 96 N. Y. 303. In that case the question was as to what might or may develop, and was not as to what would probably or was reasonably certain to develop. This question was considered in the case of *Griswold v. New York, C. & H. R. R. Co.* 44 Hun, 236, affirmed, 115 N. Y. 61, and was again considered by us in the case of *McClain v. Brooklyn City R. Co.* 116 N. Y. 459, and under the rules laid down in these cases we consider the evidence competent.

During the trial the plaintiff's counsel offered in evidence a photograph of the plaintiff, showing

it was done, however, one of the doctors testified that the photograph was taken in his presence, and that it correctly represented the condition of the limbs. The only materiality of this evidence was to show the manner in which the limbs of the plaintiff were contracted. In this regard the testimony of the physician is that it was a correct representation of them. This made it competent as a map or diagram. *Arch-er v. New York, N. H. & H. R. Co.* 9 Cent. Rep. 233, 106 N. Y. 589-603. See also *Wilcox v. Wilcox*, 46 Hun, 32-38; *Ruloff v. People*, 45 N. Y. 213-224; *Hynes v. McDermott*, 82 N. Y. 50.

The judgment should be affirmed, with costs.

Bradley, Vann and Parker, JJ., concur; **Brown, J.**, not sitting.

Follett, Ch. J., dissenting:

This action is for the recovery of damages for a personal injury caused by the negligence of the defendant. On the trial the plaintiff was permitted to prove, against the objection and exception of the defendant, that he depended on his earnings for the support of himself and wife; that he had no other means; and that since December 7, 1885, his wife had been working what she could for the support of both. It was held in the prevailing opinion that this evidence was not admissible generally, nor on the question of damages, which is well sustained by the authorities cited, and others might be cited. It is sought to sustain in this court the reception of the testimony on the ground (we use the language of the respondent's counsel) "that it was competent for the purpose of showing that the plaintiff used ordinary care to cure and restore himself; that he acted in good faith, and resorted to such means as were reasonably within his reach to make his damages as small as he could."

The rule here stated was laid down in *Lyons v. Erie R. Co.* 57 N. Y. 400, in this language: "When one receives an injury through the carelessness of another, he is bound to use ordinary care to cure and restore himself. He cannot recklessly enhance his injury, and charge it to another. If his arm be broken, he cannot omit to have it set, and charge the loss of the arm to the wrong-doer. He is not obliged to employ the most skillful surgeon that can be found, or resort to the greatest expense to ward off the consequence of an injury which another has inflicted upon him. He is bound to act in good faith, and to resort to such means and adopt such methods reasonably within his reach as will make his damage as small as he can." The rule was reaffirmed in *Sauter v. New York C. & H. R. R. Co.* 66 N. Y. 50, and must be regarded as a settled rule of law in this State.

At this point it is important to inquire whether an issue, that the plaintiff had not used ordinary care to cure himself, had acted in bad faith, and had failed to resort to such means as were reasonably within his reach, was raised on trial. It is not alleged in the answer that the plaintiff was negligent in respect to the means used to effect his cure, or that his attendants, professional or lay, were incompetent, or negligent; and such an issue is not alluded

pose of sustaining this ruling, all of which we will now quote.

The first witness sworn in behalf of the plaintiff was his father-in-law, Jonathan Allen, and on the cross-examination he testified: "Alfred Center is a place of from 800 to 1,000 inhabitants. Dr. Shepard is one of the practicing physicians in that place. The country about there is quite thickly settled, for a farming country; farms averaging about a hundred acres to the farm. Dr. Shepard's practice is confined to that locality."

Q. Some time after this injury, did you make any arrangement for Dr. Seguin to visit Mr. Alberti and examine him?

A. We did; yes, sir.

Q. And about when was that?

A. Mrs. Alberti can explain that better than I can, for she made the arrangement. I think it was the last of November or first of December,—some time along then.

Q. Did you have anything to do with making that arrangement?

A. I did. I requested Dr. Hubbard, of Hornellsville, who was one of the consulting physicians, with the advice of others, to send for Dr. Seguin.

Q. Did you do that because you understood Dr. Seguin was skilled in that class of cases?

A. We did; yes, sir.

Q. And was that arrangement made for an examination, with a view of having him treat Mr. Alberti?

A. Yes, sir; and as I understand it, the day was set for him to come up, but Mr. Alberti got so bad he thought he could not stand the examination, and I requested Dr. Hubbard to telegraph Dr. Seguin to wait further orders, and he did not go then at all, until quite recently. Dr. Shepard has been the attending physician. Dr. Crandall has been one of the consulting physicians. He has practiced at Andover. It is eight miles south of Alfred, on the Erie Road. It is a place of about 1,000 inhabitants, it may be more,—1,200. Dr. Hubbard we have called once, and Dr. Robinson once. Those were single visits. The treatment has been under the direction of Dr. Shepard.

Q. Now has Mr. Alberti, at any time since this injury, been under the charge of anyone who was especially skilled in this class of cases?

A. Well, no more so than these men I have mentioned.

Q. Than such men in that ordinary practice would be?

A. Yes, sir; I don't know what their skill is.

The plaintiff was not present at the trial, but his deposition, taken March 26, 1886, by and pursuant to sections 872 and 873 of the Code of Civil Procedure, was read, in his behalf at the trial, which occurred April 26, 1886. Among other statements, the deposition contained the following: "I depend on my earnings for the support of myself and wife." The defendant objected to the reading of the sentence quoted, "as incompetent and improper," but the objection was overruled, an exception taken, and the sentence was then read.

¶ L. R. A.

than what he earns?

This was objected to incompetent and improper was overruled, and excused answer given:

A. No, sir; he has December I have been to support myself and him.

Dr. Mark Shepard, physician, was sworn in among other things, plaintiff was incurable. tion, he testified:

Q. What you are given opinion, is it not, in answers?

A. To these last questions.

Q. And that opinion experience since you have is it not?

A. Well, in a very small.

Q. In part is it based learned in regard to the various diseases before practice?

A. In part; yes.

Q. Is it based upon two?

A. Yes, sir; I commenced in the spring of 1878. I graduated of the City of New York. I immediately commenced with Alfred Center, where I have been practicing two winter courses. I have been practicing under my charge another the first case of this kind my medical observation Mr. Alberti, on the 11 July, the examination thing I had not observed experience.

Q. And it has in this case—developed that had never observed or known experience before?

A. Yes, sir.

Q. Then, in your treatment was nothing in your mind guided you, was there?

A. Yes, sir; there was edge of the treatment with the spinal cord, etc.

Q. Did you ever have

A. Oh, yes; lots of times.

Dr. William M. Cranford, was sworn in behalf, testified that in his opinion whether the plaintiff. Upon cross-examination practice medicine at Andover, miles from Alfred. And over a thousand inhabitants district around there been confined mostly to not had occasion, in my

I believe this to be a case of meningitis; that is my opinion in regard to it. I have seen others besides myself treat cases of meningitis. Have advised them with reference to them. Dr. Lewis, who was sworn here as a witness yesterday, Dr. Baker, Dr. Harmon,—well, I don't know, I should be bothered, may be, to think of them all. They are physicians in the locality in which I live. I don't think any of them ever made diseases of that kind a specialty."

Q. Then, have you ever seen the treatment of a case of this kind or of this class by some physician who made a specialty of diseases of that character?

A. No, sir; I don't know as I can say I have.

Smith Ely, a physician residing at Newburgh, made an examination of the plaintiff April 1 or 2, 1885, in connection with Drs. Lewis, Crandall and Shepard, and was sworn as a witness in behalf of the plaintiff. He testified, on cross-examination: "I don't say that it is impossible that he should recover. I don't think there is any doubt but that there was no lesion of the cord. There is some doubt whether the membranes were actually inflamed. I think the symptoms point to that."

Q. Who is the best qualified to express an opinion on that subject,—the ones who have made it a special study for life?

A. Yes; I should think they would.

Q. Is Dr. Seguin recognized as a standard authority on matters of that kind in this country?

A. Yes; he is.

Q. And you think he would be well qualified to express an opinion on those matters?

A. Yes, of course.

Q. You have heard the testimony here in regard to Alfred Center, and you saw the place there yourself. Isn't it a fact that, in ordinary country practice, in a case of this character, which required special treatment, the ordinary method is to put him under the hands or charge of someone who has special knowledge in that direction?

Objected to by the plaintiff as incompetent and immaterial. The objection was sustained, and the defendant excepted.

It is possible to infer that this question was asked with reference to raising the issue that the plaintiff had been negligent in not employing a physician having special skill and experience in the treatment of injuries like the plaintiff's, but this question was excluded by the court.

We have now quoted all the evidence referred to by the respondent's counsel for the purpose of sustaining this ruling, and we think it very clearly shows that no such issue as is now sought to be introduced into the case was presented on the trial. All of this evidence was given before the plaintiff rested. The defendant called four physicians,—Drs. Seguin, Stillman, Robinson and Nye. The first three acquired their knowledge of the plaintiff's condition by being called in consultation by him, and Dr. Nye gave no evidence of consequence.

But two issues were contested at the trial:
6 L. R. A.

probable duration of the consequences. To this second issue all of the medical testimony was directed, and none of it tends to show that the plaintiff was negligent in the means adopted for his cure, or that such a position was taken by the defendant at the trial; and it seems to us plain that this so-called "issue" has been raised out of the record for the purpose of avoiding the effect of the ruling discussed.

The judgment should be reversed, and a new trial granted, with costs to abide the event.

Potter, J., concurs.

Benjamin W. FRANKLIN, *Respt.*,

v.

Mary C. BROWN, *Appt.*

(.....N.Y.....)

There is no implied covenant in the lease for a year of a furnished house for immediate occupation as a residence against external defects originating on premises of a stranger, without fault of the lessor, such as noxious odors from an adjacent livery stable, and unknown to the lessor when he entered into the contract.

(December 20, 1889.)

APPEAL by defendant from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment entered upon the report of a referee in favor of plaintiff in an action to recover rent alleged to be due under a certain lease. *Affirmed.*

Statement by Vann, J.:

This action was brought to recover the rent reserved by a lease of a furnished dwelling-house. The answer pleaded a counterclaim for damages alleged to have been sustained by the defendant on account of a breach of an implied covenant that said house was fit for immediate and permanent occupation. The referee found that on the 14th of September, 1883, the parties entered into a written agreement whereby the plaintiff leased to the defendant the dwelling-house known as "No. 6 West Seventeenth Street," in the City of New York, for the term of one year, at the annual rental of \$8,100, and that the defendant covenanted to pay said sum in equal monthly payments, commencing on the 1st day of November thereafter. He also found due performance on the part of the plaintiff, and a failure to perform on the part of the defendant, who omitted to pay the rent which became due for the months of July, August and September, 1884, the last three months of the term. Upon the request of the defendant, the referee further found that said house was leased to her to be used as a private residence; that the furniture therein was a large and important element in determining the amount of rent to be paid; that, during the time covered by the lease, noxious gases, and strong, unhealthy and disagreeable odors "existed generally, and in

very large quantities, throughout said furnished dwelling-house," making the defendant sick, and rendering the house unhealthy and unfit for human habitation, and that she incurred certain expenses as the immediate and necessary result of occupying said premises. The referee, however, added to these requests, as found, that said gases, odors, etc., did not arise in or from any part of said house, but that they came from the adjoining premises, which were used for a livery stable, and that neither party knew of their existence when the lease was executed.

Mr. John G. Agar, for appellant:

If a person contracts, for a consideration, to let another use a furnished dwelling-house for a period short enough to indicate an intention to give and take immediate use, and for the particular purpose of dwelling therein as a private residence, he impliedly warrants the use for that purpose for which he receives the consideration free from all defects and incumbrances.

1 Addison, Cont. 293; *Smith v. Marrable*, 11 Mees. & W. 5; *Sutton v. Temple*, 13 Mees. & W. 60; *Campbell v. Wentlock*, 4 Fost. & F. 716; *Wilson v. Finch Hatton*, L. R. 2 Exch. Div. 336; *Bird v. Greville* (Q. B. Div.) 1 Cababe & El. 817; *Gilhooley v. Washington*, 4 N. Y. 292.

If a man lets out household furniture for immediate use in a particular manner and place, there is an implied warranty on his part that it is fit for use and free from all defects inconsistent with the reasonable and beneficial enjoyment of it, and when by the contract the use is limited to one place the warranty extends to the place in which alone the chattel or furniture can be used.

1 Addison, Cont. 343, 344; *Harrington v. Snyder*, 3 Barb. 381; *Horne v. Meakin*, 115 Mass. 380; *Fowler v. Lock*, L. R. 7 C. P. 280; *Lyon v. Mella*, 5 East, 428, 437; *Steel v. State Line Steamship Co.* L. R. 3 App. Cas. 72.

A man who lets out vessels or casks for holding wine or oil, and furnishes such as are not in good condition, shall be responsible for such damages as may accrue. He is held to warrant the use for which he takes the hire.

Domat, Lib. 1, title 4, §§ 3, 8; Digest, Lib. 10, title 2, 19, § 1; Pothier, Louage, No. 54. See also Story, Bailm. § 388.

Messrs. Delos McCurdy and A. H. Vanderpoel, for respondent:

The case of *Smith v. Marrable*, 11 Mees. & W. 5, is understood to have been distinctly overruled by the subsequent cases of *Sutton v. Temple*, 13 Mees. & W. 60; *Hart v. Windsor*, Id. 68; *Francis v. Cockrell*, L. R. 5 Q. B. 501; *Carson v. Godley*, 26 Pa. 111; *Howard v. Doolittle*, 3 Duer, 464; *Dutton v. Gerrish*, 9 Cush. 89; *Foster v. Peyser*, 9 Cush. 242; *Royce v. Guggenheim*, 106 Mass. 201; *Edwards v. New York & H. R. Co.* 98 N. Y. 245; *Murray v. Albertson*, 11 Cent. Rep. 584, 50 N. J. L. 167.

Upon the letting of a dwelling-house there is no implied warranty of its fitness for the purpose for which it was let.

Jaffe v. Harteau, 56 N. Y. 398; *Oleves v. Willoughby*, 7 Hill, 88; *Mumford v. Brown*, 6 Cow. 475; *Westlake v. De Grauw*, 25 Wend. 669; *Chadwick v. Woodward*, 18 Abb. N. C. 441; 6 L. R. A.

Coulson v. Whiting, 14 Abb. N. C. 60; *Sutphen v. Seebass*, 14 Abb. N. C. 68; *Edwards v. New York & H. R. Co. supra*; *Simons v. Seward*, 23 Jones & S. 406.

Where the landlord has created no nuisance himself, and none arises from the premises, no liability can be imposed upon him for nuisances created elsewhere by others over whom he has no control.

Cohen v. Dupont, 1 Sandf. 266; *Royce v. Guggenheim. supra*; *Pendleton v. Dyett*, 4 Cow. 581; *Edwards v. New York & H. R. Co. supra*; *Wolf v. Kilpatrick*, 2 Cent. Rep. 81, 101 N. Y. 148.

The only implied covenant is for quiet and peaceable enjoyment, and this only secures the tenant from the lawful interruption of such enjoyment by persons having a title paramount to that of his landlord, or an interruption by the landlord, or those claiming under him, and not by a stranger.

Gilhooley v. Washington, 3 Sandf. 380, 4 N. Y. 217; *Townsend v. Gilsey*, 7 Abb. Pr. N. S. 59; *Ogilvie v. Hull*, 5 Hill, 52; *Edgerton v. Page*, 20 N. Y. 281; *Wood, Land. and Ten.* 801-804; *Mortimer v. Bruner*, 6 Bosw. 653.

Vann, J., delivered the opinion of the court:

It is not claimed that any deceit was practiced or false representations made by the plaintiff as to the condition of the house in question, or its fitness for the purpose for which it was let. The defendant thoroughly examined the premises before she signed the lease, and she neither ceased to occupy nor attempted to rescind until the last quarter of the term. Neither party knew of the existence of the offensive odors when the contract was made. They were not caused by the landlord, and did not originate upon his premises, but came from an adjoining tenement. The lease contained no covenant to repair, or to keep in repair, and no express covenant that the house was fit to live in. The defendant, however, contends that, as the demise was of a furnished house for immediate use as a residence, there was an implied covenant that it was reasonably fit for habitation. It is not open to discussion, in this State, that a lease of real property only contains no implied covenant of this character, and that, in the absence of an express covenant, unless there has been fraud, deceit or wrong-doing on the part of the landlord, the tenant is without remedy, even if the demised premises are unfit for occupation. *Witty v. Matheers*, 53 N. Y. 512; *Jaffe v. Harteau*, 56 N. Y. 398; *Edwards v. New York & H. R. Co.* 98 N. Y. 245; *Oleves v. Willoughby*, 7 Hill, 88; *Mumford v. Brown*, 6 Cow. 475; *Westlake v. De Grauw*, 25 Wend. 669; *Taylor, Land. and Ten.* 8th. ed. § 882; *Wood, Land. and Ten.* § 379.

But it is argued that the letting of household goods for immediate use raises an implied warranty that they are reasonably fit for the purpose, and that, when the letting includes a house furnished with such goods, the warranty extends to the place where they are to be used. This position is supported by the noted English case of *Smith v. Marrable*, 11 Mees. & W. 5, which holds that, when a furnished house is let for temporary residence at a watering place, there is an implied condition that it is in a fit state to be habited, and that the tenant is enti-

It was decided in 1843, yet during that year it was distinguished and questioned by two later decisions of the same court. *Sutton v. Temple*, 12 Mees. & W. 52; *Hart v. Windsor*, Id. 68.

It was approved and followed in 1877 by *Wilson v. Finch Hatton*, L. R. 2 Exch. Div. 336, in which, however, there was an important fact that did not appear in the earlier case, as before the lease was signed there was a representation made in behalf of the landlord that she believed "the drainage to be in perfect order," whereas it was in fact defective, and the contract was promptly rescinded on this account. The principle that there is an implied condition or covenant in a lease that the property is reasonably fit for the purpose for which it was let, as laid down in *Smith v. Marrable*, has been frequently questioned by the courts of this country, and has never been adopted as the law of this State. *Edwards v. New York & H. R. Co.* 98 N. Y. 248; *Howard v. Doolittle*, 8 Duer, 476; *Carson v. Godley*, 26 Pa. 117; *Dutton v. Gerriah*, 9 Cush. 89; *Chadwick v. Woodward*, 18 Abb. N. C. 441; *Coulson v. Whiting*, 14 Abb. N. C. 60; *Sutphen v. Seebass*, Id. 67; *Meeks v. Boverman*, 1 Daly, 99.

We have been referred to no decision of this court involving the application of that principle to the lease of a ready-furnished house, and it is not necessary to now pass upon the question, because the case under consideration differs from the English cases above mentioned in two significant particulars: (1) It involves a lease for the ordinary period of one year, instead of a few weeks or months during the fashionable season. (2) The cause of complaint did not originate upon the leased premises, was not under the control of the lessor, and was not owing to his wrongful act or default. It was simply a nuisance arising in the neighborhood, but neither caused nor increased by the house in question. Hence we are not called upon in this case to decide whether a lease of a furnished dwelling contains an implied covenant against inherent defects either in the house or in the furniture therein, but simply whether the lease under discussion contains an implied covenant against external defects, which originated upon the premises of a stranger, and were unknown to the lessor when he entered into the contract.

It is uniformly held in this State that the lessee of real property must run the risk of its condition, unless he has an express agreement on the part of the lessor covering that subject. As was said by the learned general term when deciding this case: "The tenant hires at his peril, and a rule similar to that of *caveat emptor* applies, and throws on the lessee the responsibility of examining as to the existence of defects in the premises, and of providing against their ill effects." 21 Jones & S. 479.

In *Cleves v. Willoughby*, 7 Hill, 88, 86, Mr. Justice Beardsley, speaking for the court, said: "The defendant offered to show that the house was altogether unfit for occupation, and wholly untenable. The principle on which this offer was made, however, cannot, I think, be maintained. There is no such implied warranty on the part of the lessor of a dwelling-house as the offer assumes. It is quite unne-

cessary to say that the doctrine has a very limited application, for any purpose, to a lease for years, and in every case has reference to the title, and not to the quality or condition, of the property. The maxim *caveat emptor* applies to the transfer of all property, real, personal and mixed, and the purchaser generally takes the risk of its quality and condition, unless he protects himself by an express agreement on the subject."

In *O'Brien v. Capwell*, 59 Barb. 504, the court declared that, "as between landlord and tenant, . . . when there is no fraud or false representations or deceit, and in the absence of an express warranty or covenant to repair, there is no implied covenant that the demised premises are suitable or fit for occupation, or for the particular use which the tenant intends to make of them, or that they are in a safe condition for use."

In *Edwards v. New York & H. R. Co.* 98 N. Y. 249, it was said in behalf of this court: "If a landlord lets premises, and agrees to keep them in repair, and he fails to do so, in consequence of which anyone lawfully upon the premises suffers injury, he is responsible for his own negligence to the party injured. . . . If he creates a nuisance upon his premises, and then demises them, he remains liable for the consequences of the nuisance, as the creator thereof. . . . But where the landlord has created no nuisance, and is guilty of no willful wrong or fraud or culpable negligence, no case can be found imposing any liability upon him for any injury suffered by any person occupying or going upon the premises during the term of the demise, and there is no distinction stated in any authority between cases of a demise of dwelling-houses and of buildings to be used for public purposes. The responsibility of the landlord is the same in all cases. If guilty of negligence or other *delictum* which leads directly to the accident and wrong complained of, he is liable; if not so guilty, no liability attaches to him."

These quotations illustrate the strictness with which the courts have refused to imply covenants on the part of the lessor as to conditions under his control. What sound reason, then, is there for claiming that the law will imply a covenant as to conditions not under his control, and with reference to which neither lessor nor lessee can reasonably be supposed to have contracted, as they knew nothing about them? The fact that personal property was in part the subject of the lease can have no bearing upon this question, because neither the furniture, nor the place provided for its use, was the cause of the unpleasant odors. They were not a part of the leased property, either real or personal, but were independent of it in origin, and accidental in their effect. If smoke from a neighboring manufactory had blown through the windows, or gas had escaped from a leaky main in the street and entered the house, could the lessee have abandoned the premises, or have called upon the lessor to respond in damages? If any nuisance had existed in the vicinity without the landlord's agency or knowledge, but which materially lessened the value of the lease, upon whom would the loss fall? These questions

ence to the condition of leased real property, simply because personal property is included in the lease. The furniture was not the basis of the contract, but a mere incident, and in law the rent is deemed to issue out of the realty. 1 Wood, Land, and Ten. 2d ed. 123; *Newman v. Anderton*, 2 Bos. & P. N. R. 224; *Emott's Case*, 2 Dyer, 212b, note.

The difficulty is still more serious when the effort is made to extend the contract of the

leased, whether real or personal. We do not think that there was any covenant in the lease in question, implied either by common law or from the acts or relations of the parties, that extended to the grievance of which the defendant complains.

The judgment should therefore be affirmed, with costs.

All concur.

RHODE ISLAND SUPREME COURT.

Re the BALLOT ACT.

(....R. L....)

The provision of the Ballot Act (Pub. Laws, chap. 731, § 6), which requires ballots to contain the names, etc., of all candidates in nomination for any offices specified in the ballot, is not in conflict with the constitutional requirements that ballots for general officers shall be returned to the Secretary of State for safe keeping, while ballots for other officers must be returned to other persons, since the names of candidates for general offices may be printed on ballots distinct from those for local officers, or if printed on the same ballot it may be separated into two pieces and each part returned to the required custodians.

(January 22, 1890.)

ON submission by the Governor of a question for the opinion of the court.

Pub. Laws, R. I. chap. 731, "The Ballot Act" of March 29, 1889, § 6, provides:

"Sec. 6. Every ballot printed in accordance with the provisions of this Act shall contain the names, residences, together with the street and number, if any, and the party or political designation of all candidates whose nominations for any offices specified in the ballot have been duly made and not withdrawn in accordance herewith, and shall contain no other names; except that in the case of electors of president and vice-president of the United States the names of the candidates for president and vice-president may be added to the party or political designation. The names of candidates for each office shall be arranged under the designation of the office in alphabetical order, according to surnames, except that the names of candidates for the offices of electors of president and vice-president shall be arranged in groups as presented in the several certificates of nomination or nomination papers. There shall be left at the end of the list of candidates for each different office as many blank spaces as there are persons to be elected to such office, in which the voter may insert the name of any person not printed on the ballot, for whom he desires to vote as candidate for such office. Whenever the approval of a constitutional amendment or other question is submitted to the vote of the people, such questions shall be printed upon the ballot after the list of candidates. The ballots shall be so printed as

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to give each voter a clear opportunity to designate by a cross mark [X] in a sufficient margin at the right of the name of each candidate, his choice of candidates and his answer to the question submitted, and on the ballot may be printed such words as will aid the voter to do this, as 'Vote for one,' 'Vote for three,' 'Yes,' 'No,' and the like. Before distribution the ballots shall be folded so that no printing shall appear except the indorsement, which shall be printed on the back and outside 'Official Ballot for,' followed by the designation of the polling place for which the ballot is prepared, the date of the election, and a fac-simile of the signature of the Secretary of State who has caused the ballots to be so printed and folded."

The Constitution of the State of Rhode Island, art. 8, §§ 2, 3, 5, 6, provides:

"Sec. 2. The voting for governor, lieutenant-governor, secretary of state, attorney-general, general treasurer and representative to Congress shall be by ballot; senators and representatives to the General Assembly, and town or city officers, shall be chosen by ballot, on demand of any seven persons entitled to vote for the same; and in all cases where an election is made by ballot or paper vote, the manner of balloting shall be the same as is now required in voting for general officers, until otherwise prescribed by law.

"Sec. 3. The names of the persons voted for as governor, lieutenant-governor, secretary of state, attorney-general and general treasurer shall be placed upon one ticket; and all votes for these officers shall, in open town or ward meetings, be sealed up by the moderators and town clerks, and by the wardens and ward clerks, who shall certify the same and deliver or send them to the Secretary of State, whose duty it shall be securely to keep and deliver the same to the grand committee, after the organization of the two Houses at the annual May session; and it shall be the duty of the two Houses at said session, after their organization, upon the request of either House, to join in grand committee, for the purpose of counting and declaring said votes, and of electing other officers."

"Sec. 5. The ballots for senators and representatives in the several towns shall, in each case, after the polls are declared to be closed, be counted by the moderator, who shall announce the result, and the clerk shall give certificates to the persons elected. If, in any case, there be no election the polls may be reopened,

See also 17 L. R. A. 364.

election may be made to a time not exceeding seven days from the first meeting.

"Sec. 6. In the City of Providence, the polls for senator and representatives shall be kept open during the whole time of voting for the day, and the votes in the several wards shall be sealed up at the close of the meeting by the wardens and ward clerks in open ward meeting, and afterwards delivered to the city clerk. The mayor and aldermen shall proceed to count said votes within two days from the day of election; and if no election of senator and representatives, or if an election of only a portion of the representatives, shall have taken place, the mayor and aldermen shall order a new election, to be held not more than ten days from the day of the first election; and so on until the election shall be completed. Certificates of election shall be furnished by the city clerk to the persons chosen."

Pub. Stat. R. I. chap. 10, § 19, as amended by Pub. Laws R. I. chap. 629, § 2, of April 19, 1887, provides:

"Sec. 19. In cities and in towns which are divided into districts for voting, as soon as the examination and counting of the ballots is concluded, the wardens and clerks and the moderators and district clerks shall forthwith, in open ward or district meetings, seal up all the ballots other than those given for general officers, with a certificate of the number of ballots, and for what officers they have been given. The package containing said ballots shall be delivered to the city or town clerk within twelve hours of the time of sealing up, and shall not upon any pretense whatever be opened or recounted by said wardens and clerks, or moderators and clerks, or by either of them, or by any other person, until said package of ballots is delivered to the said city or town clerk. Said wardens and ward clerks and moderators and district clerks shall, as soon as said ballots, including those given for general officers, are counted, make a record in a book to be provided by the Secretary of State for said purpose, of the number of ballots given in at said election, specifying the names of the persons, for what offices and the number of ballots given in for each; also the number of ballots cast for or against any proposition of amendment to the Constitution of the State, or upon any other proposition or subject whatever, and shall respectively sign such record. Said book shall be deposited with the town or city clerk with the ballots, and, in case of the loss or destruction of said ballots, shall be evidence of the matters therein contained. Any person who shall willfully violate any of the provisions of this section shall be fined not more than \$1,000, or be imprisoned not more than three years, either or both."

Under art. 10, § 8, of the Constitution of the State, which provides that "The Judges of the supreme court . . . shall . . . give their written opinions upon any question of law whenever requested by the governor, or by either House of the General Assembly," the governor addressed the following communication to the judges of the court:

6 L. R. A.

To the Honorable, the Justices of the Supreme Court of the State of Rhode Island:

Gentlemen,—In accordance with the provisions of § 3, art. 10, "of the judicial power" of the Constitution of the State, I respectfully request an opinion upon the following question of law:

Is section 6 of chapter 731 of the Public Laws in conflict with sections 2 and 3 of article 8 of the Constitution, "Of Elections," or in conflict with any other article or section of the Constitution of the State?

Very respectfully submitted,

Herbert W. Ladd, Governor, etc.

Per Curiam:

To His Excellency, Herbert W. Ladd, Governor of the State of Rhode Island and Providence Plantations:

We have received from Your Excellency a communication requesting our opinion upon the following question:

'Is section 6 of chapter 731 of the Public Laws in conflict with sections 2 and 3 of article 8 of the Constitution, 'Of Elections,' or in conflict with any other article or section of the Constitution of the State?'

In response to this inquiry our opinion is that chapter 731 of the Public Laws is not in conflict with sections 2 and 3 of article 8 of the Constitution of the State.

From the reference to these sections, we assume that the supposed difficulty relates to returning the votes cast to different officers. Section 3 requires that the names of persons voted for as general state officers shall be placed upon one ticket; that such votes shall be sealed up in open town meeting and be sent to the Secretary of State, to be counted at the ensuing May Session of the General Assembly. Section 5 of article 8 requires that ballots for senators and representatives shall be counted in open town meeting and the result declared. Section 6 of the same article, and chapter 10, § 19, amended by Pub. Laws R. I. chap. 629, § 2, of April 19, 1887, of the Public Statutes, requires ballots for other than general officers to be returned to the city or town clerks, to be counted by the mayor and board of aldermen or town council, as the case may be. From the language of section 6, chapter 731, of the Public Laws, it may be inferred that the Act contemplates one ballot only; and that such ballot as a whole, because it contains the names of persons voted for as general officers, must be sent to the Secretary of State, pursuant to said section 3 of article 8, thus preventing compliance with sections 5 and 6 of the same article, and with the law in regard to districted towns.

We do not think such an inference is necessary; on the contrary, chapter 731 clearly implies that such course is not to be taken. Section 13 requires the supervisors of elections to make returns by joint or separate report to the returning board or boards to whom said ballots are by law now required to be returned. The intention evidently is that the ballots, with the report of the supervisors, shall go to the officers who are designated by the law to count

them; that is, ballots for general officers to the Secretary of State and ballots for other officers to the mayor and board of aldermen or to the town council.

If one ballot is used then the part containing the names of general officers would have to be detached from the other part and each part sent to the proper officer.

We see nothing in the law forbidding this, and we do not see how the supervisors can fulfill the duties imposed upon them without doing this unless separate ballots should be used for the two classes. We do not see that this latter course would necessarily conflict with the

statute, although the implication in section 18 and elsewhere is that one ballot will be used.

The sections of the Constitution, referred to in the question of Your Excellency, simply require the votes for general officers to be by ballot upon one ticket and returned to the Secretary of State.

In either of the ways aforesaid these requirements can be complied with.

Thomas Durfee,
Charles Matteson,
John H. Stiness,
P. E. Tillinghast,
George A. Wilbur.

VIRGINIA SUPREME COURT OF APPEALS.

Eliza Agnes WARWICK, *Appl.*,

v.

Phoebe C. WARWICK *et al.*, by Richard L. Poore, Guardian, etc.

(....Va....)

A will in testator's own handwriting, which has no signature at the end, and in which testator's name appears only at the beginning, although such name is indorsed, together with the words "My Will," on the outside of a sealed envelope which incloses it, is not sufficiently signed under the Code, § 2514, requiring a will to be signed "in such manner as to make it manifest that the name is intended as his signature."

(January 30, 1890.)

APPEAL by defendant from a decree of the Circuit Court for Henrico County in favor of complainants in a suit to set aside the probate of a paper alleged to be the last will and testament of Abraham Warwick, Jr., deceased. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. J. R. Tucker, Jr., and John H. Ingram, for appellant:

It is immaterial where the name to a will is signed, if it appear from the face of the papers in the cause that the paper offered for probate was intended by the testator to be his will. The signature at the beginning is sufficient signing,

when ratified and confirmed by other evidence on the face of the papers.

Ramsey v. Ramsey, 18 Gratt. 664; *Roy v. Roy*, 16 Gratt. 419.

The revisers of the Code, in recommending this Statute, disavowed any purpose of requiring holographic wills to be signed at the end or bottom.

Code 1887, § 2514. See note to Report of Revisers, p. 624.

The paper on which the body of the will of Abraham Warwick, Jr., is written, and the sealed envelope containing the paper, will be treated in law as *res integra*, one whole and indivisible transaction.

8 Lomax, Dig. 2d ed. p. 37; *Wickoff's App.* 15 Pa. 281.

Messrs. Richard E. Pegram and Chas. S. Stringfellow, for appellees:

Under the Statute the identity of the instrument is to be ascertained and its finality and authenticity established without resort to extrinsic evidence.

McBride v. McBride, 26 Gratt. 483. See also *Perkins v. Jones*, 84 Va. 358.

Lacy, J., delivered the opinion of the court:

This is an appeal from a decree of the Circuit Court of Henrico County, rendered on the 12th day of November, 1889.

The case is a contest concerning the alleged

NOTE.—Holographic will.

A holographic will is an instrument entirely in the handwriting of the testator. Cal. Civ. Code, § 1277; Estate of Rand, 61 Cal. 468; Johnson's Estate, Myrick Prob. (Cal.) 5; La. Civ. Code, art. 1581; Wilbourn v. Shell, 59 Miss. 206; Anderson, L. Diet. 512; Schouler, Wills, 7.

Generally speaking they require no attestation. *Ibid.*; 3 Jarman, Wills, 767, note; Reagan v. Stanley, 11 Lea, 316.

Where a testatrix executed a will entirely in her own handwriting, containing a bequest to the executor of certain personal property, and requesting him to dispose of the same "in the manner specified in my letter of this date;" and after the execution of the will the testatrix dictated a letter to the executor, which was in the handwriting of the latter, but signed by the testatrix, disposing of the property.—the will was properly admitted to probate as an holographic will, and the letter was properly excluded. *Re Shillaber*, 74 Cal. 144.

Some Codes require it to be entirely written, dated & L. R. A.

and signed by the testator's own hand. Johnson's Estate, *supra*; Gaines v. Lizardi, 3 Woods, 77; Reagan v. Stanley, *supra*.

The will becomes legally established on proof of the handwriting of testator. Davis v. Williams, 57 Miss. 843; Kirk v. State, 13 Smedes & M. 406; Crutcher v. Crutcher, 11 Humph. 377.

A holographic will with testator's name in the body, but not subscribed, was held to be well executed. Adams v. Field, 21 Vt. 256.

So in Virginia (*Roy v. Roy*, 16 Gratt. 418; *Bailey v. Teackle*, Wythe (Va.) 8); but not where the will was incomplete. Waller v. Waller, 1 Gratt. 454.

In Tennessee the writing must come from unsuspected custody, or be found among the testator's papers, in order to be valid without testator's signature. Tate v. Tate, 11 Humph. 465. See also N. C. Code; Toebbe v. Williams, 80 Ky. 661.

The word "witness," followed by a person's name and address, added to an holographic codicil, does not show an intention to make an attested codicil. *Re Sober's Estate*, 78 Cal. 477.

ginning with the words "I, Abraham Warwick, Jr., of the County of Henrico, declare this to be my last will and testament," etc., but did not otherwise contain the signature or the name of the said Abraham Warwick, Jr., and was folded and inclosed in an envelope found in the desk of the said alleged testator, which was sealed with mucklage, and on the back of the envelope was written, also in the handwriting of the said Warwick, the following: "My Will—Abraham Warwick, Jr."

It is admitted that the said Warwick was a man of sound mind, and there is no dispute concerning the construction of the said testamentary paper. The contest was upon the question as to the due execution of the said contested will.

The appellees, two of the next of kin and heirs-at-law and distributees of the said Abraham Warwick, Jr., deceased, filed their bill in the said Circuit Court of Henrico, claiming that the said Warwick died intestate, and that the said testamentary paper, which had been probated in the county court, was not the will of the said decedent, the same not having been signed by the supposed testator (although written wholly in his handwriting) in such manner as to make it manifest that the name is intended as a signature.

The case was tried in the said circuit court, and the said will pronounced invalid, for the reason that, while wholly in the handwriting of the decedent, it was not signed in such a manner as to make it manifest that the name was intended as a signature. From this decree the appellant appealed. The sole question to be considered here is as to the due execution of the said will as prescribed by law.

Section 2514 of the Code of Virginia provides as follows: "No will shall be valid unless it be in writing and signed by the testator, or by some other person, in his presence and by his direction, in such manner as to make it manifest that the name is intended as his signature; and moreover, unless it be wholly written by the testator, the signature shall be made, or the will acknowledged, by him in the presence of at least two competent witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

The will in this case was wholly written in the handwriting of the testator. No witnesses were therefore necessary, and none have subscribed the paper in question. So that, the capacity of the testator being conceded, the only question is as to whether the will is signed in manner required by law.

We have seen that there is no signature appended to the will, nor does the name of the testator appear to the will, except at the top, and in the manner stated, the will commencing: "I, Abraham Warwick, Jr., of the County of Henrico, declare this to be my last will and testament," etc.

It is insisted by the learned counsel for the appellant that, the name appearing thus at the top of the will, and the will being folded and inclosed in an envelope, which was sealed and

the trial, moved the court to instruct the jury "that if they believe from the evidence that the paper writing produced before them, dated January 18, 1888, and the indorsement on the envelope, and the signature to said indorsement, are wholly in the handwriting of the testator, then they shall find that the said paper writing, and the indorsement on said envelope, and the signature to said indorsement, constitute the last will and testament of Abraham Warwick, Jr., if the jury shall believe that the said Abraham Warwick, Jr., was, at the time of executing the said writing, of sound mind;" and insisted, in support of these instructions, that the signature in the beginning of the said will was a sufficient signing, the final intention of the said testator that this paper should operate as his last will being proved by the facts that it was inclosed in a sealed envelope and by the ratifying and confirmatory words, "My Will—Abraham Warwick, Jr.," on the back of said envelope. But the court refused the said instruction, and gave the following: "The court instructs the jury that, even if they believe from the evidence that the paper writing produced before them, dated the 18th day of January, 1888, and the indorsement, in the words 'My Will—Abraham Warwick, Jr.,' upon the envelope in which the said writing was inclosed, and wholly in the handwriting of said Abraham Warwick, Jr., deceased, they must nevertheless find that the said paper is not of itself, nor is any part thereof, the true and valid last will and testament of said Abraham Warwick, Jr., because it is an unusual mode of signing or authenticating a will as a concluded act by indorsing the name of a person executing and making it on the envelope in which it is inclosed, and, such indorsement being at most equivocal, it does not appear that the said Abraham Warwick, Jr., signed his name in the body of the paper writing aforesaid, or upon the envelope in which said writing was inclosed, in such manner as to make it manifest that it was intended as a signature, as required by the Statute in such case made and provided." Under this instruction of the court the jury found against the will, and the motion of the appellants to set aside the verdict was overruled by the court.

We have set forth above the Statute of this State upon this subject, but several statutes upon this subject have been derived from the English Statutes of 29 Charles II., chap. 3, § 5; 7 Wm. IV.; 1 Vict., chap. 26, and 15 and 16 Vict., chap. 24.

The Statute of 29 Charles II., chap. 3, § 5, did not prescribe where the signature should be placed; and soon after the enactment of the Statute it was determined in the case of *Lemayne v. Stanley*, decided in the Court of Common Pleas, at Easter Term, in the 83d year of Charles II., 1682, that "a will written wholly by the testator himself, but not signed by him, was good; for, being written by himself, and his name in the will, it is a sufficient signing within the Statute, which does not appoint where the will shall be signed, in the top, bottom or margin, and therefore a signing in any part is sufficient." 8 Levinz, 1.

was done by statute both in England and in Virginia.

It was agreed that the object in requiring the testator's signature was twofold: (1) to connect him with the paper, and (2) to afford proof of the finality or completion of the testamentary intent. It was admitted also that the first object was satisfactorily attained by the testator's signature occurring anywhere in the paper. But it was insisted that the second object was wholly frustrated by allowing the signature to be anywhere else but at the end, and, in response to the suggestion that the finality of testamentary intent was proved by the attestation of the subscribing witnesses, it was said that the Statute designed two safeguards, the attestation of the witnesses and the signature also, and that the courts thwarted the design of the Legislature when they dispensed with either. 2 Bl. Com. 876, 877, and note 9.

The Virginia courts, like those of England, acquiesced reluctantly in *Lemayne v. Stanley* until November, 1818, when, in the case of *Selden v. Coalter*, 2 Va. 558, it was very gravely doubted whether the doctrine of that case was applicable in a will written wholly in the testator's handwriting, which, by our Statute, does not need to be attested by subscribing witnesses at all: for that there then would be no proof whatever, on the face of the will, of the finality of the testamentary intent. And afterwards, in 1845, in *Waller v. Waller*, 1 Gratt. 454, that doubt as to holograph wills was not a little strengthened, although the court still admitted that in an attested will it must follow *Lemayne v. Stanley*.

Then in 1850 came the Statute (taken from 7 Wm. IV., and 1 Vict., chap. 26, 15 and 16 Vict., chap. 24) requiring, in the terms above stated, that the signature should be affixed in such a manner as to make it manifest that the name was intended as a signature. Speaking of this Statute of July 1, 1850, Judge Lomax says: "It now requires, in addition to what was expressed under the former law, that it shall be signed in such manner as to make it manifest that the name is intended as a signature. This expression was probably inserted in approbation of the principle that was decided (but in which decision it may seem there was not a unanimity of the judges) in the case of *Waller v. Waller*, and to settle, as far as general expression in a statute can settle the law of particular cases, the doubts and difficulties which are presented in *Selden v. Coalter*, and which may often occur in cases of holograph wills.

"The design is probably the same, in effect, as that which the English Statute (1 Vict. chap. 26, § 9) requires when it says that it shall be signed at the foot or end thereof by the testator, the manifest intention of the signature, wherever placed, being the rule of the Virginia Statute, the signing at the foot or end being alone the index of the intention as the rule of the English Statute." Lomax, Dig. 8, 70.

In the case of *Ramsey v. Ramsey*, 18 Gratt. 664, this Statute of July 1, 1850, came under review in this court in the case of a will like this, lacking, however, the indorsement on the envelope. And Judge Daniel, delivering the opinion of this court, said: "Whether, in the

context, or seek their interpretation in the state of the law existing at the time when the Act was passed, and shown to have been brought to the notice of the Legislature, and in the design which we thence declare to have been contemplated by them, I think there is no serious difficulty in coming to the conclusion that the Act recognizes no will as sufficiently signed unless it affirmatively appear from the position of the signature, as at the foot or end, or from other internal evidence equally convincing, that the testator designed by the use of the signature to authenticate the instrument.

"And as in the case under consideration the signing at the top alone, which, from its nature, is an equivocal act, is aided by no other evidence or explanation, on the face of the paper, showing that such signing was used for the purpose of ratifying and authenticating the contents of the instrument, I am of the opinion that the requirements of the Act have not been complied with."

In the case of *Roy v. Roy*, 16 Gratt. 418, the will in question was like this, except that the paper upon which the will was written was folded up, and on the back, after it was folded, the paper was indorsed, "David M. Roy's Will," so that, when unfolded, the said indorsement appeared to be about the middle of the third page, the will having ended on the second page. Judge Allen said in that case, after citing *Ramsey v. Ramsey*: "It is an unusual mode of signing or authenticating a paper as a concluded act by indorsing the name of the person executing it on the back. Such indorsement is usually made as a label or mark, to distinguish it from other papers, and probably it never occurred to the deceased that it was to have any other function in this case. It is at most equivocal, and, being so, is ruled by the case of *Ramsey v. Ramsey*."

In England, the signing at the foot or end is alone the index of intention by the Statute of Victoria, and the manifest intention of the signature, wherever placed, is the rule in Virginia.

The intention of the name, "Abraham Warwick, Jr.," at the beginning is an equivocal act, and, being so, it cannot be held to be such a signing of the paper as to make it manifest that it was intended as a signature. The indorsement on the envelope is not a signing of the will, and was doubtless not so intended by the deceased. The apparent object of indorsing an envelope or wrapper is for a label, to mark or designate the contents, but does not afford internal evidence that the signature on the back of the envelope was intended as a signature to the will. It was obviously not a signature to the will at all, and the result of all the authorities is that the finality of intention evinced by the signing must appear from the will itself. The Statute says: "Signed in such manner as to make it manifest that the name is intended as a signature." And this court said, in the case of *Ramsey v. Ramsey*, that unless the name of the testator appears affirmatively, from something on the face of the paper, to have been intended as a signature; it is not a sufficient signing under the Statute. The signing required by the Statute must manifestly appear to be intended as a signature from the

internal evidence, equally as manifest that the name was intended as a signature. The finality of the testamentary intent must be ascertained from the face of the paper, and extrinsic evidence is not admissible either to prove or disprove it. The signing of a will, to be a sufficient signing under the Statute, must be such as, upon the face of the instrument, appears to have been intended to give it authenticity. It must appear that the name was regarded as a signature, and that the instrument was complete without further signature; and the paper itself must show this, for

manifest that the name was intended as a signature. It is an equivocal act, as is well settled, to insert the name at the top or beginning, and extrinsic evidence is not employed to affect either *pro* or *con* the question of finality of intention when this internal evidence, to be afforded by the face of the paper, is wanting.

We think the decree of the Circuit Court of Henrico rejecting the will is without error, and the same will be affirmed.

Decree affirmed.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Benjamin B. NEWCOMB

BOSTON PROTECTIVE DEPARTMENT.

(....Mass.....)

A corporation, the membership in which is limited to officers and agents of fire insurance companies doing business in a certain city, having power to provide for, and assist in, the saving of life and property at fires, the funds of which are raised by assessments upon the companies doing business in such city, is a private and not a public corporation, nor is it a public charity, and it is liable in damages for injuries resulting from the negligence of its servants in driving through the public streets, notwithstanding the facts that the saving of life and property are referred to in its charter in general terms, and that it in fact makes no distinction in its efforts to save property between insured and uninsured.

(February 27, 1890.)

ON report from the Superior Court of Suffolk County of a suit brought to recover damages for personal injuries alleged to have resulted from the negligence of defendant's servants, in which a verdict had been found for plaintiff. *Judgment on the verdict.*

The injuries complained of were occasioned to plaintiff, who was a cab driver, by reason of a collision between his cab and a wagon of defendant upon one of the public streets of Boston, while defendant's wagon with its regular complement of men was responding to a fire alarm.

After the evidence was all in, defendant requested the court to rule that defendant was a public charitable corporation, and was not liable for injuries done by the negligence of the employes selected by it, and that therefore plaintiff could not recover.

The court refused to so rule, and, a verdict having been returned in favor of plaintiff, upon defendant's request reported the case for the determination of this court, if the ruling was erroneous the verdict to be set aside and a new trial granted; otherwise judgment to be entered on the verdict.

The other material facts appear in the opinion.

Messrs. Gaston & Whitney, for plaintiff:

If the rule laid down in *McDonald v. Mass.*

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General Hospital, 120 Mass. 432, as to the non-liability of public charitable corporations for the negligence of their servants, is still law, its application will not be extended.

Davis v. Central Cong. Society, 129 Mass. 367; *Donnelly v. Boston Catholic Cemetery Assn.* 5 New Eng. Rep. 741, 146 Mass. 163; *Holliday v. St. Leonard*, 11 C. B. N. S. 192; *Mercy Docks & Harbor Board v. Gibbs*, L. R. 1 H. L. 93; *Foreman v. Canterbury*, L. R. 6 Q. B. 214.

The recent English decisions hold that public boards or incorporated public officers performing public duties gratuitously are liable for the negligence of their servants in the same manner that private individuals are.

Foreman v. Canterbury, *supra*; *Kent v. Worthing Local Board of Health*, L. R. 10 Q. B. Div. 118; *The Rhosina*, L. R. 10 Prob. Div. 131; *Joyce v. Metropolitan Board of Works*, 44 L. T. N. S. 811.

The defendant is not a public charitable corporation within the rule laid down in *McDonald v. Mass. General Hospital*, *supra*.

See *Donnelly v. Boston Catholic Cemetery Assn.* 5 New Eng. Rep. 741, 146 Mass. 163.

Messrs. Robert M. Morse, Jr., and William M. Richardson, for defendant:

The defendant is a public charitable corporation, and as such is not liable for the negligence of its servants if they have been selected by it with reasonable care.

Holliday v. St. Leonard, 11 C. B. N. S. 192.

In determining whether or not a gift is charitable in its nature, the court will not inquire whether the motive of the person or body making the same was charitable, but only whether the work itself was such.

Jackson v. Phillips, 14 Allen, 539; *McDonald v. Mass. General Hospital*, 120 Mass. 432.

The fire department of a city performs a public duty or service.

Haford v. New Bedford, 16 Gray, 297; *Fisher v. Boston*, 104 Mass. 87.

The defendant Department is a voluntary adjunct to the fire department of the city, and is a charitable corporation.

Humane Fire Co's App. 88 Pa. 339; *Thomas v. Ellmaker*, 1 Para. Eq. Cas. 98; *Fire Ins. Patrol v. Boyd*, 1 L. R. A. 417, 120 Pa. 624.

It is not necessary, in order to maintain the ground that a corporation is a charitable one, that the contributions should be wholly voluntary.

Gooch v. Assn. for Relief of Aged Females, 109 Mass. 558; *McDonald v. Mass. General Hospital*, 120 Mass. 432.

Whilst the Statute 43 Eliz., chap. 4, has frequently been held to be a part of our common law (*Earle v. Wood*, 8 Cush. 430, 445; *Bates v. Bates*, 134 Mass. 110, 113), the enumeration of charities therein has been held not to be intended as a complete specification of them.

Drury v. Natick, 10 Allen, 169; *Jackson v. Phillips*, 14 Allen, 539, 554; *Bates v. Bates*, *supra*; *Atty-Gen. v. Heelis*, 2 Sim. & Stu. 67.

A charitable use, when neither law nor public policy forbids, may be applied to almost anything that tends to promote the well-doing and well-being of social man.

Perry, Tr. § 637; *Ould v. Washington Hospital*, 95 U. S. 311 (24 L. ed. 453).

In the following cases the use or corporation has been held to be a charitable one:

A bequest for the purpose of establishing, for the use and benefit of the inhabitants of a town, a free public library and reading room.

Drury v. Natick, *supra*.

A devise to bring water into a town for the use of the inhabitants, and to make conduits and reservoirs.

Jones v. Williams, Ambl. 651.

A legacy to build a town house for transacting town business.

Coggeshall v. Pelton, 7 Johns. Ch. 292.

A devise for the purpose of building and maintaining schoolhouses.

Perin v. Carey, 65 U. S. 24 How. 506 (16 L. ed. 711).

A devise for the general improvement of a town.

Horse v. Chapman, 4 Ves. Jr. 542.

For the establishment of a life boat.

Johnston v. Swann, 8 Madd. 457.

For a fire engine and hose.

Magill v. Brown, Brightly, 847.

For a botanical garden.

Townley v. Bedwell, 6 Ves. Jr. 194.

A gift designed to promote the public good, by the encouragement of learning, science and the useful arts, without any particular reference to the poor.

American Academy v. Harvard College, 12 Gray, 582.

For improvement of a city.

Gort v. Atty-Gen. 6 Dow. P. C. 186; *Mitford v. Reynolds*, 1 Phill. Ch. 191, 192; *Atty-Gen. v. Eastlake*, 11 Hare, 205.

For the delivery of public lectures upon scientific subjects.

Lowell, Appellant, 22 Pick. 215.

For the establishment of experimental farms.

Northampton v. Smith, 11 Met. 390.

For the maintenance of an instructor in a school.

Sanderson v. White, 18 Pick. 328.

Or for a school.

Tainter v. Clark, 5 Allen, 66.

Gifts towards payment of the national debt, or for the benefit and advantage of Great Britain.

Tudor, Charitable Trusts, 2d ed. 14, 15.

A bequest to create a public sentiment that will put an end to negro slavery.

Jackson v. Phillips, 14 Allen, 539.

A bequest for the poor of a particular church is a good public charity.

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Attorney-General v. Old South Society, 13 Allen, 474.

Knowlton, J. delivered the opinion of the court:

It is contended that the defendant is a public charitable corporation, and is not liable for the negligence of its servants. It therefore becomes necessary to consider the Act which incorporated it, and the business in which it is engaged.

The Statute of 1874, chap. 61, created a corporation in which membership was limited to officers for the time being of incorporated fire insurance companies or associations, and agents doing the business of fire insurance in the City of Boston. It gave the corporation the power to provide and maintain a corps of men and suitable apparatus for the purpose of discovering and preventing fires, and saving life and property at and after fires. It provided that there should be an annual meeting at which each incorporated fire insurance company or association doing business in the City of Boston, whether its officers or agents were members of the defendant corporation or not, should have a right to be represented and to cast one vote; that at such meeting a majority of the whole number represented should determine whether the business of the corporation should be carried on during the ensuing year, and if so what should be the maximum amount expended in conducting it; that the whole amount so fixed should be assessed upon all the organizations and agencies engaged in the business of fire insurance in the City of Boston in proportion to the several amounts of premiums returned as received by each; and that such assessments should be collectible in courts of law. The corporation was also empowered to require semi-annually a statement to be furnished by all corporations, associations, underwriters and agencies doing the business of fire insurance in the City of Boston of the aggregate amount of premiums received for insuring property situated there, during the preceding six months, and a penalty was provided for a failure to make such a statement when required.

It appeared in evidence that the corporation has no capital stock, and derives no income from any other source than the assessments provided for in the Statute. The directors levy assessments upon each insurance company in proportion to the amount of premiums returned as received by it, except that, for the purpose of determining the amounts of assessments, premiums received for insuring buildings are reckoned at only one half as much as premiums received for insuring the contents of buildings. In levying assessments no distinction is made between companies which are connected with the corporation and those which are not. The evidence was undisputed that it would be impracticable for the men in attempting to protect property at fires to make a distinction between that which was insured and that which was not, and that no such distinction was made. The Statute gives the employes of the corporation a right to enter buildings and assist at fires; but they are not allowed to interfere with the members of the fire department of the City of Boston in the performance of their

made subordinate to the rights of the fire department.

Under these facts, is the defendant a public charitable corporation, or is it a private corporation carrying on business for the pecuniary benefit of its members, and incidentally helping others because it is impracticable to conduct its business without so doing? Clearly it is a private, and not a public, corporation. *Louisville v. University of Louisville*, 15 B. Mon. 642; *Dartmouth College v. Woodward*, 17 U. S. 4 Wheat. 518 [4 L. ed. 629].

It seems to us also that it was not organized and is not conducted as a public charity, but to diminish the cost of fire insurance to underwriters. None but insurers can be members of it, none of its funds came from voluntary contributions, but they are all derived from assessments ordered by a vote of the majority. The projectors of the corporation seem to have intended to compel all insurance companies doing business in Boston to submit to the decision of the majority the question whether assessments shall be made upon all for the purpose of saving property insured. The nature of the work which the corporation is created to do is shown by this provision for the payment of the expenses. The Statute, and the conduct of the corporators under it, indicate that a very large part of the property liable to be destroyed by fire in Boston is insured, and that the corporations which provide for the defendant are willing to maintain at their own cost and for their own benefit a protective department which may be incidentally beneficial to the few who are

less direct, in diminishing the amount which they are liable to pay for losses, than if the amount saved at each fire were estimated, and required to be paid to the defendant by the companies benefited and afterwards distributed in dividends.

The chief grounds on which it is contended that the work of this corporation is a public charity are the language of the Statute which refers to the preservation of life and property in general terms, and the practice of the defendant to have no regard to ownership and to make no distinction between insured and uninsured property. But these are of little significance in view of other provisions of the Statute, and especially in view of the fact that it is impracticable for the defendant to conduct its business in any other way.

The defendant places great reliance upon *Fire Ins. Patrol v. Boyd*, 120 Pa. 624, 1 L. R. A. 417, which somewhat resembles the case at bar. But in that case membership in the corporation was open to everybody, and the expenses were wholly paid by voluntary contributions. The facts so differed from those in the present case that if the decision were binding in this jurisdiction, it would not be decisive of the question before us. We are of opinion that the defendant is not a public charitable corporation, and that it is liable for the negligence of its servants. See *Donnelly v. Boston Catholic Cemetery Assn.*, 146 Mass. 163, 5 New Eng. Rep. 741; *Coe v. Washington Mills*, 149 Mass. 548.

Judgment on the verdict.

NORTH CAROLINA SUPREME COURT.

George H. NISSEN, *Appt.*,

v.

John T. CRAMER.

(.....N. C.....)

1. **Saying "That's a lie,"** of material testimony of a witness on the opposite side, is not actionable when spoken during the trial of an action against a corporation by its manager, who is representing it on the trial, although it is represented also by attorney.
2. **The manager of a corporation** representing it on a trial has the same privilege that he would have if he was himself a party, in respect to words spoken by him in the course of the proceedings.
3. **A party to an action is protected against all inquiry into his motives** in uttering words, during the course of the trial concerning the opposite party or his witness, that are relevant and pertinent to the issue, however defamatory they may be.

NOTE.—Libel and slander.

See note to *Runge v. Franklin* (Tex.) 3 L. R. A. 417. See, generally, note to *Park v. Detroit Free Press Co.* (Mich.) 1 L. R. A. 599; note to *Byam v. Collins*, (N. Y.) 2 L. R. A. 129; note to *Bradstreet Co. v. Gill* (Tex.) 2 L. R. A. 405; *Smith v. Smith* (Mich.) 3 L. R. A. 52; *Allen v. Pioneer Press Co.* (Minn.) 3 L. R. A. 632; note to *Arnott v. Standard Association* (Conn.) 6 L. R. A.

4. **A letter saying that a person "expects to pay a claim out of what he hopes to beat my company in a suit now pending"** is irrelevant in an action by him for alleged slanderous words spoken in the course of the trial of the suit referred to in the letter.

(January 15, 1890.)

A PPEAL by plaintiff from a judgment of the Superior Court for Davidson County in favor of defendant in an action to recover damages for slander. *Affirmed.*

Statement by Avery, J.:

This is an action for slander, tried before Merrimon, J., at Davidson Superior Court, at September Term, 1889. Upon the trial the plaintiff offered evidence tending to prove that the words charged in the complaint to be slanderous were spoken by the defendant at the time and place mentioned in the complaint, in an audible voice, sufficient to be heard in all

3 L. R. A. 69; *Sealer v. Montgomery* (Cal.) 3 L. R. A. 653; note to *Missouri P. R. Co. v. Richmond* (Tex.) 4 L. R. A. 280; *People v. Stephens* (Cal.) 4 L. R. A. 845; note to *Elmer v. Fessenden* (Mass.) 5 L. R. A. 724; *Broughton v. McGrew*, 5 L. R. A. 406, 39 Fed. Rep. 672; note to *Hayes v. Press Co.* (Pa.) 5 L. R. A. 643; note to *John W. Lovell Co. v. Houghton*, *ante*, 363; note to *Sillars v. Collier* (Mass.) *ante*, 680.

See also 3 L. R. A. 524.

and individually I am wrong than the annoyance enough to cover the whole has mortgaged. If you prefer immediate settlement me the least you would and I am satisfied, I will amount myself, just to annoyance. Let me hear practicable, for I may soon and be gone until

It appeared in evidence that Cramer, was the manager of the Mining Company, and was of said company, at the time of the alleged conspiracy, and the said company, as a referee, advising the court. Messrs. Robbins & Rapaport, who were present, represented the company at the time the alleged conspiracy was spoken. The charge in the opinion of the court. Plaintiff's charge. Verdict and judgment. Plaintiff appeals.

It is always open to a slanderer to prove malice, defence, or by circumstantial evidence, or by others that

Shelfer v. Gooding, 2 J. When a party appears is closed. If this is so, because the presumption

Bing v. Wheeler, 7 Co.

In *Hastings v. Lusk*,¹ the doctrine of absolute privilege in Congress, State Legislatures, grand juries, and cases mostly embodied in *Jones*, L. 175. Ours can be absolute privilege.

Messrs. Robbins & Pinnix for appellee.

The plaintiff's exception whether the defendant, as agent at the time protected in saying of plaintiff, who had just been, "That's a lie," went, also appearing for whether, under the administrative privilege, if it existed at only prima facie, a protection only a presumption of guilt might rebut it by showing actual malice when the language of Justice Ruffin, in *Briggs*, 380, says that the phrase "malice" means words "proceeding, or on some other duty, which prima facie was actuated by a sense of the malice which is generated."

The witness Chaney testified that he was not guilty of the crime of perjury imputed to him, and that the indictment was *not. pros'd* at this term of the court, at the cost of the prosecutor, Cramer.

Henry Tysinger was also introduced by plaintiff, and, upon cross-examination by defendant's counsel, testified that he made affidavit for plaintiff on the 4th day of August, 1888, in the said proceedings for injunction and attachment in the case of the plaintiff against the Genesee Gold-Mining Company, and was indicted at the instance of the defendant, Cramer, for alleged perjury in making said affidavit, the said Cramer being prosecutor in the perjury indictment. Witness testified he was not guilty of the perjury for which he had been indicted; that he had been ready for trial at the term when the indictment was found, and at the present term; and that the case had been continued at the instance of the prosecutor, Cramer, at both terms, and was still pending.

The plaintiff, for the purpose of showing malice on the part of defendant, offered in evidence a letter, dated July 26, 1889, written by Cramer to Talbott & Sons, of Richmond, Va. The court excluded the letter on the ground of immateriality, and plaintiff excepted.

The following is a copy of the said letter:

Thomasville, N. C., July 26th, 1889.
Messrs. Talbott & Sons, Richmond, Va.

Gents: As you perhaps know, one George H. Nissen depends on settling the claim you have against him out of what he hopes to beat my company in a suit now pending, but my company do not propose to be swindled out of a cent in the way he proposes, except at the end of the law, no matter how much hard

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events it is settled law, that one who appears in person, on his own behalf or on behalf of another, or counsel representing a party on the trial of an action, may say, in the progress of the trial, anything in reference to the character or conduct of the opposing party or witnesses that is relevant or pertinent to the question or issue before the court or jury, without incurring any liability whatever in an action for slander predicated upon the language so used. The occasion gives absolute protection, if the utterances are not irrelevant. *State v. Leigh*, 3 Dev. & B. 127; *Shelfer v. Gooding*, 2 Jones, L. 175; *Townshend, Slander and Libel*, § 224; *Ring v. Wheeler*, 7 Cow. 731; *Jennings v. Paine*, 4 Wis. 358; *Lester v. Thurmond*, 51 Ga. 118.

The inference of malice is not drawn, as a matter of law, when irrelevant words are uttered or spoken by parties or counsel in the due course of judicial proceedings; and such words "are not actionable unless it affirmatively appears that they were malicious, and without reasonable or probable cause." *Lawson v. Hicks*, 38 Ala. 279.

In *Briggs v. Byrd*, *supra*, this court held that there was a presumption of good faith in favor of one who made a verbal charge of larceny to a justice of the peace against another, with the expressed purpose, not afterwards carried out, of filing a formal affidavit embodying the charge; and that, in an action for slander founded upon the statement to the justice, the plaintiff must prove the existence of malice when the words were uttered. On the other hand, it is a well-established rule that where one actually lodges information before a judicial officer that he is informed that another has committed a felony or infamous offense, the informer is absolutely protected against any action for slander based upon his affidavit; and a person claiming to have sustained injury has no remedy, unless the facts will enable him to maintain an action for malicious prosecution. *Holmes v. Johnson*, Busb. L. 44; *Flint v. Pike*, 4 Barn. & C. 478; *Hastings v. Luak*, 22 Wend. 410.

Both parties and witnesses in civil tribunals are protected against accountability in actions for slander for anything contained in the pleadings, affidavits and depositions filed in the record, or testimony given on the trial, that is pertinent to the questions or issues arising in the action. *Townshend, Slander and Libel*, §§ 221-224; *Lea v. White*, 4 Sneed, 111.

It follows from the principles that we have stated that, if the defendant had the same privileges when his counsel were present with him before the referee that the law accorded to him when appearing in his own behalf, no action would lie against him for the language used in reference to the plaintiff.

In the case of *Badgley v. Hedges*, 2 N. J. L. 233, the court said, when the very same words were uttered of a plaintiff who had just testified, by a defendant conducting his own defense: "This judgment cannot be sustained. It is abundantly evident from the record that the words charged in the three first counts were spoken in a court of law, in the progress of a trial, and in a course of justice. That the lan-

Nothing is more common than for a party to say in his defense that the evidence given against him is not true, and that he can prove it." This case, decided over eighty years ago, has been cited and recognized as authority since the opinion was rendered. *Townshend, Slander and Libel*, § 224.

There can be no doubt that, as an acknowledged agent of a defendant corporation, he enjoyed all the privileges of an actual party. This court held that a master, not an attorney, had a right to appear for his slave, and insist that what a plaintiff had sworn in reference to a slave was false, and that an action could not be maintained against him for slander in charging that the testimony was false. *State v. Leigh*, 3 Dev. & B. 127.

In *Shelfer v. Gooding*, *supra*, Judge Battle states the principle deduced from an examination of the whole line of authorities as follows: "However it may be held with respect to the responsibility of counsel or a party uttering words, against the character of a witness or the opposite party, in the course of a trial, not relevant to the cause, we think that we have shown by abundant authority that a counsel or party is entirely protected against an action for slander for whatever he may choose to say relevant and pertinent to the matter before the court, and that no inquiry into his motives will be permitted." See also *Bigelow, Cas. Torts*, 161.

Mr. Townshend, in his work on *Slander and Libel*, § 224a, says: "A party to a proceeding in a court of justice may ordinarily conduct the prosecution or defense in person, or by counsel or attorney." In either case, whatever a party "may reasonably believe necessary, successfully to maintain his suit or his defense, that he may speak, in the course of the proceeding, without being subject to an action for slander."

We fail to find any authority for limiting the privilege of a party to those cases in which he conducts the trial on his own behalf. Therefore, we must look to the reasons for first shielding parties and counsel from liability in order to determine whether a party present, but represented also by counsel, should have the benefit of the rule, because his situation brings him within the reason for establishing it.

As we have seen, this court, in *Briggs v. Byrd*, extends the protection to everyone placed, in a legal proceeding or otherwise, in such relation, personal or official, to a cause as to make it a duty to say something defamatory of a party or witness. *Bigelow, Cas. Torts*, 162.

The defendant was, as is admitted, the general manager, as well as the agent, of the Genesee Gold-Mining Company, and present, advising the counsel of the company in the trial before the referee; and when the plaintiff in that action and this testified that Cramer wanted him (Nissen) to give him (Cramer) \$500 for awarding Nissen a certain contract, then it was that Cramer, in an audible tone, uttered the words charged. If the testimony of Nissen was material—and the defense that it was irrelevant was not, as it seems, insisted on—then the apparent motive of Cramer was to protect the company he represented by contradicting

it, and he is no more liable to answer in damages in this action than one of his counsel would have been, had he uttered the words imputed to Cramer at that time. Though the courts, as a rule, refuse to hear parties on their own behalf when they are represented by counsel, any court has the right, in the exercise of a sound discretion, to do so.

As in the case of *Badgley v. Hedges*, the defendant doubtless merited censure for using such language from the learned jurist who was acting as referee; but, if he permitted both the counsel and manager (who was, for the purposes of the trial, the company) to speak, it is not the province of this court to say that the party permitted, or not prevented or punished for speaking on his own behalf, shall not be protected at least against any presumption of intentional and malicious slander in the use of the pertinent words spoken. The best considered opinions of the highest courts in this country concur in according to parties and their counsel this absolute privilege or total immunity from liability for words pertinent to the issue, and spoken in the course of a judicial investigation or trial, in part, at least, because of the excitement naturally incident to the proceeding, and the supposed power of the presiding officer to restrain abuse, as well as for the important purpose of leaving counsel free and unfettered in discharging their duty to clients.

Judge Cooley, in his work on Torts, 212, cites with approval the language of *Chief Justice Shaw* on this subject, which is as follows: "We take the rule to be well settled by the authorities that words spoken in the course of judicial proceedings, though they are such as impute crime to another, and therefore, if spoken elsewhere, would import malice, and be actionable themselves, are not actionable, if they are applicable and pertinent to the subject of inquiry. . . . And, in determining what is pertinent, much latitude must be allowed to the judgment and discretion of those who are intrusted with the conduct of a cause in court, and a much larger allowance made for the ardent and excited feelings with which a party, or counsel, who naturally, and almost necessarily, identifies himself with his client, may become animated, by constantly regarding one side only of an interesting and animated controversy, in which the dearest rights of such party may become involved. And, if these feelings sometimes manifest themselves in strong invectives or exaggerated expressions, beyond what the occasion would strictly justify, it is to be recollected that this is said to a judge who hears both sides. . . . Still, this priv-

ilege must be restrained by some limit, and we consider that limit to be this: that a party or counsel shall not avail himself of his situation to gratify private malice by uttering slanderous expressions, either against a party, witness, or third person, which have no relation to the cause or subject-matter of the inquiry." *Hoar v. Wood*, 8 Met. 198; *Lawson v. Hicks*, *supra*.

The same reason exists for making some allowance for the excitement incident to the occasion, whether the defendant, Cramer, was appearing in proper person or by attorney for the corporation, when we consider that the answer of the witness Nissen contained a charge, in making which he was protected by absolute privilege from an action, that this defendant, Cramer, had attempted dishonestly to provide a bonus for himself while acting as agent for another.

His honor instructed the jury as follows: "The plaintiff alleges in his complaint that the Genesee Gold-Mining Company was present and represented by counsel and its agent, and admits that the agent present was the defendant, Cramer. If the defendant was representing the Genesee Gold-Mining Company in the plaintiff's action against it, he had the right to contradict what the plaintiff swore, and to say it was a lie, and would not be liable to an action of slander, unless he took advantage of and used the occasion to speak the words maliciously; but the plaintiff must prove that the defendant spoke the words maliciously, and such proof must show malice at the time the words were spoken, and that, under the circumstances surrounding their utterance, the law would not presume malice from the use of the words themselves."

If, as we believe, the defendant company or its agent, when permitted by the court to speak in the course of a trial or judicial proceeding, was protected, as the counsel would have been, against all inquiry into his motives in uttering any words that were relevant and pertinent, however defamatory, of a witness offered for the opposing party, there is certainly no ground for complaint on the part of the plaintiff when the court allowed him the opportunity to show, if he could, that the language which was pertinent was in fact used to gratify malice which the defendant at the time entertained towards the plaintiff.

We think that there was no error in the refusal to admit the letter offered. It did not tend to show malice, and was not relevant as evidence of the utterance of the defamatory language alleged to have been used.

There is no error, and the judgment is affirmed.

ARKANSAS SUPREME COURT.

James CAMPBELL, *Appt.*,

v.

John C. JONES *et al.*

(...Ark....)

1. Where a homestead is exchanged for

NOTE.—See *Miller v. Finegan*, *post*, 813.

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lands in another State, in which no judgments exist against its owner, larger in area than the quantity to which the laws of such State permit a homestead exemption to attach, the surplus, beyond what may be held as exempt, becomes liable for the debts of the one making the exchange at the instant the title vests in him.

2. Such liability cannot be defeated as to existing debts by the simple surrender and

A PPEAL by complainant from a decree of the Circuit Court for Arkansas County in favor of defendants in a suit to set aside as fraudulent certain conveyances of land. *Reversed.*

The case sufficiently appears in the opinion. *Messrs. Paul Hutchinson and Gibson & Holt*, for appellant:

The cancellation of the deed from Brown to Jones did not divest Jones of the legal title to the lands.

Strawn v. Norris, 21 Ark. 80.

The fact of the land traded being the homestead gives no right to support a deed to the children, and the homestead is forfeited on account of the attempted fraud.

Chambers v. Sallie, 29 Ark. 407; *Sargent v. Chubbuck*, 19 Iowa, 37-40; *Oliphant v. Hartley*, 32 Ark. 485; *Bennett v. Hutson*, 38 Ark. 762.

The States of the Union are separate commonwealths, and their peculiar Homestead Exemption Laws only apply to bona fide citizens residing in their limits and continuing so to reside.

Donnelly v. Wheeler, 34 Ark. 111.

The privilege of immunity granted by the law is conditioned on continued citizenship in the State. This being the case, had Jones sold his homestead for money or personal property and started to leave Iowa, every dollar's worth of this could have been subjected to his debts.

Mr. W. H. Halliburton, for appellees:

If there was no fraud then there was no equity in the bill: if fraud, the burden of proof was on the appellant.

Bump, Fraud, Conv. 365,600; Ex parte Conway, 4 Ark. 356; *Spence v. Dodd*, 19 Ark. 168.

If John C. Jones' homestead was absolutely exempt from Campbell's judgment in Iowa, he had the right to dispose of the same at his will, free from all taint of fraud.

Bump, Fraud, Conv. 245,620; Erb v. Cole, 31 Ark. 554; *Stanley v. Snyder*, 43 Ark. 434, and authorities cited; *Bogan v. Cleveland* (Ark.), 12 S. W. Rep. 159.

A man may sell his homestead and reinvest the proceeds of that sale in a new homestead, no matter how many judgments may be standing against him.

Monroe v. May, 9 Kan. 466; *Bump, Fraud, Conv.*; 4 So. Law Rev. (St. Louis ed.) p. 7.

Hughes, J., delivered the opinion of the court:

On the first day of August, 1885, appellant recovered a judgment against John C. Jones, one of the appellees and the father of the other appellees, in Desha Circuit Court, in Arkansas, in the sum of \$3,661.98, and on the 23d of October, 1885, had an execution issued on said judgment, which on the 23d of December, 1885, was returned unsatisfied. He then filed his bill in equity to set aside as fraudulent, and have declared void as to his debt, certain conveyances of land, which John C. Jones had procured to be made to his children by one Talmadge E. Brown. The bill was dismissed and he appealed. John C. Jones owned, near

could not be taken in execution for his debts. In November, 1877, John C. Jones exchanged his forty-acre homestead with one Talmadge E. Brown, for 1,600 acres of land, in what was then a part of Desha County, in the State of Arkansas, but which was afterwards attached to Arkansas County. He had the deed to the Arkansas lands made to himself, and conveyed his homestead in Iowa to Brown, with an understanding, at the time the conveyances were made, that he would visit Arkansas, examine the lands purchased of Brown, determine how he would divide them between his children, and that he would then cancel and deliver up Brown's deed to him for the lands, and that Brown would thereupon make deeds according to his division of the lands, and his directions. He canceled in writing across its face Brown's deed to him, he and his wife signed and acknowledged the cancellation and delivered the deed to Brown, who then made to John C. Jones a deed for 160 acres, and to his children deeds for 1,440 acres, of the Arkansas lands. Two of the children were minors. The lands were wild and unimproved. The father, John C. Jones, settled upon and improved, and claims as a homestead, the 160 acres conveyed to him. The only consideration for the conveyances from Brown to John C. Jones and his children for the Arkansas lands was the conveyance by John C. Jones, the father, of his homestead in Iowa to said Brown. No consideration moved from the children to the father. At the time John C. Jones made this exchange of lands with Brown, there was a subsisting, unsatisfied judgment against him, in favor of appellant, Campbell, in Iowa, where his homestead was situated, and that judgment was the foundation of the judgment in Desha County, Arkansas, and was recovered in the Supreme Court of Iowa on appeal, March 18, 1875.

No motion was ever made, or step taken to set aside, vacate or modify the judgment recovered in Desha County, Arkansas, and no good reason is given for the failure by appellee, John C., to make such motion, or take such step; and yet he asks to be allowed to attack the judgment collaterally, which, it is hardly necessary to say, cannot be done. Appellees insist that the exchange of his homestead in Iowa for the lands in Arkansas was not made to defraud his creditors, but in good faith, and to procure homes for his children; that neither his homestead in Iowa, nor the proceeds of the sale thereof, when sold by him, could have been taken in execution for his debts; that he had a right to reinvest the proceeds of the sale of the same for the benefit of his family, and that the property purchased therewith could not have been taken in execution for his debts; that, his homestead in Iowa being exempt, there were no creditors as to it, and that any disposition he might have made of it would not have been a fraud upon his creditors; that having invested his homestead, thus exempt in Iowa, in lands in Arkansas for himself and his children, the lands in Arkansas taken in exchange cannot be taken in execution for this debt.

It is also contended for appellees, that the

described therein did not pass thereby, nor until the conveyances were made by Brown to him and his children according to John C. Jones' division of the lands and after the cancellation of the first deed.

But this theory is not supported by the evidence, the preponderance of which, as to this, is that the deed first made by Brown to appellee John C. Jones, for all the lands, was delivered to him directly. There is no evidence to the contrary.

It is well settled that a voluntary conveyance made to hinder, delay or defraud creditors is void as to them, the grantor being insolvent without the property so conveyed. *Driggs & Co's Bank v. Norwood*, 50 Ark. 42; *Adams v. Edgerton*, 48 Ark. 419; *Hershey v. Latham*, 48 Ark. 542; *Reeves v. Sherwood*, 45 Ark. 520; *Danley v. Rector*, 10 Ark. 225; *Leach v. Fowler*, 22 Ark. 145; *Bertrand v. Elder*, 28 Ark. 494; *Massie v. Enyart*, 32 Ark. 251; *Oliphant v. Hartley*, 32 Ark. 465; *Bennett v. Hutson*, 38 Ark. 762, 767.

But it is as well settled that "it is incumbent on a creditor, who complains of a fraudulent conveyance, to show that his debtor has disposed of property that might otherwise have been subjected to the satisfaction of his debt. Until this is done no injury appears."

Creditors cannot complain that a conveyance of a homestead is fraudulent as to debts for the payment of which it cannot be taken in execution. They could not reach it if not conveyed, and hence the motives for the conveyance do not concern them. *Stanley v. Snyder*, 48 Ark. 430; *Brill v. Cole*, 31 Ark. 557; *Clark v. Anthony*, 31 Ark. 546; *Menz v. Anthony*, 11 Ark. 411; *Hempstead v. Johnston*, 18 Ark. 124; *Bogan v. Cleveland*, October 12, 1889, 52 Ark. —.

But when the deed to the 1,600 acres of land in Arkansas was made and delivered to appellee, John C. Jones, the title thereto vested in him, and the same became liable, *eo instanti*, to sale under execution for the payment of his debts, except such part as he might be entitled to fix and claim a homestead upon. That it was not competent for him to divest the title thus acquired by simple cancellation and surrender of the deed, first made to him by Talmadge E. Brown for the 1,600 acres of land in Arkansas, is, we apprehend, well settled. *Bird v. Jones*, 37 Ark. 195; *Taliaferro v. Rolton*, 24 Ark. 503; *Neal v. Speigle*, 38 Ark. 63; *Strawn*

H. 433; *Holbrook v. T. bert v. Bulkley*, 5 Conn. 383; *Kearns v. Kilian Rogers*, 53 Wis. 36; 1 G. v. *Steel*, 4 Allen, 422; S. 7 Pet. 171 [8 L. ed. 1 ton, 47 Me. 308; *Fonda Howard v. Huffman*, 8

The appellee, John C. claim and have set aside instead, the 160 acres of land Talmadge E. Brown as homestead in his name which he had fixed his commencement of this recovery of appellant's County. More than that under the Constitution which limit the homestead. The title to all the lands to the payment of appellant vested in him, and become (save that which he might) the appellee, John C. cancellation of the conveyance procuring of conveyance children, which were appellant's right, as one of his lands thus conveyed subject of his debt.

It is insisted that appellant was barred before the suit. But the lands were and it follows, from which no title ever vested in John C. Jones, to the 1,600 acres conveyed to them by Brown. The title to the 1,600 acres conveyed him title to John C. Jones in whom it still resides vested by the cancellation of the first deed made to him, of land, by Brown. E. Brown, the children of appellant's complaint, do not know that deeds to them until 1882. The case was filed the 4th of

The decree of the Arkansas Chancery is reversed, court below to enter with this opinion.

NEW HAMPSHIRE SUPREME COURT.

ADAMS FEMALE ACADEMY *et al.*, *Pliffs.*,
v.

Edmund ADAMS *et al.*

(...N. H....)

A fund given by will to trustees "to establish a female academy," etc., may be

used for the support of education with the town, which is liable to maintain a fund

(July 1)

ON reservation from Rockingham County

NOTE.—Charitable uses and trusts; doctrine of cy pres.

See *Stratton v. Physio-Medical Institute*, ante, 21, 149 Mass. 505; *Bullard v. Chandler*, ante, 104, 149 4 L. R. A.

Mass. 532; *Fire Ins. Pat.* 120 Pa. 624; *Cottman v. G. Y.* 229; *Heiskell v. Chick* and notes, 37 Tenn. 668.

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See also 19 L. R. A. 413; 21 L. R. A. 454.

to sell certain real estate and to apply the whole income of the institution, according to an Act of the Legislature, to the support of a public school in connection with the Town of Derry. *Decree for plaintiffs.*

Jacob Adams, by his will dated August 7, 1822, gave a fund to certain persons as trustees "to establish a female academy in Londonderry for the education of females." The trustees accepted the trust and the Adams Female Academy was founded.

The bill in this case represented that the corporation which was formed to carry out the purposes of the trust had continued under successive trustees to the present time, and that a successful and satisfactory school was maintained for many years.

The bill further alleged that the conditions for the support and maintenance of the school at the place named in the will of Adams are entirely different now from what they were at the date of said will, and what they have been since; values in property have changed, the requirements for schools have changed, a fund which was sufficient from 1823 to 1860 is not now sufficient; within a few years past Pinkerton Academy for males and females has been established within three miles of Adams Academy building, and other schools have been established in the vicinity,—so that the objects and purposes of the testator are liable to be defeated unless some change can be made. That the trustees have concluded that the best way to carry out the intention of the will is to connect the district school in that locality with the corporation and use the school building of the corporation for the public school-house; and the income of the fund in the hands of the trustees, added to the school money coming annually from the district, being used together, will provide efficient and capable teachers and give longer and better school than either corporation or district could support separately. That to accomplish this purpose an Act was passed by the Legislature establishing the Adams School District. The inhabitants of said district have voted to unite with the Academy to carry into execution the purposes of the Act. That the school building erected for the Academy is in fair condition and in location and place well adapted to school-district purposes. The bill prayed that the trustees be allowed to sell certain of the real estate belonging to the Academy and use the income thereof to support a school in the Academy school building, and for such other relief as might be just.

Mr. David Cross, for the plaintiffs:

This is a charitable gift. "Education and schools of learning of all grades are referred to in the statutes, and almost all gifts for educational purposes are held to be charitable."

Perry, Tr. § 700; Bispham, Eq. § 124; *Jackson v. Phillips*, 14 Allen, 555.

The will fixes the place at "within one hundred rods of the old parish meeting-house in the said First Parish in Londonderry." The use of the fund by the Adams School District is the only method of effecting that result.

"If the gift be to find a preacher in Dale it would be a breach of trust to find one in Sale;" "if the trust be for the poor of O, it would be
6 L. R. A.

where a charitable gift has been made in trust in clear and exact terms that cannot be fulfilled because of a change in circumstances, the court will apply it *cy près*.

American Academy of Arts and Sciences v. Harvard College, 12 Gray, 596; *Jackson v. Phillips*, 14 Allen, 549; *Minot v. Baker*, 6 New Eng. Rep. 688, 147 Mass. 352; 2 Story, Eq. Jur. p. 596, § 1169; Bispham, Eq. 2d ed. §§ 126, 127, and cases cited; Perry, Tr. §§ 724, 725, and notes.

In *Bishop of Hereford v. Adams*, 7 Ves. Jr. 324, a very large estate was given to trustees to provide out of the income money, provisions, physic and clothes for the poor of certain parishes. The heir claimed a large surplus that remained. The whole property was decided to be impressed with a charitable idea, and the surplus was decreed *cy près* to be used in instructing and apprenticing out children in the same parishes. Mark the change from provisions to instruction, and also mark the limit to "the same parish."

In a stronger case of *Atty-Gen. v. Minshull*, 4 Ves. Jr. 11, the testator provided for apprenticing children, paying no more than ten pounds each. It was impossible to bind out at so low a sum, the applicants were few, and the gift was not nearly exhausted. The limitation of the testator was considered not to be positive; the times had changed since his will, so his intention must be presumed to have changed; and the price paid for each apprentice was enlarged.

In *Atty-Gen. v. Wansay*, 15 Ves. Jr. 281, a bequest was made to trustees for placing out as apprentices two boys, sons of members of a Presbyterian congregation, dwelling in the parish named, and a large surplus arose, the charity was extended *cy près* to apprenticing all boys answering the description in that parish, then in other parishes, and after that to daughters of members in like manner.

In this case the court sought first to limit it to boys in that parish, and not finding boys, sons of a Presbyterian congregation, in that parish, then to other parishes, and then to girls.

In *Atty-Gen. v. Ironmongers Co. Craig & P. 227*, Lord Chancellor Cottenham said: "A charity may be *cy près* to the original object, which seems to have no trace of resemblance to it, but which may be very properly adopted if no other can be found having a nearer connection."

The trustees' object to the fund being transferred from them. Even if the trustees requested such transfer to other trustees, it could not be done.

Perry, Tr. § 735; *Harvard College v. Society for Promoting Theological Education*, 3 Gray, 280.

Messrs. Fred R. Felch and Frink & Batchelder, for defendants:

This was not a gift for general educational purposes. The purpose was to establish a female seminary in testator's own village, and it does not sufficiently appear that the fund cannot be applied to the purpose the testator intended. It is not a question of usefulness or convenience.

2 Story, Eq. Jur. §§ 1174-1176 *Harvard*

We have no reason to suppose the testator would, in any event, have assented to the application of the fund proposed by the plaintiffs. It was his expressed intention to limit his charity to a particular institution and a particular mode of education.

See *Philadelphia v. Girard*, 45 Pa. 9; *Atty-Gen. v. Whiteley*, 11 Ves. Jr. 241; *Atty-Gen. v. Earl of Mansfield*, 2 Russ. 501; *McIntire v. Zanesville*, 17 Ohio St. 852.

To divert the fund to the education of both sexes in a common district school is an unauthorized departure from the testator's intention.

The court cannot do what the executor might have done—remodel the provisions of the will.

Lepage v. McNamara, 5 Iowa, 125; *Venable v. Coffman*, 2 W. Va. 320.

The meaning of the doctrine of *cy près* is that, when a definite function or duty is to be performed, and it cannot be done in exact conformity with the scheme of the person or persons who have provided for it, it must be performed with as close approximation to that scheme as reasonably practicable.

Philadelphia v. Girard, 45 Pa. 28; *Brown v. Concord*, 33 N. H. 296.

If the plan suggested by the plaintiffs does not approximate as nearly to the apparent intent of the testator as the plans suggested by the defendants, we ask the court to direct that the fund shall be administered in accordance with one of said plans.

This fund, if possible, should be so administered that only females shall reap the educational benefits therefrom.

Jackson v. Phillips, 14 Allen, 549; *Combs v. Brazier*, 2 Desaus. Eq. 431.

Trustees, whether individuals or corporations, cannot convert the fund to other uses, so long as the uses declared by the donor are capable of execution.

Perry, Tr. § 783, and cases cited.

Clark, J., delivered the opinion of the court:

The trust created by the will of Jacob Adams, "to establish a female academy in Londonderry for the education of females," was a gift to charitable uses. It was accepted by the trustees and has been administered for a period of sixty years according to the purpose of the testator expressed in the will. The trustees represent that circumstances have so changed that the original plan of administering the trust is no longer practicable, and they ask the direction of the court whether they may change the mode of executing the same by converting certain real estate held by them as a part of the fund into money and applying the income of the fund to the support of a school in connection with the Adams School District, a corporation embracing the territory where the Adams Female Academy is located, and empowered by law to receive and use the income of the Academy fund for educational purposes.

The question is whether the proposed change in the mode of executing the charity is reasonable and allowable under the terms of the bequest by which it was created. The necessity of a change is shown by the fact that the fund

other mode of executed the charity must of the plan suggested it seems to be the ne of carrying out the donor. Whether the der the terms of the construction.

The doctrine of *cy près* not formally adopted recognized (*Second First Congregational, Brown v. Concord*, 33 regarded as a rule of administration (Perry, able doctrine,—by w enforced in favor of where the particular by the donor fail by quacy.

The rule of equity c clear that, when a defi failure of the particula effectuated does not equity will substitute substantial intention s formal intention. *Ph* Pa. 27; *Jackson v. Ph*

The doctrine of *cy p* is in harmony with t. liberal construction is donations to accompli intent of the donor.

Upon the facts ap trustees are authorize change in the mode of The purpose of the c fund for the education guage of the will indi tablish a permanent ch not in terms restricted the donor, which havi by reason of a change sonable construction c authorizes the trustees ministering the trust w ultimate purpose of scheme is practicable; seems best adapted to ble intention of the tes cumstances.

Decree accordingly.

Blodgett, J., did curred.

At the subsequent C tiff moved for a judg above opinion. At the ants submitted proposi tion of the funds by pl of the trustees of the I income to be applied to in Pinkerton Academy be deemed deserving n the limits of the origi derry as it existed at tl Jacob Adams. The co of the propositions up matter was already adj ants excepted, and the



WISCONSIN SUPREME COURT.

CENTRAL LITHOGRAPHING & ENGRAVING CO., *Recept.*,

v.

William B. MOORE, *Appt.*

(....Wis....)

1. An error in submitting a question of law to the jury is not material, where the court has sufficiently ruled in accordance with the jury's decision by refusing to set aside the verdict.
2. An agreement to manufacture engravings and lithographs for theatrical purposes for the special use of a person, to be taken and paid for by him during a theatrical season, the work to be ready for delivery by a certain day, is not a sale but a contract to furnish work and labor; and the manufacturer holds the completed work merely as bailee subject to a lien for the consideration to be paid.
3. Where engravings and lithographs are burned while in the possession of the manufacturer, after they are ready for delivery, and after they have been accepted as according to contract by the person for whom they were made, the latter must suffer the loss, and the manufacturer may recover from him for his work and labor done thereon.
4. One who has ordered goods to be

manufactured for him, to be paid for as they are delivered, is liable to the manufacturer for damages in case he fails to accept and take away the completed goods at the time he is required by the contract to do so.

5. Insurance by the manufacturer, of goods manufactured to order, and which he holds as bailee, although taken by him as nominal owner, is not material as bearing on the question of their ownership, or of his right to collect the amount due him on the contract from the person for whom they were made.

(December 2, 1890.)

APPEAL by defendant from a judgment of the Circuit Court for Winnebago County in favor of plaintiff in an action to recover the agreed price of certain engravings and lithographs alleged to have been made by plaintiff for defendant according to contract. *Affirmed.*

The facts are fully stated by the court.

Messrs. Jackson & Thompson, for appellant:

Where a manufacturer is employed to make an article out of his own materials, the title remains in him until the "finished article is delivered," and he alone must bear the loss in case it is destroyed by accident.

Edwards, Ballm. pp. 356, 357; *Story*, Ballm.

NOTE.—Sales and contracts to manufacture, distinguished.

The distinction between a "contract for sale" and one for "work, labor and materials," is tested by the inquiry, whether the thing transferred is one not in existence, and which would never have existed but for the order of the party desiring to acquire it, or a thing which would have existed, and been the subject of sale to some other person, even if the order had never been given. *Groves v. Buck*, 8 Maule & S. 178; *Towers v. Osborne*, 1 Strange, 506; *Benjamin*, Sales, 90.

In some of the States of the Union the distinction is taken between an agreement for the sale and delivery at a future day of articles then existing, and an agreement to sell and deliver articles then existing, and an agreement to sell and deliver articles not then manufactured, but to be made afterwards,—the courts holding that the latter are contracts for work and labor and materials found, and not within the statute. *Crookshank v. Burrell*, 18 Johns. 58; *Pitkin v. Noyes*, 48 N. H. 294.

A simple contract "to manufacture" an article is not a contract "for the sale." *Higgins v. Murray*, 78 N. Y. 252; *Donnell v. Hearn*, 12 Daly, 230; *Mixer v. Howarth*, 21 Pick. 205; *Spencer v. Cone*, 1 Met. 233; *Goddard v. Binney*, 115 Mass. 450; *Dowling v. McKenney*, 124 Mass. 480.

So, where a contract is made for furnishing a machine or a movable thing of any kind and fixing it to the freehold. *Cotterell v. Apsey*, 6 Taunt. 322; *Tripp v. Armitage*, 4 Mees. & W. 387; *Clark v. Bulmer*, 11 Mees. & W. 243.

Or where the substance of the contract is to make improvements to a chattel already in existence, *e. g.*, to make and fix boilers to a ship. *Anglo-Egypt*, 6 L. R. A.

tian Nav. Co. v. Rennie, L. R. 10 C. P. 271; *Benjamin*, Sales, 98.

So when the article is not at the time of the contract owned by the vendor and ready for delivery, but labor, skill or money are necessary to be expended in producing or procuring the same, it is a contract to manufacture. *Bennett v. Nye*, 4 Greene (Iowa) 410; *Partridge v. Wilsey*, 8 Iowa, 459; *Brown v. Allen*, 35 Iowa, 306.

A contract to deliver at a future day a thing not then existing, and yet to be made, is a contract for work and labor only and not for sale and purchase of goods. *Crookshank v. Burrell*, 18 Johns. 58.

So of a contract for a carriage to be made and delivered. *Towers v. Osborne*, 1 Strange, 506.

So of a contract to make and deliver casks of cut nails (*Sewall v. Fitch*, 8 Cow. 215); or to deliver barrels of flour to be made from wheat not yet on hand (*Bronson v. Wiman*, 10 Barb. 406); or to manufacture and deliver barrels of beer every week for a specified time. *Courtright v. Stewart*, 19 Barb. 455; *Donovan v. Willson*, 26 Barb. 138.

So of a contract by a paper maker to make and deliver paper similar to other paper previously made, of such size and weights as the plaintiff should direct. *Parsons v. Loucks*, 4 Robt. 216, 43 N. Y. 17; *Deal v. Maxwell*, 51 N. Y. 653.

When a contract of sale.

When a person stipulates for the future sale of articles which he is habitually making, and which at the time are not made or finished, it is essentially a contract of sale and not a contract for labor; otherwise when the article is made pursuant to the agreement. *Lamb v. Crafts*, 12 Met. 356. See also *Smith v. New York Cent. R. Co.* 4 Keyes, 180; *Benjamin*, Sales, 98.

§ 426; *Buffum v. Merry*, 8 Mason, 478; *Andrus v. Durant*, 11 N. Y. 40.

This property, by the terms of the contract, was to be paid for "as delivered." And it must have been completed before the title could pass.

Andrus v. Durant, *supra*; *Thomas v. Telford*, 70 Wis. 155; *Wagar v. Farrin*, 15 West. Rep. 876, 71 Mich. —; *Lingham v. Eggleston*, 27 Mich. 324; *Cole v. Berry*, 43 N. J. L. 308; *Terry v. Wheeler*, 25 N. Y. 520; *Macomber v. Parker*, 13 Pick. 183; *Pierson v. Spaulding*, 12 West. Rep. 493, 67 Mich. 640; Benjamin, Sales, § 819; *Gibbs v. Benjamin*, 45 Vt. 124.

Since plaintiff insured the property "as its own," and at all times treated the property as belonging to it, it is "estopped" and cannot be heard now to say the contrary.

Evans v. Warren, 122 Mass. 803; *Broom, Legal Max.* 169; *McDonald v. Pike*, 60 Wis. 220; *Kaehler v. Dobberpuhl*, 60 Wis. 260, 261; *Carter v. Smith*, 23 Wis. 497, 498; *Littlejohn v. Turner*, 78 Wis. 118; *Tompkins v. Clay Street R. Co.* 66 Cal. 163-167; *Dyckman v. Sevaton*, 39 Minn. 182.

It is error to submit the construction of a written contract to a jury.

See *Gough v. Root*, 78 Wis. 82; *Ranney v. Higby*, 5 Wis. 62, 69, 70; *Cohn v. Stewart*, 41 Wis. 527.

Messrs. Weisbrod, Harshaw & Nevitt for respondent.

Orton, J., delivered the opinion of the court:

By two certain written agreements, one dated September 15, and the other November 2, 1885, the plaintiff agreed to manufacture a large

quantity of engravings and lithographs for theatrical purposes, for the defendant and for his special use, to be taken and paid for during the theatrical season of 1885-86, and all of the work was to be completed and ready for delivery by the 15th day of December, 1885. A large portion of the goods were taken and paid for during the theatrical season above stated, and the remainder was ready for delivery by the 15th day of December, 1885, and during that theatrical season, and was not called or paid for until it was burned up on the 26th day of May, 1886, on the premises of the plaintiff, where it was piled up and set apart for the defendant. The plaintiff had procured insurance on this remainder of the work, and received part of what was due on the contracts, for the loss, from the insurance company. This suit is brought to recover the balance unpaid.

The jury found that the plaintiff had manufactured the goods ready for delivery at the time fixed in the contract, and had them ready for delivery at all times thereafter, until the fire occurred; and that the hand-colored proofs under one contract, and the quality of the paper under the other, were accepted by the defendant as sufficient; and that he also accepted a part of all the different kinds of work, and paid for the same, during the theatrical season; and that the theatrical season ended on the 1st or 5th day of May, 1886. The only ambiguity in the contracts was as to when the theatrical season ended or was to end, and that the jury has supplied, and we think on sufficient evidence, by the last above finding. The jury found, also, that it was agreed and understood that the title of the property should pass to the defendant the 15th day of December, 1885, the

Where labor is employed on the materials of the seller, he cannot maintain an action for work and labor. *Atkinson v. Bell*, 8 Barn. & C. 277; *Lee v. Griffin*, 30 L. J. N. S. Q. B. 235; *Prescott v. Locke*, 51 N. H. 94.

But it is elsewhere held that a contract to manufacture certain articles out of one's own materials is not a sale (*Allen v. Jarvis*, 20 Conn. 38; *Atwater v. Hough*, 29 Conn. 509. See also *Finney v. Apgar*, 31 N. J. L. 271; *Hardell v. McClure*, 1 Chand. (Wis.) 271; *Cason v. Cheely*, 6 Ga. 554; *Philippe v. McFarlane*, 3 Minn. 109; *O'Neil v. New York & S. P. Min. Co.* 3 Nev. 141; *Bird v. Muhlinbrink*, 1 Rich. L. 199; *Gadsden v. Lanco*, 1 McMullan, Eq. 87; *Meincke v. Falk*, 55 Wis. 427), and that a contract for the sale and future delivery of a crop, then ungathered, is not a sale, but a contract for work and labor. *Eichelberger v. McCauley*, 5 Har. & J. 213; *Reutch v. Long*, 27 Md. 188. Compare, however, *Downs v. Ross*, 28 Wend. 270; *Seymour v. Davis*, 3 Sandf. 239; *Smith v. New York Cent. R. Co.* 4 Keyes, 180.

If the article ordered by the purchaser is exactly such as the plaintiff makes and keeps on hand for sale to anyone, and no change or modification of it is made at the defendant's request, it is a contract of sale, even though it may be entirely made after, and in consequence of, the defendant's order for it. *Garbutt v. Watson*, 5 Barn. & Ald. 613; *Gardner v. Joy*, 9 Met. 177; *Lamb v. Crafts*, 12 Met. 358; *Waterman v. Meigs*, 4 Cush. 497; *Clark v. Nichols*, 107 Mass. 547; *May v. Ward*, 134 Mass. 127; *Abbott v. Gilchrist*, 38 Me. 200; *Crockett v. Scribner*, 64 Me. 447; *Edwards v. Grand Trunk R. Co.* 48 Me. 379, 54 Me. 106; *Pitkin v. Noyes*, 48 N. H. 294; *Prescott v. Locke*, 51 N. H. 94; *Gilman v. Hill*, 36 N. H. 811; *Ellison v. Brigham*, 36 Vt. 64.

A contract to make, if the article ordered is also L. R. A.

ready substantially in existence at the time of the order, and merely requires some alteration, modification or adaptation to the buyer's wishes or purposes, is a contract of sale. *Mixer v. Howarth*, 31 Pick. 205.

Conflicting rules of different States.

The rules adopted by the courts of the different States for determining whether a contract is one of sale or for work and labor are directly in conflict. In Massachusetts the established rule is based upon the distinction referred to in *Lamb v. Crafts*, 12 Met. 358, and the rule was defended on the ground of its justice and convenience, while the rule laid down in *Lee v. Griffin*, 30 L. J. N. S. Q. B. 232, was referred to but not followed. *Goddard v. Binney*, 115 Mass. 450; Benjamin, Sales, 99.

If an order be given to a manufacturer or dealer for a specific article, there is no implied warranty that it will answer the purpose for which it is intended (*Goulds v. Brophy*, *ante*, 332, *note*), while the adaptation of a machine to the use for which it is manufactured is always warranted. *Smith v. Hightower*, 76 Ga. 629. See *Campbell Printing Press Co. v. Thorp*, 1 L. R. A. 645, 36 Fed. Rep. 414.

A refusal to receive an article to be manufactured to the satisfaction of the vendee, made before an actual, bona fide inspection, or before an opportunity is had to judge of its quality or merits, will not relieve the vendee from liability. *Warsaw Twp. School Dist. v. Sidrey School Furniture Co. (Pa.)* 18 Atl. Rep. 604.

A contractor furnishing all materials bears the loss where the house is destroyed by fire before its completion and delivery, unless the owner accepts the property before the loss. *Galyon v. Ketchen*, 48 Tenn. 55.

ally understood, should be delivery to the defendant. These two findings dispose of questions of law which depend upon the meaning, construction and legal effect of the written contracts, and they ought not to have been submitted to the jury. But the court sufficiently ruled the same way, by refusing to set the same aside, and to grant a new trial, and the verdict of the jury, in this respect, has done no harm.

The learned counsel on both sides, and the court below, treated this transaction as a sale of personal property. It was not a sale. When the contracts were entered into there was nothing *in solido* to be the subject of a sale. The mere paper, as the basis of this valuable work of mechanical art, was not only of insignificant value, but was not the subject of sale. The defendant did not wish to buy blank paper, and the plaintiff had none to sell. The plaintiff was to manufacture these engravings and lithographs for the especial, peculiar and exclusive use of the defendant in his business as a theatrical manager. They were advertisements adapted to the names and characters of his theatrical performances. It was the plaintiff's work of skill that gave the property produced by it any value. It was work and labor performed according to the order and direction of the defendant, and according to the terms of the contracts. When the required works were produced and ready to be taken away by the defendant and paid for, it was then not a sale. The plaintiff did not own them, and did not wish to own them, for they were of no use or value whatever to him, and were only of use and value to the defendant. When the job was completed according to the contracts, then the defendant was under legal obligation to take them away, and pay the amount agreed upon, during the theatrical season which ended May 5, 1886. If he does not do this, what are the legal rights of the parties? Is there any question about delivery or acceptance? Clearly not. It makes no difference to the plaintiff whether the defendant takes them away or not, for he is entitled to be paid for the job, or for his work according to the contracts. The contracts are that the works shall be paid for "as they are delivered;" that is, as they are delivered during the theatrical season of 1885-86. After that the money is due at all events. The defendant is liable because he has not accepted the work, and taken it away, and paid for it, according to the contracts. It is not even property out of which the plaintiff could reimburse himself, for it is of no value to him, or to anyone else, except the defendant. How long must the plaintiff wait? The money is due, and he may sue for it. These are, especially, contracts for work and labor of this peculiar kind, and the transaction is more clearly not a sale than almost any other where the new thing is produced by work and labor for another. For in such cases the article produced is generally of some considerable value to the mechanic, or it may be sold in the market. But not so here. But the contracts themselves call it work and labor. In both it is that the "party of the first part agrees to lithograph, in a workmanlike manner, for the party of the second part, the 6 L. R. A.

kind of work. The plaintiff is stated to be lithographers, wood-engravers, printers and binders.

These contracts may be likened to a job that a printer does for another, and according to his directions, when the work consists of hand-bills or advertisements set up in attractive form, and adapted exclusively to the business of such other person, and useful to no one else. The job is completed according to contract, and the other party has failed to take them away and pay for them. May not the printer sue? Or an artist paints the likeness of another according to contract. It is not called for, but left a long time on the artist's hands. The work was well done and acceptable to the person who ordered it. It is of no use to the artist, or of any value to anyone, except to him whose likeness or picture it represents. In all these cases it is too clear for argument that the transaction is not governed by the law of sales, but of work and labor. In these supposed cases, if the hand-bills and advertisements in the one case, and the likeness in the other, after the time for taking them away and paying for them had expired, are burned up, whose loss is it? They are put by themselves in a safe place until called for. Why should the printer or the artist lose by the fire, and the person who ordered the work done, and who is in default in not taking it away and paying for it, and by whose negligence it was left with the artist where it was burned, without his fault, suffer no loss? The law works no such injustice. These cases are alike in principle. They are clearly analogous.

The defendant, by his own default and neglect, left his engravings and lithographs with the plaintiff, and under his care and custody, as a naked bailee, for some time after the time he agreed to take them away and pay for them, and they were burned. They were piled together and set apart for the defendant in a safe place, and he had accepted the work as being according to the contract. There can be no doubt, as we have said already, that the plaintiff had an action for the money agreed to be paid, after the time for payment had expired. In that view, the fact that the work was afterwards burned up is immaterial, unless caused by the plaintiff's negligence. But, in analogy to a sale of the property, it was left in the plaintiff's care by the fault of the defendant, and if there was any loss by fire he must suffer it. Where several articles of the same kind were purchased, and only one taken away, and the others left with the vendor, to be called for at any time the vendee chose, the title of the property passed to the vendee at the time of the sale. *Bullis v. Borden*, 21 Wis. 137.

So the title of this property passed to the defendant December 15, 1885, when it had all been manufactured according to the contracts, and part of it taken away, and after that remained with the plaintiff or under its care, until called for, during that theatrical season.

Where one had stored in a certain warehouse a large number of barrels of flour, and sold the same to another, to be paid for "when used or disposed of," a part of them had been disposed of or taken away and paid for. Most of the

turned belonged to the purchaser, and that he was liable at once for the price of that burned up. *Boland v. Benson*, 54 Wis. 387.

There is another principle of liability in such a case, and that is that the defendant was liable for not accepting and taking away the goods manufactured after the time he was required by the contracts to do so, as in *Ganson v. Madigan*, 15 Wis. 145. The defendant had ordered a reaping-machine of the manufacture of a certain kind. The machine was what the defendant had ordered, and the plaintiff had set it apart for the defendant, so as to be capable of identification. It was held that the plaintiff could have sold the machine to satisfy his lien upon it, and recover the balance of the purchase price, or could have held it subject to the defendant's order, and recover the whole price.

In *Mixer v. Howarth*, 21 Pick. 207, where it is an agreement with a workman to put materials together and construct an article for the employer at an agreed price, it was held that it was not a sale until actual delivery and acceptance, and the remedy was for not accepting it on the agreement. To the same effect are *Spencer v. Cone*, 1 Met. 283, and *Goddard v. Dinney*, 115 Mass. 450.

In *Atkinson v. Bell*, 8 Barn. & C. 277, the defendant ordered certain frames, with alterations made on them, of the patentees, and when ready for delivery refused to accept them. It was held that the plaintiff might recover for his not accepting them. To the same effect is *Lee v. Griffin*, 1 Best & S. 272, where a person ordered a set of artificial or false teeth made to fit his mouth. It was held that the plaintiff might have recovered from the defendant for his not accepting them, if the contract had been in writing; and *Mead v. Case*, 83 Barb. 202, was to the same effect, where blocks of marble were directed to be finished, polished and lettered with inscriptions as a monument. But finally, on this general question, this court recently decided that a transaction or contract not by any means so clearly not so, was not a sale, but for work and labor.

In *Meincke v. Falk*, 55 Wis. 427, the article to be manufactured was a family carriage, specially ordered, of a particular model. The plaintiff's skill, labor and workmanship were the special inducement in giving the order, and without such order the plaintiff would not have manufactured it, and it was not kept as a part of his general stock. The carriage was completed according to the contract or order, and the defendant refused to accept it. The action was for the value of the carriage, and for storing it for the defendant, on the ground of non-acceptance. In that case *Mr. Justice Cassoday* reviewed very fully the authorities on the question, which were conceded to be somewhat in conflict. It was held that it was not a sale of the carriage, but a contract for work and labor, and that, therefore, the verbal contract was not within the §50 Statute of Frauds. The complaint in this action was not for the price of the goods, as sold to the defendant, but the ground of the action is that "the defendant has never ordered the same shipped, nor taken or paid for the same, or any part

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This case, therefore, authorities above cited, of the court, and the jury, were more p this transaction as a sa the findings are approp performed by the plain producing the goods; s manufactured the goo tracts, and in the time had manufactured the time specified, and until the said fire, and accepted and paid for s kinds of the work man findings, although on of the goods as if sold, of law than of fact, as not be inappropriate t transaction as for worl found that the title of defendant on the 15th c and that manufacturing them apart, subject to was understood to be a are just and proper oc treating it as one for w for a sale of the propert subject to the order or ac ant, and he ought to paid for it, before the left with the plaintiff by and at his risk. The p work as bailee and su consideration to be paid terest in the work.

In the above view ta that the plaintiff insure owner, and collected material, as bearing o ownership, for the pla them insured to protec nominal owner would defendant ought not to paid for them before th if any, was not his los accepts the goods may evidence that he has v them if they are not ac *Bacon v. Eccles*, 43 Wi

But the defendant o the insurance. It was would have lost then plaintiff insured them The goods owned by fendant would have b either for insurance o his forethought and f fendant from a large p he would have been plaintiff, and lessens his recovery in this ac

This opinion is muc have been if the case correct theory. It w it to go into the Rep diction of *Meincke v.* was warranted by the however, and the jud errors assigned becom

The judgment of the

CALIFORNIA SUPREME COURT.

Solon HUMPHREYS *et al.*, *Repts.*,
v.

Peter HOPKINS, *Appt.*

(....Cal....)

Possession by a receiver, appointed in one jurisdiction, of the personal property of a debtor, taken by him under an order of court which vests no title in him, does not exempt it, when taken into another jurisdiction, from attachment by creditors of such debtor therein, or give the receiver any right to hold the property against the claims of such attaching creditors.

(*Thornton and McFarland, JJ., dissent.*)

(December 2, 1892.)*

APPEAL by defendant from a judgment of the Superior Court for the City and County of San Francisco in favor of plaintiffs, and from an order denying a motion for a new trial, in an action to recover possession of a railroad car. *Reversed.*

*A decision was reached in this case, and an opinion handed down, on February 27, 1889. Subsequently a rehearing was granted and the decision given herewith was reached, which renders the former opinion of no value, and it is consequently omitted. [Rep.]

NOTE.—Receiver, appointment of.

The appointment of a receiver is a provisional remedy,—an auxiliary proceeding. *Bufkin v. Boyce* (Ind.) 1 West. Rep. 560.

He cannot be appointed *ex parte* before defendant has an opportunity to be heard. *People v. O'Brien*, 2 L. R. A. 255, 111 N. Y. 62; *Devoe v. Ithaca & O. R. Co.* 5 Paige, 521; *Ferguson v. Crawford*, 70 N. Y. 255.

The receiver is but the officer or agent of the court from which he derives his appointment, and his possession is exclusively the possession of the court; the property being regarded as in the custody of the law, *in rem* *legis*, for the benefit of whoever may be ultimately determined to be entitled to its possession. *High, Receivers*, §§ 134, 139; *Day v. Postal Telegr. Co.* 6 Cent. Rep. 445, 86 Md. 364.

It is the duty of the court to protect a receiver whom it appoints, in the possession of the property committed to his care. *Moore v. Mercer Wire Co.* (N. J.) 15 Atl. Rep. 737; *Riggs v. Whitney*, 15 Abb. Pr. 390; *Noe v. Gibson*, 7 Paige, 512.

Where property is in possession of a receiver it is in the custody of the law, and it is the duty of the claimant to ask leave of the court before taking any steps to get possession of it. *Moore v. Mercer Wire Co. supra*; *Portman v. Mill*, 8 L. J. N. S. Ch. 161; *Delany v. Mansfield*, 1 Hogan, 234; *Booth v. Clark*, 58 U. S. 17 How. 322 (15 L. ed. 168).

Money in hands of the receiver at the place of permanent custody, with no duty in respect to it beyond that of its preservation, is already in court, and cannot be parted with without an order of the court, or some leave or direction authorizing him to do so. *Ricks v. Broyles*, 78 Ga. 610.

He may keep money in the bank as a safe place of deposit, and will be held responsible only for his own negligence. *State v. Gooch*, 97 N. C. 186.

Receivers should be impartial between the parties in interest, and stockholders and directors of corporations should not be appointed as receivers of the insolvent company unless in exceptional and urgent cases. *Atkins v. Wabash, St. L. & P. R. Co.* (Ill.) 20 Fed. Rep. 174.

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The facts sufficiently appear in the opinion. *Mr. Frank M. Stone*, for appellant:

The tribunals of one State cannot extend their process into other States, and any attempt of the kind would be treated in every other forum as an act of usurpation, without any binding efficacy.

Burge, Com. p. 1044; *Story*, Conf. L. § 539; *Picquet v. Swan*, 5 Mason, 40; *Steel v. Smith*, 7 Watts & S. 451.

Receivers have no extraterritorial right of action.

High, Receivers, § 239.

The same propositions are strongly stated in *Rorer*, *Interstate Law*, p. 295; *Booth v. Clark*, 58 U. S. 17 How. 322, 333 (15 L. ed. 164, 168); *Story*, Conf. L. § 888; *Hazard v. Durant*, 19 Fed. Rep. 477.

Outside of the jurisdiction which appoints him, a receiver is not ordinarily entitled to maintain suits, except by comity; and this comity does not extend to aiding preferences sought to be acquired by statutory assignments or other proceedings *in invitum* to the detriment of other creditors whose interests are in the keeping of foreign or independent tribunals.

Olney v. Tanner, 10 Fed. Rep. 104; *Booth v. Clark*, 58 U. S. 17 How. 322 (15 L. ed. 164); *Brigham v. Luddington*, 12 Blatchf. 237, 242;

Receivers appointed by the courts of the United States are subject, under the Act of Congress of March 3, 1887, to suits without leave in any court having jurisdiction over the subject matter, although no court can interfere with the custody of the property held by another court through its receiver. *Dillingham v. Anthony*, 3 L. R. A. 624, 73 Tex. 47.

Receiver, an officer of the court.

The receiver is an officer of the court. *Re Burke*, 1 Ball & B. 74; *Fairfield v. Weston*, 2 Sum. & Stu. 32; *Bryan v. Cormick*, 1 Cox, Ch. 422; *Field v. Jones*, 11 Ga. 418; *Broad v. Wickham*, 1 Smith, Ch. Pr. 500; *Angel v. Smith*, 9 Ves. Jr. 335; *Curtis v. Leavitt*, 1 Abb. Pr. 274, 10 How. Pr. 421; *Beach, Receivers*, 2.

He is an indifferent person between parties, appointed by the court. *Wyatt*, Pr. Rex. 355.

He is an officer of the court appointed in behalf of all parties and for the benefit of all parties who may establish rights in the cause. *Booth v. Clark*, 58 U. S. 17 How. 322 (15 L. ed. 168).

He is not to be regarded, in any sense, as the agent or representative of either party to the action. *Lot-timer v. Lord*, 4 E. D. Smith, 183; *Davis v. Duke of Marlborough*, 2 Swanst. 126.

He is but a stakeholder, and it is not his duty to assume ordinary business risks in the use of property in his hands. *United States v. Lake Corp. of Church* (Utah) 21 Pac. Rep. 506.

His duty is to receive and preserve the property in controversy, *pendente lite*, on behalf of the court and for the benefit of all parties in interest. *Bank v. McLeod*, 38 Ohio St. 174; *Booth v. Clark*, 58 U. S. 17 How. 322 (15 L. ed. 164); *Waters v. Carroll*, 9 Yerg. 102; *Baker v. Backus*, 32 Ill. 72; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Davis v. Duke of Marlborough*, 2 Swanst. 113; *Hooper v. Winston*, 24 Ill. 353; *Kaiser v. Kellar*, 21 Iowa, 95; *King v. Cutts*, 24 Wis. 627; *Osborn v. Heyer*, 2 Paige, 342; *Curtis v. Leavitt*, 1 Abb. Pr. 274; *Brown v. Northrup*, 15 Abb. Pr. N. S. 333; *Corey v. Long*, 43 How. Pr. 497, 19 Abb. Pr. N. S. 427; *Williamson v. Wilson*, 1 Bland,

Thompson, 5 N. Y. 520; *Hunk v. St. John*, 28 Barb. 585; *High, Receivers*, § 156; *Betton v. Valentine*, 1 Curt. 168; *Hope Mut. L. Ins. Co. v. Taylor*, 2 Rob. (N. Y.) 278, 284.

A receiver's possession ceases at the border line of jurisdiction. Without the jurisdiction, the laws and policy of other States have scope.

Green v. Van Buskirk, 72 U. S. 5 Wall. 807 (18 L. ed. 599); *Hervey v. Rhode Island L. Works*, 93 U. S. 671 (23 L. ed. 1004); *Bryan v. Brisbin*, 26 Mo. 428; *Thurston v. Rosenfield*, 42 Mo. 481; *Booth v. Clark*, 58 U. S. 17 How. 322 (15 L. ed. 164); *Kronberg v. Elder*, 18 Kan. 150; *Taylor v. Columbian Ins. Co.* 96 Mass. 853; *Willits v. Waits*, 25 N. Y. 577; *Moseby v. Burrow*, 52 Tex. 408.

A receiver has been allowed to sue where no domestic policy was infringed, and denied the right where the claims of domestic creditors would otherwise be defeated.

Bank v. McLeod, 88 Ohio St. 174; *Hunt v. Columbian Ins. Co.* 55 Me. 290; *Hurd v. Elisabeth*, 41 N. J. L. 1; *Very v. McHenry*, 29 Me. 218; *Fox v. Adams*, 5 Me. 245; *Johnson v. Parker*, 4 Bush (Ky.) 149; *Saunders v. Williams*, 5 N. H. 218; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Pierce v. O'Brien*, 129 Mass. 814; *Taylor v. Columbian Ins. Co.* 96 Mass. 853; *Zipcey v. Thompson*, 1 Gray, 248; *Swan v. Crafts*, 124 Mass. 453; *Osborn v. Adams*, 18 Pick. 245; *Fall River Iron Works Co. v. Croude*, 15 Pick.

Ch. 418; *Ellicott v. Warford*, 4 Md. 80; *Van Rensselaer v. Emery*, 9 How. Pr. 185; *Meier v. Kansas Pac. R. Co.* 5 Dill. 476 But see *Kellar v. Williams*, 3 Rob. (La.) 321.

Only property the subject of litigation should be placed in his hands. *Wormser v. Merchants Nat. Bank*, 49 Ark. 117.

As the creature or officer of the court, he has only such powers as are expressly conferred upon him by the order of appointment, or such as are conferred upon him by the established rules and usages of a court of chancery. *Green v. Bostwick*, 11 Sandf. Ch. 185; *Skinner v. Maxwell*, 66 N. C. 45, 68 N. C. 400; *Battle v. Davis*, 66 N. C. 252; *Coburn v. Ames*, 57 Cal. 201; *Hunt v. Wolfe*, 2 Daly, 303; *Corey v. Long*, 48 How. Pr. 497, 12 Abb. Pr. N. S. 427; *Devendorf v. Dickinson*, 21 How. Pr. 275; *Ellicott v. Warford*, 4 Md. 80; *Hooper v. Winston*, 24 Ill. 358; *Kaiser v. Kellar*, 21 Iowa, 95.

A receiver as the agent of the law takes from the possession of a debtor all his property, for division among all creditors in equal proportions. *New Haven Wire Co. Cases*, 5 L. R. A. 300, 57 Conn. 352.

Taking property from the possession of a receiver without leave of court is a contempt of the court and punishable as such. *Ibid.*; *Moore v. Mercer Wire Co.* (N. J.) 15 Atl. Rep. 737.

And this strict rule forbidding the interference of a third party with the possession of the receiver, without leave of the court, applies without regard to the facts; and whether such party claims paramount to or under the right which the receiver was appointed to protect. *High, Receivers*, § 139; *Evelyn v. Lewis*, 3 Hare, 472; *Day v. Postal Teleg. Co.* 6 Cent. Rep. 448, 66 Md. 354.

Neither the appointment of a receiver nor the refusal to discharge him, before final decree, involves the determination of any right between the parties. *Hull v. Caughy*, 5 Cent. Rep. 567, 66 Md. 104.

The property subject to an order of appointment of a receiver vests in the receiver as of the date of the order, without the execution of any transfer or 6 L. R. A.

Turner v. Mason, 40

Mr. T. Z. Blaker
Where a receiver takes possession of property in the jurisdiction of which he is appointed, he becomes an owner, and is entitled to the property in like manner as a private owner; and his title is as certain as that of a private owner. He has no title in his individual capacity.

Jones, Railroad Sec. M. & St. P. R. Co. v. Packet Co. 108 Ill. 817 8 Baxt. (Tenn.) 580; 127; *Crapo v. Kelly*, 88 L. ed. 435; *Wales v. A. v. Townes*, 9 Leigh, 155 La. Ann. 552; *Iglehear*.

A foreign executor in his own name upon a will in another State in his right.

Lewis v. Adams, 70 Calver, 25 Fed. Rep. (t v. Chapel, 16 Mass. 71 Hill, 57; *Manwell v. B. v. O'Neal*, 3 Sneed, 55 7 Ind. 211; *Biddle v.* 1 686 (7 L. ed. 815); *T. Mason*, 16.

assignment. *Gaither v.* 1 793, 67 Md. 222.

He has no title to the property to conserve, and his action taken only after an appointment, in each instance. *Dodge (D. C.) 3 Cent. Rep.*

The sale of property by a receiver made under execution is authorized by the court. *Russell v. Texas &*

No extraterritorial

Receivers appointed by a court are entitled as of right to receive the property. *Atkins v. Wabas* Fed. Rep. 161; *Stearns v. Cony v. Belmont*, 5 Jor Peake, 18 How. Pr. 138 Brown, 19 Ohio, 202, 211.

And where a citizen of due to a foreign corporation had been appointed by a court, it was held that into the courts of the State attached and claim the extraterritorial powers. *Bank, 7 Phila. 156. In v. Waits*, 25 N. Y. 577; *T. 14 Allen*, 333; *Hunt v. C.*

Where the receiver of property pointed by a court in Missouri upon a note in court in the latter State the receiver, as such, of *Farmers & M. Ins. Co.* also *Hope Mut. L. Ins.*

The receivers appointed in New York had no extraterritoriality in this State, and surrender the property.

Seannell, 13 Cal. 243; *McLane v. Placerville & S. V. R. Co.* 66 Cal. 617; *High, Receivers*, 2d ed. § 162 a, and *Jones, Railroad Securities*, § 483.

The court has based its decision mainly upon the proposition that the receivers were bailees of the debtor. The authorities hold that a receiver is not a bailee of the debtor, but is, like a sheriff, an executive officer of the court.

High, Receivers, 2d ed. § 184, and cases there cited; *McLane v. Placerville & S. V. R. Co.* 66 Cal. 616; 2 *Freeman, Executions*, 2d ed. § 268; *Drake, Attachm.* § 509 a.

Title to personal property vests in the receiver by virtue of the order of appointment.

High, Receivers, 2d ed. § 443, and cases there cited; 2 *Freeman, Executions*, 2d ed. § 268; *Drake, Attachm.* 5th ed. § 292; *Brownell v. Manchester*, 1 Pick. 234; *Alley v. Caspart*, 6 New Eng. Rep. 429, 80 Me. 284; *Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co.* 108 Ill. 817. See also *Lewis v. Adams*, 70 Cal. 408; *Pond v. Cooke*, 45 Conn. 127; *Parsons v. Charter Oak L. Ins. Co.* 81 Fed. Rep. 305.

Beatty, Ch. J., delivered the opinion of the court:

The plaintiffs in this action are receivers of the road and other property of the Wabash, St. Louis & Pacific Railway Company. They were appointed by the United States Circuit Court for the Eastern District of Missouri, May 25, 1884, by an order made in an action to which

road, to manage, control and operate it, and preserve and protect all its property. At the date of their appointment a certain freight car belonging to the company was at Toledo, in the State of Ohio, where, on the 29th of May, 1884, it came into their possession. It was subsequently brought by them, in the course of their business as receivers, to the City of St. Louis, in the State of Missouri, a place within the jurisdiction of the court by which they were appointed. On the 16th of March, 1885, they loaded the car with freight consigned to San Francisco, intending that when the freight was unloaded at San Francisco the car should be returned to St. Louis. While the car was in San Francisco it was attached by the defendant, as sheriff of San Francisco, in a suit brought by Henry Payot and Isaac Upham against the railway company. Payot and Upham were citizens of California, resident and doing business in San Francisco. This action was thereupon commenced by the plaintiffs to recover the car so attached. The judgment of the superior court was in their favor. Defendant appeals.

The question presented by the appeal is whether a receiver appointed in a foreign jurisdiction to take possession of the property of a railway corporation, and carry on its business, and who in pursuance of his authority as such receiver has taken the property into his actual possession within the jurisdiction of the court by which he was appointed, can hold such property against the claim of a citizen of this

land Company. *Day v. Postal Teleg. Co.* 6 Cent. Rep. 446, 66 Md. 364.

His functions and powers, for purposes of litigation, are held to be limited to the courts of the State within which he was appointed, and the principles of comity between the States do not apply to a case like the present. *Bartlett v. Willbur*, 58 Md. 485; *Booth v. Clark*, 58 U. S. 17 How. 322, 338 (15 L. ed. 164, 170); *High, Receivers*, § 239; *Day v. Postal Teleg. Co.* *supra*.

When property has once vested in a trustee, assignee or receiver, by the law of the State where the property is situated, the law of another State will not, even in favor of resident creditors, divest such trustee, assignee or receiver of his right to the property, although it has been taken out of the jurisdiction of the court by which the receiver was appointed, and into the jurisdiction of another court. *Pond v. Cooke*, 45 Conn. 128; *Chicago, M. & St. P. R. Co. v. Keokuk N. L. Packet Co.* 108 Ill. 317, 48 Am. Rep. 567; *Beach, Receivers*, 184.

A receiver appointed by one Federal court has no right to sue in another Federal court. *Brixham v. Luddington*, 12 Blatchf. 237. Compare *Holmes v. Sherwood*, 8 McCrary, 405.

If a state court, through a receiver or an administrator appointed by such court, or by levy of a writ issued to the sheriff or other executive officer of the court, has taken possession of property, the United States court will not interfere with such possession. *Kohn v. Ryan* (Iowa) 81 Fed. Rep. 638.

The law of comity between States.

There is nothing, however, to prevent the courts of other States or jurisdictions from permitting the receiver, as a matter of favor and comity, to file his bill for the enforcement of his rights; but the permission will not be allowed to interfere with the 6 L. R. A.

rights of the citizens of such other States. *Hunt v. Columbian Ins. Co.* 55 Me. 290. See *Bank v. McLeod*, 38 Ohio St. 174; *Runk v. St. John*, 29 Barb. 585; *Pugh v. Hurd*, 52 How. Pr. 22. See also *Metzner v. Bauer*, 96 Ind. 425; *McAlpin v. Jones*, 10 La. Ann. 552; *Bidlack v. Mason*, 28 N. J. Eq. 230; *Taylor v. Columbian Ins. Co.* 14 Allen, 363; *Hoyt v. Thompson*, 5 N. Y. 320, reversing 3 Sandf. 418; *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291.

Nor to contravene the policy of such States as to their laws. *Hurd v. Elizabeth*, 41 N. J. L. 1, 4; *Bank v. McLeod*, 38 Ohio St. 174. See *Day v. Postal Teleg. Co.* 6 Cent. Rep. 441, 66 Md. 364; *Beach, Receivers*, 618.

In New Jersey a foreign receiver, duly authorized to take property wherever situate, will be allowed to maintain a suit for its possession in the courts of that State, unless such suit will injuriously affect its own citizens, or is contrary to the policy of its laws. *Hurd v. Elizabeth*, 41 N. J. L. 1, 4. See *National Trust Co. v. Miller*, 38 N. J. Eq. 155.

In New York receivers appointed in other States may sue in their official capacity, but the privilege will not be extended to them in a case where damage will result to its own citizens. *Runk v. St. John*, 29 Barb. 585; *Pugh v. Hurd*, 52 How. Pr. 22.

An Ohio court permitted a receiver, who had been appointed in Kentucky, to assert in that forum his right to property belonging to the railroad and covered by the mortgage, which had been found in Ohio and there attached by a citizen of Kentucky, there being no evidence or claim that the rights of any citizen of Ohio would be affected by such an action. *Bank v. McLeod*, 38 Ohio St. 174.

In Pennsylvania the courts recognize the right of a receiver, appointed in another State, to property in that State, when the rights of its own citizens are not involved. *Bagby v. Atlantic, M. & O. R. Co.* 86 Pa. 291; *Beach, Receivers*, 618.

tached as security for his just demands against the railway company. Counsel for appellant contends for the proposition that a foreign receiver has no capacity to sue in his official character in our courts, but we do not understand the authorities to sustain this extreme view. The question, however, need not be decided in this case, for the plaintiffs, besides being receivers of the road, had an actual and lawful possession of the property at the time of its seizure, and by virtue of that possession could undoubtedly have recovered it from a mere trespasser. But their mere possession of the property of a foreign debtor cannot be held to exempt it from the claims of attaching creditors.

A debtor cannot, by placing or allowing his property to be in the possession of a third party, screen it from attachment. However lawful the possession of the bailee, the property is still subject to attachment or garnishment at the suit of a creditor of the owner. Such rights as the bailee may have to the use or possession of the property, and such liens as he may have upon it, will, of course, be protected, but, saving the rights of the bailee, the creditor may take it. The question in such cases, therefore, is not as to the lawfulness of the bailee's possession, or his right to recover the property from a mere trespasser; it is a question as to which right is superior,—his or the attaching creditor's. And such is the question here. Conceding, as we think must be conceded, that these plaintiffs could have recovered the car in controversy from a mere wrong-doer, by virtue of their lawful possession at the date of the seizure, if not by virtue of their office, still it remains to be decided whether they could reclaim it from the defendant, who justifies under a writ of attachment issued at the suit of citizens of the State of California to enforce a just demand against the owner of the property. The solution of this question depends upon the effect to be given to the order of the Court of Missouri, under whose appointment the plaintiffs are acting. For, we repeat, the mere possession by the plaintiffs of the debtor's property, however lawful, does not screen it from attachment. To show a right superior to that of creditors they must fall back upon the order appointing them receivers, and must depend upon the comity of this State as to the effect to be allowed that order.

The substance of that order has been already stated. It does not pretend to vest the title to the property of the railroad company in the receivers; it merely directs them to take possession of and use the property for the benefit, presumably, of creditors of the company who have resorted to that particular forum for the enforcement of their debts. The authorities as to the effect to be given in other jurisdictions to such orders are collected in a note to the case of *Alley v. Caspari* (Me.) 6 Am. St. Rep. 185. The result is summed up by the editor (page 189) as follows: "We deduce, therefore, from a thorough examination of the cases and text-books upon the subject, that the great weight of authority is, and should be, in keeping with the decision rendered by Mr. Justice Wayne, in *Booth v. Clark*, 58 U. S. 17 How. 6 L. R. A.

the ground of comity, and proper exercise of permit such suits to be pose of thereby doing of a larger number woinizing the orders and ju a sister State. But in right to sue conceded, be maintained by the fo claim sought to be enf rights of citizens or crea the suit is brought."

We think that the el correctly stated in this man's note, and we thi tice to our own citizens not extend the principle award this property to creditors residing in oth seeking to hold it for theft.

The judgment and on reversed, and cause rema

We concur: **Fox, J. sen, J.**

Thornton, J., disse Action to recover a ci and judgment in favor of defendant for a new Appeal by defendant fr denying the motion for

It is conceded that o 1884, the plaintiffs w United States Circuit District of Missouri, w Louis & Pacific Railwa appointed receivers of property of the compa instructions to take pos and to manage, contro serve and protect all it appears that the car in session of the receivers Ohio, on May 29, 1884 by the company to the and that the receiver carrying on the busin that day until it was this action, on the 1st d the car came into the p it was by them brough business as receivers, State of Missouri, a p tion of the court by appointed. The rece March, 1885, loaded t ined for the City of S so loaded to San Fr that the freight of sai at San Francisco, and be returned to St. Lou to San Francisco, and by Henry Payot and the State of Californ said Payot and Upa above-named railroad Under this attachmen of the City and Count lies.

It is argued that t

him. It may be conceded that this is the general rule, and still the plaintiffs can maintain this action. The right to sue and maintain the action is founded on the possession of the car, delivered to the plaintiffs as receivers by the railroad company, in May, 1884, at Toledo, Ohio, and its being taken from that place by plaintiffs in the course of their management, carrying on and control of the business of the company, to St. Louis, where it was loaded and sent to the City of San Francisco. This possession was given by the owner of the car, the railroad company, in pursuance of the order of the court, and was never afterwards disturbed by the company. The possession of the car remained in the receivers, unchanged, and never interfered with, until it was attached, in this State, on the 1st of April, 1885. The plaintiffs, under the undisputed authority of the court making the appointment, and without challenge by the railroad company, were, during the period of this possession, using this car in carrying on the business of the railroad company. The taking possession of the car by the plaintiffs, as receivers, was lawful, and their continued possession was also lawful, and such possession vested in them as individuals a special property, on which title they can as individuals maintain this action. This conclusion is supported both on principle and by authority.

The case of *Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co.* 108 Ill. 817, is directly in point. There the contest was between a receiver of the property and effects of the Northern Line Packet Company, regularly appointed by the Circuit Court of St. Louis, Mo., in an action brought against that company, and an attaching creditor on a writ brought in the Circuit Court of Adams County, State of Missouri. The court held that the title of the receiver was good against the attaching creditor in the State of Missouri, and judgment was accordingly rendered in favor of the receiver. The court, speaking to the point, said: "The general doctrine that the powers of a receiver are co-extensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another State, to remove from such State the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede; and were this the case of property situate in this State, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the facts that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of opinion that, by the receiver's taking possession of the barge in ques-

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acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as receiver; and to meet such liability he might maintain any appropriate proceeding to regain possession of the barge which had been taken from him. *Boyle v. Townes*, 9 Leigh, 158; *Singerly v. Fox*, 75 Pa. 114. It is well settled that a sheriff does, by the seizure of goods in execution, acquire a special property in them, and that he may maintain trespass, trover or replevin for them."

The court concludes its observations on this point as follows: "By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver; and it is the established rule that, where a legal title will be recognized everywhere," citing *Cammell v. Sewell*, 5 Hurlst. & N. 728; *Clark v. Connecticut Peat Co.* 85 Conn. 808; *Taylor v. Boardman*, 25 Vt. 581; *Orapo v. Kelly*, 83 U.S. 16 Wall. 610 [21 L. ed. 480]; *Waters v. Barton*, 1 Cold. (Tenn.) 450. *Cagill v. Wooldridge*, 8 Baxt. 580, is to the same effect. In that case the contest was also between the receiver and an attaching creditor. The case was ruled in favor of the receiver.

A receiver of an important manufacturing company, appointed by a court of New Jersey, who took possession of its assets for the purpose of completing a bridge which the corporation had contracted to build in Connecticut, purchased iron with the funds of the estate, and sent it into that State, and it was held that the iron was not open to attachment in Connecticut by a creditor residing there. *Pond v. Cooke*, 45 Conn. 126.

In *McAlpin v. Jones*, 10 La. Ann. 552, and in *Hurd v. Elizabeth*, 41 N. J. L. 1, receivers were allowed to maintain actions without the jurisdiction of the court appointing them. In the case cited from 10 La. Ann. the receiver had been appointed by a Chancery Court in Mississippi. He there took possession of the property, under the order of the appointment. A portion of the property, viz., four slaves, were stolen from the possession of the receiver, and came into the State of Louisiana. The owner brought suit in the latter State, and its highest court adjudged that he could recover. It may be observed that the property sued for in this case was in the possession of the receivers, within the jurisdiction of the court appointing them. The receivers got their possession in Ohio, by delivery from the owner, and took the car to St. Louis, where it was within the jurisdiction of the Circuit Court of the United States for the Eastern District of Missouri. The fact that they got possession of the car out of the jurisdiction of the appointing court cannot make any material difference, when the property was at once carried into such jurisdic-

cover that the car was afterwards sent by the receivers in the course of their duty, and in the prosecution of the business which they were appointed to carry on, see *Chicago, M. & St. P. R. Co. v. Northern Line Packet Co.* 108 Ill. 323, 324.

In the same line of decisions with the foregoing are *Low v. Burrows*, 12 Cal. 188, and *Lewis v. Adams*, 70 Cal. 408. In *Low v. Burrows* the action was brought by the assignee of a judgment recovered in New York. The assignment was made by an administrator in New York. It was contended that the administrator in New York had no right to assign the judgment, the debtor residing at that time beyond the State of New York. This contention was based on the ground that the authority of the administrator did not extend beyond the State in which the letters were granted. The court disposed of this contention adversely to counsel presenting it, and it was held that the administrator, having recovered the judgment, owned it, and could assign it. In *Lewis v. Adams*, *supra*, the action was brought on a judgment recovered by the plaintiff, as the executor of the last will of one Nat Lewis against the defendant, P. T. Adams, in the District Court for the County of Bexar, State of Texas. In the complaint in this suit the plaintiff described herself as executrix, of Lewis, and it was contended that she having been appointed executrix by a Texas court, her authority was confined to the State of Texas, and that she could not maintain any action in this State. It was held that the judgment recovered in Texas vested the title in her; that she was accountable to the court in Texas from which she received her appointment; and that she could maintain the action here on her own title as an individual. The whole subject is ably and fully discussed, and the authorities cited, in the opinion of Justice McKinstry. See *Lewis v. Adams*, 70 Cal. 406, 407.

In the same line of decisions is *Wilkinson v. Culver*, 25 Fed. Rep. 639, where a judgment was recovered by a receiver of a corporation appointed by a New Jersey Court, and the receiver, as owner of the judgment in his individual capacity, was allowed to recover on it in an action brought in the United States Circuit Court for the Southern District of New York. See also *Biddle v. Wilkins*, 26 U. S. 1 Pet. 686 [7 L. ed. 815]; *Talmage v. Chapel*, 16 Mass. 71; *Trecothick v. Austin*, 4 Mason, 84, 85; *Barton v. Higgins*, 41 Md. 539; *Cherry v. Speight*, 28 Tex. 508; *Rucks v. Taylor*, 49 Miss. 552.

The three cases last cited were actions brought by foreign administrators on judgments which they had recovered as such administrators in their own States, and they were allowed to sue upon the judgments in their own names in the other States. See also *Morton v. Hatch*, 54 Mo. 408.

On this subject Justice Story, in his able work on *Conflict of Laws*, makes the following observations:

"516. And here it may be necessary to attend to a distinction important in its nature and consequences. If a foreign administrator has, in virtue of his administration, reduced the personal property of the deceased, there situated, & L. R. A.

of that country, in the hands of the administrator, it is his duty to reduce it to the hands of the heirs or wards be found in and carried away and convert he may maintain a suit in his own name and right person new letters of administration in his own name and purposes, although he is so in the other persons. In his legacy of personal property foreign country, and in administration there, full possession and administrator, he may after name, for any injury property, in another country or wrong-doer may probate of the will the each of these cases is the legatee have, each in full and perfect legal title of the local law; and a title duly acquired by the deemed valid, and be a perfect title in every of

"517. The like principle applies to an executor or administrator abroad, bearing negotiable notes belonging to the deceased, and are payable to bearer; the legal owner and bearer of the notes, and may sue in his own name, and he need not take action in the State where the order to maintain a suit for a like reason it would be a paper of the deceased, paid and indorsed by the administrator in the State capable there of passing an indorsement, would confer on the indorsee, so that every other country is allowed to sue thereon in the same manner that he would in his own country of any personal goods of the deceased situate in the State. Story, Conf. L. §§ 516,

To support the state learned author cites decisions to the sections quoted. The decisions are all governed by the same principle, and to personal property, or required by the *lex rei sitae* and be respected as a title in every other country.

There is nothing in this with what is laid down in S. 17 How. 322 [15 L. ed. 101]. The action was attempted in the Circuit Court for the District of Columbia on the mere order of a State of New York administrator, who was so appointed that he had never had possession of the evidences of the title, which the plaintiff (Booth) recovered. On the contrary, the property remained in the possession of the deceased, went into the hands of the executor, and came back

this claim as a material fact in the case. After pointing out the means by which, through the aid of the court, he could have obtained possession of this claim, it is observed in the opinion: "Such, however, was not the course pursued in this case, though the debtor was then a resident of the State of New York, and amenable to the jurisdiction of the court. No motion was made to force Clark to comply with the injunction which Camara had obtained under the creditors' bill. The matter was allowed to rest for seven years, Camara being aware that Clark had a pecuniary claim upon the Republic of Mexico, at least as early as in the year 1848. The receiver during all that time took no action."

The essential nature of the action in *Booth v. Clark* is correctly set forth in the opinion of the court in *Hazard v. Durant*, 19 Fed. Rep. 477. It was there characterized, and properly characterized, as an action by a receiver, a mere officer and servant of the court appointing him, and having no title to the fund by assignment or conveyance, or other lien or interest than that derived from his appointment. It may be well conceded that such an officer, on such a showing of title, cannot recover in a foreign jurisdiction. If Booth, the receiver in *Booth v. Clark*, had, after his appointment as receiver, got possession of the Mexican claim prior to its coming to the hands of Clark's assignee in bankruptcy, and such had been made to appear in his action, the court would, no doubt, in accordance with the principle of its rule laid down in *Biddle v. Wilkins*, 26 U. S. 1 Pet. 686 [7 L. ed. 815], have held in favor of Booth. Booth would then have shown an individual and personal right to recover. The cases cited by the counsel for appellant, which followed *Booth v. Clark*, are like it in the material feature above pointed out. The receiver in all such cases relied on his order of appointment merely, to recover. It cannot escape observation that if this court sanctions the contention of appellant's counsel it will authorize the taking of property from the hands of a court, having ample jurisdiction, which has through the agency of a receiver (its own instrument) gotten lawful possession of property, and whose possession was lawful, when this property was attached here.

The statements made in the note referred to in the prevailing opinion relate merely to a suit by a receiver in a foreign jurisdiction, where he has never reduced the property to possession, and relies solely on the order of appointment to recover, as a careful perusal of the note will make evident. There is no case cited in the note which holds that a receiver, after he has reduced the property of the litigant to possession, and it is taken from him, cannot sue for it in any jurisdiction where he can find it. The title vests in the appointed receiver when he

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above pointed out, and is not allowed in any consideration of comity. Title vests, and in consequence a right to recover in the courts of every civilized country, as a matter, not of comity, but of right. No court has the right to take the property of one person and give it to another, or have it sold for the benefit of another. Considerations of comity only arise where the receiver sues in a foreign jurisdiction on the mere order of appointment. Considerations of comity allow such suit where there is no legal policy which forbids it, and it does not affect the rights of creditors or other persons, citizens of the jurisdiction where the suit is brought. Such is *Hurd v. Elisabeth*, 41 N. J. L. 1, where the suit was allowed to be maintained on considerations of comity. The special property vested in the receiver gives him a title on which he can recover anywhere. A sheriff gets only a special property where he has levied an execution, and on such title he can sue and recover anywhere. If a sheriff of this State seizes horses under a writ of attachment or execution within its limits, and the horses escape into the State of Nevada, and are taken possession of by a third person, we cannot see why he cannot recover in a suit in a Nevada court, even against an attaching creditor there.

The title of the receiver vested when he reduced this car to possession by the consent of the corporation. He sent it out of the State of Missouri, where he had it, for a lawful purpose. Why has a creditor a right to attach it? It was not the property of the corporation when it was attached, but of the receiver of the court, of which the receiver is the hand and instrument. I cannot conceive how a creditor can attach the property of one person to pay a debt due him by another. The statement in the complaint that the plaintiffs were appointed receivers by the court of Missouri shows the origin of the plaintiffs' right; but it is further alleged that the plaintiffs took possession of the car, and held it in possession until such possession was interfered with by the defendant, as afterwards stated in the complaint. The plaintiffs count specially on their own possession. We see nothing herein to prevent the plaintiffs from recovering on their individual rights. The averment as to their being receivers may be regarded as *descriptio personae*, and may be rejected as surplusage in accordance with the rule laid down in *Lewis v. Adams*, 70 Cal. 411, 412. I find no error in the record, and think that the judgment and order should be affirmed.

McFarland, J. :

I dissent, and concur in most of the views expressed in the dissenting opinion of Thorston, J. :

Petition for second rehearing denied.

CARRIER
v.
CHICAGO, ROCK ISLAND & PACIFIC
R. CO., *Appt.*

HIXON *et al.* v. SAME, *Appt.*

BLACKWOOD v. SAME, *Appt.*

JAUGHN v. SAME, *Appt.*

(....Iowa....)

1. An action to recover back freight charges unreasonable because in excess of those charged other shippers for the same service is a law action, and the fact that the excessive charge has been fraudulently concealed will not bring it within the exception to the general Statute of Limitations, that in actions "for relief on the ground of fraud heretofore solely cognizable in a court of chancery" the cause of action shall not be deemed to have accrued until the fraud shall have been discovered.

2. But such concealment will bring it within the rule of law that, where the party against whom a cause of action exists in favor of another, by fraud or actual fraudulent concealment, prevents such other from obtaining knowledge thereof, the Statute of Limitations will only commence to run from the time the right of action is, or by the use of diligence may be, discovered.

3. It seems that the specification by the Legislature of exceptions to the operation of the general Statute of Limitations will not preclude the court from applying exceptions to such Statute which were recognized by the common law other than those prescribed by the Legislature.

(January 25, 1890.)

APPPEAL by defendant from a judgment of the District Court for Jasper County, over-

NOTE.—The Statute of Limitations runs from discovery of concealed fraud.

Knowledge of fraud must be brought to plaintiff before the Statute of Limitations commences to run. *Gates v. Andrews*, 37 N. Y. 657, 5 Trans. App. 176; *Mayne v. Griswold*, 8 Sandf. 468; *Taft v. Wright*, 47 How. Pr. 1. See *Kent v. Kent*, 62 N. Y. 500, reversing 1 Hun, 520, 8 Thomp. & C. 630.

Mere silence is not a concealment of a cause of action, under the provision of Ind. Rev. Stat. 1881, § 800; but where a person liable to an action conceals that fact from the adverse party, limitation shall run only from the discovery of such cause of action. *Miller v. Powers*, 4 L. R. A. 483, 119 Ind. 79.

The "concealment" meant herein must be more than silence—must be some affirmative act, and must be so alleged and proven. *Wynne v. Cornelison*, 58 Ind. 313; *Jackson v. Buchanan*, 59 Ind. 360.

It must appear that some trick or artifice has been employed to prevent inquiry or elude investigation, or calculated to mislead or hinder the party entitled from obtaining information by the use of ordinary diligence; or that the facts were misrepresented to or concealed from the party by some positive act or declarations, when inquiry was being made or information sought. *Stone v. Brown*, 116 Ind. 78.

Where the bar of the Statute of Limitations is 6 L. R. A.

See also 26 L. R. A. 864.

ruling its demurrer to declarations in actions certain alleged overcharges shipping live stock *Affirmed.*

These cases all involved and were submitted to the court in each containing effect that defendant that plaintiff was engaged in live stock, and (more than five years' duration of the action) plaintiff defendant's road a carload therefor the usual tariff persons engaged in the shipping similar shipments, received a draw-back to the usual tariff rate which for the same service, and gave such persons a rebate they made shipments of less than the rates which plaintiff for the same shipments made by the service upon like conditions and instances, and that the service was precisely similar to persons; that therefore paid by plaintiff was without discrimination; that the rebate to such other persons plaintiff until shortly this suit; that the extra tariff in ignorance of the paid by other parties; that the service mulgated a tariff rate to plaintiff; that the service openly announce rates were correct, and allowed therefrom; that statements; that the service was withheld from plaintiff

sought to be avoided from which has occurred must with the requisite diligence

Under the New York Statute a conveyance as fraudulent from the time it accrues the fraud. *Jones v. Smith*

The word "concealed" Statute of Limitations, done in this State, such assumed name, change of the defendant which territory in which he lives from whence he came. *Rhoten*

An answer setting up costs upon plaintiff the fraud was not discovered the commencement of the action, 14 Abb. Pr. N. S. 9 Barb. 597, 1 Thomp. & C.

An action to recover setting that there were purchased is barred in such an action brought than six years after the within six years after required by purchase of is too late. *Northrop* 61 Barb. 126.

had no means of discovering the existence of such rebates until shortly before the beginning of these suits; that upon several occasions when plaintiff sought rebates he was told that no rebates were allowed, that all shippers were treated alike and that if any rebate was granted to anyone a like one would be granted to plaintiff; that said statement was false and was known to the officers of the defendant at the time to be false, and was made with intent to deceive plaintiff and to prevent him from acquiring the knowledge of the cause of action set forth in this count; that plaintiff relied on said false representations and was deceived by such false answers, and was thereby prevented from acquiring a knowledge of the cause of action set up in this count.

Defendant demurred to the counts similar to the above for the reasons: (1) that each of them shows on its face that the cause of action was barred by the Statute of Limitations; (2) that the cause of action accrued to plaintiff more than five years prior to the commencement of this action; (3) that it does not show fraud, as the basis of the action or otherwise, heretofore solely cognizable in equity; (4) it does not show any concealment of the alleged cause of action such as in law defeats or stops the bar of the Statute.

The demurrers were overruled, and defendant electing to stand on them, the court rendered judgment against it for the amount covered by the several counts, and the defendant appealed to this court.

Messrs. Thomas S. Wright and Winslow & Varnum for appellant.

Mr. A. Clark for appellees.

Given, J., delivered the opinion of the court:

When these causes of action are alleged to have accrued, there was no statute, state or national, fixing rates, nor providing for equality of rates; hence the right of the plaintiffs to maintain such actions must be determined by the common law. It is not questioned but that at common law a common carrier was only entitled to charge reasonable rates, and was liable to an action for unreasonable charges. The counts demurred to show that the alleged causes of action accrued more than five years before the bringing of these actions. The sole question presented in the record and arguments is whether the counts contain such allegations as take the cases out of the provisions of paragraph 4, § 2529, Code, limiting the bringing of actions "founded on unwritten contracts, those brought for injuries to property, or for relief on the ground of fraud, in cases heretofore solely cognizable in a court of chancery, and all other actions not otherwise provided for in this respect, within five years" after the causes accrue. Section 2530, Code, provides that in actions for relief on the grounds of fraud or mistake, and in actions for trespass to property, the cause of action shall not be deemed to have accrued until the fraud, mistake or trespass complained of shall have been discovered by the party aggrieved. The fraud here contemplated is that defined in the pre-

41 Iowa, 582; *Phelps Ind. Co. v. Danahard*, 47 Iowa, 432; *Higgins v. Mendenhall*, 51 Iowa, 141.

These are law actions, and clearly not such as were heretofore solely cognizable in a court of chancery, and therefore not within this exception to the general Statute of Limitations.

2. It is not contended that they are within any of the other expressed exceptions to the General Statute; but appellees rely upon the rule laid down in *Boomer Dist. Twp. v. French*, 40 Iowa, 601, and cases cited as approving and following that case. That was an action to recover moneys alleged to have been received by the defendant, French, as treasurer of the plaintiff township, and appropriated to his own use. The petition alleged that at the close of his term a partial settlement was had with the defendant, but, by means of false and fraudulent entries in his books as treasurer, and by means of fictitious entries and corrupt and fraudulent concealments and misrepresentations, the defendant kept from the plaintiff's knowledge the fact of the receipt of said sum until October, 1883, and plaintiff had no knowledge of the facts, or of the gross frauds perpetrated by defendant, till said date. The petition showing that the action was not brought within three years, defendant demurred, on the ground that the action was barred. The demurrer was sustained, and plaintiff appealed. This court, after citing Code, § 2530, says: "This action does not come within the language or meaning of the section quoted, for the reason that the action is not for relief on the ground of fraud, but on the ground that the defendant failed to pay over money received by him. The cause of action does not grow out of the fraud alleged. It existed independent of the fraud. Under the provisions of the section quoted above, the fact that the plaintiff, by reason of the fraud of the defendant, failed to discover the cause of action, does not defeat the bar of the Statute. That is defeated by the terms of that section, only where the cause of action is grounded in fraud."

There is some contention as to whether these actions are for unreasonable charges and unjust discriminations, or for unreasonable charges only. Mere discrimination, without injury, would not be actionable. When the discrimination is by charging unreasonably, it is the unreasonable charge that is the ground of the action. The ground of the action against French was his failure to pay the money received; the ground of these, the defendant's failure to pay back the money charged and received in excess of what was reasonable. In each case the plaintiffs have a cause of action independent of the frauds alleged. These cases, like that of *Boomer Dist. Twp. v. French*, measured by the Statute alone, are clearly barred; but in that case this court held the rule to be that "where the party against whom a cause of action existed in favor of another by fraud or actual fraudulent concealment prevented such other from obtaining knowledge thereof, the Statute would only commence to run from the time the right of action was dis-

Appellant contends that these cases are distinguishable from that; that French occupied a fiduciary relation towards the township, by virtue of which it was his duty to disclose the truth, and especially not to deceive, while such was not the legal duty of this defendant. The defendant is a quasi public corporation, owing certain duties to the public; and, in the absence of statute, fixed its rates without other restriction than that they should be reasonable.

It was said in *Heiserman v. Burlington, O. R. & N. R. Co.* 63 Iowa, 786, that "railroad companies are public carriers, and those who employ them are in their power, and must bow to the rod of authority which they hold over consignors and consignees of property transported by them."

The reason for the rule requiring disclosures and fair dealing applies to this defendant with the same force that it did to French.

3. Appellant contends that when exceptions are provided to a general statute it excludes all others than those expressed, and that courts are not at liberty to ingraft other exceptions than those expressed upon such a statute. This claim finds strong support in the following cases, cited by counsel: *Chemical Nat. Bank v. Kissane*, 32 Fed. Rep. 429; *Engel v. Fischer*, 102 N. Y. 400, 3 Cent. Rep. 308; *Fee v. Fee*, 10 Ohio, 470; *Amy v. Watertown*, 23 Fed. Rep. 418; *Alabama Bank v. Dalton*, 50 U. S. 9 How. 526 [18 L. ed. 243]; *Kendall v. United States*, 107 U. S. 125 [27 L. ed. 437]; *Favorites v. Booher*, 17 Ohio St. 554; *Woodbury v. Shackelford*, 19 Wis. 55; *Somerset Co. v. Veghte*, 44 N. J. L. 509; *Demarest v. Wynkoop*, 8 Johns. Ch. 143; *Miles v. Berry*, 1 Hill, L. 296; *Troup v. Smith*, 20 Johns. 38.

These precise questions were presented and passed upon in a number of those cases, and the doctrine announced that the General Statute was an exclusion of all others, and that when the Legislature has made exceptions the courts can make none, as that would be legislation. Several decisions by this court are also cited in support of these propositions.

In *Campbell v. Long*, 20 Iowa, 882, the questions were as to the extension of time granted to minors, and whether ignorance of a right would prevent the operation of the Statute. The court says that, "but for the exception in the Statute, it would run against minors and adults alike, and courts are not at liberty to ingraft upon the statutes exceptions which the Legislature did not deem necessary." "No fraud is charged upon defendants." It was simply a question whether ignorance of a right would prevent the running of the Statute.

In *Shorick v. Bruce*, 21 Iowa, 307, the court says: "The thought that the Statute would not run because Wilson, the ward, was a person of unsound mind or incapacitated to sue, finds no support either in the Statute or in the rules of the common law."

In *Relf v. Eberly*, 23 Iowa, 469, the question was whether plaintiff's case, as made by his petition, was prior to the Statute, and, within its meaning, solely cognizable in a court of chancery. Speaking with reference to this question, the court says: "Our opinion, therefore, is that in cases of fraud, when the plain-

equity, — the action must be commenced within five years after the perpetration of such fraud, and that he could not sue within that time after the discovery." The question under consideration was not noticed in that case, and the same is true of *Gebhard v. Sattler*, 40 Iowa, 132.

In *Miller v. Lesser*, 71 Iowa, 147, the question was whether the fact that the defendant changed his name, and that his place of residence was unknown to plaintiff, would prevent the running of the Statute. The right of the courts to apply exceptions recognized at common law, other than those named in the Statute, was not directly in question in either of these cases; and neither of the exceptions sought to be applied are such as were recognized at common law.

4. *Boomer Dist. Twp. v. French* finds strong support in the authorities cited in the opinion. Reference to *Sherwood v. Sutton*, 5 Mason, 143, wherein Judge Story reviews many of the English and American cases, and to the cases cited by appellant, shows a diversity of rulings on this question by the courts of different States. It is true that some of the cases were under statutes that did not contain an exception as to actions for relief on the grounds of fraud, but the question was whether, in the absence of such an exception in the Statute, the courts might apply it, just as in *Boomer Dist. Twp. v. French* the question was whether the court might apply the common-law exception announced, though not expressed, in the Statute. If the question was before us for the first time, we might hesitate to declare the rule announced in *Boomer Dist. Twp. v. French*; but that case, sanctioned by a long line of respectable authorities, has stood unquestioned as the law of the State for many years, with several sessions of the Legislature intervening, and has been cited, and more or less directly followed and approved, in *Humphreys v. Mattoon*, 43 Iowa, 556; *Findley v. Stewart*, 46 Iowa, 655; *Brunson v. Ballou*, 70 Iowa, 34; *Bradford v. McCormick*, 71 Iowa, 129; *Wilder v. Secor*, 72 Iowa, 161; *Shreeves v. Leonard*, 58 Iowa, 74.

We think there is no sufficient reason for now reversing the conclusion announced in *Boomer Dist. Twp. v. French*, *supra*.

It only remains to determine whether the plaintiffs' petitions allege such fraud, or actual fraudulent concealment, by the defendant, as prevented them from obtaining knowledge of their causes of action until within five years next preceding the commencement of these actions. It is alleged that plaintiffs were induced to and did pay the rates charged upon representations that they were the usual rates, and the same that were being charged to all others for the same service, and upon the promise that if any rebate was granted to anyone a like amount would be granted to plaintiffs; that a less rate was being charged to the shippers named and others, which fact was fraudulently concealed from plaintiffs; that the representations were false, and known to defendant's officers and agents making them to be so, and were made to prevent plaintiffs from acquiring knowledge of the fact that they were and had been charged, and had paid, unreason-

PENNSYLVANIA SUPREME COURT.

CITY OF CHESTER

v.

Henry B. BLACK, *Appt.*

(....Pa....)

Where local improvements to pay for which the Legislature had power to authorize an assessment upon adjoining property owners are made by a city under authority of an Act which is subsequently declared unconstitutional, it is competent for the Legislature to pass an Act authorizing a re-assessment to meet the cost of such improvements.

(February 24, 1890.)

A PPEAL by defendant from a judgment of the Court of Common Pleas of Delaware County in favor of plaintiff, entered upon an agreed statement of facts submitted for the determination of the question as to defendant's liability to pay a certain assessment for street improvements. *Affirmed.*

The case, stated in the nature of a special verdict, was as follows:

NOTE.—*Re-assessment of tax.*

A tax void for want of legislation to justify it may be re-assessed after proper legislative action. *Mills v. Charleston*, 29 Wis. 400; *Re Van Antwerp*, 56 N. Y. 261; 2 *Desty*, Taxn. 647.

Or it may be made to cover the defect of the original levy having been under an unconstitutional statute. *Re Van Antwerp*, *supra*; *Chattanooga v. Nashville*, C. & S. L. R. Co. 7 Lea, 561; *Cincinnati S. R. Co. Trustees v. Guenther*, 19 Fed. Rep. 896; *Cooley*, Taxn. 312.

Re-assessment is proper after a judicial decision against the first proceedings, if based on errors and defects merely. *Dean v. Charlton*, 23 Wis. 590; *Cook v. Ipswich Local Board of Health*, L. R. 6 Q. B. 451; *Brevoort v. Detroit*, 24 Mich. 322.

Upon failure of the first assessment, a re-assessment may be made. *Plumer v. Marathon Co.* 46 Wis. 184; *Tallman v. Janesville*, 17 Wis. 71; *Cross v. Milwaukee*, 19 Wis. 509; *Dill v. Roberts*, 30 Wis. 178; *Whittaker v. Janesville*, 33 Wis. 78; *Marsh v. Clark Co.* 43 Wis. 502.

The re-assessment is not to be considered a new tax. *Harwood v. North Brookfield*, 130 Mass. 561; *Fairfield v. People*, 94 Ill. 244. See *Mattingly v. Columbia Dist.* 97 U. S. 687 (24 L. ed. 1068); *Locke v. New Orleans*, 71 U. S. 4 Wall. 172 (18 L. ed. 234).

The Legislature may pass an Act directing a re-assessment, although the prior Act directing the assessment was declared invalid. *Lang v. Kiendl*, 27 Hun, 66.

A tax should be re-assessed on the valuation of the year when it was originally laid. *Davis v. Boston*, 129 Mass. 877.

When an exercise of the taxing power fails for any cause, and the tax is re-assessed, it is a debt due upon the re-assessment as from the time when it should have been first assessed. *Plumer v. Marathon Co.* 46 Wis. 181; *Peters v. Myers*, 22 Wis. 602.

In cases of re-assessment the lien of the tax re-

In the year 1888 the roadway of Madison Street in the City of Chester was paved by the said City with Belgian blocks in front of the lands of the defendant abutting on said street. Said paving was done in pursuance of an ordinance of the council of said City properly enacted, upon the petition of a majority in number of the owners of lands fronting on the street paved, and after all legal requirements preliminary to said paving had been fully complied with by the said City and its officers and council. This paving was done under the provisions of the Act of May 24, 1887, entitled "An Act Dividing Cities of This State into Seven Classes," etc. (Pub. Laws, p. 204), which said Act of Assembly has since been declared by the Supreme Court of Pennsylvania unconstitutional and void.

On July 31, 1889, viewers appointed by the council of the said City under and in pursuance of the Act of May 23, 1889, entitled "An Act Authorizing Assessments and Re-assessments for the Cost of Local Improvements Already Made or in Process of Completion, and Providing for and Regulating the Collection

lates back to the time when the land was entered upon the assessment roll and the aggregate amount of taxes determined. *Simmons v. Aldrich*, 41 Wis. 251.

It is no objection to a re-assessment that, on the first assessment, some persons paid under a stipulation that the payments should be allowed on re-assessment. *Petty v. Myers*, 49 Ind. 1; *Fairfield v. People*, 94 Ill. 244; *Cooley*, Taxn. 311.

Special assessments for local improvements.

Local assessments may be re-assessed, as well as general taxes. *Brevoort v. Detroit*, 24 Mich. 322; 3 *Desty*, Taxn. 647; *May v. Holdridge*, 23 Wis. 93; *State v. Newark*, 34 N. J. L. 236; *Tweed v. Metcalf*, 4 Mich. 579.

The Legislature may authorize a municipality to re-assess and collect certain taxes where the first assessment was adjudged invalid. *Re Van Antwerp*, 56 N. Y. 261. See *Howell v. Buffalo*, 37 N. Y. 267.

A tax on a local district for local improvements is constitutional. *Williams v. Cammack*, 37 Miss. 209.

It can be constitutionally imposed only for improvements clearly conferring special benefits upon the property assessed, and to the extent of those benefits; and it must be shown that the property assessed is benefited. *Dyar v. Farmington Village Corp.* 70 Me. 537; *Hanscom v. Omaha*, 11 Neb. 87; *Re Opening of Casacalvo and Moreau Streets*, 20 La. Ann. 497; *Crawford v. People*, 32 Ill. 557.

The foundation of the right to levy special assessments is the benefit which the property assessed is supposed to receive from the expenditure of the money. *Wistar v. Philadelphia*, 80 Pa. 505; *Seattle v. Yealer*, 1 W. T. 576; *Re Market Street*, 40 Cal. 546; *Taylor v. Palmer*, 31 Cal. 254; *Gaffney v. Gough*, 36 Cal. 104.

They cannot be imposed when the improvement is expressed or appears to be for general benefit. *Hammett v. Philadelphia*, 65 Pa. 155; *Wash-*

street by equal assessments in proportion to the number of feet the same fronts on the said street. The defendant's assessment is \$48.55. The provisions and requirements of the said Act of May 23, 1889, have been fully complied with in all respects by the said City of Chester, its officers and council and by the said viewers. If the court shall be of the opinion that the plaintiff is entitled, under and by virtue of the said Act of May 23, 1889, to recover the amount of the said assessment from the defendant, then judgment for the plaintiff for the sum of \$48.55, otherwise judgment for the defendant. The cost to follow the judgment, and either party to have the right to sue out a writ of error.

Upon this statement the court below ordered judgment for plaintiff, and defendant took this appeal.

The Act of May 24, 1887, having been declared unconstitutional by this court, and the paving in question having been done under it—without other authority—the ordinance and proceedings of the city council became null and void, being without foundation, and the Legislature had no power to create a new right or obligation on the part of property owners to pay therefor.

See *Shoemaker v. Harrisburg*, 122 Pa. 285; *Berghaus v. Harrisburg*, Id. 290.

Messrs. J. B. Hannum and J. B. Hinkson, for appellant:

Laws affecting remedies rest on a different

existing obligation, to be provided.

Hepburn v. Ourts Com. 36 Pa. 29; *Con Reading v. Savage*, 11

Art. 9 § 1, of the "All taxes shall be class of subjects with the authority levying and collected under"

The assessments p May 23, 1889, are ta the above provision *Schenley v. Allegh Hads*, 52 Pa. 479; *Odell v. Philadelphia*, 93 Pa. 129; *Church*, 105 Pa. 278; *lyn*, 4 N. Y. 419.

If this Act is held taxes of the defendant the taxes of his neighbor no paving has been

Chicago v. Larned,

In every case in Acts in regard to tax by the courts, there is liability on the part of the city if no paving has been

Grim v. Weissert

483; *Erie City v. Rea* App. 88 Pa. 55.

The General Assembly Act indirectly makes it directly prohibited

ington Ave. 69 Pa. 352; *People v. Rochester*, 54 N. Y. 507.

A property holder should not be compelled to assume the burden of a special tax from which he receives no corresponding benefit. *Lohrum v. Eyermann*, 5 Mo. App. 483; *Kiley v. Cranor*, 51 Mo. 542; *Zoeller v. Kellogg*, 4 Mo. App. 163; *Seattle v. Yesler*, *supra*.

A local assessment is void where the benefit to the property cannot be seen and traced, and it will be set aside where in fact there was no benefit. To render such assessment legal, not only must there be some special benefit, but it must appear that the benefit is direct and immediate, not contingent and remote. The land cannot be charged with an assessment greater than the benefits conferred. The principle which underlies special assessments is that the value of the property is enhanced to an amount at least equal to the assessment. This principle cannot be departed from without taking property for public use. *Carroll v. Tuscaloosa*, 12 Ala. 173; *Ex parte Buckner*, 9 Ark. 73; *California N. R. Co. v. Butte Co.* 18 Cal. 671; *Swann v. Cumberland*, 8 Gill (Md.) 150; *Taylor v. Palmer*, 81 Cal. 240; *Seattle v. Yealer*, 1 W. T. 576; *Hartford v. West* Middle Dist. 45 Conn. 462; *Guild v. Chicago*, 82 Ill. 472; *Bridgeport v. New York & N. H. R. Co.* 36 Conn. 255; *Re Fourth Ave.* 3 Wend. 432; *Tide-water Co. v. Ooster*, 18 N. J. Eq. 518; *Re Drainage of Lands*, 85 N. J. L. 497; *New Orleans Draining Co's Case*, 11 La. Ann. 838; *Yeatman v. Crandall*, Id. 220; *Re Canal Street*, 11 Wend. 155; *Albany Canal Bank v. Albany*, 9 Wend. 244; *Chamberlain v. Cleveland*, 84 Ohio St. 551; *State v. Ramsey Co.* Dist. Ct. 29 Minn. 62.

Local assessment is a valid exercise of the taxing power. The power to assess for local improvements is a part of the legislative prerogative of taxation, which the Legislature may delegate to

municipal government restrictions. *State v. St. Louis* v. Milwaukee, 53 Wis. 1 N. J. Eq. 672; *Nichols v. State*, v. Fuller, 34 N. J. N. Y. 261; *Bradley v. Mc*

If assessments are to be on the ground that taxing power. *Dalryn* 189; *Baltimore v. Green* Harvard College v. Bos Milwaukee, 10 Wis. 242.

Cities and villages are local improvements by special taxation, or both or general taxation, or ordinance prescribe. *Lake v. Decatur*, 91 Ill. Ill. 585.

Special taxation of purposes of local improvement general taxation for the from local taxation for other corporate uses. *Fairfield v. Ratcliff*, 20 N. J. L. 227.

The Legislature may among all the tax pay those of a particular set *Co. v. Otoe Co.* 68 U. S. *People v. Burr*, 13 Cal. Co. 13 N. Y. 143; *Stev* Iowa, 9; *Augusta Bank*

An assessment for a species of tax, and its power of the Legislature, the Legislature may authorizing a re-assessment. *Wis. 400*; *Dean v. Borci*

Messrs. Orlando Harvey and O. B. Dickinson, for appellee:

The Legislature can by retrospective legislation, authorize the re-assessment of taxes and assessments for municipal street improvements, which have failed by reason of the invalidity of a law under which said taxes or assessments have been laid.

Dillon, Mun. Corp. 8d ed. § 814; *Mills v. Charleston*, 29 Wis. 400; *Butler v. Toledo*, 5 Ohio St. 225; *Dean v. Borchsenius*, 30 Wis. 236; *State v. Newark*, 34 N. J. L. 236; *People v. Brooklyn*, 71 N. Y. 495; *Grim v. Weissenberg School Dist.* 57 Pa. 433; *Com. v. Marshall*, 69 Pa. 328; *Schenley v. Com.* 36 Pa. 57; *Magee v. Com.* 46 Pa. 358; *Kelly v. Pittsburgh*, 85 Pa. 170; *Hewitt's App.* 88 Pa. 55; *Erie City v. Reed*, 113 Pa. 468.

Such legislation is not in conflict with the "uniformity of taxation" clause in the Constitution.

Seely v. Pittsburgh, 82 Pa. 360; *Huidekoper v. Meadville*, 83 Pa. 156; *Pittsburgh Orphan Asylum's App.* 111 Pa. 135; *Erie City v. Reed*, *supra*; *Washington Avenue*, 69 Pa. 352; *Hale v. Kenosha*, 29 Wis. 599; *Hines v. Leavenworth*, 3 Kan. 186; *Emporia v. Bates*, 16 Kan. 495; *Brown v. Mayor of N. Y.* 63 N. Y. 239; *Sheehan v. Good Samaritan Hospital*, 50 Mo. 155; *People v. Mayor of Brooklyn*, 4 N. Y. 420; *Hill v. Higdon*, 5 Ohio St. 246; *Williams v. Detroit*, 2 Mich. 564; *Woodbridge v. Detroit*, 8 Mich. 276; *Baltimore v. Green Mount Cemetery*, 7 Md. 517; *Egyptian Levee Co. v. Hardin*, 27 Mo. 495; *St. Josephs v. Anthony*, 30 Mo. 541; *Burnett v. Sacramento*, 12 Cal. 76; *Emery v. San Francisco Gas Co.* 28 Cal. 345; *Chambers v. Satterlee*, 40 Cal. 497; *People v. Lynch*, 51 Cal. 15; *Howell v. Buffalo*, 37 N. Y. 267.

The power of the Legislature over the whole subject of taxation, including the property to be charged, the amount of the tax, the mode of levying, assessing and collecting it, is as ample as over any other matter that is a proper subject of legislative action.

People v. San Francisco & A. R. Co. 35 Cal. 606.

Per Curiam:

The paving in question was done under authority of the Act of May 24, 1887, entitled "An Act Dividing Cities of This State into Seven Classes," etc. See Pub. Laws, p. 204.

This Act was declared unconstitutional in *Ayars' App.* 122 Pa. 266, 2 L. R. A. 577.

The Act of May 23, 1889, Pub. Laws, p. 272, authorizing assessments and re-assessments for

passed to meet this difficulty. Subsequent to its passage, viewers were appointed by the council of Chester, in accordance with the terms of said Act, who proceeded to re-assess the costs of these improvements upon the property fronting upon the said street by what is commonly known as the foot-front rule. We need not discuss the rule itself as there is nothing in the case stated to indicate that it was not applicable to this street and to the property assessed. The only question remaining is the power of the Legislature to authorize this re-assessment. Upon this point we are not in any doubt. Judge Dillon, in referring to it in section 814 of the third edition of his excellent work on Municipal Corporations, says: "The original assessment for a local improvement proving insufficient, the Legislature may constitutionally authorize a re-assessment and make it operative upon the property benefited," and cites a number of cases which sustain his text, among which are the following: *Mills v. Charleston*, 29 Wis. 400; *Butler v. Toledo*, 5 Ohio St. 225; *Dean v. Borchsenius*, 30 Wis. 236; *State v. Newark*, 34 N. J. L. 236; *People v. Brooklyn*, 71 N. Y. 495.

It cannot be denied successfully that the Legislature had the power to authorize this assessment originally, and that nothing but the unconstitutionality of the Act of 1887 rendered the proceeding abortive. The principle has been repeatedly recognized in this State, that where the Legislature has antecedent power to authorize a tax, it can cure, by a retroactive law, an irregularity or want of authority in levying it, though thereby a right of action which had been vested in an individual should be devastated. *Grim v. Weissenberg School Dist.* 57 Pa. 433.

In the same line are *Com. v. Marshall*, 69 Pa. 328; *Schenley v. Com.* 36 Pa. 57; *Magee v. Com.* 46 Pa. 358; *Kelly v. Pittsburgh*, 85 Pa. 170; *Hewitt's App.* 88 Pa. 55; *Erie City v. Reed*, 113 Pa. 468.

The constitutionality of this kind of legislation is not open to objection. Of the numerous cases upon this subject it is sufficient to refer to *Huidekoper v. Meadville*, 83 Pa. 156, where it was held that the Act of 1870, which confers upon the City of Meadville the power of paving its streets, and collecting the cost from the owners of adjoining property by filing liens for paving, is not in violation of section 1 of article 9 of the Constitution, providing for a uniformity of taxation.

Judgment affirmed.

ARKANSAS SUPREME COURT.

ST. LOUIS, IRON MOUNTAIN & SOUTHERN R. CO., *Appt.*,

M. S. BIGGS.

(....Ark....)

Where a railroad is so constructed as to

cause water to occasionally overflow lands adjacent to it, an action will lie to recover damages resulting from such overflowing at each successive recurrence thereof; and the Statute of Limitations will begin to run upon the happening of the injury complained of, and not at the time of the building of the road.

NOTE.—Nuisance.

Every continuation of a nuisance makes a fresh one, and for this a recovery may be had. 1 Chitty, 6 L. R. A.

Pl. 66; *Fell v. Bennett*, 1 Cent. Rep. 409, 110 Pa. 181; *Uline v. New York Cent. & H. R. R. Co.* 2 Cent. Rep. 121, 101 N. Y. 93.

(November 9, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Hempstead County in favor of plaintiff in an action to recover damages for injuries resulting to plaintiff's lands from water caused to flow upon them, by reason of the alleged defective construction of defendant's road. *Affirmed.*

The case sufficiently appears in the opinion. *Messrs. Dodge & Johnson* for appellant. *Messrs. Scott & Jones* for appellee.

Sandels, J., delivered the opinion of the court:

The alleged nuisance was constructed in 1878. The injury complained of was in 1885. It is urged by the appellant that the Statute of Limitations began to run against appellee upon the construction of the nuisance. *St. Louis, I. M. & S. R. Co. v. Morris*, 85 Ark. 623, and *Little Rock & Ft. S. R. Co. v. Chapman*, 89 Ark. 468, are relied on as establishing this contention. The facts in those cases make them clearly distinguishable from this case.

The rules applicable to the recovery of damages for the construction and continuance of nuisances, in cases of this kind, are stated sat-

isfactorily to this court by numerous authorities, as follows:

Wherever the nuisance is of a permanent character, and its construction and continuance are necessarily an injury, the damage is original and may be, at once, fully compensated. In such case, the Statute of Limitations begins to run upon the construction of the nuisance. *St. Louis, I. M. & S. R. Co. v. Morris*, 85 Ark. 623; *Little Rock & Ft. S. R. Co. v. Chapman*, 89 Ark. 468.

But when such structure is permanent in its character, and its construction and continuance are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such case, the Statute of Limitations begins to run from the happening of the injury complained of. *Roberts v. Read*, 16 East, 215; 2 Greenl. Ev. 433; *Wood, Nuis. § 865*; *Wood, Lim. § 180*; *Angell, Lim. 800*; *Louisville & N. E. Co. v. Hays*, 11 Lea, 882, 14 Am. & Eng. R. R. Cas. 284; *Troy v. Cheshire R. Co.* 23 N. H. 83.

The case falls within the latter class.

Affirmed.

NEW YORK COURT OF APPEALS (3d Div.).

Daniel B. FAYERWEATHER et al., Appts.,

PHENIX INSURANCE CO., Resp't.

(....N. Y....)

A shipper who contracts to give the carrier, who may become liable for the loss of the goods shipped, the benefit of any insurance that may be effected thereon, cannot, in case of loss through the carrier's negligence, recover upon a policy insuring his goods which stipulates that in case of loss the insurer shall be subrogated to all claim of the shipper against the carrier, and that if any right of the insurer to recover against any person is lost by any act of the insured, or if the insurance is made for the benefit of any carrier, the insurer shall not be liable to pay any loss.

(January 14, 1890.)

A PPEAL by plaintiffs from a judgment of the General Term of the Superior Court of the City of New York, affirming a judgment of the Special Term dismissing the complaint in an action to recover the amount alleged to be due under a policy of marine insurance. *Affirmed.*

The case fully appears in the opinion.

Messrs. Arnoux, Ritch & Woodford for appellants.

Mr. George A. Black for respondent.

Follett, Ch. J., delivered the opinion of the court:

The plaintiffs were the owners of 211 bales of leather, which the Old Dominion Steamship Company undertook to transport by its steamer Guyandotte from Norfolk, Va., to New York, and deliver to the owners. The vessel reached New York June 17, 1886, with the leather safe on board, and within twenty-four hours after arrival she sank at her dock through the negligence of the employés of the steamship company. By this accident the leather was injured, as it is agreed, to the plaintiffs' damage in the sum of \$1,295.32.

In considering this case the liability of the carrier to the owners of the leather for this loss will be assumed. The bill of lading under which the leather was shipped contained this provision: "It is further stipulated and agreed that in case of any loss, detriment or damage to be sustained by any of the property herein receipted for during such transportation, whereby any legal liability or responsibility shall or may be incurred by the terms of this contract, that company alone shall be held answerable therefor in whose actual custody the same may be at the time of happening of such loss, detriment or damage, and the carrier so liable shall have the full benefit of any insurance that may have been effected upon or on account of said goods."

NOTE.—Carrier to have benefit of insurance

A stipulation in a bill of lading, allowing the carrier the benefit of an insurance procured by the owner, is valid as between the parties though the loss be occasioned by the negligence of the carrier or his agents; and in the absence of fraudulent concealment or misrepresentation, the insurer can maintain no action against the carrier upon any 6 L. R. A.

terms inconsistent with the stipulation. *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 117 U. S. 312 (29 L. ed. 873).

Under a bill of lading entitling the carrier to the benefit of insurance, payment of insurance to the owner of the property discharges the carrier from all liability, and the insurance company can have no action against the carrier. *Platt v. Richmond, Y. R. & C. R. Co.* 11 Cent. Rep. 101, 108 N. Y. 353.

loss. In the event of loss, the assured agrees to subrogate to the insurers all their claims against the transporters of said merchandise, not exceeding the amount paid by said insurers. . . . In case of any agreement or act, past or future, by the insured, whereby any right or recovery of the insured, against any persons or corporations, is released or lost, which would, on acceptance of abandonment or payment of loss by this Company, belong to this Company, but for such agreement or act, or in case this insurance is made for the benefit of any carrier or bailee of the property insured other than the person named as insured, the Company shall not be bound to pay any loss; but its right to retain or recover the premium shall not be affected."

This action is prosecuted by the assured owners to recover from the insurer their loss so sustained; and it is defended on the ground that the owners violated the provision of the contract of insurance above quoted by contracting with the carrier, without the insurer's knowledge, that the carrier, in case of liability for loss, should have the benefit of the insurance, and, in effect, that the insurer, on paying the owners' loss, should be deprived of its right to be subrogated to the owners' right of action against the carrier for injury to the leather.

When goods in the hands of a common carrier for transportation are insured by the owner, and are subsequently lost or injured under circumstances rendering the carrier liable to the owner for the damages, and the insurer pays the loss to the owner, the insurer, in the absence of stipulations between the carrier and owner defeating the right, is entitled to be subrogated to the rights and remedies of the owner against the carrier. *Hall v. Nashville & C. R. Co.* 80 U. S. 13 Wall. 367 [20 L. ed. 594]; *Connecticut F. Ins. Co. v. Erie R. Co.* 78 N. Y. 899; *Sheldon*, Subrogation, § 229.

But the struggle between carriers and insurers to escape the liability imposed under the usual bills of lading and policies, by casting the burden of the loss upon the other by the insertion of unusual and astute provisions in their respective contracts with the owner, has rendered this simple rule of law quite inapplicable to many of the cases arising under such special contracts. The provision quoted from the bill of lading cut off the insurer's right to be subrogated to the rights and remedies of the owner against the defaulting carrier. *Mercantile Mut. Ins. Co. v. Cabela*, 20 N. Y. 175; *Platt v. Richmond, Y. R. & C. R. Co.* 20 Jones & S. 496, affirmed, 11 Cent. Rep. 101, 108 N. Y. 358; *Phoenix Ins. Co. v. Erie & W. Transp. Co.* 10 Biss. 18, affirmed, 117 U. S. 812 [29 L. ed. 873], and *Re Phoenix Ins. Co.* 118 U. S. 610 [30 L. ed. 274].

It has been held (*Jackson Co. v. Boylston Mut. Ins. Co.* 189 Mass. 508), in an action by the owner against the insurer for the recovery of a loss covered by the policy, and caused by the actionable negligence of the carrier, that a

provision in the policy that this insurance shall be void in case the policy, or the interest insured thereby, shall be sold, assigned, transferred or pledged without the consent in writing of the insurer," is not violated by the agreement between the owner and carrier that the latter should have the benefit of any insurance on the goods carried.

In *Inman v. South Carolina R. Co.* 129 U. S. 128 [32 L. ed. 612], the defendant, a common carrier, transported cotton under a bill of lading which contained a stipulation that the carrier incurring any legal liability for the loss of the cotton "shall have the benefit of any insurance which may have been effected upon or on account of said cotton." The owners insured the cotton under policies which contained this stipulation: "And any act of the insured waiving or transferring, or tending to defeat or decrease, any such [the insurer's] claim against the carrier, or such other person or persons, whether before or after the insurance was made under this policy, shall be a cancellation of the liability of the said insurance company for or on account of the risk insured for which loss is claimed. In event of loss the assured agrees to subrogate to the insurers all their claims against the transporters of said cotton, not exceeding the amount paid by said insurers."

The cotton was lost by the negligence of the carrier. The insurers adjusted the loss, but did not pay the owner, agreeing with him that he should sue the carrier without prejudice to his claims under the policies, and that interest should be allowed upon the claim as adjusted until it could be collected. The assured owner sued the carrier, which defended on the ground that by the stipulation in the bill of lading it was entitled to the insurance effected on the cotton, which the owner had nullified by accepting a policy containing the stipulation quoted. It was held that the stipulation in the policy was not a defease. It is unnecessary to determine whether the reasons given for the judgment in the case last cited can be harmonized with reasons given for the judgments in the previous cases hereinbefore cited, because none of the cases determine the precise question presented in the case at bar. The plaintiffs in this action expressly stipulated that they would make no agreement, nor do any act, whereby their right of action against the carrier for losing or injuring the leather should be released or cut off, and that, in case the carrier became liable to the plaintiffs for losing or injuring the leather, the defendant, the insurer, on paying the loss, should be subrogated to their right of action against the carrier. By the contract entered into between the plaintiffs and the carrier, the rights stipulated for by the insurer have been wholly nullified and cut off, which defeats the plaintiffs' right to recover on the policy. *Carstairs v. Mechanics & T. Ins. Co.* 18 Fed. Rep. 478.

The judgment should be affirmed, with costs. All concur, except **Haight, J.**, not voting.

NEW YORK COURT OF APPEALS.

TWENTY-THIRD STREET BAPTIST CHURCH, of the City of New York, *Appl.*,

Jacob W. CORNWELL et al., Exrs., etc.,
of Catherine Weeks, Deceased, *Repts.*

(...N. Y....)

A subscription towards the erection of a church building, which is entirely voluntary on the part of the subscriber and unsupported by any consideration, and which remains unpaid at the subscriber's death, is thereby revoked, and the subsequent erection of the church, although undertaken in reliance partly upon such subscription, will furnish no reason for compelling payment by his executors.

(January, 1890.)

A PPEAL by plaintiff from a judgment of the General Term of the Superior Court of the City of New York affirming a judgment of the Special Term dismissing the complaint, and an order denying a motion for a new trial, in an action to recover an unpaid subscription towards a fund for the erection of a church building. *Affirmed.*

The action was brought to recover \$5,000 upon an alleged subscription claimed to have been made by the defendants' testatrix in favor of the plaintiff by its then name of the Stanton Street Baptist Church, on December 14, 1881, in a paper-writing subscription by her of which the following is a copy: "We the undersigned hereby agree to pay on May 1st, 1882, or sooner at our own option, the sums severally set to our names towards a church-edifice fund of fifty thousand dollars (\$50,000), now being raised by the Stanton Street Baptist Church of New York City, on condition that the aggregate of subscriptions herein found shall not be less than the said amount of fifty thousand dollars (\$50,000).

"Moneys received will be paid in to the New York Life Insurance & Trust Company.

"Location of the new building to be Twenty-Third Street, corner of Lexington Avenue."

Mrs. Weeks signed her name to this paper, and opposite her name set down the amount of \$5,000. On April 7, 1882, she died. The complaint alleged that upon the faith of said subscription the plaintiff proceeded with the erection of the church edifice and expended thereupon large sums of money and incurred thereupon large liabilities, and has completed said building, and that all the conditions upon which said subscription was made have been complied with and the plaintiff has duly performed all the conditions on its part.

It appeared from the evidence that the building operations were commenced about the 1st

of May, 1882. The trial court dismissed the complaint, and, the general term having affirmed this judgment, the plaintiff brought the case to this court by appeal.

Mr. Edward S. Clinch for appellant.

Mr. Flamen B. Candler, for respondents:

The subscription of Catherine Weeks was void for want of consideration, for it was a mere naked subscription not implying any request by the subscriber.

First Presbyterian Church v. Cooper, 8 L. R. A. 468, 112 N. Y. 517; *Stewart v. Hamilton College*, 2 Denio, 408; *Wilson v. Baptist Education Society*, 10 Barb. 308; *Van Rensselaer v. Aikin*, 44 N. Y. 126; *Cottage Street M. E. Church v. Kendall*, 121 Mass. 528.

The action is predicated upon alleged acts done and expenses incurred in reliance upon the alleged subscription; but in cases of this kind where a voluntary subscription is made for charitable purposes, and where no specific request was made at the time of the subscription, the contract becomes binding on the subscriber only in case expenses are incurred, etc., upon the faith of his subscription, to which expenses the subscriber expressly or impliedly assents.

First Presbyterian Church v. Cooper, *Stewart v. Hamilton College*, *Wilson v. Baptist Education Society*, *Van Rensselaer v. Aikin* and *Cottage Street M. E. Church v. Kendall*, *supra*.

In the case at bar, Catherine Weeks died on April 7, 1882, at a time prior to all acts by virtue of which the plaintiff seeks to entitle itself to recover in this action. At the time of her death she was not liable. Her death was a revocation of the offer. No acts of the plaintiff could thereafter implicate her or her estate.

Pratt v. Elgin Baptist Society, 93 Ill. 475; *Beach v. First M. E. Church*, 96 Ill. 177; *Helfenstein's Estate*, 77 Pa. 328; *First Presbyterian Church v. Cooper*, 8 L. R. A. 468, 112 N. Y. 517, 45 Hun, 453.

Finch, J., delivered the opinion of the court:

It is an insuperable barrier to a recovery by the plaintiff that the subscription of Mrs. Weeks to the fund for the erection of a new church building was merely an executory gift, unsupported by any consideration. The doctrine settled in the recent case of *First Presbyterian Church v. Cooper*, 112 N. Y. 517, 8 L. R. A. 468, is decisive upon the facts here presented. Since the subscriptions of several furnished no consideration for the promise of anyone; since the decedent did not request the corporation to build a new edifice and the Church did not promise that it would; since no endeavor to obtain subscribers was occasioned by the expressed wish or direction of tes-

NOTE.—Contract not enforceable.

Where one party only is bound by an agreement such agreement is not enforceable; both parties must be bound, or neither will be. *Parkhurst v. Van Cortlandt*, 1 Johns. Ch. 232; *Benedict v. Lynch*, 1 Johns. Ch. 370; *De Cordova v. Smith*, 9 Tex. 126; *Armiger v. Clarke*, *Bunbury*, 111; *Troughton v.* 6 L. R. A.

Troughton, 1 Ves. Sr. 36; *Lawrenson v. Butler*, 1 Sch. & Lef. 13; *Bromley v. Jefferies*, 2 Vern. 415.

Chancery will not aid a party seeking the specific performance of a mere voluntary contract founded upon neither a good nor a valuable consideration. *Aoker v. Phoenix*, 4 Paige, 305. See note to *First Presbyterian Church v. Cooper*, 8 L. R. A. 468.

...the plaintiff is compelled to rely, and does rely, upon one originating later.

The contention is that the church corporation erected its new edifice, and incurred the large cost of its construction, in reliance upon these subscriptions; and so, in the end if not in the beginning, a consideration arose to support the promise. That may happen where the expenditure can be said to have proceeded with the knowledge and assent of the subscribers; but here, before any expenditure was made or any work was begun, Mrs. Weeks died. Her gift was unexecuted at her death and revoked

where none existed before, and had no authority to bind the estate by an assent to the work of construction, or to convert an invalid promise of the testatrix into an enforceable liability of her estate. The promise died when she died, and was merely a good intention which did not survive her.

This view of the case makes it needless to discuss the other questions with which the argument was largely occupied.

The judgment should be affirmed, with costs.
All concur.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Thomas J. BARRY
v.
Samuel J. CAPEN.

(....Mass.....)

1. Defendant is not entitled to insist, in an action to recover upon a special contract for personal services, that an instruction be given to the jury that the contract was void because the services to be rendered were of such a character as to be against public policy, if there is some evidence of a lawful contract.

2. A contract to pay a lawyer a certain sum to appear before the street commissioners and advocate the laying out of a street through land of the promisor, and to get as much as he can as damages therefor, is not against public policy, but is a valid contract which will not be invalidated by evidence tending to show the subsequent use by the lawyer of his personal influence as chairman of the city committee of a political party in fulfilling his part of the contract.

(February 26, 1890.)

ON defendant's exceptions from the Superior Court for Suffolk County in an action upon a special contract for personal services in which judgment was entered for plaintiff. *Overruled.*

The case sufficiently appears in the opinion. *Messrs. E. B. Callender, and Charles J. Noyes, for defendant:*

All agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public office, or the ordinary course of legislation, are void as against public policy, without reference to the question whether improper means are contemplated or used in their execution.

Providence Tool Co. v. Norris, 69 U. S. 2 Wall. 45 (17 L. ed. 868); *Jones v. Randall*, Cowp. 39.

Where professional services are blended with work in its nature prohibited, the whole is a unit and indivisible, and that which is bad destroys that which is good, and they perish together.

Trist v. Child, 88 U. S. 21 Wall. 452 (22 L. ed. 625). See also *Providence Tool Co. v. Norris*, *supra*; *Clippinger v. Hepbaugh*, 5 Watts & S. 6 L. R. A.

815; *Hatzfeld v. Gulden*, 7 Watts, 152; *Harris v. Roof*, 10 Barb. 489.

Mr. M. J. Creed, for plaintiff:

The services performed by the plaintiff were professional services and in no way or manner partook of the nature of "lobbying." Services the same as those performed by the plaintiff have been held to be proper professional services for an attorney to do.

Frost v. Belmont, 6 Allen, 161; *Blake v. Norfolk Co.* 114 Mass. 586; *Powers v. Skinner*, 34 Vt. 281; *Stanton v. Embrey*, 93 U. S. 557 (23 L. ed. 985).

This is not within the principle which renders agreements to compensate a person, for privately soliciting individual members of the Legislature or other public bodies to act in favor of a claim or measure, void.

Sedgwick v. Stanton, 14 N. Y. 289.

Holmes, J., delivered the opinion of the court:

This is an action upon a special contract to pay the plaintiff, a member of the bar, \$1,000 for professional services. When the evidence was all in, the counsel for the defendant asked the court to rule "that the contract of service, and the services rendered, were in part of such a character as were against public policy and illegal, and thereby vitiated the contract, and that the plaintiff could recover nothing." The court refused so to rule, and found for the plaintiff.

The question before us, therefore, is not what we should have found upon the evidence, but simply whether there was no evidence of a lawful contract, so that the court below should have ruled, as matter of law, that the agreement testified to was void. A majority of the court are of opinion that the defendant was not entitled to require such a ruling, because there was some evidence of a contract consistent with public policy. As the plaintiff recovered upon an express contract, and not upon a *quantum meruit*, it is not of the first importance to consider what he actually did. That is evidence, no doubt, tending to show what was the contemplated consideration of the defendant's promise, but it is not conclusive. The plaintiff may have rendered illegal services and yet the defendant's promise may

have been in consideration of the plaintiff's promising to perform or performing legal ones only.

If the contract was legal, it would not be made illegal by misconduct on the part of the plaintiff in carrying it out. *Howden v. Simpson*, 10 Ad. & El. 798, 818, 819, 2 Perry & Dav. 714, 740; *Simpson v. Howden*, 9 Clark & F. 61, 68; *Barrett, J., in Powers v. Skinner*, 84 Vt. 274, 284, 285.

The judge having found that the contract was legal, the fact that the plaintiff did things against public policy, if it be a fact, can be considered only as bearing, by way of illustration, upon the question whether the tendency of the contract necessarily was to induce the doing of such things. If that was its necessary tendency to an appreciable degree, it was void, whether it induced the acts or not.

The plaintiff's statement of the contract is as follows: The defendant came to his office and said that he had a case which he wished the plaintiff to attend to, that there had been appropriated \$25,000 for Talbot Avenue, which went through the defendant's land, and that he wanted to have it laid out as soon as possible. The plaintiff asked what the defendant wanted him to do. The defendant answered: "I want you to appear before the street commissioners and advocate the laying of it out and the terms of damages." He then stated what damages he thought he ought to get, and offered the plaintiff everything he got over \$10,000.

The plaintiff declined to do business in that way, whereupon the defendant said, "You go and get as much as you can, and I will pay you \$1,000 for it." To this the plaintiff assented.

The judge was warranted in finding that a bilateral contract was made in this conversation; that the only services on the part of the plaintiff promised by him or contemplated by either party at that time were legitimate professional services, as the defendant's known counsel, in advocating the laying out of a street by fair and open argument at meetings of the board to which the public had access, and, after the street was laid out, in presenting the defendant's claims for damages in the same way. The board of street commissioners had

quasi-judicial duties to perform at both stages of the case. Public argument before it was proper both on the question whether there was a public necessity for laying out the way and and on the damages to be allowed those whose land was taken. The retaining for a definite sum of counsel avowed as such to conduct the argument was perfectly legal. *Fuller v. Dame*, 18 Pick. 472, 480; *Trist v. Child*, 88 U. S. 21 Wall. 445, 450 [23 L. ed. 628, 624]; *Marshall v. Baltimore & O. R. Co.* 57 U. S. 16 How. 814, 835 [14 L. ed. 953]; *Lyon v. Mitchell*, 36 N. Y. 235, 241.

The plaintiff did not draw the petition in the case. He was not present at the hearing after the order of notice of intention to take the property. He did not do some other things which it might be supposed that one who really was engaged as counsel would do. On the other hand, from December to January—that is, before public proceedings were begun for laying out the street—he went at least three times a week to see the street commissioners. At this time he was chairman of the Democratic City Committee. We perceive the inferences which a jury or the judge in this case might have drawn from these facts, and we appreciate the argument addressed to us, upon the evils of corruption, and the invalidity of contracts tending to induce it. But we cannot say that there was not some evidence of a legal contract. We cannot say, as matter of law, that the chairman of the committee of a political party cannot practice his profession, the law, in the city hall, as well as in the courts. We cannot say that the contract appears, as matter of law, to have contemplated the use of improper influence, or necessarily to have tended to induce it. The words in which the contract is said to have been made did not disclose such a tendency on their face. The political position of the plaintiff, and what was done, are only evidence of what was expected, and are not conclusive that it was expected. What was done, moreover, was not necessarily improper, even in the particulars mentioned. We have not mentioned those services rendered which were not open to question.

Exceptions overruled.

NEBRASKA SUPREME COURT.

PULLMAN PALACE CAR CO., *Pf. in Err.*,

Jesse LOWE.

(....Neb....)

*1. A sleeping-car company, so far as it renders service similar in kind to an

*Head notes by MAXWELL, J.

NOTE.—*Bediment; guests, who are.*

Guests are those who are bona fide (really) traveling and make the use of an inn, and not mere neighbors and friends who visit the house occasionally. *Tidswell, The Innkeepers' Legal Guide*, 1.

A guest is "a stranger who comes from a distance 6 L. R. A.

innkeeper, is subject to the same liabilities; and where an article of wearing apparel belonging to a passenger in one of such cars has been placed in the care of the porter, and is stolen from the car, the company will be liable therefor.

2. The words "guest" and "lodger" defined.

(December 17, 1892.)

ERROR to the District Court for Douglas County to review a judgment in favor of

and takes his lodgings at a place." Webster's Diet.

In short, anyone away from home receiving accommodations at an inn as a traveler is a guest and entitled to hold the innkeeper as such. *Walling v. Potter*, 36 Conn. 183.

Absence from home, whether on business or

The Pullman Palace Car Company is not liable as a common carrier.

Blum v. Southern P. P. Car Co. 1 Flipp. 500; *Pullman P. C. Co. v. Smith*, 73 Ill. 360; *Woodruff, S. & P. C. Co. v. Diehl*, 84 Ind. 474; *Pullman P. C. Co. v. Pollock*, 69 Tex. 120; *Lewis v. New York S. C. Co.* 143 Mass. 267; *Pullman P. C. Co. v. Gaylord*, 23 Am. L. Reg. N. S. 788; *Illinois Cent. R. Co. v. Handy*, 68 Miss. 609; *Clark v. Burns*, 118 Mass. 275; *Pullman P. C. Co. v. Gardner* (Pa.) 16 Am. & Eng. R. R. Cas. 324.

The defendant is not liable as an innkeeper. *Ibid.*

Defendant is not liable in the case at bar for the reason that the overcoat was never delivered into the care of the defendant and the defendant never accepted control thereof.

Tower v. Utica & S. R. Co. 7 Hill, 47; *Steamboat Crystal Palace v. Vanderpool*, 16 B. Mon. 302; *Wilcox v. The Philadelphia*, 9 La. 80; *Illis v. Chicago, R. I. & P. R. Co.* 72 Iowa, 228; *The R. E. Lee*, 2 Abb. (U. S.) 49; *Welch v. Pullman P. C. Co.* 16 Abb. Pr. N. S. 352.

The rules that govern defendant's liability in general are: (1) that the defendant is only bound to employ ordinary care and watchfulness over the property of passengers (*Lewis v. N. Y. S. C. Co.* 143 Mass. 267); (2) that the defendant is only bound to employ reasonable care and watchfulness over the property of passengers (*Blum v. Southern P. P. C. Co.* 1 Flipp. 500; *Woodruff, S. & P. C. Co. v. Diehl*, 84 Ind. 474; *Clark v. Burns*, 118 Mass. 275; *Pullman P. C. Co. v. Pollock*, 69 Tex. 120; *Pullman P. C. Co. v. Gaylord*, 23 Am. L. Reg. N. S. 788; *Illinois Cent. R. Co. v. Handy*, 68 Miss. 609; *Palmetto v. Wagner*, 11 Alb. L. J. 149; *Pullman P. C. Co. v. Gardner* (Pa.) 16 Am. & Eng. R. R. Cas. 324); (3) that the passenger must not be guilty of contributory negligence.

Blum v. Southern P. P. C. Co. supra; *Lewis v. New York S. C. Co.* 143 Mass. 267; *Pullman P. C. Co. v. Pollock, supra*; *Whitney v. Pullman P. C. Co.* 143 Mass. 243, 3 New Eng. Rep. 358; *Tower v. Utica & S. R. Co.* 7 Hill, 47.

In the following cases defendant was held not liable, losses occurring in the day-time:

Whitney v. Pullman P. C. Co. and *Tower v. Utica & S. R. Co. supra*; *The R. E. Lee*, 2 Abb. (U. S.) 49.

On petition for rehearing.

The following cases hold that a sleeping-car company is not an innkeeper:

Pullman P. C. Co. v. Smith, 73 Ill. 360; *Woodruff, S. & P. C. Co. v. Diehl* and *Pullman P. C. Co. v. Pollock, supra*; *Dargan v. Pullman P. C. Co.* 2 Wilson (Tex. Ct. App.) 607; *Lewis v. N. Y. S. C. Co.* 143 Mass. 267; *Pullman P. C. Co.*

J. 149; *Tracy v. Pullman P. C. Co.* 67 How. Pr. 154; *Pullman P. C. Co. v. Gardner* (Pa.) 16 Am. & Eng. R. R. Cas. 324; *Sealing v. Pullman P. C. Co.* 24 Mo. App. 29; *Blum v. S. P. P. C. Co.* 1 Flipp. 500; *Bevis v. Baltimore & O. R. Co.* 56 Am. Rep. 850, *note*. See also the able and exhaustive *note* in 5 Am. St. Rep. 34; article in 19 Am. L. Reg. 204.

Mr. A. Steere, Jr., for defendant in error:

A sleeping car company undertakes, for hire, to supply with lodging and toilet facilities such first-class passengers on the train as choose to avail themselves of the opportunity; and in this respect its service is exactly that of an innkeeper, and it is obliged to serve the public to the exact extent to which it undertakes to serve it.

Nevin v. Pullman P. C. Co. 106 Ill. 222; *Pullman P. C. Co. v. Gardner* (Pa.) 16 Am. & Eng. R. R. Cas. 324; *Blum v. Southern P. P. C. Co.* 1 Flipp. 500; *Welch v. Pullman P. C. Co.* 16 Abb. Pr. N. S. 352.

So far as the company holds itself out as performing the duties of an innkeeper, so far should it be charged with the strict liability of the same. An innkeeper, in respect to the extent of his responsibility, is said to be effectually an insurer.

Gales v. Hatman, 11 Pa. 515; *Mason v. Thompson*, 9 Pick. 280.

The fact that a loss occurs in the day-time does not alter the liability.

Pullman P. C. Co. v. Taylor, 65 Ind. 169.

Maxwell, J., delivered the opinion of the court:

This action was brought by the defendant in error against the plaintiff in error to recover the value of an overcoat which it is alleged was lost or stolen from a Pullman car in which the defendant in error was a passenger, on the Wabash Railway, from St. Louis to Council Bluffs. The court was requested to make special findings in the case, which it did, as follows: "I find, as the facts proven on the trial of this case, that on the 18th day of April, 1887, the plaintiff took passage at St. Louis for Council Bluffs on the Wabash & St. Louis Railroad, and purchased a sleeping-car ticket from the defendant's agency at St. Louis, entitling him to a lower berth in the sleeping car attached to the train which left St. Louis the evening of that day. That the train left St. Louis at 8:25 P. M. That a short time before the train left plaintiff entered the sleeping car, and, upon doing so, delivered his coat to the porter of the car, who took it, and placed it in the vacant upper berth of the section of which plaintiff had secured the lower berth. That, shortly after the train started, the sleeping-car conductor passed through the car, and took up the ticket which had been purchased by the plaintiff, and

pleasure, constitutes one a traveler. *Atkinson v. Sellers*, 5 C. B. N. S. 442.

Carriers as bailees: duty of.

It is the clear duty of a sleeping-car company to use reasonable care to guard its passengers from

theft, and if through want of such care the personal effects of a passenger, such as he may reasonably carry with him, are stolen, the company is liable therefor. *Pullman P. C. Co. v. Matthews* 74 Tex. 654; *Pullman P. C. Co. v. Pollock*, 69 Tex. 120; *Staub v. Kendrick* (Ind.), *ante*, 619, *note*.

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he prepared the sleeping berth for occupation by the plaintiff. That the next morning, when the plaintiff arose, he took out from the upper berth a portion of his clothing, and then saw his overcoat there, where it had been placed the evening before by the porter, and where he (the plaintiff) left it. That plaintiff was last to leave his berth, and, with the exception of a gentleman and lady, the last of the passengers to leave the car for breakfast that morning. That plaintiff went out to breakfast at the regular breakfast station, which occupied him about fifteen minutes, and that after breakfast he stood on the rear platform of the sleeper about ten minutes smoking a cigar, and then went to his berth in the car, the same having been made up, and then discovered that his overcoat was missing. That he immediately called the attention of the conductor of the sleeping car to the fact, who, after first disclaiming any responsibility for the care of the coat, after a time caused a search to be made through the car, in company with the porter, for it, but without finding it, and the coat has been entirely lost to the plaintiff, and was of the value at the time of the loss of \$50.

"I also find that the conductor left the car at the breakfast station, and went to his breakfast at the same time as the passengers, including the plaintiff, were at their breakfast, and that during the interval of about twenty-five minutes' absence of plaintiff from his berth in the sleeping car, between the time when he left the car for breakfast and the time when he returned into it, his berth was made up, and his overcoat abstracted.

"Conclusion of Law:

"I find, as a conclusion of law, that defendant was guilty of negligence in not properly guarding and taking care of property of plaintiff during his necessary absence from defendant's car, and that plaintiff was not guilty of negligence in the matter. I therefore find that defendant is liable to the plaintiff for the value of the overcoat, to wit, \$50, with interest thereon from April 20, 1887, to the first day of this term, \$3.75."

The rules of the Company were also introduced in evidence in its behalf, but, as the defendant in error had no notice of them, they do not enter into the case.

The question presented, therefore, is the liability of a sleeping-car company for the loss of necessary wearing apparel of one who had paid the necessary sleeping-car charges, and was lawfully riding in one of its cars, which apparel had been placed in the care of the employees of the Company. We find no case exactly in point, and as the question is a new one, not only in this State, but, to a great extent, in the other States of the nation, we are practically without precedents to aid us, and must adopt such rule as may seem just and equitable. It may be well to consider what the Company undertakes to perform, and also what it does not undertake. The latter proposition will be considered first. It does not undertake to furnish the railway for its cars to

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It does invite for hire all passengers holding first-class tickets to occupy its cars. In effect, it says to all such passengers: "We will furnish you safe, pleasant, commodious cars, with all possible facilities to prevent weariness and fatigue, with comfortable sleeping accommodations, and the necessary toilet facilities, if you pay the price demanded in addition to the ordinary fare." The nature of this undertaking is the question for consideration. On the one hand, it is claimed that, so far as the Company holds itself out as performing the duties of an innkeeper, so far it should be charged with the strict liability of the same. On the other, it is sought to make the liability of the Company merely that of a lodging-house keeper.

In the very able and carefully prepared brief of the attorney for the plaintiff in error, we find the following objections to charging the Company with the liability of an innkeeper. He says: "It undertakes (1) to furnish accommodations to 'first-class' passengers exclusively; (2) to furnish toilet accommodations to such passengers; (3) to furnish a certain specified seat or bed to such a passenger; (4) to furnish a servant who will respond to all proper demands on his service by such passengers, promptly and politely; but to do these four things for a limited time, which is agreed upon between it and each passenger in advance. It does not make even this agreement with all those who travel by rail. It makes this agreement with first-class passengers exclusively.

The distinction between an innkeeper and a lodging-house keeper is set forth in many cases, but is very well drawn in the case of *Cromwell v. Stephens*, 2 Daly, 15 (1867), from pages 21 to 26, inclusive. After quoting the definition of an "inn," as given by Chief Justice Oakley in *Wintermute v. Clarke*, 5 Sandf. 247, to wit, "where all who come are received as guests, without any previous agreement as to the duration of their stay or as to the terms of their entertainment;" and from *Willard v. Reinhardt*, 2 E. D. Smith, 148, in which the distinctions between a boarding house and an inn were declared to be this: "In a boarding house, the guest is under an express contract, at a certain rate, for a certain period of time, but in an inn there is no express engagement; the guest, being on his way, is entertained from day to day, according to his business, upon an implied contract;" and from *Carpenter v. Taylor*, 1 Hilt. 195, as follows: "Mere eating houses cannot be considered as inns. They are wanting in some of the requisites necessary to constitute them inns,"—it will be seen that a distinction is attempted to be drawn between the sleeping-car company and an innkeeper, because only a certain class can occupy such cars, viz., persons holding first-class tickets, whereas, at an inn, all who conduct themselves properly may be entertained. There is great confusion in the decisions as to what constitutes an "inn."

In *Calys's Case*, 8 Coke, 32, it was held that inns were instituted for passengers and wayfarers. In another case, an "inn" is defined to be a house where the traveler is furnished all

Bouvier defines "innkeeper" to be "the keeper of a common inn for the lodgment and entertainment of travelers and passengers, their horses and attendants, for a reasonable compensation."

The innkeeper is bound to take in and receive all travelers and wayfaring persons, and entertain them if he can accommodate them, and the same is true of a sleeping car company as to all passengers holding a first-class ticket. The fact that persons holding second or third class tickets agree, in effect, in consideration of lower fare, to waive their right to enter a sleeping car, does not enter into the case any more than that of a traveler who, to avoid the expense of an inn, should stop at a private house. In any event, the company which sells sleeping-car tickets to all first-class passengers that may pay the price, to that extent stands in the same relation as an innkeeper who must for hire entertain those asking for entertainment.

A more difficult question is to properly define the word "guest" at an hotel. Parsons defines a "guest" to be one who "comes without any bargain for time, remains without one, and may go when he pleases." 2 Pars. Cont. 151. This is not sufficiently comprehensive to be a proper definition.

In *Walling v. Potter*, 85 Conn. 183, the Supreme Court of Connecticut defines the word "guest" as follows: "A guest is one who patronizes an inn as such. But it is said that none but a traveler can be a guest at an inn, in a legal sense. We do not suppose that the court intended, in the definition above quoted, to lay stress upon the word 'traveler.' It is used, in a broad sense, to designate those who patronize inns."

"In *Wintermute v. Clarke*, 5 Sandf. 247, the court says that, in order to charge a party as an innkeeper, it is not necessary to prove that it was only for the reception of travelers that his house was kept open; it being sufficient to prove that all who came were received as guests, without any previous agreement as to the time or terms of their stay. A public house of entertainment, for all who choose to visit it, is the definition of an inn. These definitions are really in harmony with each other. Webster defines a traveler as 'one who travels in any way.' Distance is not material. A townsman or neighbor may be a traveler, and therefore a guest at an inn, as well as he who comes from a distance, or from a foreign country. If he resides at the inn, his relation to the innkeeper is that of a boarder; but if he resides away from it, whether far or near, and comes to it for entertainment as a traveler, and receives it as such, paying the customary rates, we know of no reason why he should not be subjected to all the duties of a guest, and entitled to all the rights and privileges of one. In short, anyone away from home, receiving accommodations at an inn as a traveler, is a guest, and entitled to hold the innkeeper responsible as such." This, we think, is a correct definition of the word "guest," and we adopt the same. *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417.

In the latter case, the guest made an arrangement as to the price to be paid per week, and

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characterized as a traveler and guest. See also *Hall v. Pike*, 60 Mass. 495; *Norcross v. Norcross*, 53 Me. 163; *Pinkerton v. Woodward*, 33 Cal. 557; and a valuable article in 14 Cent. L. J. 206; *Hancock v. Rand*, 17 Hun, 279.

In *Dunbar v. Day*, 12 Neb. 597, this court held that an innkeeper was bound to take all possible care for the safety and security of the goods, money, etc., of his guests while in his house. And if the goods or money of a guest be stolen from the inn, through no fault or neglect of the guest, nor by a companion guest, and there is no evidence to show how it was done, or by whom, the innkeeper is liable for the loss. This, we think, is a correct statement of the law.

A "lodger" is defined by Bouvier to be "one who inhabits a portion of a house of which another has the general possession and custody." There is some confusion in the decisions, arising mainly from the want of a clear definition of what constitutes a "guest" as distinguished from a mere "lodger." Generally, however, a lodger is one who, for the time being, has his home at his lodging-place. *Phillips v. Evans*, 64 Mo. 17.

The rule, under the decisions, is not of universal application, but nearly so. *Phillips v. Henson*, 80 Moak, Eng. Rep. 19; *Thompson v. Ward*, L. R. 6 C. P. 827; *Bradley v. Baylis*, L. R. 8 Q. B. Div. 195; *Ness v. Stephenson*, L. R. 9 Q. B. Div. 245; *Hickman v. Thomas*, 16 Ala. 666; *Ullman v. State*, 1 Tex. App. 220.

It will be seen that the engagement of the sleeping-car company, so far as it goes, is exactly the same as the duties assumed by an innkeeper. A passenger, on entering a sleeping-car as a guest,—because that is what he is in fact,—necessarily must take his ordinary wearing apparel with him, and some articles for convenience, comfort or necessity. The articles, when placed in the care of the company's employes, are *infra hospitium*, and are at the company's risk. The liability of innkeepers is imposed from considerations of public policy, as a means of protecting travelers against the negligence and dishonest practices of the innkeeper and his servants. Occasionally, no doubt, the innkeeper is subjected to losses without any fault on his part. This, however, is one of the burdens pertaining to the business, and the courts have deemed it necessary to enforce this wholesome rigor to insure the security of travelers. Besides, where loss is sustained, neither party being in fault, it must be borne by one of them, and it is no more unjust to place it on the innkeeper than on the guest. The liabilities incident to the business are to be considered in fixing the charges for the service. *Mason v. Thompson*, 9 Pick. 283.

Except in the matter of furnishing meals, there seems to be no essential difference between the accommodation at an inn and those on a sleeping car, except that the latter are necessarily on a smaller scale than at an inn. In both cases the porter meets the traveler at the door, and takes whatever portable articles he may have with him. He waits upon him and the other passengers in the car so long as they remain therein. The traveler is not required to sit in his seat during the day, but

may, if he so desires, go forward into the other cars on the train, and at stations may go out on the platform. A passenger in a sleeping car need not avail himself of these privileges, but the fact that he may do so, and that many persons actually do avail themselves of the same, is well known to every traveler and to the Company, and is a circumstance in the case. If it is said that it would be unjust to hold the Company to the same liability as an innkeeper, because thieves might take one or more berths in a car, and at the first opportunity leave the car, carrying what articles they could steal before leaving, the same is true of an innkeeper. Thieves, in the garb of respectable people, may take rooms at an inn, and afterwards steal what they can, and escape, yet no one would contend that the innkeeper would not be responsible for the property so stolen, and this, whether it is stolen at night or in the daytime; yet in many of the large inns of this country, at least, there are numerous doors for ingress and egress, while in a sleeping car there are but two. Were meals served

on a sleeping car, no one would contend that it differed from an inn in its accommodations. In this State, meals are furnished on the through trains, and a passenger need not leave the train from the time of entering it until he reaches the end of the line. This, however, does not appear to have been the case on the railway in question. But the fact that meals are taken at designated stations on the line of the road, instead of on the train itself, does not change the character of the service rendered. So far as such services are rendered, they are the same in kind as those furnished by an innkeeper; and the security of travelers, and as a means of protecting them, not only against the negligence, but also against the dishonest practices, of the agents or employes of the Sleeping Car Company, requires that the Company, so far as it renders service as an innkeeper, shall be subject to like liabilities and obligations.

The judgment is therefore affirmed.

The other Judges concur.

Motion for rehearing denied February 21, 1890.

FLORIDA SUPREME COURT.

Daniel A. MILLER, Exr. of William Cox,
Deceased, *Appl.*,

v.

Lucy C. FINEGAN *et al.*

(....Fla....)

*1. A husband and wife living together constitute a "family," within the meaning

*Head notes by RANNEY, Ch. J.

NOTE.—"Family" defined.

A "family" has been defined as a collective body of persons living together in one house or within the curtilage. *Anderson, Dict. citing Wilson v. Coehran, 31 Tex. 680; Roco v. Green, 50 Tex. 438; Poor v. Hudson Ins. Co. 2 Fed. Rep. 438.*

In its popular sense it includes parents, children, servants—all whose domicile or home is in the same house and under the same management and head (*Cheshire v. Burlington, 31 Conn. 339; Carmichael v. Northwestern Mut. Ben. Assn. 51 Mich. 484*); children, wife and children, blood relatives or the members of the domestic circle, according to the connection. *Spencer v. Spencer, 11 Paige, 160. See Muir v. Howell, 37 N. J. Eq. 30; Race v. Oldridge, 90 Ill. 233; Poor v. Humboldt Ins. Co. 125 Mass. 277; Bates v. Dewson, 128 Mass. 384; Bradlee v. Andrews, 137 Mass. 55; Arnold v. Walts, 53 Iowa, 707; Linton v. Crosby, 56 Iowa, 389.*

The term includes children over age, if they have no home elsewhere. Having a wife is having a family. *Kitchell v. Burgwin, 21 Ill. 40, 45.*

The protection of the family from dependence and want is the expressed object of nearly all the Homestead and Exemption Laws. *McKenzie v. Murphy, 24 Ark. 157; Tumlinson v. Swinney, 23 Ark. 400; Greenwood v. Maddox, 37 Ark. 655; Thompson, Homesteads and Exemptions, 32.*

Head of the family, who is.

The person who controls, supervises, or manages the affairs about a house is the head of the family. *Anderson, Dict.*

Where there is a husband or father, he is ordinarily the head of the family. *4 L. R. A.*

of the word as used in the first section of the ninth or homestead article of the Constitution of 1868.

2. The third section of the same article provided that the exemption of the homestead from forced sale, granted by the first section, to the head of a family residing in this State, should accrue to his heirs; and under it the exemption from such liability for indebtedness of the head of the family passed on his death to whomsoever the title of the homestead

narly the head; but there may be a head where there is no marriage relation. *Sallee v. Waters, 17 Ala. 438; Marsh v. Lasenby, 41 Ga. 153; Race v. Oldridge, 90 Ill. 250; Rock v. Haas, 110 Ill. 633; Whalen v. Cadman, 11 Iowa, 236; Van Doran v. Marden, 48 Iowa, 156; Tyson v. Reynolds, 52 Iowa, 431; Arnold v. Walts, 53 Iowa, 700; Wade v. Jones, 20 Mo. 75; Lathrop v. Soldiers Loan & Bldg. Assn. 45 Ga. 433; Whitehead v. Tapp, 69 Mo. 415; Barney v. Leeds, 51 N. H. 233; Bowne v. Witt, 19 Wend. 476; Garaty v. DuBois, 5 S. C. 433; Calhoun v. Williams, 32 Gratt. 18; Griffin v. Sutherland, 14 Barb. 458; Woodward v. Murray, 18 Johns. 403.*

If the law imposes upon a person a duty, growing out of status, and not out of contract, the person owing such duty, if dwelling together in a domestic establishment with the persons to whom he owes it, is the "head of a family." *Whalen v. Cadman, 11 Iowa, 236; Marsh v. Lasenby, 41 Ga. 153; Sallee v. Waters, 17 Ala. 438; Sanderlin v. Sanderlin, 1 Swan (Tenn.) 441; Thompson, Homesteads and Exemptions, 45.*

But a moral duty on the part of the managing member of the domestic association to support the others, or some of them, under an "obligation of nature," will be sufficient to constitute the association of a family, and the manager of it the head of a family. *Connaughton v. Sands, 32 Wis. 387; Wade v. Jones, 20 Mo. 75; Blackwell v. Broughton, 56 Ga. 390.* This case must be read with *Marsh v. Lasenby, 41 Ga. 153; McMurray v. Shuck, 6 Bush, 111.*

Homestead exemption.

The homestead is the dwelling-house at which the family resides, with the usual and customary

3. The term "heirs," in the third section includes an adult son, and an adult grandson, the son of a daughter deceased at the death of the head of the family, notwithstanding they were not at his death living at the home place.

4. Residence by the heirs on the homestead of the ancestor after his death is not necessary to continue the exemption of it from his debts.

5. A creditor seeking to satisfy a judgment which he has recovered against the administratrix, out of the homestead of her intestate, who was the head of a family residing in this State, can claim no advantage from the fact that the wife has elected to take a child's part in lieu of dower. If by her election she forfeited her dower interest the heirs took the entire homestead.

6. A judgment rendered against an administratrix, on an indebtedness of her intestate not excepted from the exemption provisions of the homestead provisions of the Constitution of 1868, was not a lien on the homestead of the intestate, who was the head of a family residing in

APPPEAL by defendant from a judgment of the Circuit Court for Orange County in favor of plaintiffs in an action to enjoin the sale under execution of certain property which was alleged to be subject to a homestead right. *Affirmed.*

The case sufficiently appears in the opinion. *Mr. C. F. Akers* for appellant. *Messrs. Foster & Gunby* and *J. F. Welborne* for appellees.

Raney, Ch. J., delivered the opinion of the court:

The first question to be disposed of in this case is whether Joseph Finegan, the intestate, was at the time of his death, November 3, 1885, the "head of a family residing in this State," within the meaning of the first section of the 9th article of the Constitution of 1868. That he and his wife were at the time occupying the land as a home is not denied, and that husband

appurtenances, including out-buildings necessary and convenient for family use and lands used for the purposes thereof. *Anderson, Dict.* citing *Gregg v. Bostwick*, 33 Cal. 227; *Re Delaney's Estate*, 37 Cal. 179; *Blum v. Carter*, 63 Ala. 238; *Williams v. Dorris*, 31 Ark. 468; *Garibaldi v. Jones*, 48 Ark. 236; *Wiggins v. Chance*, 54 Ill. 176; *Randall v. Elder*, 12 Kan. 257; *Littlejohn v. Egerton*, 77 N. C. 384; *Woodman v. Lane*, 7 N. H. 245; *Hoitt v. Webb*, 36 N. H. 166; *Austin v. Stanley*, 48 N. H. 52; *Barney v. Leeds*, 51 N. H. 206; *Rogers v. Ashland Sav. Bank*, 1 New Eng. Rep. 326, 63 N. H. 428; *Sampson v. Williamson*, 6 Tex. 102; *Philleo v. Smalley*, 23 Tex. 498; *Woolfolk v. Ricketts*, 48 Tex. 87; *True v. Morrill*, 28 Vt. 672; *Spaulding v. Crane*, 46 Vt. 232.

It is whatever is used, necessary or convenient as a place of residence for the family, as contradistinguished from a place of business. *Gregg v. Bostwick*, 33 Cal. 223; *Re Crowey*, 71 Cal. 303.

Homestead exemptions are not in derogation of the common law, and the Montana courts will construe liberally statutes affording such exemptions. *Lindley v. Davis*, 7 Mont. 206.

Exemption Laws giving right to a homestead are for protection of the citizens of the State only. *Prater v. Prater*, 87 Tenn. 78; *Baker v. Leggett*, 98 N. C. 304; *Finley v. Saunders*, 98 N. C. 462.

A person cannot have at the same time two homesteads. *Wheeler v. Smith*, 62 Mich. 373; *Waggle v. Worthy*, 74 Cal. 206; *Archibald v. Jacobs*, 69 Tex. 248.

In some of the States a homestead may be laid off on the application of the wife. Ga. Code 1873, 2022; *Bowen v. Bowen*, 55 Ga. 182; *Larence v. Evans*, 50 Ga. 216; *Smith v. Ezell*, 51 Ga. 570; *Cheney v. Rodgers*, 54 Ga. 168; *Page v. Page*, 50 Ga. 597; *Thompson, Homesteads and Exemptions*, 41.

The law in force at the time of the death of a husband or wife controls on the subject of the right of survivorship. *Tyrrell v. Baldwin*, 73 Cal. 670.

Under the law of Alabama.

Under the Alabama Statute, the homestead of a decedent is reserved for the benefit of his widow and minor children, and is exempt from administration; and an attempted disposition thereof by the testator in his will cannot bar such right. *Bell v. Bell*, 84 Ala. 64.

The occupancy of a homestead by a husband at 6 L. R. A.

his death, within the statutory limitation of value—entitles the widow to an exemption under Ala. Code, § 2543, and the question whether the husband's estate is indebted is immaterial. *Cox v. Bridges*, 34 Ala. 553.

The character of a homestead is not lost by a leasing for twelve months or less (Code, § 2843); but the right of exemption does not attach without actual occupancy, and is lost by a failure to resume possession, in case of lease, at or before the expiration of twelve months. *Hines v. Duncan*, 79 Ala. 112.

The statute which declares that a homestead of specified value and quantity "shall be exempt from levy and sale under execution, or other process for the collection of debts" (Code, § 2820) applies not only to formal and technical process, but to any judicial proceedings, at law or in equity, which seek the appropriation of the property to the payment of debts. *Ibid.*

Arkansas.

Under the Homestead Act of 1852 the homestead of a decedent vests (where there is no widow) in his minor children alone as an entirety. *Kirksey v. Cole*, 47 Ark. 504.

Under the Constitution of 1868 the exemption of the homestead from sale for debt descended to the widow and infant children of a deceased debtor, and, after the termination of the widow's right by death or remarriage, the infant children have such an estate and right of possession as will support an action of ejectment against anyone in possession who does not hold under a better title than their father. *McCloy v. Arnett*, 47 Ark. 445.

The reversionary interest in a decedent's homestead, after the termination of the homestead rights of his widow and infant children, could not be sold for payment of his debts. *Ibid.*

A purchaser of a decedent's homestead at a probate sale must take notice of the minor's right; and if he use the homestead for his profit or convenience, must account to the minor for the rents. *Ibid.*

Under Const. 1874, art. 9, § 6, the probate court cannot order a homestead worth less than \$300 to vest in the widow under *Manaf.* (Ark.) Dig. 3, while there are any minor children. *Sansom v. Harrell*, 51 Ark. 429.

A widow may remain in possession of the house and farm of her husband free of rent until her

and wife living together constitute a family within the spirit and intent of homestead legislation, whether it be in the form of organic or of more mutable law, is a sound and recognized proposition. Thompson, Homesteads and Exemptions, §§ 44, 46, 48; *Kitchell v. Burquin*, 21 Ill. 40, 45.

Where the relation of husband and wife exists their joint consent is essential, under our Constitution, to any voluntary alienation of the homestead, and the existence of such relation logically, if not necessarily, fills out the measure of the requirement of the Constitution for exemption of the land, owned by the head of the family and occupied by them as a home, from forced sale.

II. Two of the complainants, J. Ford Finegan and J. Finegan Paramore, are the heirs of the intestate, the former being his son, and the latter a grandson and the child of a daughter, Mrs. Paramore. The son was not living with the father at the death of the latter, and whether or not the grandson was the record does not inform us. The son had attained his majority before such death; and the answer says that the grandson reached maturity before

the filing of the bill, which, however, was nearly nineteen months subsequent to his grandfather's death. As it does not affirmatively appear that the grandson was at the intestate's death under twenty-one years of age, or that he was living with his grandfather at the homestead, we will, as the most favorable view that can be taken with reference to the argument of counsel for appellant, regard him as having been over the age of twenty-one, and as not one of those living at the homestead.

The complainants before us seeking an injunction against the sale of the homestead of the intestate upon a judgment recovered since his death against his administratrix are, then, his widow, a son and a grandson. The former instrument provided that "a homestead to the extent of 160 acres of land, or the half of one acre within the limits of an incorporated city or town owned by the head of a family residing in this State, together with \$1,000 worth of personal property, and the improvements of the real estate, shall be exempted from forced sale under any process of law, and the real estate shall not be alienable without the joint consent of husband and wife when that relation

dower is assigned. This does not prevent an action by minor heirs for their share of the rent, although dower has not been assigned. *Winters v. Davis*, 51 Ark. 335.

She may rent out the homestead of her deceased husband, and receive the rents and profits, but she cannot sell it. If she does, she thereby abandons it, and it at once becomes assets in the hands of the administrator for the payment of debts. *Garibaldi v. Jones*, 48 Ark. 230.

Ordinarily a lease of a homestead for life is conclusive evidence of an abandonment of it; but if there is an intention to return there is no abandonment. *Gates v. Steele*, 48 Ark. 530.

A debtor who would preserve his exempted property from sale, whether homestead or chattels, must claim his exemption and file his schedule as prescribed by the statute, and see that a supersedeas issues. A failure to prosecute the remedy is a waiver of the right. *Chambers v. Perry*, 47 Ark. 400.

California.

A person residing with his family on community property, which he had previously conveyed by a deed of trust to secure an indebtedness, has such an interest in the property, notwithstanding the trust deed, as entitles him to make a valid claim of homestead thereon. *King v. Gotz*, 70 Cal. 236.

Under Cal. Act of April 23, 1860, husband and wife could abandon their homestead only by declaration of abandonment signed, acknowledged and recorded. Mere removal from the premises, either with or without intention to return thereto, was not sufficient. *Tipton v. Martin*, 71 Cal. 325.

The homestead property, upon the death of the husband, vests absolutely in the surviving wife, as her separate property, and is not affected by her subsequent marriage. *Graham v. Stewart*, 68 Cal. 374.

Under Cal. Civ. Code, § 1468, as it existed in 1879, upon the death of a husband without leaving any minor children, his surviving widow became the owner in fee of a homestead set apart to her out of the community property, in proceedings for the settlement of his estate. *McKinnle v. Shaffer*, 74 Cal. 614.

Minors who are not decedent's children, either in fact or by adoption, are not entitled to have the homestead set apart for their use. *Re Romero's Estate*, 75 Cal. 379.

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A declaration of homestead may be made on real property upon which the claimant has actually resided only one day, although the family of the claimant resided elsewhere, and the property is partly rented to others, or used for purposes other than a residence. *Skinner v. Hall*, 69 Cal. 106.

A statement in a declaration of homestead that "the cash value of the homestead is about \$4,000," is held sufficient as a statement of value. *Graves v. Baker*, 68 Cal. 134.

Under §§ 1474, 1476, a homestead of less value than \$5,000 when selected will, as against the heirs of the husband, vest in the wife absolutely upon his death, although at that time worth much more than that amount. *Re Burdick's Estate*, 76 Cal. 639.

A declaration of homestead covering certain premises on which the claimant resided, and certain other premises not occupied by him, is valid as respects the land resided on. *King v. Gotz*, 70 Cal. 236.

Prior to the California Act of March 9, 1868, a homestead could not be acquired in land held by one in joint tenancy or as a tenant in common. *Fitzgerald v. Fernandez*, 71 Cal. 504.

Colorado.

Where the wife is the owner of the property occupied as the home of the family, she is capable of investing it with the exemption character provided by the statute, and she alone can do this. *McPhee v. O'Rourke*, 10 Colo. 301.

Georgia.

In Georgia, children have such a substantive interest in the homestead as will disable the mother from alienating it. *Whittle v. Samuels*, 54 Ga. 648.

A married woman could not take a homestead, under the Constitution of 1877, out of her own property, as the head of a family, where her petition showed her husband to have been the head of a family. *Robson v. Walker*, 74 Ga. 823.

A man upon the death of his wife and arrival of his daughter at age, upon his second marriage could again apply and have another homestead set apart for the benefit of his second family. *Shore v. Gastley*, 75 Ga. 813.

The Georgia laws will not allow a man to obtain a homestead on the ground that he is the head of the family, consisting of himself and daughter, who has been married and deserted by her husband; the

The indebtedness against which the exemption is claimed is a judgment recovered against the administratrix on a promissory note made by the intestate early in February, 1882.

The intestate enjoyed the benefit of the exemption; it was not necessary to such enjoyment that there should have been an attempt to enforce the debt against the land, nor an actual setting apart of the homestead in the manner provided by the Statute, nor that there should be any record thereof.

To those upon whom the Statute throws the title by descent, the Constitution gives the right of exemption; or, in other words, the Constitution makes the exemption an incident to the inheritance, and thereby, in so far as the homestead or other exempt property is concerned, repeals the general law, governing in the case of other property, that the heir takes subject to the debts of the ancestor.

The rights of the complainants, whatever they may be, accrued under the Constitution of 1868, the indebtedness having been contracted

art. 10, that the exemptions should by the former Constitution shall apply to all debts contracted and judgments rendered subsequent to its adoption, and prior to the adoption of the present Constitution.

It has been held, and must be regarded as settled by this court, that a widow is not an "heir" of her husband, within the meaning of the 9th article of the Constitution of 1868, where children survive him. *Wilson v. Fridenberg*, 19 Fla. 461, decided in June Term, 1882; *Brokaw v. McDougall*, 20 Fla. 212; *Wilson v. Fridenberg*, 21 Fla. 386.

That the son and grandson are heirs, according to the Statute of Descents, cannot be denied; but it is urged that "heirs" means children, and that "children" means infants or persons under twenty-one years of age, not adults, and two sections of statutory law are invoked in support of this view. The first of these is § 8, p. 531, McClellan's Digest, it being the 5th section of an Act approved January 16, 1866. The previous provisions of the Act exempted

fact that she moves to his residence and lives with him after he has obtained the homestead right will not make that right legal or proper. *Walker v. Thomason*, 77 Ga. 682.

On an application by a widow as the head of a family to set apart homestead and exemption, the children are not required to be made parties. *Deyton v. Bell*, 81 Ga. 370.

Property set apart under the Constitution of 1868 is not subject to execution on a judgment founded on a contract made by one of the beneficiaries since the adoption of the Constitution of 1887, the head of the family having died, but some of the beneficiaries still being minors. *Stephens v. Montgomery*, 74 Ga. 832.

Illinois.

When the husband, the owner of a homestead, deserts his wife and family, the right and exemption of the homestead continue in favor of the wife occupying the premises, although the paramount title and ownership of the land continue in the husband. *Rendleman v. Rendleman*, 6 West. Rep. 98, 118 Ill. 257.

During the life of the parents whatever concludes the parents from asserting the homestead right, and thereby deprives them of it, must, on principle, in like manner affect their children who succeed them. *Clubb v. Wise*, 64 Ill. 160; *Thompson, Homesteads and Exemptions*, 44.

A surviving husband or wife cannot convey to a third person his or her estate in a homestead the fee of which is in the heirs, before it has been assigned. *Best v. Jenks*, 18 West. Rep. 281, 123 Ill. 447.

Neither can he or she release or waive half of the homestead before it has been set off, and demand a homestead of the value of \$500. *Ibid.*

The statute in regard to homesteads was not intended to apply to partnership property. A partner has no interest in partnership real estate upon which the homestead can be based, until partnership debts are paid. *Trowbridge v. Cross*, 4 West. Rep. 192, 117 Ill. 109.

Indiana.

When a husband, who, after wife's death, continued to occupy the homestead, which had been conveyed to his married daughter, upon which he paid taxes, but not rent, requested his daughter and her husband to occupy the house, which they

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did, she acting as housekeeper and the father contributing partly to the expenses, he is entitled to claim exemption as a householder. *Hipus v. Deer*, 8 West. Rep. 437, 106 Ind. 135.

Iowa.

A failure to live upon a homestead for seven years is not an abandonment, where husband and wife all of the time retain the use of a part of it for storage, and intend to occupy it again as soon as their affairs will permit. *Repen v. Davis*, 72 Iowa, 548.

One partner cannot, as against his copartner, acquire a homestead interest in real estate belonging to the partnership, whether the title be in himself or in the firm. *Hopt v. Hoyt*, 69 Iowa, 174.

Upon the death of either a husband or wife there cannot thereafter be an abandonment of the homestead by the survivor, if the title was in the deceased, except by setting off the distributive share of such survivor in the real estate of the deceased. No mere election by the survivor is sufficient to devest the property of its homestead character. *Darrah v. Cunningham*, 72 Iowa, 123.

A person does not abandon a homestead by going away with the intention to make a visit as long as she wants to, and return home when she pleases. *Jones v. Blumenstein* (Iowa) 42 N. W. Rep. 821.

Where one claims a homestead in land which he has ceased to occupy, he has the burden, as against intervening claimants, to prove an intention on his part to return and reoccupy it. *Newman v. Franklin*, 69 Iowa, 244.

Kansas.

The death of the husband does not affect the homestead rights of the wife or children in any respect. If the land descends to them, it is still a homestead. If the husband wills it to the wife during her life, the life estate supports the homestead right. *Pilcher v. Atchison, T. & S. F. R. Co.* 38 Kan. 517.

If the homestead should also be used as a place of business, it will not for that reason alone cease to be a homestead, if the part so used would be necessary or convenient for the use of the family, independent of the business. *Bebb v. Crowe*, 39 Kan. 242; *Rush v. Gordon*, 38 Kan. 535.

A homestead is not abandoned where the owner, under advice of physicians, goes with his wife to

certain personal property, and every dwelling-house and the lot upon which it stood in any city, town or village when the owner or his family resided in the house, and the house and lot did not exceed the value of \$1,000, and to every farmer forty acres of land, five acres thereof being in cultivation or productive use, or so much of the forty acres as did not exceed the value of \$1,000. The section relied upon by counsel provided that the proprietor of such lands so exempted from execution, attachment and distress should have power to dispose of the same by last will and testament; and should the proprietor of such land die intestate, then the same should descend to his widow and minor children, and such exemption continue through the widowhood of the widow, and the minority of the children; and should the proprietor leave neither widow nor children, the property shall be subject to his debts.

The other section invoked is § 16, p. 593, McClellan's Digest, the 6th section of the Act approved June 23, 1869, entitled "An Act for Setting Apart a Homestead and Personal Property to be Exempted from Forced Sale under Process of Law." The only part of it necessary

to be given reads as follows: Real and personal estate exempted from forced sale under any process of law shall likewise, after the death of the owner, being the head of the family, be exempt from sale in all cases in which any widow or infant children of the owner shall survive and claim such exemption," etc.

The former of the above sections is, as is apparent, a part of the Homestead and Exemption Law, as regulated by Statute in force here prior to the operation of the Constitution of 1868; and it is clear to our minds that the 9th article of that Constitution by its exemption provisions as to real and personal property supplanted entirely all previous statutory exemptions, at least as to indebtedness accruing subsequent to the time when the Constitution became of force. An immediate result of a comparison of the section of the Statute of 1868 with the exemption provisions of the Constitution, is a perception of the absence from the latter of any discrimination between minor and adult heirs, and of any limitation upon the duration of the exemption from indebtedness after the death of the head of the family. In the Statute the discrimination and limitation

another State on account of her health, intending to return as soon as her health will permit. *Gaillinghouse v. Mulvane*, 40 Kan. 428.

After the death of the husband the homestead continues to be a homestead to the same extent that it was before, until after all the children arrive at the age of maturity, and until it shall have been partitioned among the heirs. *Pilcher v. Atchison*, T. & S. F. R. Co. *supra*.

His homestead is not subject to partition so long as his widow remains unmarried and occupies it as her residence, until all the children arrive at the age of majority. *Hafer v. Hafer*, 36 Kan. 524.

The Homestead Law of Kansas is part and parcel of the public policy of the State, and its provisions cannot be waived or avoided except by an exact and literal compliance with the mode and manner it has prescribed. *Pilcher v. Atchison*, T. & S. F. R. Co. *supra*.

Kentucky:

A homestead passes to the widow and children of the owner only in case of his death without disposing of it. *Derr v. Wilson*, 84 Ky. 14.

Infant children are entitled to a homestead in the real estate of their father, against their adult brothers and sisters, and also against the creditors of the decedent, whether their mother be living or not. *Loyd v. Loyd*, 82 Ky. 521.

Both the widow and remainderman cannot have a homestead in the same tract of land. *Merrifield v. Merrifield*, 83 Ky. 529.

Louisiana.

The debtor who claims a homestead, under La. Act 22 of 1865, must own the property, occupy it as a residence, and have a family dependent upon him for support. *Denis v. Gayle*, 40 La. Ann. 236.

A homestead right cannot be asserted as to land inherited while a judgment stands of record against the heir to disturb or prejudice such judgment and its lien. *Taylor v. Seloy*, 38 La. Ann. 62.

Homestead rights are to be strictly construed. *Kinder v. Lyons*, 38 La. Ann. 718.

They can be waived or destroyed only by sale or its equivalent. *Colvin v. Woodward*, 40 La. Ann. 627.

The proviso in the Louisiana Act of 1865 relating to homestead exemptions, declaring that no debtor shall be entitled to the exemption whose wife shall own in her own right, and be in the actual enjoyment of the property, is to be given reads as follows: Real and personal estate exempted from forced sale under any process of law shall likewise, after the death of the owner, being the head of the family, be exempt from sale in all cases in which any widow or infant children of the owner shall survive and claim such exemption," etc.

ment of property worth more than \$1,000, was intended to operate as a restraint upon its exercise under the conditions imposed, and refers to the time of its assertion judicially and to a wife at that time in being. *Garnier v. Joffrion*, 39 La. Ann. 884.

In construing homestead exemptions under the Louisiana Law of 1865, reference must be had to the condition of things at the date of seizure. *Ibid*.

Michigan.

A debtor may give his interest in his homestead to his child; and, if occupied by her, it becomes her homestead, free from his debt. *Shay v. Wheeler*, 13 West. Rep. 899, 69 Mich. 254.

The occupancy of forty acres by the placing of, and living in, a dwelling-house thereon, is in itself a sufficient declaration of homestead. *Evans v. Grand Rapids*, L. & D. R. Co. 13 West. Rep. 170, 68 Mich. 602.

Where a husband, living with his wife in another State, abandoned her and came to Michigan, where he married again and established a homestead, and so occupied it until his death, the nonresident legal wife, never having come to the latter State, acquires no homestead rights in such property. *Stanton v. Hitchcock*, 7 West. Rep. 616, 64 Mich. 318.

Minnesota.

One having an undivided interest in a larger tract than is allowed as a homestead is not thereby entitled to claim any more of the tract than the amount specified in the statute. *O'Brien v. Krenz*, 36 Minn. 136.

Missouri.

Where a widow marries a second husband, and acquires a new homestead at the domicile of her second husband, she forfeits her homestead right in the domicile of her first husband. *Kaes v. Gross*, 8 West. Rep. 568, 32 Mo. 647.

If the right of homestead be once lost, and possession of the homestead be again resumed, such resumption will have no retroactive validity on the old right lost by abandonment. *Ibid*.

Montana.

Under Rev. Stat., 311, 312, allowing a householder a homestead, no homestead can be set apart by a partner from land held by the partnership, as

property with an express guaranty of an exemption which is unlimited. The absence from the Constitution of the distinction and the limitation to be found in the Statute cannot be regarded as accidental or meaningless, but are clearly indicative of a purpose to do away with them.

Turning our attention to the above Statute of June, 1869, we find that in the sections preceding the one set out above it provides a mode of procedure by which a head of a family residing in this State may, either before or after a levy, designate or set apart his homestead; and for a survey of the same at the instance of a judgment creditor dissatisfied as to the quantity of land claimed as a homestead. The 7th and subsequent sections make provision for setting apart \$1,000 worth of personal property when a levy has been made, and for a plaintiff in decree or judgment testing by bill in equity whether property claimed to be exempt as a homestead is so.

It was not the purpose of the above Statute of 1869 to amend the Statute of Descents, nor

grandchildren, the latter being the offspring of a child who has died before the common ancestor, are still the heirs of the deceased ancestor, and upon them the title of his real estate falls by inheritance, whether the land be impressed with the character of a homestead or not. The only meaning or effect that can be claimed for the quoted language of the section, if it is to be regarded other than an adoption of the same mode of procedure applicable in other cases for setting apart a homestead and personal property exempted from forced sale, is that it excludes from the benefit of the exemption any heir upon whom the title to the land may descend, who is not an infant child of the ancestor or head of the family; either this, or that the adult heirs are excluded unless there be at the death of the ancestor also a widow or an infant child surviving him.

The language of the 3d section of the 9th article of the Constitution is that "the exemptions provided for in sections 1 and 2 shall accrue to the heirs of the party having enjoyed or taken the benefit of such exemption." The

against a firm creditor. *Lindley v. Davis*, 6 Mont. 453.

New Hampshire.

The right of a widow in premises set out to her as a homestead, under the Act of 1868, is an estate for life, and may be alienated. *Lake v. Page*, 1 New Eng. Rep. 116, 68 N. H. 818.

Under Gen. Laws, chap. 188, § 1, there may be a right of homestead in land on which there is no building, but which is occupied as a part of the place of his home, by the owner, living in a hired house. *Rogers v. Ashland Sav. Bank*, 1 New Eng. Rep. 326, 68 N. H. 428.

New Jersey.

A widow in possession under Rev. 320, § 2, giving her the right to hold her husband's homestead until her dower is assigned, is not a tenant for life, and is not bound to keep down interest on an incumbrance, and to pay taxes, and to make necessary annual repairs. *Spinning v. Spinning*, 4 Cent. Rep. 55, 41 N. J. Eq. 437.

North Carolina.

Under N. C. Const., art. 10, § 2, giving a homestead right in real estate, "owned and occupied by any resident of this State," a person who moved with his family out of the State is not while so living out of the State, although returning two or three times a year to purchase supplies and look after property left there, a resident entitled to a homestead in North Carolina. *Lee v. Moseley*, 3 L. R. A.; 108, 101 N. C. 811.

Under the North Carolina Homestead Law, the wife and children only succeed to the homestead in the event of the death of the father or husband. They are not entitled to it after his removal from the State, though they may remain. *Finley v. Saunders*, 98 N. C. 462.

A homestead, whether laid off to the husband in his lifetime, or when he leaves no children to his widow after his death, cannot be devested in favor of the heir by the release or extinguishment of the debts of the deceased husband, but inures to the benefit of the widow during widowhood, under N. C. Const., art. 10, § 5. *Tucker v. Tucker*, 108 N. C. 170.

The constitutional provision for a homestead, and the statutes enacted in pursuance thereof, require a specific allotment of the homestead in severalty.

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and do not permit any community of interest between the homesteader and the purchaser of the excess. *Campbell v. White*, 95 N. C. 491.

Pennsylvania.

The widow may claim the bounty in her own right, and is not obliged to divide it among adult children. *Nevins' App.* 47 Pa. 230.

The homestead of a widow cannot be subordinated to debts contracted by the husband's executors. *Jeffries v. Allen*, 29 S. C. 501.

The widow is entitled to it irrespective of the question whether the husband is solvent or insolvent. Her right to this is superior to that of creditors, unless in cases of liens for the purchase money of real estate elected to be retained, and of course it is to the exclusion of the legatees. *Compher v. Compher*, 25 Pa. 33.

Where a widow accepts a provision made for her in the will of her husband, she cannot claim her rights under the Intestate Laws; but this does not apply to the \$300 which she is authorized to retain by the Act of 1851. So much of the estate is withdrawn from the general course of administration, whether the widow elects to take under the will, if there be one, or prefers her statutory rights in the distribution of the estate. *Ibid.*

So held under a similar statute, in *Collier v. Collier*, 3 Ohio St. 399, 375; *Thompson, Homesteads and Exemptions*, 724.

South Carolina.

A widow without children is entitled to a homestead in her husband's property, in addition to dower. *Jeffries v. Allen*, 29 S. C. 501.

Tennessee.

Under the Tennessee Code of 1858, where a man had no homestead right at the time of his death, his widow can have none in his lands. *Threat v. Moody*, 87 Tenn. 142.

The Amendment to Code, 2114, confers a power and interest to the homestead upon the widow and children. *Shelton v. Hurst*, 16 Lea, 470.

A woman who has abandoned her husband and is residing out of the State at his death cannot claim a domicile within the State so as to be entitled to a homestead. *Prater v. Prater*, 87 Tenn. 78.

Under the Act of 1879 the lands of a debtor may

meaning of this is that those who inherit the property shall take with it, and as incident to the inheritance, the same exemption from the debts of the deceased head of the family who owned it as he enjoyed at his death. This exemption is from liability for the debts of the ancestor, and it is given to whoever may be heirs, without reference to whether they be infants or adults; no such condition is to be found in the Constitution, but, according to its plain language and meaning, the heirs, if they be all adult, take the exemption with the land in the same way that infant heirs do; and if some heirs are adult and some infant, the Constitution has provided that the title to the homestead vests in the former freed from liability for the ancestor's debts, just as it does in the latter. Legislation seeking to make infancy a test among heirs of the right to the enjoyment of the exemption is hostile to the Constitution in that it adds a requirement for such enjoyment not to be found in that instrument. We are not required, nor do we mean, to say that the Constitution inhibits all changes of the Statute of Descents, but in our opinion the purpose and effect of that instrument were that

the exemption should follow the land or other property to whomsoever it might descend by inheritance, independent of the consideration of the age of such person or persons.

It may be said, however, that to permit adult heirs to enjoy the benefit of the exemption is inconsistent with the general idea or purpose of a homestead, and that this is more prominently so when such adults have not lived under the home roof and been a part of the family it protects. The answer to this is found in the very provision of the Constitution that the exemption shall accrue to the heirs of the party having enjoyed it. That property which creditors could not take from the head of the family when he was living, they cannot take from his heirs after his death. This is what the Constitution plainly said to anyone who might become a creditor. It required that a person should be an heir, and nothing else, to successfully claim the exemption against the debts of the ancestor who, at his death, was the head of a family residing in this State; no residence upon the land or abiding with the parent or ancestor was made a condition to such heirship or consequent right of exemption. Nor is the

be sold subject to the right of homestead. *Flatt v. Stadler*, 16 Lea, 371.

Texas.

Under the Constitutions of 1845, 1866 and 1890, for several city lots to constitute one homestead, they must be for homestead purposes, not as places of business for the head of the family. The Constitution of 1876 extended the exemption to the place of business of the head of the family. *Inge v. Cain*, 65 Tex. 75.

If the owner of a tract smaller than the amount exempted as a homestead purchases an adjacent tract to fill out his homestead, he is not required to enclose or build upon this second tract, as its situation is sufficient to excite inquiry that would discover the intent. *Crockett v. Templeton*, 65 Tex. 134.

The actual use of a lot of ground for the convenience of the family has always been regarded as the most satisfactory evidence of an intention to make it a part of the homestead. *Ruhl v. Kauffman*, 65 Tex. 723.

Contiguity of the tract upon which A lived to the tract in which he had an undivided interest, in connection with facts manifesting his intention to make the latter tract a part of his homestead, was sufficient to clothe it with that character. *Luhn v. Stone*, 65 Tex. 439.

In the designation of the homestead of a family, Rev. Stat., art. 2343, applies only when the homestead forms a part of a larger tract, or tracts, of land than is exempted from forced sale. *Radford v. Lyon*, 65 Tex. 471.

The Constitution of 1876 places only two limitations upon property exempt as a place of business: it shall not exceed \$5,000 in value, and it shall be used as a place to exercise the calling or business of the head of the family. *Willis v. Morris*, 66 Tex. 623.

Const., art. 16, § 50, protects the homestead from "forced sale for the payment of all debts except . . . for work and material used in constructing improvements thereon." The wife's consent must precede the purchase of the material. Rev. Stat. art. 3174; *Lyon v. Ozee*, 66 Tex. 96; *Taylor v. Huck*, 65 Tex. 238.

A man and woman living together in adultery do not compose such a family as the law recognizes, and are not entitled to the benefit of a Homestead Law. *Lane v. Phillips*, 69 Tex. 240.

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If the head of a family owns a house and occupies it with his family, although he own no interest or estate in the land on which it stands, it is the home of the family, and is embraced in the spirit and purpose of the Constitution. The same rule applies to the place of business. *Cullers v. James*, 66 Tex. 494.

Children have no interest in the homestead as such, as against the surviving parent, by virtue of the homestead rights of their deceased parent; but they take title to such property just as they would to other real property. *Ashe v. Youngst*, 65 Tex. 631.

Since a natural obligation rests upon the father to support illegitimate children, they, when living with him, constitute such a family as may assert homestead rights. *Lane v. Phillips*, 66 Tex. 240.

Under the law in Texas as it existed in 1863, title to land possessed and owned as a homestead vested absolutely in the widow of a deceased husband who died insolvent, freed from all claims by his heirs or for his debts or any community debts. This is not altered by partition between herself and her husband's heirs. *Watson v. Rainey*, 69 Tex. 319.

The surviving widow is liable to the minor heirs of her deceased husband for reasonable rents of improved property improperly set aside to her as a homestead by order of the probate court, when such order is corrected by a direct proceeding for that purpose. *Lynch v. Broad*, 70 Tex. 92.

The wife and minor children of a man who has left the State and desires that they follow him retain the protection of the homestead exemption upon the residence while they remain upon it, without regard to his wishes. *McDannell v. Ragsdale*, 71 Tex. 23.

The homestead rights of the wife are lost by her accompanying her husband when he abandons. *Beece v. Benfro*, 68 Tex. 102.

Abandonment of a homestead occupied as such cannot be accomplished by mere intention, but there must be a discontinuance of the use, together with the intention not to use it again as a home. *Archibald v. Jacobs*, 69 Tex. 248.

Where the use of a lot in controversy is of a character to make it part of a homestead, the intention of the occupant is not a matter for investigation. *Little v. Baker* (Tex.) 11 S. W. Rep. 549.

Whether the cessation of the homestead use is temporary or not, may be shown by the acts of the husband alone. *Wynne v. Hudson*, 66 Tex. L.

249.
Whatever the interest of the ancestor was in the land, it descends to and vests in the heir, whether it be a term of years, a fee simple, or other estate extending beyond the life of the ancestor. We have found no Constitution or other Homestead Law like ours, nor any decision which, in view of the plain language of our instrument, justifies us in departing from the well-known meaning of the terms used, and, by construction, formulating what to our minds might be a more reasonable homestead or exemption system.

We are aware the word "children," in a Texas Statute providing that a homestead shall descend and be set apart to the widow and children, has been construed to include only such children as were minors, and not those who were adults. The word "children," when used irrespective of parentage, may denote that class of persons under the age of twenty-one years, as distinguished from adults, but its ordinary meaning, with respect to parentage, is sons and daughters of whatever age (see titles *Child, Minority, Majority*, Abbott, L. Dict.; Bouvier, L. Dict.), and the Texas court adopted the former meaning as more consistent with the purposes of homestead legislation, yet held that the estate vested in the infant children not merely during minority or infancy, or so long as they continued to occupy it as a homestead, but in fee and independent of a continuation of its use as a home. *Reeves v. Petty, supra; Horn v. Arnold*, 52 Tex. 161.

The word "heirs" does not afford an opportunity for the construction thus given to "children" as between minors and adults.

III. It appears from the record before us that at the time the bill was filed to enjoin the sale by the sheriff under the execution issued

proceeding for partition of the homestead property, and that a decree had been made on February 3, 1887, appointing commissioners to divide the same between herself and them, and the commissioners reported the lands to be so situated that they could not be divided without great prejudice to the owners, and recommended a sale, and on the first of March a sale was ordered, and on the 1st day of August in the same year the property was sold to Mrs. Finegan and the sale was confirmed in the following September, and on the 4th day of October the commissioner conveyed the land to her by a deed. The bill was filed on the 23d day of May in the same year, and, as is apparent, the sale and proceedings consequent upon it were subsequent thereto. The decree of partition, that for the sale, and the deed, are the only parts of the partition proceeding before us, yet they give the information indicated above. It also appears that on the 26th day of January, 1886, a few days less than three months after the death of the intestate, Mrs. Finegan filed in the County Court of Orange County an election to take a child's part in lieu of dower "in and to all the real and personal property of which she was dowable, according to the true intent and meaning of the law, as widow," of the intestate.

Upon these proceedings two positions are asserted by counsel for appellant. The first is that, the widow having elected to take a child's part, her interest in the estate is subject to the execution; and the second is that, the property having been sold and passed out of the heirs, it has thereby become subject to the lien of the judgment.

The answers to these propositions are apparent. To the first it may be well said that if the widow had no other interest in the homestead but dower, as was held in the *Fridenburg* and *McDougall Cases, supra*, and her election to

Absence of the family from the home for a long period of time is a fact to which due weight should be given upon the question of abandonment. *Sanders v. Sheran*, 66 Tex. 665.

The intention to abandon a homestead may be shown by circumstances. *Ibid.*

The qualified intention not to return if he can sell it and invest the proceeds in a home that will suit him better, is not an intention which, connected with change of domicile, will operate an abandonment. *Ibid.*

A wife removing her residence from the State thereby relinquishes all right of homestead; and the business engaged in by herself or by her husband, or both, without the State, is immaterial. *McElroy v. McGoffin*, 68 Tex. 208.

Defendant and his wife agreed to separate, and divided the land, his portion being under cultivation, but having no house on it. It was held that until the husband and wife united in abandoning the part she occupied, the husband could acquire no other homestead; the homestead exemption still attached to his portion. *Crockett v. Templeton*, 65 Tex. 184.

The mother or surviving father can, by abandoning the homestead, deprive the children of their right. *Dawson v. Holt*, 44 Tex. 174; *Morrill v. Hopkins*, 38 Tex. 686.

That this rule is liable to abuse is not a sound argument against it. *Dawson v. Holt*, 44 Tex. 179. 6 L. R. A.

Vermont.

To acquire a homestead, premises must be used or kept for a family home. There must be a present use, or a keeping for that purpose, with a present right to use them. *Keyes v. Bump*, 4 New Eng. Rep. 513, 59 Vt. 391.

A widow, by consenting that her husband's administrator may sell, under order of court, premises in which she has a homestead interest, does not waive her rights to the homestead fund. *Re Worcester's Estate*, 6 New Eng. Rep. 845, 60 Vt. 420.

A married woman who deserted her husband and was living apart from him at his decease, is not deprived of a homestead in his premises. *Lindsay v. Brewer*, 7 New Eng. Rep. 45, 60 Vt. 627.

Where a wife is divorced from her husband, and the custody of the children is decreed her, and they move from his premises and are absent two years, it is an abandonment of the homestead. *Heaton v. Sawyer*, 6 New Eng. Rep. 861, 60 Vt. 495.

Virginia.

A widow whose husband owed no debts at his decease cannot claim a continuance of the homestead which, in his lifetime, he had set apart under Va. Code 1873, chap. 183. *Barker v. Jenkins*, 84 Va. 895.

Wisconsin.

Mere temporary removal from a homestead, with intention to reoccupy, cannot impair its exemption. *Phillips v. Root*, 68 Wis. 128.

take a child's part was a surrender of her dower claim with its superiority to the rights of creditors, this did not affect the title of the heirs to the entire homestead discharged of her dower claim. Again, if she has successfully asserted, as she seems to have done by her partition suit, a claim to a one-third interest in this land as against the heirs, or with their consent, it is a matter of no concern to the appellant or other similar creditors. They are not injured, for the same land, if she had no interest in it, would go to the heirs exempt from the indebtedness.

As to the lien of the judgment, nothing is required to be said other than that before the judgment was rendered the title had descended to the heirs exempt from liability for the intestate's indebtedness, and the judgment against the administratrix was never a lien upon it, even should we admit that a judgment against an administrator or administratrix is a lien upon any of the lands of an intestate.

The decree making the injunction perpetual is affirmed, and it will be ordered accordingly.

Robert S. WILLIAMS, *Appt.*,

v.

STATE OF FLORIDA.

(....Fla.....)

- *1. A bail-bond given under the Act of January 6, 1848 (McClell. Dig. 439, 440), must be approved by the court, if given while the court rendering the judgment or sentence is in session.
2. Where a statute authorizes a special remedy against parties to a bond or other particular instrument, an instrument of the character specified is necessary to such remedy.
3. A seal, or a scrawl to which the statute gives the same effect, is essential to a bond; and an instrument to which there is no seal or scrawl is not a bond, although in the body thereof it is recited that the obligors or parties thereto have set their hands and seals.
4. The bail which the Act of January 6, 1848, authorizes any person convicted of a criminal offense, and sentenced to pay a fine, to give, is expressly required to be by bond; and unless the instrument given thereunder and taken and approved by the judge in open court has a seal, it is not in form the instrument required, and will not, when returned by the proper officer indorsed with a default, authorize the execution which the statute requires the clerk on return of the bond to issue against the surety. "as if there had been judgment at law on such bond."
5. That a bail surety under the Act of January 6, 1848, had importuned the court to impose a fine on the prisoner instead of sentencing him to the penitentiary, stating he wanted the prisoner to work as a tenant on his plantation, and had assured the court that he would give the bond required by the statute to secure the payment of the fine if it would change the sentence, and in consequence of such importunity and assurance the court changed the sentence, and then the surety signed a paper purporting to be a bond, and informed the court he had given the bond required by law, and there-

upon the prisoner was released, and was taken by the surety to his plantation and worked as a tenant till the paper fell due, does not estop the surety from questioning the legality of an execution issued by the clerk upon the return of the paper, on the ground of there being no seal to such paper, it having been taken and approved in open court by the judge.

(December 20, 1890.)

A PPEAL by defendant from a judgment of the Circuit Court for Leon County in favor of the validity of a certain execution issued against defendant as surety in an alleged bail bond. *Reversed.*

Statement by *Raney, Ch. J.*:

On the 4th day of August, 1888, the clerk of the Circuit Court of Leon County issued an execution addressed to all and singular the sheriffs of the State, commanding them that of the goods, etc., of Robert S. Williams, they cause to be made "the sum of \$200, which is the amount of a fine imposed upon one Lot Bryant in a certain criminal proceeding had" in said court, "for the payment of which, within ninety days from the 14th day of January, 1888, the said Williams became his surety, and a default has been made in said payment, and the sheriff has returned said bond into court indorsed with a certificate of such default, and filed the same, and costs of this writ," etc.

On the same day, the sheriff having levied on certain property of Williams, and indorsed the levy on the writ, Williams made before the clerk an affidavit of the illegality of the writ, stating as the grounds thereof that the instrument referred to in the writ as a bond was not under seal, and that no execution had issued against Lot Bryant, the principal in the pretended bond; and filed a bond with surety, in the form usual in such proceedings as to executions, the same having been approved by the sheriff.

It appears from the transcript before us the paper or undertaking executed by Lot Bryant and Williams, and upon which the execution issued, is, in so far as it is necessary to give the same, with the approval of the same, and the sheriff's indorsement thereon, and file-marks, in the following words and figures:

State of Florida, County of Leon.

Know all men by these presents, that we, Lot Bryant and Robert S. Williams, are held and firmly bound unto the governor of the said State of Florida, and his successors in office, in the just and full sum of four hundred dollars. . . . Signed with our hands, and sealed with our seals, this the fourteenth day of January, A. D. one thousand eight hundred and eighty-eight.

The condition of the above obligation is such that whereas the above bounden Lot Bryant has been duly tried and convicted, in the Circuit Court in and for the said County of Leon, of stealing a domestic animal, to wit, a black bull yearling, the property of one Susan Mitchell, and thereupon by said court was sentenced and adjudged to pay a fine of \$200, and the costs of his said prosecution for his said offense; now, therefore, if the above-bounden parties, or either of them, shall well and truly

*Head notes by *RANEY, Ch. J.*

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days from the date hereof, then this obligation to be void and of no effect; otherwise to be and remain in full force and virtue.

his
Lot X Bryant.
mark.
Robert S. Williams.

Taken and approved by me in open court.
D. S. Walker, Judge.

Indorsed:

I, John A. Pearce, sheriff of Leon Co., do hereby certify the within bondsmen, Lot Bryant and R. S. Williams, have failed to pay within ninety days the amount of within bond, or any part thereof, and have still failed to pay any part thereof, this 18th day of July, A. D. 1888.

J. A. Pearce, Sheriff.

Filed Aug. 3rd, 1888.

C. A. Bryan, Clerk.

The question of illegality having come on for trial at the Fall Term, 1888, of the Circuit Court, the following judgment was rendered:

"In the matter of the affidavit of R. S. Williams, that the execution issued on the 4th of August, A. D. 1888, against him, in favor of the State of Florida, in the sum of two hundred dollars, as a surety on the bond of Lot Bryant, is illegal.

"This cause came on to be heard this day, and the said Williams having been heard by himself in person, and by his attorney, John S. Beard, and the State having been heard by its attorney, E. C. Love, Esq., it appears to the court that the said Williams importuned the court to adjudge a fine against the said Lot Bryant of two hundred dollars, instead of sentencing him to a term in the penitentiary, because the said Williams, as he stated, wanted the said Bryant to work as a tenant on the plantation of said Williams; that said Williams assured the court that if the court would so change the sentence of the said Bryant, he, said Williams, would give the bond required by the statute securing the payment of said fine of two hundred dollars; in consequence of this importunity and assurance the court did change the sentence of said Bryant from a term in the penitentiary to a fine of two hundred dollars; that thereupon said Williams signed the paper purporting to be a bond, which is on file and filed with the clerk, and informed the court that he had given the bond required by law; that thereupon the prisoner, Lot Bryant, was released and taken by said Williams to his plantation, and worked as a tenant on his plantation till the paper purporting to be a bond fell due, and then, instead of paying it, he made the affidavit filed in this case. Under this state of facts, it is considered by the court that said Williams is estopped from saying that he did not give the bond required by the State, and that said execution was not legally issued."

From this judgment Williams has appealed.

Mr. John S. Beard for appellant.

Mr. W. B. Lamar, Atty-Gen., for the State.

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of a criminal offense, and sentenced to pay a fine, shall have the right, on being taken into custody by the proper officer of the court, or prior to such arrest, to give bail or security for the payment of such fine and the costs of prosecution adjudged against him. Such bail or security shall be by bond, conditioned as above, and be executed by the defendant and one or more good and responsible persons, to be approved by the court rendering the judgment, if in session at the time, or by the sheriff or other officer charged with the execution of the judgment. It is to be payable to the governor in ninety days from its date, and, if not paid by the expiration of this time, the sheriff or other officer shall indorse thereon that default has been made, and sign the indorsement, and file the bond with the clerk of the court in which the judgment was rendered, and the clerk shall forthwith issue execution for the amount of such fine and costs against such "security or bail," as if there had been judgment at law on such bond; and the same proceedings shall be had thereon as in cases of other executions, and the person convicted shall be liable to be proceeded against as if no such bond had been given, until the same shall be fully paid and satisfied.

It is evident, from the above terms of the statute, that no execution is to be issued under it against the person convicted or principal in the bond on the return of it by the sheriff after default, but only against the surety or bail; and for this reason, probably, the second ground of illegality stated in the affidavit has been practically abandoned before this court. *Southern Exp. Co. v. Van Meter*, 17 Fla. 788.

The argument of appellant in support of his first ground is that, in the absence of a bond, there was no basis for the summary process of execution contemplated by the Statute.

It is certain that the instrument executed by Bryant and Williams is not a bond.

In the case of *United States v. Linn*, 40 U. S. 15 Pet. 290 [10 L. ed. 742], where, as here, the instrument had no seal, the supreme court held that it was not a bond, and that, as the Act of Congress directed the security of the officer, a receiver of public moneys, to be taken by bond, it was not in form the instrument required by the Act, though binding as a simple contract at common law. An "obligation" or "bond," says Blackstone's Commentaries (book 2, p. 340), is a deed whereby the obligor obliges himself, his heirs, executors or administrators, to pay a certain sum of money at a day appointed. A "deed," says the same authority, is a writing sealed and delivered by the parties. Id. 295.

Although in the body of a writing it is said that the parties have set their hands and seals, it is not a bond unless it has been actually sealed and delivered. *Taylor v. Glaser*, 2 Serg. & R. 502; *Deming v. Bullitt*, 1 Blackf. 241.

Our Statute has given a scrawl the effect of a seal (§ 87, p. 882, McClell. Dig.); but this instrument has nothing purporting to be either a scrawl or a common-law seal, or anything intended for either.

As, then, it is not a bond, it is not the instrument contemplated by the Statute, and, not being such, it, according to the authorities, did not authorize, and will not sustain, the summary remedy provided by the Act in case of a default to enforce the payment of a bond taken and duly returned under it.

In *Skinner v. McCarty*, 2 Port. (Ala.) 19, upon a certiorari to a judgment rendered by a justice of the peace, there was a trial in the county court, and verdict against Skinner, the plaintiff in certiorari, and judgment was rendered under the Statute also against his sureties on the instrument taken to bring up such proceedings; it having all the requisites of a certiorari bond, except seals to the signatures of the obligors. The Statute gave to the bond required in such proceedings the force and effect of a judgment against all the obligors, and authorized execution to be issued against them. It was held by the supreme court of that State that the sealing is a distinct and substantive requisite to constitute a perfect bond, and that without it the instrument was not binding on the parties as a bond, and the judgment of the county court was reversed, and a judgment rendered simply against Skinner, the original defendant.

In *Howard v. Brown*, 21 Me. 385, where the Statute required that a poor-debtor's bond should be executed by the debtor as well as the sureties, it was held that a bond not executed by the debtor was not good as a statutory bond, though valid and enforceable as a common-law bond.

In *State v. Montgomery*, 74 Ala. 226, where the decree appealed from was affirmed, the appeal bond was by its terms payable to the register instead of the appellee, and it was held that no judgment could be rendered on the appeal against the sureties. "Being made expressly payable to the register," says the opinion, "it is not a statutory bond; and hence, if there be any recourse against the sureties, it must be sought in an action on the bond." P. 232; *Tarver v. Nance*, 5 Ala. 712.

The following authorities sustain and illustrate the principle upon which we rely, that under statutes of the kind under consideration there must be a statutory instrument to support the special remedy they authorize. *Moody v. Hoe*, 22 Fla. 809; *Sewall v. Franklin*, 2 Port. (Ala.) 498; *Brown v. Lovins*, 6 Port. (Ala.) 414; *Curry v. Barclay*, 8 Ala. 484; *Butler v. O'Brien*, 5 Ala. 810; *State v. Montgomery*, *supra*; *Miller v. Vaughan*, 78 Ala. 323; *Earle v. Dobson*, 1 Jones (N. C.) 515; *Richardson v. Bartley*, 2 B. Mon. 328; *Poston v. Southern*, 7 B. Mon. 289; *The Justices v. Smith*, 2 J. J. Marsh. 472; *Morse v. Hudon*, 5 Mass. 314; *Winthrop v. Dockendorff*, 8 Me. 156; *Pease v. Norton*, 6 Me. 229; *Branch v. Branch*, 6 Fla. 314; *United States v. Linn*, 40 U. S. 15 Pet. 290 [10 L. ed. 742].

The record shows that the bond was "taken and approved in open court," by the circuit judge, by whom alone it could have been taken and approved while the court was in session. This approval was error, and though, of course, it would not have been given had the absence of the seal been noticed by the judge, still it gave no validity to the paper as a bond. The Statute authorizes an execution to be issued by the

clerk upon due return of the bond, and, when there is no bond, the writ cannot be issued "as if there had been a judgment at law on said bond." The existence of a bond is indispensable to the power of the clerk in the premises, and the approval or acceptance of any other kind of an instrument will not create the power.

As the Statute does not authorize the discharge of the prisoner pending the term of the court, until the bond has been approved by the judge, a bond cannot be said to be given under it, pending a term, until it has been so approved. The fact that Williams informed the judge that he had given the bond required by law does not, considering the patent character of the defect and the approval of the instrument by the judge, show that the omission of the seal was intentional or fraudulent, or that Williams did not intend to give a bond when he made the proposition for a change of the sentence detailed in the judgment, even assuming that the fraud would estop Williams from taking advantage of the absence of a seal,—a point upon which we intimate no opinion. The employment of Bryant as a tenant on Williams' plantation is a matter solely between those parties, and one with which the State had no connection, and it is not shown to have influenced the approval of the bond.

The conduct of Williams set out in the judgment appealed from did not supply the place of a bond, and does not estop Williams from resisting a proceeding for which in law there was no authority. His conduct is not before us in any other aspect.

The case will be remanded to the Circuit Court, with directions to set aside the execution as illegal.

Eduardo H. GATO

v.

EL MODELO CIGAR MANUFACTURING CO.

(..... Fla.)

*1. A general demurrer to a bill as for want of equity will be overruled if there is any equitable ground of relief stated in the bill, even if

*Head notes by MITCHELL, J.

NOTE.—Trade-name and trade-mark.

A name not being a name of a private estate, but that of a large boundary of land containing a number of private estates, cannot be appropriated as a trade-mark by the owner of one of the estates to the exclusion of the others (*Laughman v. Piper* (Pa.) 5 L. R. A. 599); so a mere geographical name cannot be appropriated; nor can a word, mark or device which denotes merely the nature, kind or quality of the article (*Ibid*); but anyone may affix to the product of his own manufacture any symbol or device not previously appropriated. *Ibid*.

A trade-name, though not strictly a trade-mark, is property and as such will be protected. *Ibid*.

Violation of trade-mark of goods intended for transportation to a foreign country. See *United States v. Koch* (Mo.) 5 L. R. A. 120.

Protection of the use of a label showing the goods had been made in clean, healthy shops by first-class workmen. See *Carsons v. Ury* (Mo.) 5 L. R. A. 614, with note referring to all prior decisions.

that he manufactures and sells by a peculiar label, symbol or trade-mark, and no other person has a right to adopt his label or trade-mark, or one so like his as to lead the public to suppose the article to which it is affixed is the manufacturer's.

3. A man may acquire the right of a trade-mark in his own name or the name of any person, but he cannot acquire the right of a trade-mark in the use of his own name to the exclusion of the right of another person by the same name, and whose place of business is in the same place.
4. When a man manufactures his goods at a particular place, he may use the name of that place, in combination with other words, as a trade-mark to distinguish the origin or ownership of his goods, and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place.
5. A party whose trade-mark has been violated is entitled to recover all profits realized by the wrong-doer from sales of the spurious articles, and also all damages resulting from such violation.

(January 7, 1890.)

CROSS-appeals from a decree of the Circuit Court for Duval County enjoining defendant from infringing plaintiff's trade-marks, defendant appealing from so much of the decree as granted the injunction, and plaintiff appealing from so much of the decree as disallowed his claim to damages. *Affirmed on defendant's appeal; reversed on plaintiff's appeal.*

Statement by Mitchell, J.:

This case comes here upon appeal and cross-appeal from the Circuit Court of Duval County.

The bill was filed August 6, 1885, and alleges, among other things:

That the complainant engaged in and commenced the manufacture and selling of cigars at Key West, Fla., in 1875. That complainant used exclusively Havana tobacco at his factory, and that he established among purchasers, dealers, etc., a high reputation for his cigars, and that his cigars still maintain said high reputation. That the climate at Key West is more favorable to the manufacture of Havana cigars than points north of that place. That to identify his cigars among consumers, etc., years ago complainant adopted and used, and still uses upon the boxes in which his cigars are packed, certain marks, names, labels and pictures, by which his cigars became known to the trade and public. That the quality, etc., of his cigars, in the estimation of consumers, etc., depend upon the locality of manufacture, as well as the quality of tobacco used in making.

That the complainant caused to be stamped or branded on his cigar-boxes the words "Key West," and the words "Key West" printed upon the labels, pictures and paper, both upon the inside and outside of such boxes, and caused to be stamped or branded upon such boxes, and printed upon the labels, pictures and paper, complainant's name, "E. H. Gato" or "Eduardo H. Gato."

G. L. R. A.

known among dealers, etc. That in addition to the words, pictures, etc., upon complainant's cigar boxes, complainant, upon certain brands of his cigars, in the manufacture of which he has made a specialty, and on the labels and pictures thereon, has caused to be branded and printed the word "Bouquet," both separate from, and in connection with, the words "E. H. Gato," "Eduardo H. Gato," and "Key West," and that the cigars put up, etc., as aforesaid, have been for many years and are now known to the trade, etc., as "Gato's Bouquet Cigars of Key West," "Gato's Key West Cigars," and "Cigars Bouquet de E. H. Gato, Key West." That on certain other cigars manufactured by complainant he has caused to be branded and printed on the labels, etc., of the boxes, the words "La Estrella," both separate and in connection with the words "Key West," "E. H. Gato," and "Eduardo H. Gato," and that this brand of cigars has become widely known to the market, etc., as "Gato's Estrella Cigars of Key West," or as "Gato's Key West Estrella Cigars," and that both the Bouquet and Estrella brands of cigars made by complainant at his said factory have become favorites in the market among buyers, etc., and are known as cigars of very superior quality, and that said cigars are made of the best Havana tobacco, etc.

That complainant made use of the distinctive words "Bouquet," "La Estrella," and the words "Key West" and "E. H. Gato" and "Eduardo H. Gato," upon the boxes of his cigars and labels, etc., as trade-marks, and to distinguish his cigars in the market, etc., from cigars made and put upon the market by other manufacturers, long before the defendants made use of the said distinctive words upon boxes of cigars, labeled and printed thereon as hereinafter stated and complained of.

That the defendants, or one or more of them, about the year 1883, commenced to manufacture cigars at Jacksonville, Fla., under the name and style of the firm of "El Modelo Cigar Manufacturing Co.," or "Company," and that they from that time have and are still manufacturing cigars on an extensive scale. That defendants use seed tobacco in their business, and make their cigars of seed tobacco, at their factory, which is a much inferior quality of tobacco to the Havana tobacco, in the estimation of dealers, etc., and is in point of fact a greatly inferior tobacco to the Havana tobacco, and well known to all manufacturers, etc.

That the defendants, well knowing the superior qualities of complainant's cigars, and the large and extensive trade therein and sales thereof which complainant has built up and established in the markets of the country, and among consumers, etc., by his skill, etc., by making his cigars at Key West, where they were represented to be made, and of Havana tobacco, as they were likewise represented to be made, and that complainant had thereby acquired and secured a profitable business in the making and selling of his cigars, and confederating and contriving to injure complainant in his business, etc., in the year 1883, com-

etc., used and employed by complainant, in such manner and with such combination upon some of the boxes of cigars made by them, to deceive and palm off upon and sell to purchasers, etc., the inferior cigars of the defendants' manufacture, as and for the cigars manufactured by complainant at Key West. That defendants ever since about the year 1888 have deceived, palmed off and sold continuously to such traders, etc., the product of their factory, at Jacksonville, as and for the cigars made by complainant at his factory at Key West, to the great damage and injury of complainant.

That the defendants' brand and stamp upon the boxes containing their cigars manufactured at Jacksonville, and print upon the labels, pictures and paper upon said boxes, the words "Key West" and "G. H. Gato," in conspicuous places upon said boxes, and in form and size of letters identical with or similar to the form and size of letters employed and used by complainant upon his boxes of cigars and labels and pictures thereon, and that the defendants' stamp, brand and print upon the boxes of their cigars, pictures and labels thereon, the words "G. H. Gato" and "Key West," both separately and in combination with each other, and in such manner, form, style and general appearance to the eye as to readily deceive traders, purchasers and consumers, and by such means do cause them to take, purchase, sell and consume the cigars of defendants as and for the cigars of complainant, and with the intent and design so to do. That the defendants used and employed upon their boxes of cigars the letters and words "G. H. Gato" prior to the time when the person known by that name became a member of said firm, and the defendants so stamped and printed upon the boxes of cigars, and upon the labels and pictures thereon, the said initial letter "G," as to make it appear to the eye, and cause it to be readily read and taken by dealers, etc., for the letter "E," the initial letter of complainant's name; and the defendants have offered and sold, and continue to offer and sell, their said cigars, stamped, branded and printed as aforesaid, as and for Gato's Key West cigars, at a price much less than complainant has sold or can sell his cigars without loss, and thereby have deprived, and do continue to deprive, complainant of his reasonable and lawful profits in his said business.

That the defendants have also used and employed, for two years and upwards, and do now use and employ, brand and print upon their boxes of cigars, made by them at their factory at Jacksonville, the words "Bouquet" and "La Estrella," both separately and in combination with the words "G. H. Gato" and "Key West," so as to appear like and resemble the same words upon the boxes of complainant's cigars, and by such means, and by representing and advertising in newspapers, and by their agents and otherwise, which defendants have done, and now do, the said cigars as "Gato's Key West Cigars," and as "Gato's Bouquet Cigars," and as Gato's Estrella Cigars of Key West," do, and for a long time, to wit, for two years and upwards, have, palmed off

6 L. R. A.

ants' said cigars in la the complainant's "B cigars, and "Gato's Ke by the fraudulent pr stated defendants hav profits which justly b

The prayer of the l accounting of profits, general relief.

Decree *pro confesso* answer, etc.

After decree *pro a* bill was demurred to: tains no matter of eq can ground any decr any relief, as against th the bill, in addition to an account of profits, of the defendants.

The demurrer was ground, but sustained.

On November 13, 18 answered. The answer is and has been engag cigars at Key West, and are manufacturing cig the firm name of "El turing Co.," also that cigars known as their they offer them in box ed as not only not to complainant's cigars " dissimilar; and defend as far as the words "K they make use of said all the boxes of cigars

All the other materi are denied by defenda plainant's "Estrella" l "Estrella" brand.

On the 26th day of O entered a motion to s motion for injunction, fore said motion was fl interposed a demurrer equity, which had been held under advisement had not been disposed said court has not yet d

On the 16th day of plainant moved for inju fore then filed.

On the 14th day of plainant filed his replic

In support of the mot davits were filed by con affidavits by defendants

On the 10th day of J granted a writ of injun der of the court granti defendants appealed, and the appeal is to operate on the same day the com appeal from the order o defendants' demurrer to that claims damages of excess of profits realized

The errors assigned. The overruling of the a the bill of complaint of

issue, as prayed for in said bill of complaint.

The errors assigned upon cross-appeal by complainant are: "Comes now Eduardo H. Gato, who prosecutes a cross appeal in the above-entitled cause, and petitions the said supreme court to reverse so much of the interlocutory decree of the circuit court entered on the demurrer to the bill as declares he, as complainant, cannot recover any damages in the cause beyond profits received by defendants by the infringement of his trade-mark," etc.; "and, as ground of such appeal, says the said circuit court erred in so ruling."

Messrs. G. B. Patterson and H. Bisbee, for complainant:

In such a case as this the essence of wrong is the selling of the goods of one manufacturer or vendor as and for the goods of another.

Delaware & H. Canal Co. v. Clark, 80 U. S. 18 Wall. 322 (20 L. ed. 584).

To represent that goods are manufactured at a particular place by a person whose manufacture had acquired a great reputation, when in fact by a different person at a different place, is a fraud upon the public which no court of equity will countenance.

Manhattan M. Co. v. Wood, 108 U. S. 218 (27 L. ed. 706); *McLean v. Fleming*, 96 U. S. 245 (24 L. ed. 828).

Where one person manufactures his goods at a particular place and uses the name of that place, either alone or in combination with other words, as a trade-mark to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place.

See *Delaware & H. Canal Co. v. Clark*, 80 U. S. 18 Wall. 322 (20 L. ed. 584); *Glenn & H. Mfg. Co. v. Hall*, 61 N. Y. 226, 230, 19 Am. Rep. 278; *Newman v. Alford*, 51 N. Y. 189, 10 Am. Rep. 588; *Congress & E. Spring Co. v. High Rock C. Spring Co.* 45 N. Y. 291; *Sawyer v. Horn*, 1 Fed. Rep. 24.

One person will not be permitted, though his name be the same as that of another person or manufacturer, to represent his goods as and for the goods of another.

Gilman v. Hunnewell, 122 Mass. 139, 38 Am. Rep. 337.

A family name will be protected if another use it in such a way as to mislead purchasers.

Marshall v. Pinkham, 52 Wis. 572, 38 Am. Rep. 756.

D. F. Tayler & Co., on hairpins, using the firm name as a trademark, may enjoin L. B. Tayler & Co., from using the latter's name upon hairpins.

Williams v. Brooks, 50 Conn. 278, 47 Am. Rep. 642; *Shaver v. Shaver*, 54 Iowa, 208. See *McLean v. Fleming*, 96 U. S. 245 (24 L. ed. 828).

The following words have been protected as trade-marks, to wit: "Insurance Oil" (*Insurance Oil Tank Co. v. Scott*, 38 La. Ann. 946, 39 Am. Rep. 286); "Pride" as a trade-mark for cigars (*Hier v. Abrahams*, 82 N. Y. 519, 37 Am. Rep. 589); "La Favorite" as applied to a stamp on flour barrels (*Holt v. Menendez*, 28 Fed. Rep. 869); "St. Louis Lager Beer" (*Anheuser*, 6 L. R. A.

"528" on hosiers in combination with a wreath and eagle will be protected. *Lawrence Mfg. Co. v. Lowell Hosiery Mills*, 129 Mass. 325, 37 Am. Rep. 362.

Intent upon the part of the defendant to infringe upon the plaintiff's trade-mark, or to deceive the public, is not a necessary element in any case.

See *Gorham Co. v. White*, 81 U. S. 14 Wall. 521 (20 L. ed. 786); *Morgan's Sons Co. v. Trozell*, 89 N. Y. 292, 42 Am. Rep. 296; *Williams v. Brooks* and *Hier v. Abrahams*, *supra*.

The complainant in such a case as this is entitled to nominal damages though he may be unable to show defendants made any profits.

Thomson v. Winchester, 19 Pick. 214; *Blafeld v. Payne*, 4 Barn. & Ad. 410; *Rodgers v. Nowill*, 6 Hare, 325; *Marsh v. Billings*, 7 Cush. 322.

He is entitled to damages though defendants made no profit.

Graham v. Plate, 40 Cal. 598, 6 Am. Rep. 689. See *Pitts v. Ritchie*, 62 Mo. 171; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Hostetter v. Vowinkle*, 1 Dill. 329; *Pitts v. Hall*, 2 Blatchf. 229.

Messrs. Randall, Walker & Foster for defendant.

Mitchell, J., delivered the opinion of the court:

The first question to be decided is, Did the court below err in overruling the first ground of the demurrer to the bill?

In discussing the demurrer to the bill, counsel for appellants insist that defendants had the right to use the name of G. H. Gato, and that Gato had the right to manufacture cigars, and that G. H. Gato had the right to use his own name in announcing the origin of his cigars, provided no fraud was practiced by him in so doing, and cite the following authorities as sustaining their position: *Partridge v. Menck*, 2 Barb. Ch. 101, 47 Am. Dec. 281, and *note*; *Clark v. Clark*, 25 Barb. 76; *Burgess v. Burgess*, 17 Eng. L. & Eq. 257; *Faber v. Faber*, 49 Barb. 857; *Wolfe v. Burke*, 7 Lans. 151; *Meneely v. Meneely*, 62 N. Y. 427; *Masaam v. J. W. Thorley's Cattle Food Co.* 36 L. T. N. S. 848; *Ainsworth v. Walmsley*, 85 L. J. N. S. Ch. 352; *Hardy v. Outtor*, 8 Pat. Off. Gaz. 468; *Carmichel v. Latimer*, 11 R. I. 395, 23 Am. Rep. 481; *Decker v. Decker*, 52 How. Pr. 218; *Gilman v. Hunnewell*, 122 Mass. 139.

Now, we admit the soundness of the legal proposition as laid down *supra*; but after the complainant, whose factory was located at Key West, had adopted his own name in combination with the words "Key West," "La Estrella" and "Bouquet," and certain brands, labels and pictures as his trade-marks, the defendants did not, afterwards, have the right to adopt the name of "G. H. Gato," in combination with the words "Estrella," "Bouquet" and "Key West," and certain brands, labels and pictures, in combination with the name of "G. H. Gato," as their trade-marks, when the words, etc., so adopted by them, so clearly resembled the trade-marks so adopted by the complainant as to enable them to palm off upon and induce an ordinary purchaser to buy their cigars for those

Mark Cas. (Price & S.) 153, 50 Md. 591; *Humphreys' S. H. Medicine Co. v. Wenz*, Am. Trade-Mark Cas. (Price & S.) 711, 14 Fed. Rep. 250; *Liggett & M. Tobacco Co. v. Hynes*, Am. Trade-Mark Cas. (Price & S.) 898, 20 Fed. Rep. 883; *Glen Cove Mfg. Co. v. Ludeling*, Am. Trade-Mark Cas. (Price & S.) 957, 22 Fed. Rep. 828; *Insurance Oil Tank Co. v. Scott*, 33 La. Ann. 946, 39 Am. Rep. 286; *Hier v. Abrahams*, 82 N. Y. 519.

It is now well established that a man may acquire the right of a trade-mark in his own name, or in the name of any person, but a man cannot acquire the right of a trade-mark in the use of his own name, to the exclusion of the right of another person by the same name, and whose place of business is in the same place; yet it is well settled in the law of trade-marks that when one person uses his own name to identify and distinguish the origin and ownership of his goods, which are manufactured at a particular place, no other person by the same name will be permitted to use his name on his own goods, if under such circumstances as are calculated and designed to injure the trade and business of another. In other words, one man will not be allowed, though his name be the same as that of another person or manufacturer, to represent his goods as and for the goods of another. *Gilman v. Hunnewell*, 122 Mass. 139; *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 837, note 1.

A man may establish his right to a trade-mark in the name of a place, city or town, and it is well established that when a man manufactures his goods at a particular place, and uses the name of that place in combination with other words as a trade-mark to distinguish the origin or ownership of his goods, no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place. *Delaware & Hudson Canal Co. v. Olark*, 80 U. S. 18 Wall. 325 [20 L. ed. 584]; *Congress & Empire Spring Co. v. High Rock Congress Spring Co.* 45 N. Y. 291; *Newman v. Alford*, 51 N. Y. 189; *Glenn & Hall Manufacturing Co. v. Hall*, 61 N. Y. 226; *Sawyer v. Horn*, 1 Fed. Rep. 24; *Gilman v. Hunnewell*, 122 Mass. 139; *Robertson v. Berry*, 50 Md. 591, 33 Am. Rep. 837, note 1.

Under these decisions it will be seen that the defendants clearly had no right to use the name of the place, Key West, or the name of G. H. Gato, either alone or in combination with the other words, as alleged in the bill to have been used by them.

The defendants by their answer aver that they did not intend to injure the complainant by any contrivance, etc.

But do not the facts and circumstances of the case contradict such averments of the defendants? If they did not intend to injure the complainant why did they aver in their answer that the atmosphere of Key West was not more favorable for the manufacture and preservation of cigars than at points north of that place, when they had branded their boxes "Key West," and had printed on their letter and bill heads the words "Key West" and "Gato's Fine Key West Cigars," thereby inducing the pub-

they use the name of the firm in combination West," "La Estrella" difference between the member of said firm his Christian name, complainant's Christian why did defendants a junior member of the boxes that it would as name of the complain that of said junior me

There can, we thin these questions, and t by their said actions, public by palming of those of the compla bill.

A general demurrer equity, will be overru of equitable relief su there are any number murer. *Thompson v*

The demurrer to the general, and the bill a complainant is entitle prayed for; wherefore cellor overruling the murer was not erronc

In the second place, in granting the tempo

We have before us, the record of the case), complainant's La Estri of cigars, and one of brand, and, by placing side by side, the dissin is apparent, and ther between them, we thi in such matters to dist complainant from tha out placing the boxes eral appearance of ti stamps, brands, picti thereon and therein, at shape and color that t lead an ordinary purcl is the case a court of e restraining a defendan trade-marks of the cor *Berry*, Am. Trade-Ma 50 Md. 591; *Humphre Wenz*, Am. Trade-Ma 14 Fed. Rep. 250; *Lig Hynes*, Am. Trade-Ma 20 Fed. Rep. 883; *Gle ling*, Am. Trade-Mark Fed. Rep. 828; *Insura 33 La. Ann. 946, 39 Am hams*, 82 N. Y. 519.

When a trade-mark even if no one has bee intention to deceive w *App. Am. Trade-Mark 15 Pat. Off. Gaz. 248.*

And, although a ma jure another, yet he adopt the marks by w other person are desi adopting them would i

We have not been furnished with any of defendants' boxes of the Estella brand, but the bill alleges that this brand of defendants so closely resembles the Estrella (star) brand of complainant that it is calculated to mislead the public into believing the brand of the defendants to be that of the complainant. The demurrer to the bill admits these allegations of the bill, and the defendants virtually admit the truth of the allegations in their answer. They, it is true, deny, in a general way, the allegations of the bill in regard to the said brand so closely simulating complainant's brand, but fail utterly to show wherein their brand does not resemble the complainant's. They admit the manufacture of the Estella brand of cigars at Jacksonville, but say that the word "Estella" is not "Estrella," as alleged in the bill. Is this a denial of the positive allegations of the bill as to the resemblance between the said two brands? Certainly not. Then why did not the defendants deny the allegations of the bill, if they were not true? They admit the allegations of the bill to be true; that is to say, that they intended to deceive the public, profit by the deception, and to injure the complainant. The omitting of the letter "r," as aforesaid, was but an artifice resorted to by the defendants, under the belief that it would not be detected, but, if detected, it might protect them in a suit for damages by the complainant against the defendants for so pirating his trade-mark. No other conclusion would be consistent with the facts of the case.

The affidavits of Bishop & Co. and others filed in the case tend to show that the defendants have palmed off and sold their said cigars as and for those of the complainant, and that the agents of complainant have had to publish notices in newspapers cautioning the public against the deception thus practiced by the defendants. This the defendants have attempted to contradict by filing counter-affidavits, stating that the affiants knew of no such efforts, either on the part of the defendants or their agents, to palm off or use their cigars as, of and for those of the complainant. This is mere negative evidence, and proves nothing. There was no error in granting the temporary injunction.

This disposes of the errors assigned by appellants, but counsel in their argument further contend that the complainant has been guilty of such laches that he is not entitled to the relief he prays for, and cite 6 Wait, Act. and Def. 42, 43; *Beard v. Turner*, 13 L. T. N. S. 747.

The rule in England in trade-mark cases is more stringent than in this country, and a lack of diligence there in suing deprives complainant in equity of the right to an injunction or an account. But our courts are more liberal in this respect. A long lapse of time will not deprive the owner of a trade-mark of an injunction against an infringer, but a reasonable diligence is required of a complainant in asserting his rights, if he would hold a wrong-doer to an account for profits and damages. This rule, however, applies only to those cases where 6 L. R. A.

Nor will the acquiescence of any person in the wrongful use of his name estop him from asserting his rights in equity, unless he has notice during such acquiescence of the facts rendering the use of his name wrongful. *Horton Mfg. Co. v. Horton Mfg. Co.* Am. Trade-Mark Cas. (Price & S.) 857, 18 Fed. Rep. 816.

And the laches of the complainant will not avail as a defense in a proceeding to restrain the use of a trade-name when the defendant adopted the name with a fraudulent intent. *Sanders v. Jacob*, Am. Trade-Mark Cas. (Price & S.) 1048, 2 West. Rep. 408, 20 Mo. App. 96.

The complainant was in no such laches as would deprive him of his rights in the premises.

The only remaining question to be considered is, Did the chancellor err in sustaining the second ground of defendants' demurrer to the bill?

This court held in *Doggett v. Hart*, 5 Fla. 230, that, "in cases of accounts, of agency, of apportionment, of general average, of contribution, of waste and of partnership, where chancery once entertains a suit upon grounds legitimately cognizable in that court, it will proceed to adjudicate other matters of which it has only incidental cognizance, in order to avoid a multiplicity of suits."

"Another rule," says Mr. Story (1 Story, Eq. Jur. § 646), "respects the exercise of jurisdiction when the title is at law, and the party comes into equity for a discovery, and for a relief, as consequent on that discovery. In many cases it has been held that where a party has a just title to come into equity for a discovery, and obtains it, the court will go on and give him the proper relief, and not turn him round to the expenses and inconveniences of a double suit at law. The jurisdiction having once rightfully attached, it shall be made effectual for the purposes of complete relief. And it has accordingly been laid down by elementary writers of high reputation that 'the court, having acquired cognizance of the suit for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident and mistake.'"

In the case at bar the bill prays for discovery, an accounting of profits, injunction, damages and general relief, and the only ground of objection to the bill raised by the second ground of defendants' demurrer is that the bill prays damages.

That a man whose trade-marks have been infringed upon, as in this case, is entitled to compensation for infringement, is unquestionable; and it strikes us that it makes no difference whether the compensation to which the complainant is entitled is called "profits" or "damages." What is an accounting but the method by which to ascertain the complainant's damages or compensation for the wrong and injury done him by the defendants?

That the complainant is entitled to damages, see *Hostetter v. Vowinkle*, 1 Dill. 329; *Pitts v. Hall*, 2 Blatchf. 229; *Atlantic Milling Co. v. Robinson*, 20 Fed. Rep. 217; *Graham v. Plate*, 40 Cal. 598; *Marsh v. Billings*, 7 Cush. 322;

Stonebraker v. Stonebraker, 88 Md. 252; *Blackwell v. Wright*, 73 N. C. 810.

A party whose trade-mark has been violated is entitled to recover all the profits realized by the wrong-doer from sales of the spurious article, and also all damages resulting from such violation. *Graham v. Plate*, 40 Cal. 893; *Pelts v. Eichele*, 62 Mo. 171; *Marsh v. Billings*, 7 Cush. 322; *Atlantic Milling Co. v. Robinson*, Am. Trade-Mark Cas. (Price & S.) 904, 20 Fed. Rep. 217; *Hostetter v. Vowinkle*, 1 Dill. 329; *Pitts v. Hall*, 2 Blatchf. 229.

The owner of a trade-mark is entitled to nominal damages for the violation of his trade-mark, although it is not shown that he has sustained actual damages, and although the defendant's articles are not inferior in quality to his own. *Blofeld v. Payne*, 4 Barn. & Ad. 410, 1 Nev. & Man. 353; *Thomson v. Winchester*, 19 Pick. 214; *Rodgers v. Nowell*, 5 C. B. 109; *Conrad v. Joseph Ulricg Brewing Co.* Am. Trade-Mark Cas. (Price & S.) 816, 8 Mo. App. 277.

The decree of the court below granting injunction is affirmed, but the order sustaining defendants' demurrer to that part of the bill that claims damages, in excess of profits realized, is reversed, and the cause remanded for further proceedings consistent with this opinion; the appellant, El Modelo Cigar Manufacturing Company, to pay all costs of the suit.

Subsequently to the handing down of the above opinion, defendants filed a motion for rehearing, and after consideration Maxwell, J., delivered the opinion of the court:

Appellants are not satisfied with the decision in this case, and they now come with application for a rehearing, based on mistakes of the court in the opinion rendered.

The first mistake complained of is in relation to a statement of the court respecting allegations of appellants in regard to climatic and atmospheric conditions in Key West, as adapted to the manufacture and preservation of cigars. The court asked in argument, Why did appellants "aver in the answer that the atmos-

phere of Key West was not more favorable for the manufacture and preservation of cigars than at points north of that place," etc.? So far as we can see, this is but hypercritical, in that the word "aver" was used instead of the word "deny." Whether it was an averment or denial made no difference as to the question then under discussion, of intention to injure complainant by the use of simulative words and brands.

The next ground for a rehearing is that "there is no allegation in the bill or answer, nor is there any proof, that G. H. Gato was the junior member of the firm of the El Modelo Cigar Manufacturing Company, yet the court, in its opinion, asked, Why did they use the name of the junior member of their firm in combination with the words 'Key West,' 'La Estrella' and 'Bouquet?'" With all due respect to counsel, this seems simply frivolous. G. H. Gato was spoken of as the junior member of the firm because in the list of four partners his name appeared last. But whether he was a junior or other member did not affect the question involved in the use of his name; the impressive fact being that his name was used, instead of any other of the four, or of the firm name, to direct attention to the brand of cigars.

The third ground for rehearing is that there was mistake of the court in reference to the La Estrella brand of cigars, in saying that the defendants "admit the allegations of the bill to be true; that is to say, that they intended to deceive the public, profit by the deception, and to injure the complainant." The paragraph of the opinion in which this sentence occurs, taken altogether, is such as to render the sentence susceptible of reference to the admission of defendants under their demurrer to the bill. In this view, the statement is correct. But without regard to that, and even if the mistake is a substantive one, it cannot affect the conclusion of the court, for there is still the Bouquet brand not touched by this mistake, which furnishes sufficient ground for that conclusion.

A rehearing is denied.

CONNECTICUT SUPREME COURT OF ERRORS.

Laura L. FOOT

v.

Maria D. CARD.

(68 Conn. L.)

1. A wife can maintain an action against another woman for alienating her husband's affections.
2. The husband is not a necessary party to an action by his wife against another woman for alienating his affections.
3. The fact that a man and his wife continue to live together does not prevent her from maintaining an action against another woman for the alienation of his affections.

(September 12, 1889.)

RESERVATION in the Superior Court for New Haven County, for the opinion of this

NOTE.—See *Bennett v. Bennett*, ante, 553, 116 N. Y. 584.

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court, of an action by a wife to recover damages for the alienation from her of her husband's affections by defendant. *Judgment for plaintiff advised.*

The following allegations were made in the complaint:

1. Plaintiff was and is the wife of Enos Foot, of the Town of New Haven, and in 1872, and for many years previous thereto, she was living happily with her said husband at New Haven as his wife.

2. About the year 1872 the defendant came to New Haven, and by her acts, blandishments and seductions alienated the love and affection of the plaintiff's husband, and destroyed her happiness and the happiness of her home, and has continued so to do to the date hereof.

3. The defendant has at various times from 1872 to 1889, and at various places, committed adultery with the plaintiff's said husband, and by means thereof has obtained large sums of money.

band, and her own health and happiness, and has been neglected and abandoned by her said husband in consequence of the wrongs and injuries of the defendant as aforesaid, and said abandonment still continues.

Defendant pleaded in abatement that the husband should have been joined as a co-plaintiff. Plaintiff demurred to the plea, and the court held it insufficient.

Defendant then demurred to the complaint. Upon these pleadings the case was reserved for the advice of this court.

The further facts appear in the opinion.

Mr. Charles S. Hamilton, for defendant, in support of the demurrer:

Plaintiff does not come within the provisions of any of the existing statutes relating to suits which may be brought by married women alone.

Stat. 1888, §§ 984-987, 2794.

So that the case stands squarely upon the common-law rights of a married woman to sue in her own name alone, for a tort alleged to have been committed against her during coverture, and on these common-law grounds this suit cannot be maintained by the plaintiff alone.

Swift, Dig. 37; 2 Addison, Torts, pp. 1107, 1108; *Fowler v. Friebie*, 8 Conn. 320, 324; *Smith v. Bank of New England*, 45 Conn. 416-419; *Edwards v. Sheridan*, 24 Conn. 165, 169.

If further alterations are necessary in the laws relative to married women bringing suits, it is for the Legislature, and not for the courts, to make them.

Edwards v. Sheridan, *supra*.

If a party has an adverse interest, who ought to join as a plaintiff, he is nevertheless to be made a party.

Practice Act, p. 4, § 11.

The proper mode of taking advantage of a nonjoinder is by plea in abatement.

White v. Webb, 15 Conn. 302, 305; *Branch v. Doane*, 17 Conn. 402, 415, 416.

The law is that such an action as this cannot be maintained; and as no obvious reason appears in this case why the court should depart from the law as it stands, the complaint is insufficient.

Swift, Dig. p. 88; Addison, Torts, 48; *Lynch v. Knight*, 9 H. L. Cas. 577, 589-599; Cooley, Torts, 227; *Van Arnam v. Ayers*, 67 Barb. 544-546; *Logan v. Logan*, 77 Ind. 558, 564, 565.

A wife cannot maintain an action to recover back money which her husband has expended in committing adultery. Neither she alone nor jointly with her husband can maintain a suit for a loss sustained by the husband.

Fuller v. Naugatuck R. Co. 21 Conn. 557, 571; *Tompkins v. West*, 56 Conn. 478.

Mr. C. H. Fowler, for plaintiff, *contra*.

The foundation of this action is an injury to the marital rights of the plaintiff.

Norton v. Warner, 9 Conn. 172.

It is the duty of the court to protect the marital rights of the wife equally with the rights of the husband.

U. S. Const. art. 14; Conn. Const. art. 1, § 12.

By adultery with defendant the husband has renounced his marital right to the person of his
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and the defendant has abandoned the marriage contract, she would be discharged on habeas corpus—she cannot compel her to live with him.

Rea v. Mead, 1 Burr. 542; *Rea v. Lister*, 1 Strange, 478.

By this breach of the marriage contract the husband has abandoned his marital rights in, and his duties to, his wife, and conferred on her all the rights of a *feme sole*. This is abandonment.

See Stat. § 2794; *Ahorn v. Easterby*, 42 Conn. 546, 551; *Jaynes v. Jaynes*, 39 Hun, 40, 42; *Moore v. Stevenson*, 27 Conn. 14, 24.

The plaintiff's husband cannot be joined as plaintiff in this action.

Practice Act, § 11. See Stat. § 987.

A joint wrong is set up as a defense.

Nullus commodum capere potest de injuria sua propria.

The happiness of the marriage relation cannot be destroyed by man or woman with impunity and the law furnish no redress.

Lynch v. Knight, 9 H. L. Cas. 577, 588.

There is no rule of law preventing this action.

See *Burger v. Belsley*, 45 Ill. 72, 75; *Peru v. French*, 55 Ill. 817, 328; *Reeve, Dom. Rel.* 181, note 228.

In a case *sui generis* the court will supply the *causam omisissam*, to prevent a failure of justice.

Reeve, Dom. Rel. 260, *165; *Adams v. Adams*, 51 Conn. 185.

The court can promulge as law any provision which will meet the particular mischief.

Card v. Grinman, 5 Conn. 168.

The existence of the wife as a person, with personal rights separate and apart from the husband, has always been recognized in this State. "The ground of this action is the wife's personal injury."

Stat. § 987; *Fuller v. Naugatuck R. Co.* 21 Conn. 558, 578.

The good of society, public health and morals and private happiness demand that the right of the wife in the *consortium* of her husband shall be protected by the courts as against the wanton,—that both parties to the marriage contract shall be protected alike in their contract rights.

See *Westlake v. Westlake*, 34 Ohio St. 621; *Clark v. Harlan* (Ohio) 1 Cin. Super. Ct. Rep. 418; *Baker v. Baker*, 16 Abb. N. C. 298; *Warner v. Miller*, 17 Abb. N. C. 221; *Churchill v. Lewis*, 17 Abb. N. C. 227; *Jaynes v. Jaynes*, 39 Hun, 40; *Breiman v. Paasch*, 7 Abb. N. C. 249, 253.

Pardoe, J. delivered the opinion of the court:

The plaintiff alleges that in the year 1872 she was living happily with, and in the enjoyment of the conjugal affection and society of, her husband, Enos Foot; that in that year the defendant, by her arts, blandishments and persuasion, induced the said Enos Foot to begin, and from thence hitherto to continue, an adulterous intercourse with her; and that she thereby alienated from the plaintiff his conjugal affection, induced him to deny to her his conjugal society and persuaded him to abandon her. She asks damages for these injuries.

The defendant pleads in abatement that the

plaintiff and her husband are still living together, and that he should have been made co-plaintiff. The plaintiff, demurring to this plea, admits, for the purpose of the question before us, that she is still living with her husband.

For further defense, the defendant demurs to the complaint as follows.

"1. The matters and allegations contained in the plaintiff's complaint are insufficient in the law to constitute any cause of action against the defendant.

"2. Because it is alleged in said complaint and appears therefrom that the plaintiff is a married woman, the wife of one Enos Foot, and has been the wife of said Enos ever since the year 1872, and for many years previous thereto, and as such married woman she cannot, either alone or jointly with said Enos, her husband, maintain this action; nor can she as such married woman maintain any action for any of the supposed causes of action set forth in the complaint; nor can she as such married woman recover any damages against this defendant for any of the acts alleged to have been done in the complaint, or for the money so alleged to have been expended, as therein set forth; nor has she as such wife any claim or cause of action against the defendant for any of the alleged acts set forth in the complaint.

"3. The relation of husband and wife does not give the plaintiff any cause of action at law for any of the alleged acts set forth in the complaint.

"4. The plaintiff has no right, title or interest in the supposed causes of action set forth in the complaint.

"5. The alleged acts set forth in the complaint could only have been done by the voluntary assistance and co-operation of the said Enos Foot; and for his immoral conduct the defendant is not liable to the plaintiff.

"6. No legal cause of action could accrue from the facts set forth in the complaint, because it appears that the said Enos, the plaintiff's said husband, was equally guilty with the defendant in the doing of the alleged acts.

"7. The plaintiff alone cannot maintain this action, but the said Enos is a necessary party to this action, if any cause of action exists.

"8. It does not appear from said complaint that the supposed wrongs and injuries which the plaintiff is said to have suffered resulted from acts of the defendant, but it does appear that the same (if any there are) resulted directly from the voluntary, immoral and adulterous conduct of the said Enos Foot.

"9. No action for criminal conversation is at common law maintainable by a married woman against another woman, and it is not alleged and does not appear that this pretended action is founded upon any statute authorizing it; and there is in fact no statute authorizing it."

For the sole purpose of testing the sufficiency of the pleadings the defendant admits by her demurrer that from 1872 to this present she has alienated from the plaintiff the conjugal affection of her husband, induced him to withhold from her his conjugal society, and herself has since lived in continual adultery with him. She denies, however, that the law has any form or mode of redress for this wrong. The case is

reserved for the advice of this court as to the judgment to be rendered.

So far forth as the husband is concerned, from time immemorial the law has regarded his right to the conjugal affection and society of his wife as a valuable property, and has compelled the man who has injured it to make compensation. Whatever inequalities of right as to property may result from the marriage contract, husband and wife are equal in rights in one respect, namely, each owes to the other the fullest possible measure of conjugal affection and society; the husband to the wife all that the wife owes to him. Upon principle this right in the wife is equally valuable to her, as property, as is that of the husband to him.

Her right being the same as his in kind, degree and value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. But from time to time courts, not denying the right of the wife in this regard, not denying that it could be injured, have nevertheless declared that the law neither would nor could devise and enforce any form of action by which she might obtain damages.

In 3 Blackstone's Commentaries, 148, the reason for such denial is thus stated. "The inferior hath no kind of property in the company, care or assistance of the superior, as the superior is held to have in those of the inferior; therefore the inferior can suffer no loss or injury."

Inasmuch as by universal consent it is of the essence of every marriage contract that the parties thereto shall, in regard to this particular matter of conjugal society and affection, stand upon an equality, we are unable to find any support for the denial in this reason, and the right, the injury, and the consequent damage being admitted, then comes into operation another rule, namely, that the law will permit no one to obtain redress for wrong except by its instrumentality, and it will furnish a mode for obtaining adequate redress for every wrong. This rule, lying at the foundation of all law, is more potent than, and takes precedence of, the reason that the wife is in this regard without the pale of the law because of her inferiority.

In *Lynch v. Knight*, 9 H. L. Cas. 589, the wife, with whom the husband was joined for conformity, complained that the defendant, a man, had alienated from her the conjugal affection of her husband and deprived her of his conjugal society by falsely asserting to him that she had been guilty of unchaste conduct; and asked damages. The defendant had judgment for the reason that the court was of opinion that the statement by the defendant to the husband did not, as a fact, occasion the alienation of affection and consequent separation complained of. In dismissing the case for this reason the Lord Chancellor said: "Although this is a case of first impression, if it can be shown that there is presented to us a case of loss and injury from the act complained of, we are bound to say that this action lies. Nor can I allow that the loss of *consortium*, or conjugal society, can give a cause of action to the husband alone. . . . The loss of conjugal society is not a pecuniary loss, but I think it may be a

loss which the law may recognize to the wife as well as to the husband." *Lord Cranworth* said: "In the view I take of this case I do not feel called upon to express a decided opinion on this point. I believe your Lordships are not all agreed on it; and I will therefore only say that I am strongly inclined to think that the view taken by my late noble friend" (the Lord Chancellor) "was correct."

Wherever there is a valuable right and an injury to it, with consequent damage, the obligation is upon the law to devise and enforce such form and mode of redress as will make the most complete reparation. A technicality must not be permitted to work a denial of justice. The defendant has no possible interest in requiring the husband to be co-plaintiff, other than that she should have security for her costs in this suit, and be protected from a second judgment upon the same cause of action in his name. As she is in no danger of a second judgment, and can compel the plaintiff to give security for costs, it is simply an empty technicality which she here interposes. There are good reasons for the rule that the husband should join in a complaint for damages resulting from an injury to the person, property, reputation or feelings of the wife in every case other than that before us. Whenever in any of these she suffers, presumably he suffers; he has a direct pecuniary interest in the result; and the defendant is entitled to protection from a second judgment. But, in the case before us, it is the pith and marrow of the complaint that in alienating the husband's conjugal affection from the wife, in inducing him to deny his conjugal society to her, in persuading him to give his adulterous affections and society to the defendant, the latter has inflicted upon the plaintiff an injury by which from the nature of the case it is impossible for the husband to suffer injury; for which it is impossible for him to ask redress either for himself or for his wife. To ask in his name would be to plant the seeds of death in the cause at the outset, and the law does not compel those who have suffered wrong so to ask for redress as to insure denial.

In a case of this kind the wife can only ask for damages by and for herself; the law cannot make redress otherwise than to her solely, apart from all others, especially apart from her husband. For no theory of the law as to the merger of the rights of the wife in those of the husband could include her right to his conjugal affection and society. Although all other debts and rights to her might go to him, there yet remained this particular debt from him to her absolutely alone and beyond the reach of the law of merger. So long as she on her part kept the marriage contract no interest in this right can be taken from her; the husband cannot

acquire any interest in it; she cannot transfer any.

Of legal necessity, therefore, damages for injury to this right must be to her solely. If the law should permit the husband to share therein, it would be to the extent of such share to deny justice. This the law may not do. Moreover, even if it be so that upon the recovery of damages by the wife for this injury to her sole right, the law would give to the husband the custody thereof as her trustee, that would not be a sufficient answer to the action in its present form.

It is the contention of the defendant that the admission by the plaintiff that she and her husband are still living together is an admission that she now has and enjoys all that the marriage contract can, or intended to, secure to her; and that she has neither in law nor in fact suffered any injury. But this admission is to be considered in the light of that made by the defendant, namely, that she has, during the last fifteen years, lived in continual adulterous intercourse with the husband,—an intercourse procured by her influence over him. Upon this admission it becomes certain that whatever may have been the measure or quality of the remnant of conjugal affection and society permitted to the plaintiff by the defendant, as a matter of fact, and of law as well, the plaintiff has been deprived of the conjugal affection and society which the marriage contract entitled her to enjoy and required her husband to give; and that a valuable right, absolutely sole in her and incapable of division, has been injured.

It is not a prerequisite to the right of the plaintiff to maintain this suit in her own name that she should have been abandoned by her husband in the literal sense, nor that she should have actually separated herself from him by or without a decree of divorce. If she has suffered the wrong complained of her right to redress is absolute; it cannot be made to depend upon any of these conditions. As long as she keeps her marriage contract, so long she has the right to the conjugal society and affection of her husband. Possibly she may regain these. This possibility is her valuable right. The defendant may not demand that she shall sacrifice it for the future as the price of redress for injuries in the past. Upon the pleadings there is a valuable right in the wife solely, and an injury thereto for which damages must be given to her solely, notwithstanding the fact that she is living with her husband; therefore the law cannot refuse its assistance. The rules of law which the defendant invokes for her protection are not applicable to the case.

The Superior Court is advised that the complaint is sufficient and that the plea in abatement is insufficient.

In this opinion the other Judges concurred.

Open and notorious possession of land under a deed which appears by the records to be from a stranger to the title is sufficient to put an intending purchaser thereof from one holding the record title on inquiry; and the existence of such facts will therefore prevent his becoming a purchaser bona fide and without notice.

(December 19, 1889.)

A PPEAL by plaintiff from a judgment of the Superior Court for Mendocino County in favor of defendants in an action of ejectment.

Affirmed.

Commissioner's opinion.

The facts sufficiently appear in the opinion.

Messrs. Bond & Finback and J. M. Mannon, for appellant:

As Nickerson and Baker were operating the road for themselves and claiming the land in their own right, their possession gave no notice of any title to the land held by the Garcia and Point Arena Railroad Company.

Fair v. Stevenot, 29 Cal. 490.

Nickerson and Baker refused to answer any inquiry when made defendants as to the foreclosure suit, except to assert the title to a right of way. The corporation is estopped by the acts of its servants and agents, and is limited in its pretensions to the claim of Nickerson and Baker, made in the foreclosure.

Pickard v. Sears, 6 Ad. & El. 471; *Peter v. Russel*, 1 Eq. Cas. Abr. 322; *Savage v. Foster*, 9 Mod. 35; *Sharpe v. Foy*, L. R. 4 Ch. 35; *Berrioford v. Milward*, 2 Atk. 49.

The effect of mere possession is not notice of title, but only to put the purchaser upon inquiry.

Wade, Notice, § 274, p. 152; *Fair v. Stevenot*, 29 Cal. 486; *Thompson v. Pioche*, 44 Cal. 508; *Smith v. Yule*, 31 Cal. 180; *Lestrade v. Barth*, 19 Cal. 675; *Pico v. Gallardo*, 52 Cal. 208.

Possession is notice only of the legal or equitable interest in the land of the person in possession.

Smith v. Dall, 18 Cal. 510; *Losey v. Simpson*, 11 N. J. Eq. 246; *Wade*, Notice, § 278, p. 151.

The protection furnished by the Registry

Laws should not be taken away except upon clear proof of a want of good faith in the party claiming their protection, and a clear right in him who seeks to establish notice by means of possession.

Brown v. Volkening, 64 N. Y. 76, 3 N. Y. Week. Dig. 86; *Union College v. Wheeler*, 59 Barb. 585; *Bogue v. Williams*, 48 Ill. 371; *Butler v. Stevens*, 26 Me. 484; *LeNeve v. LeNeve*, 3 White & T. Lead. Cas. in Eq. 4th Am. ed. 185 and cases cited; *Merritt v. Northern R. Co.* 12 Barb. 605.

The only notice which the Bank of Mendocino had of the possession of the railroad company is such as might have been implied from the possession of Nickerson and Baker; and the extent of such notice is only the interest which they individually had and held in their own right, and not as agents or servants.

Smith v. Dall, 18 Cal. 510; *Losey v. Simpson*, 11 N. J. Eq. 246; *Wade*, Notice, § 278, p. 151.

If the apparent possession of land is consistent with the title appearing of record, it is not the duty of the purchaser to make any inquiry concerning the title beyond what the recording office shows.

Smith v. Yule, 31 Cal. 181.

Where one holds and is in possession of certain rights in a tract of land by a deed which is recorded, and has certain other rights by deed not recorded, his possession will not be notice of his title or claim beyond what he holds under his recorded deed.

Great Falls Co. v. Worster, 15 N. H. 412; *Plumer v. Robertson*, 6 Serg. & R. 179; *Palmer v. Bates*, 22 Minn. 532; *Woods v. Farmers*, 7 Watts, 382; *Coppman v. Baecastow*, 84 Pa. 863; *White v. Wakefield*, 7 Sim. 401; *Rice v. Rice*, 2 Drew. 73; *Muir v. Jolly*, 26 Beav. 143; *Staples v. Fenton*, 5 Hun, 172; *Bell v. Twilight*, 23 N. H. 500; *Crassen v. Swoeland*, 22 Ind. 427; *Newhall v. Pierce*, 5 Pick. 450; *Truesdale v. Ford*, 37 Ill. 210; *Emmons v. Murray*, 16 N. H. 393; *Ely v. Wilcox*, 20 Wis. 523; *Colby v. Kenniston*, 4 N. H. 282.

To imply notice, the possession must be open, visible and unambiguous, such as is not liable to be misunderstood or misconstrued.

Coleman v. Barklew, 27 N. J. L. 357; *Holmes v. Stout*, 10 N. J. Eq. 419; *Bell v. Twilight*, 23 N. H. 500.

Notice which puts the purchaser on inquiry merely is not sufficient.

Dey v. Dunham, 2 Johns. Ch. 182; *McMechan*

NOTE.—Adverse possession; late decisions.

Visible, notorious, distinct and absolute adverse possession of a lot for more than twenty years is a bar to an action to recover it. *Middlesex Co. v. Lane*, 149 Mass. 101; *Finn v. Wisconsin River Land Co.* 72 Wis. 546.

The breaking and sowing for fifteen years of thirty acres of an unfenced eighty-acre tract of land, without performing any further acts of possession except to harvest the crops, does not constitute an open, notorious and exclusive possession during that period. *Robbins v. Moore* (Ill.) 21 N. E. Rep. 934.

Possession, to be adverse, must be inconsistent & L. R. A.

with the title of the true owner who is out of possession, and of such a character as to operate as notice to him that the possession is held under a claim of right or color of title sufficient to establish an ouster of the owner. *McDonald v. Fox* (Nev.) 23 Pac. Rep. 234.

What constitutes adverse possession. See note to *Collett v. Vanderburgh County* (Ind.) 4 L. R. A. 321.

Sufficiency of occupation to constitute. *Erick v. Church* (Tenn.) 4 L. R. A. 641, note; *Illinois Cent. R. Co. v. Houghton* (Ill.) 1 L. R. A. 213, note.

Under tax title; color of title; period of limitation. *Gage v. Hampton* (Ill.) 3 L. R. A. 512, note.

Wallace v. Oraps, 3 Strob. L. 266; *Hart v. Farmers & M. Bank*, 83 Vt. 252; *Mills v. Smith*, 75 U. S. 8 Wall. 27 (19 L. ed. 346); *Rogers v. Wiley*, 14 Ill. 65.

Mr. J. A. Cooper for respondents.

Foots, C., delivered the following opinion:

This is an action in ejectment. A day or two before the trial of the cause the defendants offered, in writing, to allow the plaintiff to take judgment for all the land sued for, except that described in paragraph 6 of the answer. This seems to have been declined, and the result of the trial was that the plaintiff obtained judgment for all the land, except that set out in said paragraph, and for costs. From that judgment and an order denying a new trial the plaintiff has appealed.

Under the facts, as found by the court, the plaintiff was defeated in its effort to recover the land mentioned in the paragraph referred to because it appeared upon the trial that the title and right of possession to that portion of the land in dispute was in the Garcia & Point Arena Railroad Company, a corporation, not a party to the suit, and that the defendants only have possession of it as the agents of that company. The evidence on which the findings were based, that the title and right of possession so existed, was, in brief, that the railroad company had been for many years in the open and notorious possession of the land, and that a deed in fee simple had been executed to it about the time that it assumed such possession, in the year 1870, from one Campbell, from whom the plaintiff also claims to derive its title by mesne conveyance. It further appears that the deed to the railroad company had never been recorded, and was lost. The plaintiff claimed title by virtue of a sheriff's deed on a foreclosure sale, under a mortgage executed by one Abbott, to whom Campbell had made a deed of the land long after the deed to the railroad company was executed.

In the brief of its counsel, appellant claims that the evidence shows that the plaintiff was a bona fide purchaser, without notice of the unrecorded deed from Campbell to the railroad company, and that the findings to the contrary are wrong, and seems to rely mainly upon this point for a reversal of the judgment and order appealed from. It is said the evidence shows that the possession of the railroad company was initiated under a deed of a mere right of way from two persons, Whitmore and Stevens, to whom there was no deed of record from Campbell; that, having taken possession in such manner, and placed such a deed upon record, the railroad company had an apparent possession under that deed; and that such possession, long continued, open and notorious as it might be, did not and should not have put the plaintiff, when it came to take a deed to the land, upon inquiry as to the true nature of the possession of the railroad company. In other words, the plaintiff contends that the possession of the railroad company was consistent with the deed from Whitmore and Stevens, although, by the record, they were

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be heard to say the plaintiff should have inquired diligently as to whether the company held a deed from Campbell of prior date, although unrecorded, to that made to Abbott, from whom the plaintiff claims.

The real question in the controversy, then, is whether an open and notorious possession under the deed of one who apparently never had any connection with or conveyance from the real holder of the title is such as that an individual desiring to purchase the land from one who, by the record, seems to be the true owner, may safely do so without any further inquiry as to the true nature of the occupant's possession, and may conclude that he has possession of the true owner's land by no other conveyance than that of one who has no shadow of title to the premises. The position of the appellant is to the effect that no inquiry would be necessary; that the purchaser would have a right to assume that the possession was under one who had no title whatever, was that of a mere trespasser as to the true owner of the land, and that a purchaser might with safety take a deed from the owner.

The case of *Fair v. Stevenot*, 29 Cal. 490, cited by the appellant, does not sustain his contention. The rule as to the matter is very aptly stated in *Pell v. McElroy*, 36 Cal. 277, where the appellate court quotes affirmingly from the opinion in the case of *Williamson v. Brown*, 15 N. Y. 354, to this effect: "The true doctrine on this subject is that, when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a bona fide purchaser."

The fact of open and notorious possession for so many years, as in this case, would certainly be sufficient to put a purchaser upon inquiry as to the existence of a deed. 3 Washb. Real Prop. 5th ed. 337.

The disclosure by the record of a deed which was made by a stranger to the title would not clear up the doubt to a prudent man, desiring to purchase. It would hardly be presumed that a person would have had open and notorious possession of another man's land for years without any disturbance under a deed which amounted to nothing. That kind of possession, under such a deed, is equivalent to an open and notorious possession, without any deed upon record, and inquiry should be made as to whether a deed from the owner existed. Where there is such possession, held under no record title, it is clear from the authorities that the intending purchaser is at least put upon inquiry as to whether the party in possession has a deed from the rightful owner or not. *Hellman v. Levy*, 55 Cal. 118, and cases cited; *Patten v. Moore*, 82 N. H. 384.

It was an easy matter to inquire of those in possession, without any record title from Campbell, under what claim they were in open and notorious possession of his land; and the mere fact that the parties in possession had a deed upon record which did not appear to be from

anyone connected with the title did not absolve the plaintiff from this inquiry. The possession of the railroad company, by its agents, as it seems to us, was consistent with its unrecorded deed from Campbell; and the plaintiff should have inquired of them about the actual claim of title by the railroad from the true owner. The plaintiff had no right to believe that the railroad company was maintaining open, notorious and long-continued possession of land under a claim of title exclusively derived from one who, by the record, had no title or claim to the land held by the corporation. Fairly considered, with reference to the different defenses set up in the answer, we do not think that the defendants' admissions that

they were the successors "in interest" of the railroad company should be held to preclude the court from finding from the evidence, as presented, that the title was still in the railroad company. Neither do we perceive that the court committed prejudicial error in its rulings as to the exclusion of evidence, of which the plaintiff complains.

The other matters adverted to do not require special attention; and we advise that the judgment and order be affirmed.

We concur: Belcher, *CC.*; Hayne, *C.*

Per Curiam:

For the reasons given in the foregoing opinion, the judgment and order are affirmed.

ILLINOIS SUPREME COURT.

GERMAN INSURANCE CO., *Appt.*,

Wilhelmina GUECK *et al.*

(....III....)

1. An insurance policy may be reformed by correcting a mutual mistake in the description of the premises.

NOTE.—Mistake defined.

The essential element of mistake is a mental condition or conception, or conviction of the understanding, either in a passive or active state; when passive, it may consist of unconsciousness, ignorance or forgetfulness; and when active it must be a belief. The first condition must always concern a fact material to the transaction, while in the second the belief may be that a matter or thing exists at the present time which really does not exist; or that it existed at some past time when it did not really exist. All particular errors which fall under either condition are mistakes of fact, which are ground of equitable relief. This mistake may arise from ignorance (*Briggs v. Vanderbilt*, 19 Barb. 222); in forgetfulness of a fact past (*Quirkin v. Cranston*, 7 Johns. 442); of a fact present (*Huthmacher v. Harris*, 38 Pa. 491); in unconsciousness (*McDaniels v. Bank of Rutland*, 20 Vt. 238; *Elwell v. Chamberlin*, 4 Bosw. 320); in belief in a thing which does not exist (*Rheel v. Hicks*, 25 N. Y. 289; *Ketchum v. Bank of Commerce*, 19 N. Y. 602; *Belknap v. Sealey*, 14 N. Y. 143; *Martin v. McCormick*, 8 N. Y. 535; *Kip v. Monroe*, 29 Barb. 579; *Gardner v. Troy*, 26 Barb. 423; *Wheaton v. Ol's*, 20 Wend. 174); of things which have not existed. *Martin v. McCormick*, *supra*.

The theory that a mistake in respect of matters as to which the party had "means of knowledge" does not avoid a contract, has been overruled. *Allen v. Mayor*, 4 E. D. Smith, 404; *Kelly v. Solari*, 9 Mees. & W. 54; *Dalls v. Lloyd*, 12 Q. B. 531; *Bell v. Gardiner*, 4 Man. & G. 11; *Townsend v. Crowdy*, 8 C. B. N. 8. 477.

Mistake in written instrument, remedies in case of.

When by accident or mutual mistake a written contract does not express the contract of the parties, the remedy is by a reformation or rectification of the writing. When, through mistake concerning the subject matter, it does not express their understanding, the remedy is by rescission or cancellation. See *Page v. Higgins* (Mass.) 5 L. R. A. 132 and *nota*.

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2. A policy issued by mistake to a man who had no title to the premises insured, which were owned by his wife and her children, will be reformed and enforced in their favor where the agent who issued it, and who was wholly relied upon by the insured to have the papers in proper form, knew the facts as to the title.

3. Refusal to pay a policy solely on the

Mutual mistake in equity is a mistake common to all the parties to a written contract or instrument, and usually a mistake concerning the contents or the legal effect of the contract or instrument. *Ibid.*

Where each party misunderstood the understanding of the other, it is a common, but lot a mutual, mistake as to the subject matter. *Ibid.*

Where there is an honest misunderstanding between the parties as to the subject matter, and one party drew the instrument according to his understanding, and the other party executed it without a knowledge of its contents, it cannot be reformed against the consent of the drawer; and if it be declared void, the other party cannot retain the consideration, and the drawer must account for the gain made during his possession of the subject matter. *Ibid.*

When an instrument is drawn and executed which professes or is intended to carry into execution an agreement, whether by writing or by parol, previously entered into, but which by mistake of the draftsman, either in fact or in law, does not fulfill, or which violates, the manifest intention of the parties to the agreement, equity will correct the mistake so as to produce a conformity of the instrument to the agreement. *Cooke v. Nathan*, 16 Barb. 346; *Curtis v. Leavitt*, 15 N. Y. 164; *Hunt v. Rhodes*, 28 U. S. 1 Pet. 1 (7 L. ed. 27); *Maher v. Hibernia L. Ins. Co.* 67 N. Y. 291; *Many v. Beekman Iron Co.* 9 Paige, 188; *Bond v. Dorsey*, 8 Cent. Rep. 512, 65 Md. 810.

Mistake must be material and free from culpable negligence.

The mistake must be material and free from culpable negligence on the part of the party seeking the equitable relief, to warrant the exercise of equitable jurisdiction. *Penny v. Martin*, 4 Johns. Ch. 506; *Segur v. Tingley*, 11 Conn. 184; *Weaver v. Carter*, 10 Leigh, 37; *Trigg v. Read*, 5 Humph. 523; *M'Ferran v. Taylor*, 7 U. S. 8 Cranch, 270 (2 L. ed. 486); *Henderson v. Dickey*, 35 Mo. 120; *Paulson v. Van Iderstine*, 28 N. J. Eq. 306; *Dambmann v. Schulzing*, 75 N. Y. 63; *Stethelmer v. Killip*, Id. 232.

APPPEAL by defendant from a judgment of the Appellate Court, Third District, affirming a judgment of the Circuit Court for Calhoun County in favor of plaintiffs in a suit to reform a certain insurance policy and to recover the amount due thereon as reformed. *Affirmed.*

The facts sufficiently appear in the opinion. *Messrs. Wilderman & Hamill* for appellant.

Messrs. Pinero & Selby, for appellees:

A policy of insurance may be reformed where there has been an innocent omission or insertion of a material stipulation contrary to the intention of the parties.

Palmer v. Hartford Ins. Co. 8 Legal Ad. Nov. 15, 1887, p. 423; *Stons v. Hale*, 17 Ala. 557, 52 Am. Dec. 187; *Parsons v. Hosmer*, 2 Root, 1, 1 Am. Dec. 58; *Harris v. Columbiana Co. Mut. Ins. Co.* 18 Ohio, 116, 51 Am. Dec. 449; *Miles v. Stevens*, 45 Am. Dec. 684, and cases quoted; *Evants v. Strode*, 11 Ohio, 480, 38 Am. Dec. 744; *Norris v. North America Ins. Co.* 2 Am. Dec. 865; *Phoenix F. Ins. Co. v. Gurnee*, 1 Paige, 278, 19 Am. Dec. 432; 1 Story, Eq. Jur. 18th ed. § 162, p. 173.

But equity will not relieve from the consequences of one's own negligence. *Miller v. Powers*, 4 L. R. A. 453, 119 Ind. 79.

When fraud entitles to relief.

The fraud in such cases which will entitle a party to relief is fraud at the time of execution of the instrument, and not in a subsequent and distinct transaction. *Chesterman v. Gardner*, 5 Johns. Ch. 29.

It is one of the most familiar duties of a court of chancery to relieve from mistake, especially where it has been produced by the misrepresentations of the adverse party. *Rhode Island v. Massachusetts*, 40 U. S. 15 Pet. 238 (10 L. ed. 721).

Power to reform written contracts for fraud or mistake belongs to courts of equity, and cannot be exercised by common-law courts. Such power should be exercised only in cases where the proof is entirely satisfactory. *Ivinson v. Hutton*, 98 U. S. 79 (25 L. ed. 66).

Equity has jurisdiction of fraud, misrepresentation and concealment; and it does not depend on discovery. *Jones v. Bolles*, 78 U. S. 9 Wall. 364 (19 L. ed. 734).

If there be any one ground upon which a court of equity affords relief with more unvarying uniformity than on any other, it is on allegation of fraud, whether proven or admitted. *Atkins v. Dick*, 39 U. S. 14 Pet. 114 (10 L. ed. 878).

Affirmative relief will not be granted in equity upon the ground of fraud, unless it is alleged in the bill. *Voorhees v. Bonesteel*, 33 U. S. 16 Wall. 16 (21 L. ed. 268).

Mistake of fact.

A mistake as to a matter of fact, to warrant relief in equity, must be material, and the fact must have controlled the conduct of the party, and the party must have availed himself of accessible knowledge. *Grymes v. Sanders*, 98 U. S. 55 (23 L. ed. 793).

If a mistake exist, not in the instrument, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a court of equity will, in general, grant relief. 6 L. R. A.

Co. v. Myer, 1886 Ill. 271; *Moliere v. Pennsylvania F. Ins. Co.* 5 Rawle, 846; 1 Story, Eq. Jur. note B, 18th ed. § 111, p. 111.

The rule that no person shall be permitted to deliver himself from contract obligations by saying that he did not read what he signed or accepted, is subject to the limitation that it is not to be applied in behalf of any person who by word or act has induced the omission to read.

Palmer v. Hartford Ins. Co. supra.

The Company's refusal to pay obviates proof of loss.

Williamsburg City F. Ins. Co. v. Cary, 83 Ill. 457; *Pennell v. Lamar Ins. Co.* 73 Ill. 303; *Peoria M. & F. Ins. Co. v. Whitehill*, 25 Ill. 470; *Etna Ins. Co. v. Maguire*, 51 Ill. 842.

The adjuster's refusing to pay because the property was not in the name of the owner in the policy, would estop the Company from demanding proofs.

Grange Mill Co. v. Western Assur. Co. 7 West. Rep. 423, 118 Ill. 401.

An application filled out by the agent of the Company, not read to assured, nor authorized by assured, binds the Company, but not the assured.

Equity will relieve in case of a mistake of fact. *Hunt v. Rhodes*, 26 U. S. 1 Pet. 1 (7 L. ed. 27); *Cathcart v. Robinson*, 80 U. S. 5 Pet. 264 (8 L. ed. 120).

Courts of equity will rescind contracts on account of their having been induced by a mutual mistake as to material facts. *Belknap v. Sealey*, 3 Duer, 570.

Courts of equity have so long rescinded contracts on account of their having been induced by a mutual mistake as to material facts that it cannot be contended that such relief cannot be properly granted. *Ibid.*

Mistake of law.

A mistake of law exists only when it arises from (1) a misapprehension of the law by all parties, supposing that they knew and understood it; (2) a misapprehension of the law by one party, of which the other was aware at the time of contracting, but which they did not rectify. Many v. Beekman Iron Co. 9 Paige, 188; *Hall v. Reed*, 2 Barb. Ch. 500; *Pitchee v. Turin Plank Road Co.* 10 Barb. 436; *Wake v. Harrop*, 6 Hurlst. & N. 788; *Broughton v. Hutt*, 3 De G. & J. 501; *Evants v. Strode*, 11 Ohio, 480; *Wheeler v. Smith*, 50 U. S. 9 How. 55 (13 L. ed. 44); *Chaplin v. Laytin*, 18 Wend. 407, 422; 3 Pom. Eq. Jur. 301.

The general rule, both at law and equity, is "*ignorantia juris haud excusat*," as the courts of this State have repeatedly declared. The rule, however, has not been considered universal and inflexible. *Frelchnecht v. Meyer*, 30 N. J. Eq. 558; *Garwood v. Eldridge*, 3 N. J. Eq. 145; *Bentley v. Whittemore*, 18 N. J. Eq. 306; *Hampton v. Nicholson*, 23 N. J. Eq. 423; *Hayes v. Stiger*, 29 N. J. Eq. 193.

Assuming that complainant was aware of the omission to execute the deed, and that grantee's name was not to be appended, except by her special guardian, the case would in that respect be one of mistake of law. *Temple v. Hawley*, 1 Sandf. Ch. 174.

If both were ignorant of the Act of the Legislature, there was a mutual mistake of law against which equity will relieve. *Sparks v. Pittman*, 51 Miss. 530; *Green v. Morris & E. R. Co.* 12 N. J. Eq. 165.

First Ins. Co. v. McNeel, 34 Ill. 439; *Foster v. Ethna F. Ins. Co.* 16 Am. Dec. 466; *Campbell v. Merchants & F. Mut. F. Ins. Co.* 87 N. H. 85, 72 Am. Dec. 830; *American Ins. Co. v. Luttrell*, 89 Ill. 816. See also *Rockford Ins. Co. v. Nelson*, 76 Ill. 548.

Craig, J., delivered the opinion of the court:

This was a bill in equity, brought to reform a policy of insurance issued by the German Insurance Company to one Fred. Gueck, on the ground that it purports to insure his interest in certain property, when it should have insured the interest of the complainants, whose agent they claim Fred. Gueck was, and on the further ground that a mistake was made in the description of the land on which the building was erected. The bill also seeks to enforce payment of the policy after it shall be reformed. The relief sought is resisted mainly on two grounds: *first*, there is no case made by the pleading or evidence entitling complainants to a decree to reform the policy; *second*, if such a case were made, the evidence fails to show a case entitling the complainants to a decree enforcing payment. On the hearing in the circuit court, on the pleadings and

affirmed in the appellate court.

Upon looking into the evidence it appears that Christian Fiedler died intestate on the 23d day of November, 1869; that he left a widow, Wilhelmina, and Henry, William, Christian, Johanna and Charles Fiedler, and Louisa Simon and Rachel Boede, as his heirs-at-law. Fiedler died seized of the N. W. $\frac{1}{4}$ of sec. 20, T. 11 S., R. 2 W., in Calhoun County. The widow was appointed administratrix of his estate. She testified that the house on the place, when her husband died, was "not fit to live in," "and the county court gave her permission to build a new one, which she did, at a cost of \$2,200."

The testimony shows that the widow employed Morris Fisher to build the house. He commenced the work in the fall of 1870, and finished the job in the spring of 1871. In the mean time, on January 6, 1871, the widow was married to Fred. Gueck. Fisher was agent of the Insurance Company, and while building the house he had conversation with Gueck and his wife in regard to insuring the property. On the 14th day of October, 1872, Gueck called on Fisher, and informed him that his wife had concluded to insure the house for \$1,400. Fisher filled out an application. It

Assuming that complainant was aware of the omission to execute the deed, and that grantee's name was not to be appended, except by her special guardian, the case would in that respect be one of mistake of law. *Temple v. Hawley and Champlin v. Laytin*, *supra*.

Courts do not relieve from acts done under a false knowledge of the facts though under a mistake of the law. If relief can be granted in any case it is for mistake of the law, founded on the fact that the adverse party had parted with nothing of any real value. *Garnar v. Bird*, 57 Barb. 238.

Courts of chancery will not relieve from mere mistakes of law. *Bank of U. S. v. Daniel*, 37 U. S. 12 Pet. 32 (9 L. ed. 989); *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85 (25 L. ed. 52).

Ignorance of the law, with a full knowledge of the facts, will not be a ground for equitable relief. *Storrs v. Barker*, 6 Johns. Ch. 166.

This rule is applied to a case where a partnership settlement was made on the basis that one partner was liable to pay certain obligations incurred on partnership account. *Bispham v. Price*, 56 U. S. 15 How. 162 (14 L. ed. 644).

In case of a mutual mistake of law, if the nature of the transaction is such that the parties cannot be restored substantially to their rights as they existed previous to the agreement, chancery cannot relieve against the consequences of the mistake. *Crosier v. Acer*, 7 Paige, 137.

Courts will sometimes grant relief against a mistake of law, where it can be done without impairing the rights of those who were ignorant of the existence of any such mistake when their rights accrued. *Hall v. Reed*, 3 Barb. Ch. 500.

So where a contract was made under a mistake of law, relying on the statements of the other party, it may be reformed. *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85 (25 L. ed. 52).

A mistake arising from ignorance of law is not a ground for reforming a deed founded on such mistake, except in some few cases of peculiar character. *Hunt v. Rhodes*, 26 U. S. 1 Pet. 1 (7 L. ed. 27); *Cathcart v. Robinson*, 30 U. S. 5 Pet. 264 (8 L. ed. 120).

The law of a foreign country, or of another

State, is always regarded as a fact, subject to mistake through error or ignorance (*Haven v. Foster*, 9 Pick. 111; *Bank of Chillicothe v. Dodge*, 8 Barb. 233; *Merchants Bank v. Spalding*, 12 Barb. 303; *Patterson v. Bloomer*, 85 Conn. 87); hence, where an act is done intentionally and with knowledge, the doing of the act cannot be treated as a mistake, as by adding to or omitting from the written agreement; the elements of knowledge and intention contradict the essential conception of mistake. *Betts v. Gunn*, 31 Ala. 219.

Misconception of legal rights.

A contract entered into under a mutual misconception of legal rights, amounting to a mistake of law in the contracting parties, where the object of it cannot be accomplished, may be set aside or rescinded as a contract founded in mistake of matters of fact. *Champlin v. Laytin*, 1 Edw. Ch. 467, affirmed, 6 Paige, 189, 18 Wend. 407; *Griffith v. Townley*, 69 Mo. 13; *Story*, Eq. § 184.

Where the parties stand in unequal position, and one party, reposing confidence in the other, surrenders rights without a proper understanding of them, the compromise will be set aside, even though there was no fraudulent intent on the part of the other party. *Wheeler v. Smith*, 50 U. S. 9 How. 55 (18 L. ed. 44).

Mistake as to legal effect of instrument.

A reformation is permitted where there has been a failure to perform it, by the misunderstanding, on the part of the plaintiff, of the effect of the instrument by which performance was attempted, although the mistake be not mutual. *Welles v. Yates*, 44 N. Y. 530.

The court would be justified in the exercise of its equitable powers, if it was necessary to do so, for the purpose of preventing injustice, to direct that the deed be modified so as to preserve the lien of the mortgage. *Judd v. Seekins*, 62 N. Y. 271.

Where the parties, on deliberation and advice, reject one species of security and agree to select another, under misapprehension as to the nature of the security selected, equity will not relieve in

About five years afterwards another policy was issued, in renewal of the first, by the Company. On or about October 13, 1882, a third policy was issued by the Company, in the same amount, for five years, and while it (policy No. 209,025) was in full force and effect, to wit, on or about October 15, 1886, the house burnt down and became a total loss. All the applications are in the handwriting of Morris Fisher, the agent of the Company, and are signed "Frederich Gueck" and "Fred. Gueck," respectively. Gueck never knew what the applications contained. He and Mrs. Gueck left all this business to Mr. Fisher, relying on him to have all the papers in proper form. The third, dated October 13, 1882, on which the policy No. 209,025 was issued, is the foundation of this suit. The land is incorrectly described as being in section 5, instead of section 20, as before, township and range being right. The following question as to title appears: "(5) Title. Have you fee-simple title? Good? If not, what kind of title have you?"—to which there is no answer.

The policies were all issued to Fred. Gueck, although he had no interest in the property named, and after the loss the Company refused to pay, on the ground that he had no interest in the property, predicated its refusal upon

errorship thereof, both at law and in equity, this Company shall not be liable to pay to the assured, by virtue of this policy, any sum exceeding the actual cash value of the interest of the assured at the time of the loss."

If the contracting parties to a policy of insurance make a mistake in the description of the premises, or in the names of the insured, a court of equity, upon proper proof, has jurisdiction to reform the contract and correct the mistake, as held in *Keith v. Globe Ins. Co.* 53 Ill. 518, and *Home Ins. Co. v. Myer*, 93 Ill. 271.

Here the land upon which the house was located was described as being in section 5, instead of section 20. The parties never owned, or pretended to own, land in section 5, and had no intention of insuring a house in that section. The intention of Fisher, the agent of the Insurance Company, and the intention of Gueck, who was acting for the complainants, was to insure the house which Fisher had erected on section 20, for Mrs. Wilhelmina Gueck, and the evidence leaves no room for doubt that by mutual mistake section 5 was written in the policy, when the intention was to write section 20 therein.

As respects the other question, that the policy was issued to Fred. Gueck, when the intention

consequence of a subsequent unforeseen event, nor will it decree that that be done which the parties supposed would have been effected by the instrument they finally agreed on. *Hunt v. Rhodes*, 28 U. S. 1 Pet. 1 (7 L. ed. 27); *Cathcart v. Robinson*, 30 U. S. 5 Pet. 264 (3 L. ed. 120).

Remedy by injunction.

Injunction lies to restrain defendant from enforcing forfeiture *pendente lite* upon plaintiff's depositing, under the order of the court, the sums growing due under a contract sought to be reformed on the ground of important errors inserted by mistake or fraud to the disadvantage of plaintiff, and which contained a severe forfeiture in case of nonperformance. *Bryce v. Lorillard Ins. Co.* 55 N. Y. 240; *Welles v. Yates*, 44 N. Y. 525; *Gillespie v. Moon*, 2 Johns. Ch. 585.

Where township bonds are signed by commissioners duly authorized, but the seals are omitted by mistake, equity at suit of a purchaser will decree that the bonds be held as valid as if actually sealed before being issued, and will restrain the setting up of the want of seals in the action at law. *Bernards Twp. v. Stebbins*, 109 U. S. 341 (27 L. ed. 366).

Reformation of insurance policy.

To authorize a court of equity to reform a contract of insurance the mistake must be one made by both parties, or it must be the mistake of one party in connection with the fraud of the other, in taking advantage of the mistake. See *Coles v. Bowne*, 10 Paige, 523.

A bill may be maintained to reform a written policy, after loss, upon the ground that it does not express the intent of the contracting parties. *Snell v. Atlantic F. & M. Ins. Co.* 98 U. S. 85 (25 L. ed. 52).

But courts will not interpose in behalf of persons not parties to the instrument or claiming any privity. *East v. Pedin*, 6 West. Rep. 294, 108 Ind. 22.

Parol evidence admissible.

In suits to reform a written instrument on the ground of a mutual mistake, parol evidence is allowed. *L. R. A.*

ways admissible to establish the fact of the mistake, and in what it consisted, and to show how the writing should be corrected in order to conform to the agreement which the parties actually made. See *Peterson v. Grover*, 20 Me. 363; *Bellows v. Stone*, 14 N. H. 175; *Langdon v. Keith*, 9 Vt. 290; *Firmstone v. De Camp*, 17 N. J. Eq. 817; *Walton v. Letson*, 15 N. J. Eq. 128; *Blair v. McDonnell*, 5 N. J. Eq. 337; *Gump's App.* 65 Pa. 478; *Chew v. Gillespie*, 56 Pa. 308; *Lauchner v. Rex*, 20 Pa. 464; *Gower v. Sterner*, 2 Whart. 75; *Baynard v. Norris*, 5 Gill, 468; *Newcomer v. Kline*, 11 Gill & J. 457; *Irick v. Fulton*, 3 Gratt. 136; *Keyton v. Brawford*, 5 Leigh, 39; *Larkins v. Biddle*, 21 Ala. 253; *Hale v. Stone*, 14 Ala. 808; *Lauderdale v. Hallock*, 7 Smedes & M. 622; *Wursburger v. Merio*, 20 La. Ann. 415; *Mattingly v. Speak*, 4 Bush, 816; *Graves v. Mattingly*, 6 Bush, 861; *McCann v. Letcher*, 8 B. Mon. 320; *McCloskey v. McCormick*, 44 Ill. 336; *Mills v. Lockwood*, 42 Ill. 111; *Cleary v. Babcock*, 41 Ill. 271; *Shively v. Welch*, 3 Or. 238.

Parol evidence of mistake is admissible in support of a suit to reform a mistake in an instrument. *Bond v. Dorsey*, 3 Cent. Rep. 512, 65 Md. 810.

It is admissible to show part of an actual agreement of parties, omitted by mistake from the written contract. *Hyndman v. Hogsett*, 3 Cent. Rep. 533, 111 Pa. 643.

The evidence must be clear and convincing that the instrument did not set forth the intent of the parties, and the failure to make it express the intent arose from mistake or oversight in drafting it. *Fritzer v. Robinson*, 70 Iowa, 500.

Where the application for insurance was signed before being filled out by the agent, the fact that the answers made by the insured at her house were incorrectly written in by the agent, at his office, may be established by parol evidence. The rule would be otherwise had she signed after the answers were written in. *Brown v. Metropolitan L. Ins. Co.* 8 West. Rep. 775, 65 Mich. 303.

Fire insurance: waiver of proofs of loss. See *Kenton Ins. Co. v. Wigginton (Ky.)*, 7 L. R. A. —.

was to issue it to and in the name of the complainants, we think this finding in the decree may be regarded as sustained by the evidence. Gueck had no interest in the property insured, and never claimed any interest therein; and what reason could he have for taking a policy in his own name when he had no insurable interest in the property? Moreover, he testified that he did the business for the complainants; that he never read the policies, but intrusted the whole matter to Fisher, the agent, to make out the policies correctly. The widow testified that she could not read English, and could read but little German; that her husband brought the policies home, and put them in a drawer. She supposed they were all right, and never read them. Fisher says he understood from the conversation with Gueck that he owned the property; but, in view of the other facts disclosed by the record, he is evidently mistaken. He built the house for the widow and heirs, and at the time knew they owned the property. Moreover, he was assessor of the county, and assessed the land upon which the house was built as property belonging to the estate of Fiedler. From these facts he could not be mistaken in regard to the owner of the property. It may be conceded that a court of equity might not interpose to correct a mistake, unless the mistake was a mutual

one, emanating from both the contracting parties; but, upon giving due weight to all the evidence, we are induced to hold that the court was justified in finding that the policy, by mistake of the parties, misdescribed the premises upon which the house insured was erected, and in finding that the policy was issued in the name of Gueck by mistake.

It is also claimed that the decree was erroneous on the ground that the insured failed to make proof of loss. There was no question here in regard to the value of the property destroyed, nor in reference to the loss being an honest one. Indeed, the only ground upon which the Company predicated its refusal to pay the loss was that Gueck, in whose name the policy issued, had no interest in the property insured. This case falls clearly within the ruling in *Grange Mill Co. v. Western Assur. Co.* 7 West. Rep. 423, 118 Ill. 396, where it was held that proof of loss under a policy of insurance is waived when the company places its refusal to pay solely on the ground that the assured had no title or insurable interest in the property destroyed.

The judgment of the Appellate Court will be affirmed.

Motion for rehearing denied January, 1890.

MASSACHUSETTS SUPREME JUDICIAL COURT.

Lillie A. CHADWICK

v.

Alexander H. COVELL.

(....Mass....)

1. A person has no right to the exclusive use of recipes made by himself for the preparation of medicines, further than to prevent another from obtaining or using them through breach of trust or of contract. He cannot prevent their use by one who comes honestly to a knowledge of them, and the latter may signify to the public that the medicines which he makes are made according to such recipes.

2. One who obtains a conveyance by deed of the recipes for medicines from the administrator of their deceased maker has a right to use them, notwithstanding they had been previously conveyed to a third person, and his deed excepts from its operation rights previously granted.

3. The grant of the trade-name and trade-marks pertaining to medicines made according to certain secret recipes, to one whose right to use the recipes is not exclusive, and who is neither successor to the business of the maker of such recipes nor owner of his manufactory or plant, will confer no right upon the grantee to enjoin the use of such name and marks by other persons having a right to use the recipes.

(February 27, 1890.)

A PPEAL by plaintiff from a decree of the Superior Court for Bristol County (Bishop, J.), dismissing the bill in a suit brought to enjoin the manufacture by defendant of medicines according to certain alleged secret recipes, and the use by him of certain trade-names and trade-marks. *Affirmed.*

The facts sufficiently appear in the opinion.

Mr. E. L. Barney, for appellant:

Plaintiff has a right to such formulas and trade-marks as are set out in her petition, and can recover damages for their use by defendant.

Pub. Stat. chap. 76, §§ 1, 2, 7; *Rogers v. Taintor*, 97 Mass. 297; *Gilman v. Hunnewell*, 123 Mass. 189.

Messrs. E. Avery and T. F. Desmond, for appellee:

Trade-marks may be divided into two classes: (1) those which are strictly personal; (2) those which are used in connection with the business of the originator. The latter "is property which will be protected by the courts, and which may be sold and transferred."

Emerson v. Badger, 101 Mass. 83; *Gilman v. Hunnewell*, 123 Mass. 189.

The right to use such a trade-mark is property which passes to an assignee, as an incident, under a transfer of the business and good-will.

Warren v. Warren Thread Co. 184 Mass. 247.

A secret invented and used by a person, and not patented, is not protected by the courts against the public or any person who uses it,

NOTE.—Trade-mark.

See *Rumford Chemical Works v. Muth*, 1 L. R. A. 44, note, 35 Fed. Rep. 324; *Coats v. Merrick Thread* 6 L. R. A.

Co. 1 L. R. A. 616, 35 Fed. Rep. 324; *Cigar-Makers Prot. Union v. Conhaim* (Minn.) 3 L. R. A. 125, note; *Laughman v. Piper* (Pa.) 5 L. R. A. 590, note; *United States v. Kosh* (Mo.) 5 L. R. A. 130, note.

Peabody v. Norfolk, 98 Mass. 458.

The defendant, if he obtained the secret through no breach of trust or contract, had and has as great a right to use it as the plaintiff.

Ibid.

As distinct property, separate from the article created by the original producer or manufacturer, "a trade-mark may not be the subject of sale."

Kidd v. Johnson, 100 U. S. 619 (25 L. ed. 770).

As part of the business of Dr. Spencer, carried on by him in the manufacture and sale of said preparations, his administrators had a right to sell the formulas, trade-marks and all other designs used by him in placing the articles upon the market for sale.

McLean v. Fleming, 96 U. S. 245 (24 L. ed. 828).

A party having no right in the business of the manufacture and sale of articles protected by trade-marks, "has no right in any trade-mark used in it."

Hallett v. Cumston, 110 Mass. 29.

The sale to the plaintiff by the administrator *de bonis non*, of dies, conferred no right upon her to use them upon articles compounded by her.

Stevens v. Gladding, 58 U. S. 17 How. 447 (15 L. ed. 155).

The evidence would not support a decree for the plaintiff, because:

1. The plaintiff had no exclusive right to compound the preparations according to the secrets or formulas of Dr. Spencer.

2. The secrets were not patented, and, having been used by Dr. Spencer for more than two years for the purposes of trade, were public property and could be used by anyone who honestly obtained them.

Peabody v. Norfolk, *supra*; U. S. Stat. §§ 4886, 4890; *Andrews v. Hovey*, 123 U. S. 267 (31 L. ed. 160); *Smith & G. Mfg. Co. v. Sprague*, 123 U. S. 249 (31 L. ed. 141); *Theherath v. Rubber & C. H. T. Co.* 15 Fed. Rep. 246.

Holmes, J., delivered the opinion of the court:

This is a suit brought for an injunction and damages in respect of the defendant's manufacture and sale of certain medicines under the name of "Dr. Spencer's Queen of Pain," and "Spinal Paste or Salt Rheum Cure," and his use of alleged trade-marks for the same. Issues were framed for the jury on the question whether the plaintiff was the owner of the formulas for the medicines, and of the trade-marks, used by Dr. Spencer; and the case came on for trial upon them. As the whole case was pending in the superior court, it is hardly to be supposed that it was understood that every question except those raised by the issues in their narrowest sense was left for trial at another time. It seems plain, at the least, that the rulings of the judge were made on the footing that the question before him was whether the plaintiff had such an exclusive ownership as she alleged in her bill, and as entitled her to an injunction, and that the judge was right in that understanding. If the issues were construed more nar-

6 L. R. A.

rows: Dr. Spencer, of New Bedford, made and sold these medicines according to certain secret formulas of his own, under the names mentioned. The plaintiff became intimate with him, and after his death, Mrs. Spencer, his administratrix, said to the plaintiff that it was the Doctor's wish and her wish that the plaintiff should have the formulas of the Queen of Pain and the Spinal Paste, and the trade-marks and the circulars and labels, and everything that went with the Queen of Pain and the Spinal Paste, and that was her reward for her kindness. These formulas were written on paper. Mrs. Spencer handed them to the plaintiff and she took them. At that time the plaintiff took some of the Queen of Pain that was manufactured and on hand. There was not any Spinal Paste made then. She took none of the labels at that time. Three days later, Mrs. Spencer died and a teamster carried the rest of the medicine to the plaintiff's house. After that, the plaintiff began to manufacture and sell the medicines. The sisters and next of kin of Dr. Spencer, and his administrator *de bonis non*, subsequently signed papers purporting to ratify the transaction, the administrator using words implying that she had a right, but not necessarily an exclusive right. The administrator also sold the plaintiff two dies used by Spencer for stamping packages of the Spinal Paste.

After these transactions, the administrator *de bonis non* conveyed by deed to the defendant, for \$200, Spencer's recipes and trade-marks for these medicines, excepting rights not specified theretofore granted by Spencer, Mrs. Spencer or himself, and, it seems, had sold him moulds for bottles for the Queen of Pain at a much earlier time. The defendant made and sold the medicines with labels like those used by Dr. Spencer.

The judge ruled that the evidence would not support a decree for the plaintiff, directed the jury to answer the questions in the negative, ordered the bill to be dismissed, and reported the case.

So far as the right to manufacture and sell the medicines goes, the plaintiff's case may be disposed of in a few words. Dr. Spencer had no exclusive right to the use of his formulas; his only right was to prevent anyone from obtaining or using them through a breach of trust or contract. Anyone who came honestly to the knowledge of them could use them without Dr. Spencer's permission and against his will. *Peabody v. Norfolk*, 98 Mass. 452, 458; *Morison v. Moat*, 9 Hare, 241, 268; *Williams v. Williams*, 3 Meriv. 157.

The defendant got his knowledge honestly. Having the right to make and sell the medicines the defendant had the right to signify to the public that the medicines were made according to the formulas used by Dr. Spencer. The only question is, whether the plaintiff has the right to restrain him from using Dr. Spencer's trade-marks.

The defendant argues that an executor or administrator has no right to give away the estate coming to his hands, and therefore that the plaintiff got no title to any property of Dr. Spencer by Mrs. Spencer's dealings with her,

transaction on behalf of anyone interested. The creditors of the estate have all been paid, and the next of kin assented to the gift. So far as this objection goes, we shall assume that, even if the gift was a breach of duty on the part of Mrs. Spencer, it gave the plaintiff a title, as against third persons, to anything which it was otherwise competent to give her. *Myers v. Meinrath*, 101 Mass. 366.

We assume, for the purposes of our decision, but without expressing an opinion on either question, that what took place between Mrs. Spencer and the plaintiff purported to be a present gift of the trade-marks, and that if the gift of a trade-mark in gross would have been good if by deed, it would be equally good at common law, when made by parol. The old rule was that "everything that is not given by delivery of hands must be passed by deed." *Noy's Maxims*, 62, chap. 33; *Fairfax, J.*, in *Y. B. 21 Hen. VII. 36*, pl. 45; *Shep. Touch. 229*.

But the formalities required by the early common law have been broken in upon a good deal, although more in England than in this State. It may be that later forms of property not admitting of delivery, but unknown to the old law, or not then the subject of transfer, are free from the restraints of the ancient rule, just as at Rome later forms of property could be conveyed without the comparatively early ceremonies of mancipation. It may be that even a parol gift of incorporeal property would be sustained, although delivery is impossible from the nature of the case. But that question we leave undecided. See *Browne, Trade-Marks*, 2d ed. § 361 and note; *Lowell, Transfer of Stock*, § 43; 2 Kent, Com. 439; *Grover v. Grover*, 24 Pick. 261, 263; *Bond v. Bunting*, 73 Pa. 210, 218.

We also refrain from considering whether the sale of the two dies to the plaintiff would not be sufficient to give her the right to use the marks upon them (*Stevens v. Gladding*, 58 U. S. 17 How. 447, 452, (15 L. ed. 155)), and pass to what seems to us the insuperable difficulty in the case.

What is the plaintiff's position when she seeks to prevent the defendant from selling his medicine by the name of "Dr. Spencer's Queen of Pain"? She is not Dr. Spencer. She is not the owner of a manufactory once owned by him. She makes the medicine with her own ingredients, tools, plants and contrivances. She has no exclusive right to make it. The defendant's use of the name does not mislead the public any more than hers does, as to the maker, the place of manufacture or the nature or quality of the goods. Unless, therefore, it should be held that a trade-mark may be erected into a new species of property, capable of lasting as long as the world does, and certain goods are manufactured, and of being transferred for value or by gift from person to person irrespective of good will, special right to make the goods, place of manufacture or fraud of any kind upon the public, the plaintiff cannot prevail.

Undoubtedly the exclusive right to use a certain collocation of words or signs to designate a certain class of goods may have a considera-

tion existed is not a conclusive reason for recognizing the right. The exclusive right to particular combinations of words or figures for purposes not less useful than advertising, for poetry or the communication of truths discovered for the first time by the writer, for art or mechanical design, has needed statutes to call it into being, and is narrowly limited in time. When the common law developed the doctrine of trade-marks and trade-names, it was not creating a property in advertisements more absolute than it would have allowed the author of *Paradise Lost*; but the meaning was to prevent one man from palming off his goods as another's, from getting another's business or injuring his reputation by unfair means, and, perhaps, from defrauding the public.

It is true that some judges, noticeably *Lord Westbury*, have preferred to rest the protection to trade-marks on the notion of property rather than of fraud; but it is plain, upon reading his judgments, that he means no more than that the deception which equity will prevent need not have been intended, as when a man ignorantly adopts a trade-mark already in use; and that within certain limits a trade-mark may be sold, which nobody denies. *Hall v. Barrows*, 4 DeG. J. & S. 150, 158; *Leather Cloth Co. v. American Leather Cloth Co.* 4 DeG. J. & S. 187. The limitations are clearly marked by the language of *Lord Cranworth* and *Lord Kingsdown* in the latter case on appeal to the House of Lords. 11 H. L. Cas. 523, 534, 538. See also *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15, 29 et seq.; *Wotherspoon v. Currie*, L. R. 5 H. L. Cas. 508, 514, 519; *Ainsworth v. Wamsley*, L. R. 1 Eq. 518, 525; *Collins Co. v. Brown*, 8 Kay & J. 423, 428.

At least as strict a rule is to be drawn from *Pub. Stat. chap. 76*, § 1. *Gilman v. Hunnewell*, 122 Mass. 139, 148.

If the nature and foundation of the right is what we suppose, then the reason why, and the limits within which, a grantee will be protected, are plain. The most usual case is when a trade-mark means that goods come from a certain manufactory, and the manufactory and mark change hands together, *e. g.*, *Hozie v. Chaney*, 143 Mass. 592, 3 New Eng. Rep. 709; *Warren v. Warren Thread Co.* 134 Mass. 247; *Kidd v. Johnson*, 100 U. S. 617, 620 [25 L. ed. 769, 770].

The use of the mark by a third person would be as much a fraud upon the grantee as it would have been upon his grantor. Therefore the grantee will be protected. *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15, 17; *Jennings v. Johnson*, 37 Fed. Rep. 364.

But our decisions have gone no further. *Sohier v. Johnson*, 111 Mass. 238, 244. See *Cotton v. Gillard*, 44 L. J. N. S. (Ch.) 90; *Congress & E. Spring Co. v. High Rock C. Spring Co.* 45 N. Y. 291, 302; *Dixon Crucible Co. v. Guggenheim*, 2 Brewst. 321, 339, and cases *supra*.

It may be that similar principles would apply if the plaintiff had the exclusive right of manufacturing the medicines, although she was not strictly a successor to Dr. Spencer's business, and did not have his manufactory or plant. See *Morison v. Moat*, 9 Hare, 241, 267; *Re J. B. Palmer's Trade-Mark*, L. R. 24 Ch. Div. 504,

cance of Dr. Spencer's marks at the present time, by whomsoever used, is to indicate a class of goods which anyone who knows how to do it may lawfully manufacture. The case more nearly resembles *Thomson v. Winchester*, 19 Pick. 214, 216. See *Emerson v. Badger*, 101 Mass. 82, 86; *Goodyear's India Rubber Glove Mfg. Co. v. Goodyear Rubber Co.* 128 U. S. 598 [33 L. ed. 535]; *Re Leonard & Ellis' Trade-Mark*, L. R. 26 Ch. Div. 288; *Singer Mfg. Co. v. Loog*, L. R. 8 App. Cas. 15, 26, 27, 87, 88.

There is a slight analogy as to the cases where a patentee has been denied the exclusive right to the name of his patented article or a trade-mark after the patent has expired. *Linoleum Mfg. Co. v. Nairn*, L. R. 7 Ch. Div. 884; *Re J. B. Palmer's Trade-Mark*, L. R. 24 Ch. Div. 517, 521; *Re Ralph's Trade-Mark*, L. R. 25 Ch. Div. 194, 199; *Coats v. Merrick Thread Co.* 36 Fed. Rep. 324, 1 L. R. A. 616.

We are of opinion that, assuming that there was a gift otherwise valid to the plaintiff, of Dr. Spencer's trade-marks, it did not give her the right to prevent the defendant from using the same words and devices.

Our decision makes the exclusion of evidence of Dr. Spencer's expressions of intention immaterial, although there seems to be no doubt that it was properly excluded.

Decree affirmed.

WOMEN AS NOTARIES PUBLIC.

(...Mass....)

Women cannot be appointed notaries public by the governor by and with the advice and consent of the council, under the clause of the Constitution providing for the appointment of notaries, in the absence of any statute authorizing such appointment.

(March 19, 1890.)

ON submission by the Governor of a question for the opinion of the Justices.

Per Curiam:

To His Excellency the Governor and the Honorable Council of the Commonwealth of Massachusetts:

The undersigned justices of the supreme judicial court have considered the question upon which our opinion was required on the 5th day of the present month, and respectfully submit the following opinion:

The question is as follows: "Under the Constitution and laws of this Commonwealth, can a woman, married or unmarried, if duly appointed and qualified as a notary public, legally perform all acts pertaining to such office?"

The acts which now pertain to the office of notary public in Massachusetts are, in part, acts which notaries public are authorized by statute to perform, and, in part, acts which from very early times they have been accustomed to perform. The office is of ancient origin, and for many centuries has been known to most, if not

6 L. R. A.

great variety and importance. In countries where the common law of England prevails, the duties of the office are more limited. In its international relations the office is, perhaps, everywhere of less consequence now than formerly. A notary public, being an officer found in all, or nearly all, parts of Christendom, was formerly of great use to merchants, ship masters and other persons in attesting writings, and in certifying to acts done by him or in his presence, proof of which might be required in distant places or in foreign countries. Modern nations and states define by statute many of the acts which may be done by both foreign notaries and notaries of their own appointment, and the effect of these acts and the uses which may be made of notarial certificates within their respective jurisdictions.

In England notaries public were appointed by the authority of the Pope of Rome until the Statute of 25 Henry VIII., chap. 21, and since the passage of this Statute they have been appointed by the Court of Faculties of the Archbishop of Canterbury. Under the charter of the Colony of Massachusetts Bay a notary public was elected by the general court, and that court prescribed the oath to be taken by him and some of his duties, and established his fees and the form of his seal, which was engraved at the expense of the Colony, and he was made exempt from militia service. Colony Laws, Whitmore ed. 1887, pp. 109, 125, 158, 165, 318; 2 Mass. Col. Rec. 86, 209; 3 Mass. Col. Rec. 119, 210, 239; 4 Mass. Col. Rec. part 1, 28, 57, 118; 5 Mass. Col. Rec. 436.

Notaries public were not mentioned in the province charter, but it appears that until 1720 they were appointed by the governor and council in the same manner as judicial officers. In that year the House of Representatives contended that notaries public should be elected by the general court, pursuant to the clause in the charter which granted power to that court "to name and settle annually all civil officers," except those otherwise provided for in the charter, subject to the approbation of the governor; and this claim was conceded, and afterward notaries public were elected by the council and House of Representatives in concurrence. 1 Province Laws, State ed. p. 781, note.

The fees of notaries public were established by statute, but it does not appear that any provincial statute was passed which defined any of their duties. Apparently the only duties which they performed under the province charter were those which by custom were attached to the office.

The Constitution of the Commonwealth, as originally adopted, provided that "the secretary, treasurer and receiver-general, and the commissary-general, notaries public and naval officers shall be chosen annually by joint ballot of the senators and representatives in one room." Const. Mass. part 2, chap. 2, § 4, art. 1.

By art. 4 of the Amendments of the Constitution adopted April 9, 1821, it was provided that "notaries public shall be appointed by the governor in the same manner as judicial officers are appointed, and shall hold their offices during seven years, unless sooner removed by the

in this Commonwealth as pertaining to the office of notary public, independently of the provisions of statute, are the presentment and protest of foreign bills of exchange and the noting and extending of marine protests. In some courts of admiralty it may be that, whenever the law of the place, whether customary or statutory, requires or authorizes an act to be done by or before a notary public, and requires that he officially make and keep a record of it, a copy of the record, certified under his hand and seal, is admissible as evidence that the act certified to was done. But courts of common law, to only a limited extent, take judicial cognizance of the notarial seals of notaries public and admit certificates as evidence.

In this Commonwealth, by statute, notaries public are authorized within the Commonwealth to take the acknowledgment of deeds; to protest any bill of exchange, promissory note or order for the payment of money; to administer oaths whenever a justice of the peace could administer them, and to take the affidavit of officers of savings banks and institutions for savings to copies of their records, books and accounts to be used as evidence. Notaries public may, within and without the Commonwealth, take the proof of claims in insolvency, and foreign notaries public may, within their jurisdictions, take depositions to be used within the Commonwealth and the acknowledgments of deeds of land situated within the Commonwealth; may serve notice upon nonresident owners of dangerous buildings situated within the Commonwealth; may administer oaths and take affidavits to be used within the Commonwealth, and may take acknowledgments of the certificates of limited partnerships established within the Commonwealth. It is plain, from this enumeration, that none of the acts which a notary public in this Commonwealth is authorized, either by custom or by statutes, to perform, is a judicial act. He cannot hold pleas, either civil or criminal. At the same time, the office is a public office, the duties of which must be performed by the notary personally, and cannot be performed by deputy, and a record must be kept of some at least of his official acts. His records and official papers are regarded as public records, and are required by statute to be deposited with the clerk of the courts, when the notary dies, resigns or is removed from office. By custom, if not by positive law, everywhere, so far as we know, a notary public must have an official seal, and copies of his records must be certified under his seal.

After such search as we have been able to make, we do not find that a woman has ever held the office of notary public in Massachusetts. We are not aware that a woman has ever been appointed to this office in England. It is impossible, in the time which we can give to the subject, to ascertain the practice in this respect of other foreign countries; but we know of no instance of the appointment of a woman to the office of notary public in any foreign country. Although the office is named in the Constitution and the manner of appointment provided for, the qualifications required of no-

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for the opinion are that the Statutes, interpreted in the light of immemorial usage, did not show it to be the intention of the Legislature that women should be admitted to practice as attorneys-at-law.

In the opinion given by the justices of this court that there is nothing in the Constitution which prevents a woman from being a member of the school committee, the reasons stated are that the Constitution contained nothing relating to school committees; that the office was one created and regulated by statute, and was a local office of an administrative character which the common law of England permitted a woman to fill. *Opinions of Judges*, 115 Mass. 603.

The opinion given upon the authority of the governor and council to appoint a woman a member of the state board of health, lunacy and charity, rests upon the construction of the Statute which created the board, interpreted with reference to other statutes upon similar subjects, and to the nature of the office. *Opinions of Judges*, 136 Mass. 578.

In answering the question now before us we do not deem it necessary or proper to consider whether it is competent for the Legislature by

has been said. In the absence of any statute authorizing the appointment of women to be notaries public, we are of opinion that the clause of the Constitution which provides for the appointment of notaries public—interpreted with reference to the history and nature of the office, and the long-continued and constant practice of the government here and the usage elsewhere—cannot be considered as authorizing the governor, by and with the advice and consent of the council, to appoint women to be notaries public, and that *the question asked must be answered in the negative.*

The chief justice has been prevented by illness from taking part in the consideration of the question.

Walbridge A. Field,
Charles Devens,
William Allen,
Charles Allen,
Oliver Wendell Holmes, Jr.,
Marcus P. Knowlton.

Boston, March 18, 1890.

Read and filed in council, March 19, 1890.

Henry B. Peirce, Secretary.

TEXAS SUPREME COURT.

WESTERN UNION TELEGRAPH CO.,

Appt.,

v.

F. E. ADAMS.

(....Tex.....)

1. **Failure to disclose the relationship of the parties** to a telegraph company when sending a message stating that a person named is dying, and saying "Come quick," will not prevent a recovery of damages for suffering on account of the inability of the receiver to be with a dying brother because of delay in delivering the message.
2. **Evidence that a person felt and exhibited mental anguish** on account of the delay in delivering a telegraph message is admissible in an action where damages are allowable for such negligence.
3. **The question as to who may maintain a suit for damages** for delay in delivering a telegram does not depend upon the payment of the fee, nor upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the dispatch was sent, but upon the question who was in fact to be served, and who is damaged.
4. **Ignorance of the relations that may exist** between the sender and receiver of a message will not excuse a telegraph company for its neglect, if the sender intended to serve the receiver and the latter accepted the act.

5. A prompt delivery is of the essence of a contract to transmit a telegram, and a failure in that respect is such a breach as will authorize the recovery back of the consideration paid.

(December 20, 1889.)

APPEAL by defendant from a judgment of the District Court for Henderson County in favor of plaintiff in an action to recover damages for failure to promptly deliver a telegraph message. *Affirmed.*

The facts are fully stated in the opinion.

Messrs. Stemmons & Field, for appellant:

There is nothing on the face of the message by which we could, in contracting to transmit and deliver it, contemplate that the relation of sister and brother existed between the parties, and that a sister's feelings would be injured by a failure upon appellant's part to perform its contract. Hence the Company had no reason to anticipate that the damages sued for would result from its negligence.

W. U. Tel. Co. v. Brown, 2 L. R. A. 766, 71 Tex. 728; *Gray, Communications by Telegraph*, § 89.

Messrs. Richardson & Watkins for appellee.

Henry, J., delivered the opinion of the court:

Appellee brought this suit to recover dam-

NOTE.—Telegraphs.

See *McCord v. W. U. Tel. Co.* (Minn.) 1 L. R. A. 143, note; *W. U. Tel. Co. v. Brown* (Tex.) 2 L. R. A. 6 L. R. A.

766, note; *W. U. Tel. Co. v. Mumford* (Tenn.) 2 L. R. A. 601, note; *W. U. Tel. Co. v. Yopst* (Ind.) 3 L. R. A. 224, note; *Gillis v. W. U. Tel. Co.* (Vt.) 4 L. R. A. 611, note.

See also 9 L. R. A. 744; 10 L. R. A. 464; 30 L. R. A. 444; 38 L. R. A. 684

Waco, October 12, 1887.
To F. E. Adams, Athens:

Clara, come quick. Rufe is dying.
[Signed] O. M. Simmons.

His allegations are that said message was delivered to appellant's agent at Waco about 10 o'clock of said day, and that the message was not delivered to appellee until shortly before noon on the 18th day of October, 1887. That appellee was a merchant, in Athens, residing there, doing business in the post-office building within one hundred yards of defendant's office, and on the public square; and that his residence was within one hundred yards of defendant's office. That appellee was well known to the residents of said town. That there were two trains daily from Athens to Waco,—one at 10:50 in the evening, the other at 7:05 in the morning; and that on the morning of the 18th of October there was an accommodation train which left Athens for Waco at 10 o'clock. That appellee's wife took the first train going to Waco, after receiving said message, arriving at Waco on the morning of October 14. That when she reached Waco her brother was dead, and his body had been sent to a distant part of the State for burial. That they were compelled to take another train to the place of burial. Her brother died about 6 o'clock in the evening of the 13th. That, had the message been promptly delivered, appellee's wife could have reached her brother in time to have been with him fourteen hours before his death, and, if the message had been delivered before either of the trains on the morning of the 13th, she could have been with him at least six hours before his death. That by reason of appellant's failure to promptly deliver said telegram, and of her being deprived of being with her brother in his last sickness, she suffered great anguish, pain of mind, and was prostrated and broken down in body and mind, and was damaged in the sum of \$5,000. That plaintiff repaid Simmons the amount he paid for transmitting the telegram.

To this appellant answered by general demurrer and general denial. The general demurrer was overruled. The trial resulted in a verdict and judgment in favor of appellee for the sum of \$2,000.40. The evidence supported the pleading.

Appellant's proposition, under its first three assignments is, "that the message did not disclose that the relation of brother and sister existed between Rufe and Clara, nor do the allegations in the petition disclose that appellant had notice of the relationship existing between them at the time it contracted to transmit said message; and by reason of the want of notice of this fact, appellant cannot be held liable for the damages sued for herein."

The rule insisted upon by appellant is too restricted to be safely applied to communications sent by the electric telegraph. Plaintiff seeks to recover damages on account of mental pain suffered by his wife because of her inability to be with her brother when he was dying. The allegations and the evidence show that her failure to be with him was on account

difficult to conceive of that would have more her the information used in the telegram, her. If any diligence delivery, when it would not only have her brother, that it was, but would have to have reached him. The mental pain suffered being deprived of this by the law as a ground damages against defendant by its negligence.

The contention of defendant it can only be held liable may be supposed to be the plation of the parties layed in its delivery, and be held to have been defendant not suggest dispatch, and that all from this dispatch by person at Waco wanted named "Clara," to cause some person named

It seems to be well companies are not charged the importance of delivery. As, in the nature of the contents of such expression being adopted knowing,—the rule is that them from the responsibility would impose on an effort to extend the sion for it, and to practice expressed in abbrevial patches. We think a must be made between terms intended to convey such as have no such to convey information words than are necessary customed meaning. public, and cannot be companies, that the union is cultivated in graph. It is as well communication is chief of importance, financing great dispatch. Y tions relate to sickness panies them a common they are of importance addressed have in them would be an unreasonable comporting with the hold that the dispatch diligence unless the concerned, as well as the are disclosed. When communication is plain instead of requiring the to the unwilling ears of ship of the parties concerned rule will be, when the desires information about to obtain it from the se

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Clara Adams, while waiting for a train to Waco, after the message had been delivered to her, seemed to be in great distress, and said that she would give everything that she possessed to see her brother, and talk to him, before he died. As the jury would be instructed that they might, in assessing damages, include her mental anguish in their estimate, it was doubtless thought that evidence of her mental condition, including expressions of it, at the time, might be given. As juries may, from their own knowledge and experience of human nature, estimate damage proceeding from that cause without any evidence, it is not important to produce it, and when produced it ought not, as a general rule, to have a controlling effect; and yet we are not able to see why the fact that mental anguish was felt, and was exhibited by speech or otherwise, may not be proved for what it may be worth. It at least furnishes no ground for setting aside a verdict that might be sustained without any evidence as to the existence or degree of mental pain. 1 Greenl. Ev. § 102; 1 Wharton, Ev. §§ 268, 269.

It is urged that "the court erred in that part of its charge wherein it instructed that if such telegram was sent by Simmons for the benefit of Mrs. Clara Adams, and that she has paid back the charges for sending it, then the husband would have a legal right to sue for a breach of the contract," etc., "because: *first*, defendant had no notice that the contract was made for Clara Adams, and, *second*, it had no notice or information that 'Clara,' named in said message, meant 'Clara Adams,' the wife of the plaintiff." If, in fact, the message was sent for the benefit of Mrs. Adams, and she was the damaged party, we can see no good reason why her husband may not maintain the suit. *Aiken v. W. U. Tel. Co.* 5 S. C. 369; *New York & W. P. Tel. Co. v. Dryburg*, 85 Pa. 303; *Ellis v. Am. Tel. Co.* 18 Allen, 226; *Shearm. & Redf. Neg.* 642.

The party to be in fact accommodated, benefited or served holds the beneficial interest in the contract. When that one sustains damage from its breach, a right of action arises in his favor. We do not attach importance to the reimbursement of the fee for sending the dispatch to the party who paid it. Unless a right of action exists independently of that, it cannot be maintained. If a person sending and paying for the dispatch was not, at the time of performing those acts, the agent of the sender, he cannot be afterwards made such, so as to give a right of action for large damages by being refunded the fee paid for the dispatch. At most, all that that transaction can amount to in any case will be to give to the party that re-

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come a debt from the person for whose use the dispatch is sent to the sender, the collection of it will be between themselves; and with that the corporation can have no concern. If it is refunded by the party having otherwise a cause of action against the corporation, it may be included and recovered in the suit brought for the other cause. We think the question as to who may maintain a suit for damages for the breach of contract does not depend upon the payment of the fee, nor upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the dispatch is sent, but upon who in fact was to be served, and who is damaged. If it was intended to serve the receiver, and he accepted the act, we are unable to see why the Telegraph Company should be excused from the consequences of its neglect to discharge its own duty by reason alone of its ignorance of the relations that may exist between the sender and the receiver of the message. If the sender, from motives of friendship or any other cause, is willing to confer upon the receiver a benefit, and he is willing to accept it, and out of the transaction there results damage for someone to receive, and for the corporation to pay, the want of the technical relationship of principal and agent between the other parties ought not to inure to the benefit of the Telegraph Company, to the exclusion of the only party for whose use the other parties intended the transaction.

A charge to the jury that plaintiff could recover the toll paid for transmitting the message is objected to upon the ground that, as defendant performed its contract for transmission and delivery of said message, a delay in its execution does not authorize a recovery of the money paid for the performance of the contract. No authorities are quoted in favor of this proposition, and we know of none. A prompt delivery was of the essence of the contract; and a failure in that respect was such a breach of it as to authorize the recovery back of the consideration paid for it, if a right to do so could be maintained in other respects.

It is contended that "the court erred in not setting aside the verdict because it is excessive in amount; because if the telegram had been promptly delivered, plaintiff's wife could not have reached her brother until after he became unconscious." The facts do not sustain this assignment, and it therefore becomes unnecessary to comment upon it in other aspects. We find no error in the proceedings for which we think the judgment ought to be reversed, and it is affirmed.

J. C. GILMAN, *Plff. in Err.*,

(..... W. Va.)

"That portion of § 1, chap. 32, Code 1887, which provides that no person, without a state license therefor, shall "keep in his possession, for another, spirituous liquors," etc., is unconstitutional and void.

(November 9, 1889.)

ERROR to the Circuit Court of Barbour County to review a judgment convicting defendant of a violation of the Revenue Laws. *Reversed.*

The case is fully stated in the opinion.

Messrs. Dayton & Dayton, for plaintiff in error:

At the common law it is no offense to have in possession counterfeit coin, forged paper or counterfeiting tools.

Bishop, Cr. L. § 204.

It is not a common-law offense to be in possession of liquors with the intent to commit the misdemeanor of selling them contrary to the regulations of the statute.

Bishop, Stat. Crimes, § 1054.

Intent to sell is the very gravamen of the offense, and it is therefore necessary, not only to allege in the indictment, but prove on trial, such intent.

See Bishop, Stat. Crimes, §§ 1054-1058, and authorities cited.

In our Statute this vital point is wholly left out.

Mr. Alfred Caldwell for the State.

Snyder, P., delivered the opinion of the court:

At the March Term, 1889, of the Circuit Court of Barbour County, the grand jury found an indictment in which it is charged that J. C. Gilman, in said county, did unlawfully, and without a license therefor, "sell, offer and expose for sale, and solicit and receive orders for, and keep in his possession for another, spirituous liquors, wine, porter, ale, beer and drink of a like nature," etc. The defendant moved the court to quash the indictment; which motion being overruled, he pleaded not guilty, and thereupon the case was tried by a jury. There was a verdict of guilty, on which the court entered judgment, fining the defendant \$20. A motion to set aside the verdict was made, and overruled by the court, and an exception taken by the defendant, in which all the facts are certified. These facts are as follows: John Thompson, witness for the State, testified that he did not buy whiskey of defendant within one year next preceding the finding of this indictment, but that, on the 15th day of October, 1888, he got whiskey of defendant, which defendant was keeping in his possession for an-

*Head note by SNYDER, P.

other person, James E. Heatherly, who was at the time a candidate for sheriff of Barbour County; and that said whiskey was kept by defendant, in his possession, at his hotel, in the Town of Philippi, in Barbour County, to be distributed free by defendant to such persons as said Heatherly should give order for or send there for it; and witness for the State had, at the time the liquor mentioned in the indictment was delivered to him by said defendant, within one year next preceding the finding of the indictment, an order from said Heatherly on said defendant for a quantity of said intoxicating liquor less than five gallons; and that upon said order, within said year, said defendant did deliver to said witness a quantity of said intoxicating liquor of less than five gallons. Defendant admits that he had no state license to sell, solicit or receive orders for, or keep in his possession for another, spirituous liquors, wine, porter, ale, beer and drink of a like nature."

This indictment is framed under the provisions of § 1, chap. 32, Code 1887, and is in the precise language of the Statute. It is in legal form, and, as no extrinsic facts were shown to invalidate the finding of it, I think the motion to quash was properly overruled.

The said Statute was amended by chapter 29, Acts of 1887, and then, for the first time, the words, "or solicit or receive orders for, or *keep in his possession for another*," were made a part of the Statute. From the facts proved, it is apparent the conviction in this case must be sustained, if it is done at all, under that provision which I have italicised, "keep in his possession for another." It will be observed that this provision has no reference to the intent or purpose for which the liquor is kept in possession, but it denounces as a crime the simple fact that the liquor is kept in possession for another, however innocent the act or commendable the purpose. Has the Legislature of this State the constitutional power to make such an act a crime? The Fourteenth Amendment to the Constitution of the United States declares: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States;" and the same Amendment makes all persons born or naturalized in the United States citizens thereof. It is conceded that the "privileges and immunities" here protected are such only as are in their nature fundamental; such as belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several States of the Union, from the time of their becoming free, independent and sovereign. What these fundamental rights are, it is not easy to enumerate; the courts preferring not to describe and define them in a general classification, but to decide each case as it may arise. The following, however, have been held to be embraced among them: "protection by the government; the enjoyment of life and liberty, with the right to acquire and

NOTE.—Ordinance regulating sale of liquors constitutional.

Ordinance of the Town of Beckley, regulating 6 L. R. A.

the sale of liquors and prescribing penalty for violation, is constitutional. *Beasley v. Beckley*, 28 W. Va. 81.

prescribe for the general good of the whole." Washington, J., in *Corfield v. Coryell*, 4 Wash. C. C. 380; *Conner v. Elliott*, 59 U. S. 18 How. 591 [15 L. ed. 497]; *Re Parrott*, 6 Sawy. 349, 1 Fed. Rep. 481; 6 Myer, Fed. Dec. § 1000; *Landing Co. v. Slaughter-House Co.* 111 U. S. 746 [28 L. ed. 585].

These are inalienable and indefeasible rights, which no man, or set of men, by even the largest majority, can take from the citizen. They are absolute and inherent in the people, and all free governments must recognize and respect them. Therefore it is incumbent upon the courts to give to the constitutional provisions which guarantee them a liberal construction, and to hold inoperative and void all statutes which attempt to destroy or interfere with them. *Cooley, Const. Lim. 85, 44.*

It can hardly be questioned that the right to possess property is one of these rights, and that that right embraces the privilege of a citizen to keep in his possession property for another. It is not denied that the keeping of property which is injurious to the lives, health or comfort of all persons may be prohibited under the police power. The maxim, *sic utere tuo ut alienum non laedas*, being of universal application, it must, of course, be within the range of legislative action to define the mode and manner in which everyone may so use his own as not to injure others. But it does not follow that every statute enacted ostensibly for the promotion of these ends is to be accepted as a legitimate exercise of the police power of the State; and much less is such the case when the Statute is merely claimed by its defenders to be intended for that purpose.

The court, in its opinion in *Mugler v. Kansas*, says: "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed, are under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the Legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution." 123 U. S. 661 [81 L. ed. 210].

The keeping of liquors in his possession by a person, whether for himself or for another, unless he does so for the illegal sale of it, or for some other improper purpose, can by no possibility injure or affect the health, morals or safety of the public; and, therefore, the Statute prohibiting such keeping in possession is not a legitimate exertion of the police power. It is an abridgment of the privileges and immunities of the citizen without any legal justification, and therefore void. But it seems to me the said provision of the Statute is in violation of that provision of our State Constitution which declares that "laws may be passed regulating or prohibiting the sale of intoxicating liquors within the limits of this State." Article 6, § 46.

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in the British Parliament, except where it is restrained either by the State or Federal Constitution, still, it is equally true that these constitutional limitations are not confined to express inhibitions, for there are but few positive restraints upon the legislative power contained in the Constitution. The third article, or "Bill of Rights," lays down the ancient limitations which have always been considered essential in a constitutional government whether monarchical or popular; and there are scattered through the instrument some other express provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangement of the Constitution are far more fruitful of restraints upon the legislative power. Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision. The frame of the government, the grant of legislative power itself, the organization of the executive authority, and the erection of the principal courts of justice, create implied limitations upon the law, making authority as strong as though a negative was expressed in each instance. *Cooley, Const. Lim. 87; People v. Draper*, 15 N. Y. 543.

If the people had not made the provision above quoted a part of the Constitution, the Legislature would, so far as that instrument is concerned, have had plenary and unrestricted authority to deal with liquors in any manner it chose to do. But the people, by declaring that "laws may be passed regulating or prohibiting the sale of intoxicating liquors," according to the principles we have announced, imposed a restraint upon this plenary power. By granting an express authority to the Legislature to regulate or prohibit the sale, there is an implied inhibition to the exercise of any authority in respect to that subject which is not embraced in the grant. This rule is simply an application of the old maxim, *expressio unius est exclusio alterius*, which Lord Bacon concisely explains by saying: "As exception strengthens the force of a law in cases not excepted, so enumeration weakens it in cases not enumerated."

The express power here given to regulate or prohibit the sale of liquors, unless it was intended to limit the legislative authority, would render this provision of the Constitution wholly nugatory and useless, because, as we have seen, without this provision the Legislature would have had plenary power over the whole subject. It could not only have legislated in respect to the prohibition and sale of liquors, but in all other respects. It seems to me, therefore, that the purpose and effect of this constitutional provision was and is to restrict and limit the legislative authority to the powers expressly granted therein,—that is, to the power to regulate or prohibit the sale of liquors, and, consequently, a legislative Act not within the legitimate scope of this express grant, unless it is a fair and reasonable exercise of the police power, must be held unconstitutional and void.

From what we have already said, it is apparent that the provision of the Statute under consideration is not a fair and reasonable exer-

simply an attempt to make the possession of liquor for any purpose a crime. A very different question would be presented if the Act had made it unlawful for any person to keep intoxicating liquors in his possession, either for himself or for another, for the purpose of selling it, or as a device to evade the Revenue Laws. But this provision has nothing in it of that kind. It makes the mere possession for another, without regard to the intent or purpose of either the possessor or of the person for whom it is kept, a crime. It would seem that, if it is a crime, or in contravention of the Revenue Laws, for one person to keep liquor in his possession for another, it would be equally so for him to keep it in his possession for himself; but under this Act the latter is no offense; and,

for such person to keep another.

Upon the whole, we say that part of said Statute to "keep in his spirituous liquors," of the Federal and State fore void. This prov void, the evidence in that the defendant w fence, and, per sequ *Circuit Court must be ant discharged.*

English and Br Green, J., absent.

VIRGINIA SUPREME COURT OF APPEALS

RICHMOND & DANVILLE R. CO., Plff.
in Err.,

v.

A. D. PAYNE.

(.....Va.....)

1. A bill of particulars need not be ordered to be filed by plaintiff in an action of

tort where the case is with sufficient fullness of its character.

2. A valid contract of a carrier to of the property carried just and reasonable rate of freight is made

(January

NOTE.—Carrier of freight; liability for loss of goods.

A common carrier has two distinct liabilities—one for losses by accident or mistake, where he is liable as insurer; the other for losses by default or negligence, where he is answerable as an ordinary bailee. *Desty, Ship, and Adm. § 278; New York Cent. R. Co. v. Lockwood, 84 U.S. 17 Wall. 363 (21 L. ed. 635); Dorr v. New Jersey Steam Nav. Co., 11 N. Y. 485, 4 Sandf. 136.*

A carrier's liability for loss of goods arises from its failure to make an absolutely safe carriage and delivery, which it assures by its undertaking. *Pingree v. Detroit, L. & N. R. Co. 9 West. Rep. 706, 66 Mich. 143.*

The liability of the carrier commences when the goods are delivered to him for transportation (*Pratt v. Grand Trunk R. Co. 95 U.S. 43 (24 L. ed. 396); Rogers v. Wheeler, 52 N. Y. 262; Grosvenor v. New York C. R. Co. 39 N. Y. 34*), and is not ended until the cargo is safely delivered at the port of destination. *King v. Shepherd, 3 Story, 380; Plantamour v. Staples, 1 T. R. 611.*

Under Tex. Rev. Stat., arts. 281, 282, the liability of the carrier of freight, as such, continues until the thing carried is actually delivered to the owner or consignee, unless due diligence has been used to give notice to such persons of the arrival at destination. *Missouri Pac. R. Co. v. Haynes, 72 Tex. 175.*

Liability as insurer.

A common carrier receiving goods for transportation is an insurer, and is liable in all events for every loss or damage, unless it happens by the act of God, or the public enemy, or without fault on his part, under some express exception in the bill of lading. *Pingree v. Detroit, L. & N. R. Co. 9 West. Rep. 706, 66 Mich. 143; Sweatt v. Boston, H. & E. R. Co. 5 Nat. Bankr. Reg. 243; Louisville & N. R. Co. v. McGuire, 70 Ala. 395; The Lady Pike, 2 Biss. 145; The Mollie Mohler, 2 Biss. 508; Amies v. Stevens, 1 Strange, 128; The Delaware, 81 U.S. 14 Wall. 597 (20 L. ed. 781); Elliott v. Russell, 10 Johns. 1; The Niagara v. Cordes, 62 U.S. 21 How. 7 (16 L. ed. 41); Clark & L. R. A.*

v. Barnwell, 53 U.S. 12 1; Lister v. Nowlen, 19 Wen Co. v. Merchants Bank, ed. 501; Trent & M. Nav 3 Esp. 127; Sewall v. Alle Wainwright, 2 Q. B. 83; Chitty, 1; Brotherton v Hyde v. Trent & M. Na Dibbin, 2 Q. B. 648; Riel 401; Colt v. McMechen, 6 Nichols v. DeWolf, 1 R.

He is liable for loss by than natural causes, whi municated from other v and whether it produces *Garrison v. Memphis Ins L. ed. 656; Singleton v. B v. Nashville & C. R. Co. 8 506; Rockingham Mut. F 253; New Jersey Steam Ne 47 U.S. 8 How. 425 (12 L. e Steam Nav. Co. 15 Conn. Smedes & M. 279; The Cl Hollister v. Nowlen, 19 W 6 Mart. O. S. (La.) 676; M Lyon v. Mells, 5 East, 4; Screw C. Co. L. R. 1 C. P.*

He is liable though he b not when the loss is cause *sey Steam Nav. Co. v. Mei v. Shepherd, 3 Story, 349; 1; Patapsco Ins. Co. v. (7 L. ed. 659); Toulmin v McArthur v. Sears, 21 W M. Nav. Co. 5 T. R. 389.*

Carrier; common-law l Northern Pac. Exp. Co. (l Limitation of, by contra St. P. M. & O. R. Co. (Min

Carrier may limit or resti cont

The carrier may limit l

defendants' alleged negligence, upon plaintiff's horses while in defendant's possession for transportation. *Reversed.*

The facts are fully stated in the opinion.

Mr. C. M. Blackford for plaintiff in error.

Messrs. Thomas S. Martin and George Perkins, for defendant in error:

Hart v. Pennsylvania R. Co. 112 U. S. 340 (28 L. ed. 721), cannot rule this case, because in that case the value of the stock was agreed and stated in the contract, and the rates of carriage were based upon the agreed valuation, while here there is no agreed valuation. If a horse is worth \$5,000 at the place and date of shipment, and he should be killed by the Company, \$5,000 could not be recovered under the contract in this case. Notwithstanding his value, \$100 is all that could be made. In such case, this contract limits the liability to \$100, although that is far below the value. If, however, a horse is worth at the date and place of shipment only \$50, his value, and not the contract, would govern. So that the whole object of the contract is to limit liability; it is a mere device for that purpose.

In several of the States it is held that the law preventing a carrier from limiting his liability for negligence by means of any contract is too well settled to permit of modification.

Moulton v. St. Paul, M. & M. R. Co. 81 Minn. 85, 12 Am. & Eng. R. R. Cas. 13; *Kansas City,*

St. L. & N. O. R. Co. v. Abels, 60 Miss. 1017, 21 Am. & Eng. R. R. Cas. 105; *United States Exp. Co. v. Bateman*, 28 Ohio St. 144. See also *Illinois Cent. R. Co. v. Adams*, 42 Ill. 474; *Illinois Cent. R. Co. v. Read*, 37 Ill. 485; *Adams Exp. Co. v. Stettaners*, 61 Ill. 184; *Boscovits v. Adams Exp. Co.* 93 Ill. 523.

The law in Virginia was settled by *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 328.

In that case the contract was almost in the exact words of the first part of the contract here. The court held the contract void and the company liable.

Lewis, P., delivered the opinion of the court:

This is a writ of error to a judgment of the Circuit Court of Albemarle County, rendered in an action of trespass on the case, wherein A. D. Payne was plaintiff and the Richmond & Danville Railroad Company was defendant.

The declaration alleges that on the 26th day of May, 1888, the plaintiff delivered to the defendant Company at Charlottesville eight horses in sound and good condition, and of the aggregate value of \$3,000, to be transported to the City of Philadelphia; that at the same time and place one J. B. Andrews delivered to the defendant eight other horses, to be likewise transported to Philadelphia; that all of the horses were on the same day placed by the servants

but there must be an express agreement, not a mere notice. *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 88 U. S. 16 Wall. 318 (21 L. ed. 297); *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 297 (22 L. ed. 559); *Ogdenburg & L. C. R. Co. v. Pratt*, 89 U. S. 22 Wall. 134 (22 L. ed. 831); *Norwich & N. Y. Transp. Co. v. Wright*, 80 U. S. 13 Wall. 104 (20 L. ed. 585); *Cooper v. Berry*, 21 Ga. 528; *Bean v. Green*, 12 Me. 422; *Palmer & M. Bank v. Champlain Transp. Co.* 16 Vt. 52, 18 Vt. 181; *Southern Exp. Co. v. Barnes*, 36 Ga. 532; *Southern Exp. Co. v. Caperton*, 44 Ala. 101; *Moore v. Evans*, 14 Barb. 524; *Western Transp. Co. v. Newhall*, 24 Ill. 498; *The Epsilon*, 6 Ben. 378, 17 Int. Rev. Rec. 68; *Watson v. Marks*, 5 Pa. L. J. 254; *Baltimore & O. R. Co. v. Brady*, 82 Md. 333; *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 223.

An unsigned general notice printed on the back of a receipt does not constitute a contract freeing the carrier from his common-law liability. *Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 88 U. S. 16 Wall. 330 (21 L. ed. 308); *McMillan v. Michigan S. & N. I. R. Co.* 16 Mich. 88.

Although he may by express special contract restrict his liability as an insurer where the loss does not occur from his own default or negligence of duty (*New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 363 (21 L. ed. 635); *Stoddard v. Long Island R. Co.* 5 Sandf. 180; *York Mfg. Co. v. Illinois C. R. Co.* 70 U. S. 3 Wall. 112 (18 L. ed. 171); *Verner v. Sweitzer*, 32 Pa. 308; *Kitzmiller v. Rensselaer*, 10 Ohio St. 65; *Illinois C. R. Co. v. Morrison*, 19 Ill. 126; *Western Transp. Co. v. Newhall*, 24 Ill. 498; *Lowe v. Booth*, 18 Price, 329); yet he cannot exempt himself from the duty to exercise ordinary care and prudence in the transportation of the goods. *Earnest v. The Express Co.* 1 Woods, 577; *Cole v. Goodwin*, 19 Wend. 261; *Atwood v. Reliance Transp. Co.* 9 Watts, 87; *Camden & A. R. Co. v. Baldauf*, 16 Pa. 87.

Nor for loss or damage caused by his own malfeasance, misfeasance or negligence. *Beckman v. Shouse*, 5 Rawle, 179; *Brooke v. Pickwick*, 4 Bing. 6 L. R. A.

213, 12 Moore, 447; *Owen v. Burnett*, 2 Crompt. & M. 380; *Hollister v. Nowlen*, 19 Wend. 234; *Lyon v. Mells*, 5 East, 428; *Moreton v. Harden*, 4 Barn. & C. 223; *Grill v. General Iron Screw C. Co.* L. R. 1 C. P. 600.

Nor for the consequences of his own fault or that of his agents or servants. *The Portsmouth*, 76 U. S. 9 Wall. 685 (19 L. ed. 755); *The Niagara v. Cordes*, 68 U. S. 21 How. 7 (16 L. ed. 41); *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 368 (12 L. ed. 432); *Camden & A. R. & T. Co. v. Burke*, 12 Wend. 611.

By such a contract the freighter agrees that as to this particular transaction the carrier is not to be regarded as in the exercise of a public employment beyond that of an ordinary bailee and answerable only for misconduct or negligence. *Sager v. Portsmouth, S. & P. & E. R. Co.* 31 Me. 223; *Bean v. Green*, 12 Me. 422; *Cooper v. Berry*, 21 Ga. 528; *Dorr v. New Jersey Steam Nav. Co.* 11 N. Y. 485; *Parsons v. Monteath*, 13 Barb. 363; *Moore v. Evans*, 14 Barb. 524; *The May Queen*, 1 Newberry, 459.

Limitative liability is an exception to the rule of liability. *Rosenfeld v. Peoria, D. & E. R. Co.* 1 West. Rep. 152, 103 Ind. 121.

Contracts limiting liability must be clear in meaning, and be construed most strongly against the carrier. *Rosenfeld v. Peoria, D. & E. R. Co.* 1 West. Rep. 152, 103 Ind. 121.

From what liability a contract that a common carrier is not to be responsible for loss or damage will exonerate, see *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 344 (12 L. ed. 465).

Limited liability; Act of Congress. See *Lawton v. Comer*, 40 Fed. Rep. 480, 7 L. R. A. —.

The rule stated, as to what constitutes such contract.

As to what is necessary to constitute such a contract, the American rule is that the contract must specially exempt the carrier from its common-law

been loaded, it was suddenly and violently, and without any notice or warning, struck by one of the defendant's locomotives, which was then and there carelessly and negligently governed, which forced the car a considerable distance on the side track from its original position, causing great damage to the horses and to the plaintiff himself, who was in the car at the time. And the declaration claims damages on account thereof to the amount of \$3,000.

Upon the delivery of the horses, and before the collision occurred, a bill of lading was issued by the defendant, signed by its station agent at Charlottesville, and by Andrews for Payne & Andrews, wherein it was recited "that whereas the Richmond & Danville Railroad Company and connecting lines transport live stock only at certain tariff rates, except when, in consideration of a reduced rate, the owner and shipper assumes certain risks specified below; now, in consideration of said railroads agreeing to transport the above described live stock at the reduced rate of \$44 per car to Philadelphia, and a free passage to the owner or his agent on the train with the stock (if shipped in carload quantities), the said owner and shipper does hereby assume and release the said railroads from all injury, loss and damage or depreciation which the animal or animals, or either of them, may suffer in consequence of either of them being weak, or escaping, or injuring itself or themselves, or each other, or in

incidental to railroads shall not have been gross negligence of

And then, among c stipulated as follows: that should damage panies may be liable and date of shipment ment, in which the exceed, for a . . . he

There was evidence show that the horses more than \$100 each the damage was cau the defendant's agents the evidence, returned for \$2,485 damages, was entered; whereu pany obtained a w sedeas.

The first assignmen cuit court erred in o motion that the plain bill of particulars. der section 8249 of the "in any action or mo a statement to be filed claim or of the grou party fails to comply when the case is trie dence of any matter ne declaration or other i

liability, while the English rule, which is adopted by the courts of Tennessee, is that the receipt of goods marked for a given point without any positive limitation of responsibility affords prima facie evidence of an undertaking to safely transport the goods to their destination whether within or beyond the limits of its own line. *Schouler, Balim. §§ 563, 568; Lawson, Cont. §§ 235, 240; Redfield, Carr. §§ 190, 197; Hutchinson, Carr. §§ 145, 152; Louisville & N. R. Co. v. Campbell, 7 Hetsk. 253; East Tennessee & V. R. Co. v. Rogers, 6 Hetsk. 143; Western & A. R. Co. v. McElwee, Id. 206; Louisville & N. R. Co. v. Weaver, 9 Lea, 38.*

An agreement that goods shall be exclusively at the risk of the owner does not relieve a common carrier from liability for negligence. *New Jersey Steam Nav. Co. v. Merchants Bank, 47 U. S. 6 How. 344 (12 L. ed. 485).*

Restriction of Liability in bill of Lading.

The bill of lading is the written contract of the parties, and by its terms their rights and liabilities must be measured. *Fry v. Louisville, N. A. & C. R. Co. 1 West. Rep. 279, 108 Ind. 235; Indianapolis & C. R. Co. v. Remmy, 13 Ind. 518; Hall v. Pennsylvania Co. 90 Ind. 459; Bartlett v. Pittsburgh, C. & St. L. R. Co. 94 Ind. 281.*

Where a bill of lading provided that the corporation should not be held liable for wrong carriage or wrong delivery of goods that were marked with initials, numbered or imperfectly marked, it was held not to cover a failure to duly forward goods only marked with an initial. *McGowan v. Wilmington & W. R. Co. 95 N. C. 417.*

A carrier desiring to limit its responsibility on bills of lading to a delivering to the named consignee alone must stamp its bills "non-negotiable." *Batavia Bank v. New York, L. E. & W. R. Co. 7 Cent. Rep. 822, 106 N. Y. 196.*

He may limit his liability in case of loss by fire by a stipulation in the bill of lading. *Van Schaak v. 6 L. R. A.*

Northern Transp. Co. 8 Nav. Co. v. Merchants Bank, 10 L. ed. 502; Hunt v. Mor

But an exception in a for loss by fire does not loss by fire occasioned *Kentucky v. Adams Ex. 873; Adams Exp. Co. v. Corp. L. J. 2.*

A limitation of liability not control where the d carrier's negligence, and that the limitation was i rate of freight. *Adams*

Where goods are deliv agreement not restrictin it cannot insert in the bil tive of its usual liability. *Rep. 280, 108 N. Y. 434.*

Restriction

A bill of lading provided not exceed the invoice, of the United States custom being worth in their dam value plus the cost of t was liable for the full a *Cunard S. S. Co. 6 New R. 27 Am. L. Reg. 2d series,*

Where the carriers are l the amount of the invoice rule is analogous to th ance, in the case of a val be the actual value of th portion or percentage of insurer pays the same pr the total sum for which able. *1 Arnold, Marine Manning, 1 H. L. Cas. 30; Camp. 228; Lewis v. Ruck v. Gillies, 4 Taunt. 308; Tu*

We think the case is stated in the declaration with sufficient fullness to apprise the defendant of its character, and that there was no error in overruling the motion. The office of a bill of particulars is not to set forth matters of evidence, but to inform the opposite party of the cause of action to be relied on at the trial, and which is not plainly set out in the pleadings. And although it is ordinarily within the discretionary power of the court to order a bill of particulars, yet the power is much less frequently exercised in actions of tort than in actions *ex contractu*, as the general rule in tort is that, if a pleading is not sufficiently specific, the remedy is by demurrer. *Garfield v. Paris*, 96 U. S. 557 [24 L. ed. 821]; *Higenbotam v. Green*, 25 Hun, 214.

The second assignment of error involves a more important question. It relates to the refusal of the circuit court to instruct the jury that, in assessing damages against the defendant, the estimate should be made "upon the supposition that each horse, in its sound condition, was only worth the sum of \$100." And this raises the question whether or not the provision in the bill of lading above quoted constitutes a valid contract, whereby the liability of the defendant is limited, as therein set forth.

This precise question has not been hitherto adjudicated by this court, but, applying to it the test of certain principles which we consider established, its solution is free from difficulty.

486; *Forbes v. Aspinall*, 18 East, 323; *Usher v. Noble*, 12 East, 639.

A contract agreeing on a valuation of the property carried, with the rate of freight, will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations. *Hart v. Pennsylvania R. Co.* 112 U. S. 381 (23 L. ed. 717).

A shipper delivered a box of jewelry to an express company, paying the minimum rate, and accepting a receipt limiting the liability of the company, and valuing the goods at \$50, knowing that the company charged increased rates for greater risks. The company failed to make delivery to consignee. It was held that a presumption of negligence arose, and, without evidence to rebut, the shipper could recover the full value of the goods. *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 300, 114 Pa. 523.

Burden of proof of cause of loss.

When goods in the custody of the carrier are lost or damaged, the presumption of law is that it was occasioned by his default, and the burden is on him to prove that it arose from a cause for which he was not responsible. *Lawson, Cont.* § 245; *Hutchinson, Carr.* § 769; *Schouler, Bailm.* § 439; *Memphis & C. R. Co. v. Holloway*, 9 Bart. 183; *Dillard v. Louisville & N. R. Co.* 2 Lea, 236; *Empire Transp. Co. v. Wamsutta Oil, F. & M. Co.* 63 Pa. 14.

The *onus* is on the carrier to show that the injury "occurred by one of the causes excepted in its undertaking." *Read v. St. Louis, K. C. & N. R. Co.* 60 Mo. 199; *Levering v. Union Trans. & Ins. Co.* 42 Mo. 88.

It is only where the contract is that the owner shall accompany the property and have it in his own charge and in fact does so that the *onus* is on the owner. *Clark v. St. Louis, K. C. & N. R. Co.* 64 Mo. 440.

6 L. R. A.

liability for the consequences of his own negligence or that of his servants. This was decided in an elaborate opinion by the Supreme Court of the United States in *New York Cent. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 357 [21 L. ed. 627], and by this court in *Virginia & T. R. Co. v. Sayers*, 26 Gratt. 323, and the principle is now brought into the Code, section 1296 of which declares that no "agreement made by a common carrier for exemption from liability for injury or loss occasioned by his own neglect or misconduct shall be valid."

But that is not the question before us. The question here is whether, when the shipper signs a bill of lading, not exempting the carrier from liability for the negligence of himself or his servants, but limiting the amount in which the carrier shall be liable, in consideration of the goods being carried at reduced rates, such a contract, fairly entered into, is valid and binding; and we see no reason why, when its terms are just and reasonable, it should not be. The test to be applied in all such cases is, Was the contract fairly entered into, and are its terms just and reasonable?

At common law, it is true, the carrier is chargeable as an insurer, unless loss or damage occur by the act of God or the public enemy. But as the law now is, he may, by special contract, restrict his liability for losses otherwise occurring. Indeed, he may, by such agreement, exempt himself absolutely from

Under a special contract limiting liability to a certain amount, a carrier received for transportation a saw, which on its arrival at its destination was cracked eight or ten inches. It was held that presumption of negligence arose, and the carrier, failing to rebut, was liable for the full value of the saw. *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 300, 114 Pa. 523.

Where goods are lost or injured while in the custody of a common carrier, a presumption of negligence on the part of the carrier arises in the absence of evidence accounting for the loss or injury in such a way that negligence cannot be inferred. *Grogan v. Adams Exp. Co.* 5 Cent. Rep. 300, 114 Pa. 523.

The burden of proof to show exemption from liability by special contract is on the carrier. *Baltimore & O. R. Co. v. Harris*, 79 U. S. 12 Wall. 85 (20 L. ed. 359); *Bissell v. Michigan S. & N. I. R. Co.* 22 N. Y. 235.

In case of continuous routes.

Where a party by his own contract creates a duty he is bound to make it good, notwithstanding any accident or inevitable necessity. *Harrison v. Missouri Pac. R. Co.* 74 Mo. 370; *Davis v. Smith*, 15 Mo. 469; *White v. Missouri Pac. R. Co.* 3 West. Rep. 132, 19 Mo. App. 400.

The first of a number of successive companies rendering service in the carriage of freight between distant points may so bind itself to deliver goods beyond the terminus of its own line as to become responsible for their safety through the entire journey. *Block v. Merchants Despatch Transp. Co. (Tenn.)* 27 Am. Law Reg. 2d series, 554.

In case of continuous routes, the carrier is liable until the goods are delivered to the second carrier (*Michigan C. R. Co. v. Mineral Springs Mfg. Co.* 53 U. S. 18 Wall. 327, 21 L. ed. 302; *Michigan C. R. Co. v. Hale*, 6 Mich. 243; *Mills v. Michigan Cent. R. Co.* 45 N. Y. 623), or until the liability of the succeeding carrier has attached. *Pratt v. Grand T. R. Co.* 36

the contract, "virtually agrees that, in respect to the particular transaction, the carrier is not to be regarded as in the exercise of his public employment, but as a private person, who incurs no responsibility beyond that of an ordinary bailee for hire, and answerable only for misconduct or negligence." *New Jersey Steam Nav. Co. v. Merchants Bank*, 47 U. S. 6 How. 844 [12 L. ed. 465]; 2 Parsons, Cont. 6th ed. 283, and cases cited.

This, indeed, is said, in some of the cases, to be no departure from the ancient principles of the common law. In *Nicholson v. Willan*, 5 East, 507, Lord Ellenborough remarked that there is no case to be met with in the books in which the right of a carrier thus to limit, by special contract, his own responsibility, has ever been, by express decision, denied. And the authorities in this country are to the same effect.

In *Southern Exp. Co. v. Caldwell*, 88 U. S. 21 Wall. 264 [22 L. ed. 556], it is declared to be settled law that the responsibility of a common carrier may be limited by an express agreement with the shipper, provided the limitation be reasonable and not inconsistent with public policy. And although there is a conflict of authority on the subject, the weight of authority, undoubtedly, is in favor of the proposition that a carrier may, by special agreement, fairly made, limit his common-law liability,

Pennsylvania R. Co. 112 U. S. 351 [28 L. ed. 717], in which it was decided that where a contract of carriage, signed by the shipper, is fairly made with a railroad company, agreeing on a valuation of the property to be transported, with a rate of freight based on the condition that the carrier assumes liability only to the extent of the agreed valuation, even in case of loss or damage by the negligence of the carrier, the contract will be upheld as a proper and lawful mode of securing a due proportion between the amount for which the carrier may be responsible and the freight he receives, and of protecting himself against extravagant and fanciful valuations.

In that case the plaintiff shipped five horses in one car over the defendant's road, under a bill of lading signed by him, which stated that the horses were to be transported "upon the following terms and conditions, which are admitted and accepted by me as just and reasonable: First, to pay freight thereon" at a rate specified, "on the condition that the carrier assumes a liability on the stock to the extent of the following agreed valuation: If horses, not exceeding \$200 each."

By the negligence of the defendant's servants one of the horses was killed and the others were injured, and the action was brought to recover damages therefor. At the trial it appeared that the horses were race horses, and

U. S. 43 24 L. ed. 336; *Rawson v. Holland*, 50 N. Y. 611; *O'Neill v. N. Y. Cent. & H. R. R. Co.* 60 N. Y. 128.

Where the exemption was from loss by fire, and the goods were unloaded in transit, awaiting re-shipment, and were lost by fire, the carrier was held liable. *Robinson v. Merchants D. Transp. Co.* 45 Iowa, 470.

Under Mass. Pub. Stat., chap. 112, § 214, a railroad company is not liable for goods destroyed by fire while in its possession under a contract of carriage. *Bassett v. Connecticut River R. Co.* 5 New Eng. Rep. 208, 145 Mass. 129; *Blaisdell v. Connecticut River R. Co.* 5 New Eng. Rep. 207, 145 Mass. 132.

But a common carrier is not bound in law to transport goods beyond its terminus, and it may therefore lawfully stipulate that it shall not be liable for loss after the goods have passed beyond the limits of its own line. *Schouler*, Balim. § 603; *Lawson*, Cont. § 236; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288; *Memphis & C. R. Co. v. Holloway*, 9 Baxt. 183; *Louisville & N. R. Co. v. Campbell*, 7 Helsk. 357.

The obligation of the carrier is discharged when it has safely delivered the goods to the next succeeding carrier. *Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co.* 10 West. Rep. 388, 67 Mich. 110.

A common carrier is not liable for loss sustained beyond the terminus of its own line unless it has assumed such liability by express contract, or unless some arrangement in the nature of a partnership exists between it and the connecting carriers. *Central Trust Co. v. Wabash, St. L. & P. R. Co.* 81 Fed. Rep. 247; *Ort v. Minneapolis & St. L. R. Co.* 36 Minn. 306; *Sumner v. Walker*, 80 Fed. Rep. 261.

Liability as bailee.

Under a contract for carriage, a common carrier is an insurer until the transit is ended, and then liable only as warehouseman during such reasonable time as the goods are in its custody awaiting

the call of the consignee. *Bassett v. Connecticut River R. Co.* 5 New Eng. Rep. 208, 145 Mass. 129; *Blaisdell v. Connecticut River R. Co.* 5 New Eng. Rep. 207, 145 Mass. 132.

On the arrival of goods at their destination, and their discharge from the cars, the liability of the company ceases as carrier and becomes that of a bailee for hire. *Budd v. Wabash, St. L. & P. R. Co.* 2 West. Rep. 535, 20 Mo. App. 206; *Gashweiler v. Wabash, St. L. & P. R. Co.* 83 Mo. 112; *Holtzclaw v. Duff*, 27 Mo. 392; *Kansas City Transfer Co. v. Neiswanger*, 18 Mo. App. 108.

The liability commences when the goods are received on board or at the wharf, and continues after they are unladen. *The Williams*, 1 Brown, Adm. 221; *Salmon Falls Mfg. Co. v. The Tangier*, 11 Law Rep. N. S. 6; *Faulkner v. Wright*, 1 Rice, L. 107; *Greenwood v. Cooper*, 10 La. Ann. 796; *Clarke v. Needles*, 25 Pa. 338; *Snow v. Carruth*, 1 Sprague, 324; *Freeman v. Buckingham*, 59 U. S. 18 How. 133 (15 L. ed. 841); *Vandewater v. Mills*, 60 U. S. 19 How. 82 (15 L. ed. 554).

When a consignee does not appear and claim the goods, it is the carrier's duty to deposit them safely or place them in proper custody for him (*Gillaume v. General Transp. Co.* 1 Cent. Rep. 723, 100 N. Y. 491), and, in case of imported goods subject to duty, to see that they are in proper custody. *Redmond v. Liverpool, N. Y. & P. S. Co.* 46 N. Y. 578.

Although the liability of a transportation company as an insurer ceases upon the arrival of the freight at the depot, it becomes responsible thenceforward, under its contract, as warehouseman, for the want of proper care in the delivery of freight. *Merchants D. & T. Co. v. Merriam*, 9 West. Rep. 382, 111 Ind. 5; *Independence Mills v. Burlington, C. R. & N. R. Co.* 72 Iowa, 535.

Liability for wrong delivery of goods.

If, through the carrier's negligence after the goods have been stored, they are delivered to the

affirmed. In the course of its opinion the supreme court, after remarking that, as the rate of freight expressed was stated to be on the condition that the defendant assumed a liability to the extent of the agreed valuation named, the fair inference was that the rate of freight was graduated by the valuation, and that this was a reasonable qualification of the carrier's liability, said: "There is no justice in allowing the shipper to be paid a large value for an article which he has induced the carrier to take at a low rate of freight on the assertion and agreement that its value is less than that claimed after a loss. It is just to hold the shipper to his agreement, fairly made as to value, even where the loss or injury has occurred through the negligence of the carrier. The effect of the agreement is to cheapen the freight and secure the carriage, if there is no loss; and the effect of disregarding the agreement, after a loss, is to expose the carrier to a greater risk than the parties intended he should assume. The agreement as to value, in this case, stands as if the carrier had asked the value of the horses, and had been told by the plaintiff the sum inserted in the contract."

And then the court went on to say that "the limitation as to value has no tendency to exempt from liability for negligence. It does not induce want of care. It exacts from the carrier the measure of care due to the value

shipper is exempted from saying that the value is greater. The articles have no greater value, for the purposes of the contract of transportation between the parties to that contract. The carrier must respond for negligence up to that value. It is just and reasonable that such a contract, fairly entered into, and where there is no deceit practiced on the shipper, should be upheld. There is no violation of public policy. On the contrary, it would be unjust and unreasonable, and would be repugnant to the soundest principles of fair dealing and of the freedom of contracting, and thus in conflict with public policy, if a shipper should be allowed to reap the benefit of the contract if there is no loss, and to repudiate it in case of loss."

This reasoning, which seems to us sound, is supported by numerous decisions of courts of the highest respectability, and is decisive of the present case. The contract in question shows on its face that in consideration of certain risks being assumed by the plaintiff, and the further stipulation that in the event of loss or damage no greater sum than \$100 would be claimed for any one horse, the Company agreed to transport the plaintiff's horses to Philadelphia at a reduced rate. The plaintiff, as the evidence shows, had choice of rates—one higher, without limitation as to the defendant's liability; the other lower, with a limitation of liability—and he chose the latter.

wrong person, the carrier will be liable to the owner as for the conversion of the goods. *Merchants D. & T. Co. v. Merriam*, 9 West. Rep. 392, 111 Ind. 5; *Furman v. Union P. R. Co.* 9 Cent. Rep. 284, 106 N. Y. 579; *Colgate v. Pennsylvania Co.* 2 Cent. Rep. 906, 102 N. Y. 120.

The risk of a wrong delivery rests upon the carrier. *Wernway v. Philadelphia, W. & B. J. R. Co.* 9 Cent. Rep. 608, 117 Pa. 46.

A carrier is not liable for goods sold under an attachment after it notified the owner thereof. *Baltimore & O. R. Co. v. Davis* (Pa.) 10 Cent. Rep. 630.

Where goods shipped were seized at an intermediate point upon an attachment, of which seizure the carrier notified the consignee, the carrier is not liable for failure to deliver at the point of destination. *Pingree v. Detroit, L. & N. R. Co.* 9 West. Rep. 708, 66 Mich. 148.

Carrier cannot stipulate for exemption from liability for negligence of itself, its servants or its agents.

A carrier cannot by contract exempt himself from liability for his own negligence. *Inman v. South Carolina R. Co.* 129 U. S. 128 (32 L. ed. 612).

It is not just and reasonable in the eye of the law for a common carrier to stipulate for exemption from responsibility for the negligence of himself and servants, and such a stipulation cannot be held valid. *New York C. R. Co. v. Lockwood*, 84 U. S. 17 Wall. 367 (21 L. ed. 627); *York Mfg. Co. v. Illinois Cent. R. Co.* 70 U. S. 3 Wall. 107 (18 L. ed. 170); *U. S. Exp. Co. v. Kountze*, 75 U. S. 8 Wall. 342 (19 L. ed. 457); *Bank of Ky. v. Adams Exp. Co.* 98 U. S. 174, 181 (23 L. ed. 872, 874); *Grand Trunk R. Co. v. Stevens*, 95 U. S. 656 (24 L. ed. 536); *Coward v. East Tennessee, V. & G. R. Co.* 16 Lea, 226; *Dillard v. Louisville & N. R. Co.* 2 Lea, 288; *Marr v. Western U. Telegr. Co.* 85 Tenn. 529; *Lawson, Cont.* § 238; *Hutchinson, Carr.* § 72. See *Ins. Co. of N. A. v. Easton*, 3 L. R. A. 424, and *note*, 78 Tex. 107.

6 L. R. A.

A condition inserted in the contract of a common carrier making its liability dependent upon the giving of a written notice to some officer of the carrier or the nearest station agent, of any loss or injury to the property, before removing it from the place of delivery or mingling it with other property, is an unreasonable limitation upon the liability of such carrier. *Good v. Galveston, H. & S. A. R. Co.* (Tex.) 4 L. R. A. 801.

The liability of the common carrier continues during transportation over the entire route over which he has agreed to transport the property. *Buckland v. Adams Exp. Co.* 97 Mass. 130.

The rule does not apply where the goods were transported in a car which was left in the exclusive control of the shipper's agent, and they were destroyed by his act; and in such case it is immaterial whether the agent was careful or negligent. *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485.

It is immaterial, also, in such case, that the owner's agent accompanied the goods under a provision in a contract exempting the carrier from liability, and which was void under section 1308 of the Code. *Hart v. Chicago & N. W. R. Co.* 69 Iowa, 485.

A despatch company cannot, by special contract, exempt itself from liability for loss or injury to goods caused by the negligence of the railroad company engaged by it to transport the same, or the servants or employees of such railroad. *Block v. Merchants Despatch Transp. Co.* (Tenn.) 27 Am. L. Reg. 2d series, 554; *Bank of Ky. v. Adams Exp. Co.* 93 U. S. 174 (23 L. ed. 872); *Muser v. Am. Exp. Co.* 1 Fed. Rep. 382; *Cincinnati, H. & D. R. Co. v. Pontius*, 19 Ohio St. 221; *Galveston, H. & H. R. Co. v. Allison*, 59 Tex. 186, 12 Am. & Eng. R. R. Cas. 28.

An express company is chargeable for the negligence of the agent it employs to do its transportation. *Boscowitz v. Adams Exp. Co.* 93 Ill. 528; *Christenson v. American Exp. Co.* 15 Minn. 270; *Empire Transp. Co. v. Wamsutta Oil, R. & M. Co.* 63 Pa. 14; *Machu v. London & S. W. R. Co.* 2 Exch. 415.

for the negligence of its servants, or from the obligation to exercise diligence and care, but for a liability commensurate with the value of the property shipped and the compensation received. That value was, in effect, agreed on in the contract; and for the purposes of the present case, it must be assumed that the property had no greater value. In such a case the principle of estoppel applies with full force and conclusive effect. There is no charge of fraud or imposition; the contract was fairly entered into, and the limitation in question is not in-

valid. See also *Graves v. Lake Shore & M. S. R. Co.* 137 Mass. 33; *Hill v. Boston, H. T. & W. R. Co.* 3 New Eng. Rep. 916, 144 Mass. 284.

It follows that, in refusing to give the above-mentioned instruction to the jury, the circuit court erred, and for this error the judgment must be reversed, and the case remanded for a new trial.

Judgment reversed.

NEW JERSEY COURT OF ERRORS AND APPEALS.

DELAWARE, LACKAWANNA & WEST-ERN R. CO., *Appt.*,

v.

CENTRAL STOCK YARDS & TRANSIT CO.

(.....N. J. Eq.....)

*1. Where one corporation seeks judicial redress against another corporation, on the ground that the other has refused to give a service, or to perform a duty which it owes, the complaining corporation, to succeed, must show, affirmatively, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law.

*Head notes by VAN FLEET, V. C., written for case in lower court.

NOTE.—Equity, protection of legal rights.

Every invasion of a private right imports an injury, for which the law will allow the recovery of nominal damages, at least, for the purpose of maintaining the right and preventing the wrong from ripening into a right by lapse of time. *Crawford v. Rambo*, 4 West. Rep. 449, 44 Ohio St. 279.

But the present power of law courts to grant complete relief does not, in general, deprive equity of a jurisdiction which it formerly possessed when law courts possessed no such power. *Varet v. New York Ins. Co.* 7 Paige, 560; *King v. Baldwin*, 2 Johns. Ch. 554, 17 Johns. 384.

So in cases where the primary right, interest or estate to be maintained, protected or redressed is a legal one, to deprive the court of equity of its concurrent jurisdiction the sufficiency and completeness of the legal remedy must be certain. *Rathbone v. Warren*, 10 Johns. 587; *Bateman v. Willoe*, 1 Sch. & Lef. 205; *Southampton Dock Co. v. Southampton Harbor & P. Board*, L. R. 11 Eq. 254; *South-Eastern R. Co. v. Brogden*, 3 Macn. & G. 8; *Varet v. New York Ins. Co.* 7 Paige, 560. See *Respass v. Zorn*, 42 Ga. 389; *Watkins v. Owens*, 47 Miss. 598; *Academy of Visitation v. Clemens*, 50 Mo. 187; *Otley v. Haviland*, 36 Miss. 19.

The concurrent jurisdiction of equity courts extends to and embraces all cases of legal primary rights and causes of action for which the law furnishes no certain, adequate and complete remedy. *Franklin Ins. Co. v. McCrea*, 4 Greene (Iowa) 229.

Injunction for violation of a legal right.

Injunction is granted, not merely because the injury is essentially destructive, but because, not being continuous or repeated, the full compensation for the entire wrong cannot be obtained in one action at law for damages; as in case of injury to houses, land, etc. (*De Veney v. Gallagher*, 20 N. J. 4 L. R. A.

2. Unless a duty has been created against a corporation by usage, or by contract, or by a statute, the courts cannot be called on to give it effect.

3. A court of chancery is not, any more than is a court of law, clothed with legislative power. It may, in cases where no adequate remedy at law exists, enforce, in its own appropriate way, the specific performance of an existing legal obligation arising out of contract, law or usage; but it cannot create the obligation.

4. The business of a stock-yard corporation, except in the character of the property which is the subject of bailment, corresponds in many respects with the business of warehousemen.

5. A warehouseman cannot have the possession of another man's property.

Eq. 33; *Witzmer's App.* 45 Pa. 455; *Frederick v. Groshon*, 30 Md. 436; *Ryan v. Brown*, 18 Mich. 196; *Echelkamp v. Schrader*, 45 Mo. 506; *Injuring a party-wall* (*Phillips v. Bordman*, 4 Allen, 147); or cutting off an aqueduct or water supply (*Wilcox v. Wheeler*, 47 N. H. 488; *Wright v. Moore*, 38 Ala. 593; *Pettigrew v. Evansville*, 25 Wis. 223); or obstructing a railroad, or access to it. *London & N. N. W. R. Co. v. Lancashire & Y. R. Co.* L. R. 4 Eq. 174; *Clark v. Jeffersonville, M. & L. R. Co.* 44 Ind. 248.

In *Robinson v. Lord Byron*, 1 Bro. Ch. 588, a preliminary injunction was granted restraining defendant "from using and maintaining certain dams, gates, etc., so as to prevent water from flowing to plaintiff's mill as it had done;" and in *Lane v. Newdigate*, 10 Ves. Jr. 193, a preliminary injunction was granted restraining defendant "from impeding plaintiff from navigating a certain canal by continuing to keep the canal banks and works out of repair, by diverting the water or by continuing the removal of the stop gate." For other instances, see *Rankin v. Huskisson*, 4 Sim. 13; *Hervey v. Smith*, 1 Kay & J. 389, 392; *Atty-Gen. v. Metropolitan Board of Works*, 1 Hem. & M. 298, 312; *Hepburn v. Lordan*, 2 Hem. & M. 345, 352; *Earl of Mexborough v. Bower*, 7 Beav. 127; *Hooper v. Brodrick*, 11 Sim. 47; *Gaskin v. Balls*, L. R. 13 Ch. Div. 324; *Smith v. Smith*, L. R. 20 Eq. 500; *Lady Stanley v. Earl of Shrewsbury*, L. R. 19 Eq. 616; *Bowes v. Law*, L. R. 9 Eq. 636; *Black v. Good Intent Tow-Boat Co.* 31 La. Ann. 497; *Longwood Valley R. Co. v. Baker*, 27 N. J. Eq. 168; *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 379; *Cole Silver Min. Co. v. Va. & G. H. Water Co.* 1 Sawy. 685; *Corning v. Troy Iron & Nail Factory*, 40 N. Y. 191, 205; *Auburn & C. Pl. Road Co. v. Douglass*, 12 Barb. 553; *Penniman v. N. Y. Balance Co.* 13 H. & W. Pr. 40.

clear service warehousemen shall render to the public, and to fix the compensation that may be demanded for such service; but until such power is exercised warehousemen are at liberty to use their warehouses as they please.

7. The presence in the defendants' charter of a provision, authorizing them to make contracts with the several railroad companies having a terminus in Hudson County, for the transportation and delivery of live stock at their yards, shows clearly that the Legislature did not intend that the defendants should be subject to any duty to railroad companies, in that respect, except such as they should voluntarily take upon themselves by contract.

8. To justify the interference of a court of equity on the ground that its interference is necessary to prevent irreparable damage, the complainant's legal right must be clear. There can be no damage, irreparable or otherwise, where there is no violation of a right.

9. Where the only ground laid to support the jurisdiction of a court of equity is that the defendant is violating a legal right of the complainant to his irreparable injury, the complainant, to be entitled to the aid of the court, must show that his adversary's conduct is unconscientious.

(*Magie and Dixon, JJ., dissent.*)

(February 20, 1890.)

APPEAL by complainant from a decree of the Court of Chancery dismissing the bill in a suit for an injunction to compel defendant to receive and care for live stock tendered to

In such cases plaintiff must be prompt in objecting and in taking steps to enforce his objection, if the circumstances are such that defendant would be unnecessarily prejudiced by the plaintiff's delay. 8 Pom. Eq. Jur. 382.

Corporation may enjoin rival corporation.

A horse railroad company, chartered by the Legislature, may, while legally operating its road, enroll a rival coach company, organized under the General Corporation Act, and licensed by the city where the tracks are laid, from regularly using its tracks with coaches adapted thereto, and from obstructing it in the use of such tracks by impeding the passage of its cars. Camden Horse R. Co. v. Citizens Coach Co. 81 N. J. Eq. 538.

Legal remedy; when adequate.

The legal remedy is adequate only when the injured party can, by one action at law, recover damages which constitute a complete and certain relief for the whole wrong—a relief virtually as efficient as that given by a court of equity. *Livingston v. Livingston*, 6 Johns. Ch. 497, 499; *Jerome v. Ross*, 7 Johns. Ch. 315, 333; *Mitchell v. Dora*, 6 Ves. Jr. 147; *Hamilton v. Worsefold*, 10 Ves. Jr. 290, note; *Crockford v. Alexander*, 15 Ves. Jr. 138; *Twort v. Twort*, 18 Ves. Jr. 123; *Kinder v. Jones*, 17 Ves. Jr. 110; *Earl Cowper v. Baker*, 17 Ves. Jr. 123; *Grey v. Duke of Northumberland*, 17 Ves. Jr. 231; *Thomas v. Oakley*, 18 Ves. Jr. 184; 8 Pom. Eq. Jur. 388.

Violation of specific contracts restrained.

The violation of specific contracts may be restrained by injunction, whenever the legal remedy of damages would be inadequate, and the contract is of such a nature that its negative specific en- 6 L. R. A.

the Vice-Chancellor delivered in the court below, which was as follows:

Van Fleet, V. C.:

The complainants allege that the defendants have refused to perform a legal duty which the defendants owe to them, and they bring this suit to procure a decree compelling the performance of such duty.

The complainants have control of a continuous line of railway from Hoboken to Buffalo, with connections at Buffalo extending to Chicago and other points in the west. They do a very large business in the transportation of live stock, their income for carrying this kind of freight exceeding a half a million of dollars a year. The defendants are a stock-yard corporation, having yards and other facilities at the foot of Sixth Street, in Jersey City, for the safe keeping, feeding, sale and slaughter of live stock. Their yards front on the Hudson River, where wharves have been built for the reception of live stock carried to the yards by vessel.

The eastern terminus of the complainants' road is at Hoboken, distant about 1,600 feet from the defendants' yards. There is no connection between the complainants' road and the defendants' yards by railroad track or other physical means. There are three different ways or means by which live stock may be taken to the defendants' yards: *first*, it may be driven there over the public highway; *second*, both the Erie Railway Company and the Pennsylvania Railroad Company have laid tracks from

forcement is possible. This rule has been extended to affirmative contracts, which imply or involve negative stipulations. *Lumley v. Wagner*, 1 De G. M. & G. 604; *Montague v. Flockton*, L. R. 16 Eq. 189; *Wolverhampton & W. R. Co. v. London & N. W. R. Co.* L. R. 16 Eq. 433; *Ward v. Beeton*, L. R. 19 Eq. 207; *Donnell v. Bennett*, L. R. 22 Ch. Div. 836; *Fothergill v. Rowland*, L. R. 17 Eq. 122, 141; *Garrett v. Banstead & E. D. R. Co.* 4 De G. J. & S. 462; *Munro v. Wivenhoe & B. R. Co.* 4 De G. J. & S. 723; *Jennings v. Brighton, I. & O. Sewers Board*, 4 De G. J. & S. 736; *De Mattos v. Gibson*, 4 De G. & J. 278; *Johnson v. Shrewsbury & B. R. Co.* 3 De G. M. & G. 914; *Stocker v. Brockelbank*, 3 Macn. & G. 250; *Saintner v. Ferguson*, 1 Macn. & G. 236; 8 Pom. Eq. Jur. p. 374.

The doctrine of *Lumley v. Wagner*, *supra*, has been either rejected entirely in this country or only partially accepted. See *Sanquirico v. Benedetti*, 1 Barb. 815; *Bank of Cal. v. Fresno Canal & Nav. Co.* 53 Cal. 201; *W. U. Teleg. Co. v. Western & A. R. Co.* 8 Baxt. 54; *Crutchfield v. Wason Car Works*, 8 Baxt. 242; *Smith v. McElwain*, 57 Ga. 247; *Hahn v. Concordia Society*, 43 Md. 460; *Manhattan Mfg. & F. Co. v. N. J. Stock Yard & M. Co.* 28 N. J. Eq. 161; *Gallagher v. Fayette Co. R. Co.* 38 Pa. 102.

Courts may interfere to restrain the violation of such contracts even while conceding that their specific performance could not be enforced. *W. U. Teleg. Co. v. Union Pac. R. Co.* 1 McCrary, 558; *W. U. Teleg. Co. v. St. Joseph & W. R. Co.* 1 McCrary, 555; *Singer S. Mach. Co. v. Union, B. H. & Embroidery Co.* 1 Holmes, 363.

Injunction as a preventive remedy.

Injunction is a preventive remedy, and if the injury be already done the writ has no operation, as it cannot be applied correctively, so as to remove

delivered on their wharf.

For more than two years prior to the 15th of July, 1887, nearly all the cattle, calves and sheep carried by the complainants to the eastern terminus of their road were transferred to the defendants' yards, in the complainants' cars, over the track of the Erie Railway Company, the cars being switched from the complainants' road to the Erie track at the junction of the two tracks. On the date last named the Erie Company increased their charge for this service, from \$2.50 and \$3 a car to \$5 a car.

The complainants being unwilling to pay the increased rate of charge, made an arrangement, for the same service, with the Susquehanna Railroad Company, who were at that time using the track of the Pennsylvania Railroad running to the defendants' yards. After the lapse of about a month, the Pennsylvania Company refused to allow the complainants to have the use of their track. The complainants then applied to the defendants to either send their boats to Hoboken for such stock as the complainants might desire to have yarded at the defendants' yard, or to allow the complainants to send, in their own boats, to the defendants' yards such stock as the complainants might desire to have yarded there. The defendants refused to do either—they refused to send their boats for complainants' stock, or to receive stock brought to their wharf by the complainants' boats.

The reason the defendants refused to comply with the complainants' request, was because the complainants had, prior to the time the request was made, refused to conduct their live-

yards.

Prior to the 14th of June, 1887, nearly all the cattle, calves and sheep carried by the complainants to Hoboken had either been yarded at the defendants' yards, or the same yard charges paid to the defendants on them that would have been payable if they had, in fact, been yarded there. About the date last named, the complainants made an arrangement by which the live stock carried over their road, for delivery at a stock yard at Forty-fifth Street, on the East River, should be transferred by their own boats, directly from Hoboken to the point of delivery. This arrangement diverted from the defendants' yards all the stock so transferred, and deprived them of the profit which they would have otherwise received from it. The diversion of this business was regarded by the defendants as a hostile act, and they at once assumed an unfriendly attitude towards the complainants. They at once gave notice, by their acts, that they intended to stand upon their strict legal rights, and to yield nothing to the complainants which the law did not give.

This was, unquestionably, the origin of the present controversy. Immediately after the complainants were notified that the defendants would neither send for such stock as the complainants desired to have yarded in the defendants' yards, nor allow it to be brought to their wharf in the complainants' own boats, the complainants filed the bill in this case, asking for an injunction compelling the defendants to receive live stock from them. A preliminary injunction was refused (*Del. L. & W. R. Co. v. Central Stock-Yard & T. Co.* 43 N. J. Eq. 71, 9 Cent. Rep. 111), and this ruling

it. *Atty-Gen. v. N. J. R. & Transp. Co.* 8 N. J. Eq. 141.

Equity has no jurisdiction to compel, on motion, the performance of any substantive act. *Drewry, Injunctions*, 260; *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 388.

The court will not, by injunction granted upon interlocutory application, direct the defendant to perform an act, but may, upon motion, order the defendant to pull down a building which was clearly a nuisance to the plaintiff. 8 *Dan. Ch. Pr.* 1767; *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 388.

The court may restrain the further digging of a ditch, but it will not, on motion before answer, order the part dug to be filled up. *Anonymous*, 1 *Ves. Jr.* 140.

Mandatory injunction not ordered on motion.

A mandatory injunction will not be ordered on a preliminary or interlocutory motion, but only upon final hearing, and then only to execute the decree or judgment of the court. *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 379.

A complainant is not in a position to ask for a preliminary injunction when the right on which he founds his claim is, as a matter of law, unsettled. *Citizens Coach Co. v. Camden Horse R. Co.* 20 N. J. Eq. 239; *Delaware, L. & W. R. Co. v. Central Stock Yark & T. Co.* 9 Cent. Rep. 111, 43 N. J. Eq. 75.

A preliminary injunction, negative in its terms, while purporting simply to restrain the wrong, so framed that it restrains the defendant from permitting his previous wrongful act to operate, and therefore virtually compels him to undo it by re- 6 *L. R. A.*

moving the obstructions or erection, or erections, and restoring the plaintiff to his former condition, is a mandatory injunction. 8 *Pom. Eq. Jur.* 391.

A preliminary injunction to restrain a tenant from discontinuing to keep an inn was dissolved on the ground that it was mandatory—the same as if he was commanded to keep an inn. *Hooper v. Brodrick*, 11 *Sim.* 47; *Rogers Locomotive & Mach. Works v. Erie R. Co.* 20 N. J. Eq. 389.

The court, upon final hearing, could not issue a mandatory injunction directing a wall to be taken down. *Rogers Locomotive & Mach. Works v. Erie R. Co.* *supra*.

As to the grounds and requisites for granting a preliminary injunction, see *N. Y. v. Mapes*, 6 *Johns. Ch.* 46; *Ogden v. Kip*, 6 *Johns. Ch.* 160; *N. Y. Printing & D. Estab. v. Fitch*, 1 *Paige*, 98.

Warehousemen as bailees.

Warehousemen are only ordinary bailees for hire, and are bound only to common care and diligence, and are liable only for want of such diligence or care. *Edwards, Bailm.* 284; *Jones, Bailm.* 97; *Story, Bailm.* § 444; *Calliff v. Danvers*, *Peake*, 155; *Knapp v. Curtis*, 9 *Wend.* 60; *Foot v. Storrs*, 2 *Barb.* 323; *Bogert v. Haight*, 20 *Barb.* 251; *Titworth v. Win-negar*, 51 *Barb.* 148; *Myers v. Walker*, 31 *Ill.* 353; *Buckingham v. Fisher*, 70 *Ill.* 121; *Hatchett v. Gibson*, 13 *Ala.* 587; *Dimmick v. Milwaukee & St. P. R. Co.* 18 *Wis.* 471; *McCullom v. Porter*, 17 *La. Ann.* 89; *Blin v. Mayo*, 10 *Vt.* 58; *Taylor v. Secrist*, 2 *Disney*, 239; *Cowles v. Pointer*, 26 *Miss.* 253; *Rodgers v. Stophel*, 32 *Pa.* 111; *Ducker v. Barnett*, 5 *Mo.* 97; *Holtzclaw v. Duff*, 27 *Mo.* 302; *Mechanics & T. Ins. Co. v. Kiger*, 103 *U. S.* 352 (20 *L. ed.* 433).

and is now to be decided on its merits. The claim of the complainants is that the defendants are under a legal obligation to take from them just such live stock as they may desire to have yarded at the defendants' yards, whether the same be sent to the defendants on foot, by rail or by boat, and also that it is the duty of this court to enforce this obligation by injunction. The proofs show that the defendants have never refused to receive stock from the complainants when the same was sent on foot or delivered by rail.

At present, however, the complainants cannot have stock carried to the defendants' yards by rail. They have no track of their own, and they have been denied the use of the Pennsylvania track, and have ceased to use that of the Erie because they are not willing to pay the rate which they have been notified will be charged for its use. But the particular way or method of delivery is rendered wholly immaterial by the defendants' answer. They deny that they are under any duty or obligation to the complainants, let the method of delivery be what it may, to take live stock from them. The following are the pertinent averments of their answer: "These defendants have and do refuse to receive, except under the command of an injunction, any live stock transported over the road of the complainants, and consigned to shippers doing business at the defendants' yards, so long as the complainants persist in diverting from the defendants' yards at least nine tenths of the complainants' cattle business, and they are advised and insist that they have a right so to do."

Again: "These defendants admit that it is their intention to prevent the transportation to their yards of any live stock coming over the complainants' railroad, unless the complainants are willing to give to the defendants all their business, the same as other railroads do, and they are advised and insist that they have a right so to do."

Further: "These defendants also say that they never have made, and do not intend to make, any objection to yarding live stock which has been delivered to consignees on the line of complainants' road and driven to their yards."

From these averments it will be seen that the material matter in dispute is not what right a natural person may have to have live stock yarded at the defendants' yards, nor what may be the right of the general public in that regard, but whether the complainants have such right.

This is not a suit by the Attorney-General asking for the protection or vindication of a public right, nor a suit by a natural person asking to be protected against a special and peculiar injury which he must suffer if deprived of a right, which he, in common with all the citizens of the State, is entitled to enjoy; but it is a suit by a corporation to enforce a right which it says belongs to it as a body corporate.

The complainants are the mere creature of legislative power, and have no capacity or rights and can exercise no powers except such as have been given to them by their creator.

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quired by contract, or as have arisen from custom or usage, so long and uniformly pursued as to have become a part of our general system of laws.

Where, in a case like the present, one corporation seeks judicial redress against another, on the ground that the other has refused to give a service or to perform a duty which it owes, the complaining corporation, to succeed, must show, affirmatively and clearly, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law. This I understand to be the principle on which the decision in *Express Cases* [*St. Louis, I. & M. S. R. v. Southern Exp. Co.*] 117 U. S. 1 [29 L. ed. 791], rests.

These cases, it will be remembered, arose out of the refusal of certain railroad corporations to give equal facilities, on like terms, to each express company asking to be permitted to do an express business on their roads. Under the lead of *Mr. Justice* Miller of the Supreme Court of the United States, it was held, both on interlocutory application and on final hearing, in several cases decided by the Circuit Court of the United States, in two or three different circuits, that a railroad corporation was under a legal duty, in the absence of either statutory regulation or contract obligation, to furnish to each express company desiring to do business on its road the same facilities for the doing of such business which it either provided for itself, or furnished to any other express company; and also that a court of equity might, in the rightful exercise of its general jurisdiction, compel the performance of this duty by injunction.

These decisions were put mainly on the ground that, as railroads were public highways, and the express business had become a well-recognized instrument of commerce, it was necessary, in order that the public might have the full benefit of the general principle, making it the duty of a common carrier, who carries on his business on the public highways, to extend equal privileges and accommodations to all, on equal terms as to compensation, that this principle should be applied in defining the duty of a railroad company to an express company. Decrees were accordingly made, compelling the defendant railroad company in each case to furnish to the complaining express company the same facilities, on both passenger and freight trains, for the transaction of an express business on its road, that it provided for itself or furnished to any other express company. Several of the cases in which this doctrine was enforced will be found collected in the notes to 1 Wood, Railway Law, 587.

Three of these cases were, after final hearing, carried to the Supreme Court of the United States, and there the decrees made below were reversed and the bills of complaint dismissed. That court held that a duty of the kind the complainants were seeking to have imposed upon the defendants could only be created in three ways, namely, by usage, or by contract, or by statute; and that inasmuch as the complainants could point neither to a usage, nor to a contract nor to a statute, which created the

The court said the circuit court had attempted to make such an arrangement for the business intercourse of the litigants, as, in the opinion of the court, the litigants ought to have made for themselves; but that that was a thing which was beyond judicial power.

Said *Chief Justice* Waite, speaking for all the members of the court who heard the cases, except *Justices* Miller and Field:

"The regulation of matters of this kind is legislative in its character, not judicial. To what extent it must come, if it comes at all, from Congress, and to what extent it may come from the States, are questions we do not now undertake to decide, but that it must come, when it does come, from some source of legislative power, we do not doubt. The Legislature may impose a duty, and when imposed it will, if necessary, be enforced by the courts; but, unless a duty has been created either by usage, or by contract, or by statute, the courts cannot be called on to give it effect."

Substantially the same principle had previously been enunciated in the decision of *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 687 [28 L. ed. 291].

The names of three railroad corporations appear in this case, namely, the Atchison, Topeka & Santa Fé Railroad Company, and the Denver & New Orleans Railroad Company, and the Denver & Rio Grande Railroad Company. For brevity the first will hereafter be called the Atchison Company, the second the New Orleans Company, and the third the Rio Grande Company.

The Atchison Company controlled a line of railroad extending from Kansas City, Missouri, to Pueblo, Colorado, and the New Orleans Company and Rio Grande Company each owned a railroad extending from Pueblo to Denver. The two latter ran nearly parallel, and were operated as rival roads.

The Atchison and Rio Grande Companies, prior to the completion of the road of the New Orleans Company, had made an agreement under which a through business was done over the whole of their lines from Kansas City to Denver. While this arrangement was in force the New Orleans Company connected its tracks with those of the Atchison Company at Pueblo, at a point distant about three quarters of a mile from the depot in Pueblo, which the Atchison and Rio Grande Companies had established there for their joint accommodation.

The New Orleans Company erected, at the point where its tracks intersected those of the Atchison Company, platforms and other conveniences for the transfer of passengers and freight from one road to the other, and then demanded that the Atchison Company should stop its trains at the junction of the two roads and furnish it there with the same facilities for doing a connected through business that it furnished to its competitor, and for the same compensation that its competitor paid. The Atchison Company refused to comply with this demand, and a bill in equity was then filed.

On the final hearing of the cause the Circuit Court of the United States made a decree placing the New Orleans Company, at the junction it had made with the Atchison Com-

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pany, both as to facilities and prices, except in respect to the issue of through bills of lading, through checks for baggage, through tickets and the interchange of cars.

Three provisions of the Constitution of Colorado were supposed, in their joint effect, to lay a foundation for this decree. These provisions declare: *first*, that all railroads shall be public highways, and all railroad companies shall be common carriers; *second*, that every railroad company shall have the right, with its road, to intersect, connect with or cross any other railroad; and *third*, that all individuals, associations and corporations shall have equal rights to have persons and property transported over any railroad in this State, and no undue or unreasonable discrimination shall be made, in charges or facilities, for the transportation of freight or passengers within this State.

On appeal to the Supreme Court of the United States it was decided unanimously that the decree made below was without warrant in law. The reasoning of the court, in part, was that the right conferred by the Constitution, of connecting the tracks of one road with those of another, did not confer a right upon either corporation to compel the other to form a business connection for the transaction of a through business, but that the right was limited to the formation of a mechanical union, to connect one physical structure with the other. The court, on this point, said:

"The railroad companies are not to be connected, but their roads. A connection of roads may make a connection in business convenient and desirable, but the one does not necessarily carry with it the other."

And as to the claim that the Atchison Company had violated the constitutional prohibition against undue or unreasonable discrimination, in refusing to interchange business with the New Orleans Company, the court said that, in the absence of statutory direction or contract obligation creating such duty, it did not exist; and also, that it was not within the power of a court of equity to compel a railroad company, having power to regulate the running of its trains as to time, and to locate its own stopping places, to stop its trains and interchange business with another company, at such point as the other company might select for the formation of a junction between the two roads. To invest any court with power of this kind would require it to exercise functions not at all judicial in their character, but such as are, in some States, confided to a special and independent agency of government.

The jurisdiction which a court of equity may rightfully exercise, in a case like the one now under consideration, was defined by *Chief Justice* Waite, in the case last cited, as follows: "A court of chancery is not, any more than is a court of law, clothed with legislative power. It may (in cases where no adequate remedy at law exists) enforce, in its own appropriate way, the specific performance of any existing legal obligation arising out of contract, law or usage, but it cannot create the obligation."

The complainants do not ground their claim to judicial aid on either contract or usage. No contract relations existed between the par-

the institution of this suit, as to give it the force of law, by which the duty in question was imposed upon the defendants.

The only foundation, therefore, which the complainants' case can have, is the law; and if it is found that that does not impose the duty claimed, then it must be declared that no such duty exists. It does not exist, so far as I can discover, by force of any general rule of law. In the opinion written when the application for a preliminary injunction in this case was decided, it was said that the defendants stand, in respect to their legal duties, in a position very similar to that which a common carrier occupies, bound to serve all who have a right to demand their service, to the best of their ability, and on equal terms as to compensation. *Dela-ware, L. & W. R. Co. v. Central Stock-Yard & T. Co.* 48 N. J. Eq. 74, 9 Cent. Rep. 111.

This opinion, as may be seen at a glance, was based on an assumption that there was a strong and close similitude between a railroad or canal company, in their character as a common carrier, and the defendants, both in respect to the powers which each might exercise, and the duties which each were bound to perform for the public. But it is now entirely clear that such is not the fact. Between the defendants and a railroad or canal company there is not the slightest analogy. There is not a single respect in which they bear the least resemblance to each other.

Railroads and canals are public highways. They are uniformly made so by Constitution, general statute or special provision of their charter; and the corporations authorized to construct them are, because their works, when constructed, are to be subject to public use as highways, given power to exercise the right of eminent domain; and for this reason such works are regarded as public highways and each member of the public has, in consequence, an equal right to their use, upon the payment of such compensation as the Legislature has seen fit to prescribe.

But the defendants stand in no such relation to the public. No privilege or prerogative of government has been granted to them (except to lay tracks across streets), and they cannot, therefore, be held to be subject to the duties which may be implied from a grant of a franchise authorizing the construction of a public highway.

The defendants' business is of recent origin. Their duties and liabilities are wholly undefined, except as they may be deduced from the application of well-established legal principles to other corporations in analogous cases. No case was cited on the argument, and none is known to exist, in which the duties of a body corporate, like the defendants, have been the subject of judicial consideration. The business of the defendants has no exact counterpart or model in any of the established instruments of commerce or agencies used by the public in the transaction of business. It bears a closer resemblance to the business carried on by warehousemen than to any other business known to the law.

Except in the character of the property which

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business which can, in my judgment, be safely used, by way of analogy, for the purpose of ascertaining whether or not, according to established principles of general law, the defendants are subject to the duty which the complainants ask the court to compel them to perform.

There can be no doubt, I think, that a warehouseman is not required, by any general rule of law, to receive goods on storage against his will.

In 2 Addison on Contracts (p. 476), it is said: "A man cannot be made a depositary without his knowledge and consent; he cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will." This must be so from the very nature of such transactions, for all bailments not made by force of statutory regulation rest in contract, and no contract can exist without consent, express or implied.

Warehouses for the storage of grain must, however, since the decision of the *Elevator Cases*, reported under the title of *Munn v. Illinois*, 94 U. S. 118 [24 L. ed. 77], be regarded as so far public in their nature as to be subject to legislative control. That case, it will be remembered, arose out of this state of facts: By the Constitution of Illinois, adopted in 1870, all elevators or storehouses, where grain or other property should be stored for compensation, were declared to be public warehouses, and the Legislature was directed to pass such laws as might be necessary to give full effect to this provision. Statutes were afterwards passed defining the service which the owners of such establishments should render to the public, and also fixing the compensation which should be charged therefor. The validity of these statutes was assailed, on the ground that they violated that provision of the Federal Constitution which prohibits a State from depriving any person of property without due process of law. When the case reached the Supreme Court of the United States, the court divided on the main question.

Mr. Justice Field, in a dissenting opinion of remarkable power, declared the statutes to be unconstitutional. His argument was this: that it was not within the power of either a constitutional convention or of a legislature to change a business which was in its nature private to a public business, by simply so declaring; that the body politic could lawfully exercise no greater dominion or control over the business of the owners of these elevators, because they did business with the public, than it could over the business of a blacksmith, who shod horses for the public; and that it is only in cases where the government, either general or local, has conferred some right or privilege on a citizen, which he can use in connection with his property, or by means of which his property is rendered more valuable to him, or he thereby enjoys an advantage over others, that it may lawfully control him in the conduct of his business, by prescribing what service he shall render to the public and regulating the compensation he may demand for such service.

Mr. Justice Strong concurred in this view. But the majority of the court took more advanced ground in favor of the right of public

interest in that use, and renders himself subject, in the use of the property so devoted, to control by the body politic. The part of the opinion of the majority of the court, which is most pertinent to the question now under consideration, is that in which it is said: "It matters not, in this case, that these warehousemen had built their warehouses, and established their business, before the regulations complained of were adopted. What they did was, from the beginning, subject to the power of the body politic to require them to conform to such regulations as might be established by the proper authority for the public good."

From this statement of the law, it would seem to be undeniable that, until the proper public authority intervenes and establishes such regulations as it may deem necessary for the public good, the owners of property, devoted to a public use of this character, retain complete and absolute dominion over it, and may exclude any member of the public from its use that they see fit. Until the body politic puts in exercise its power to control the use of such property, its owner may use it as he pleases.

The discussion thus far has demonstrated, I think, that even if we were at liberty, in deciding a question of strict legal right against a new instrument of business, to enter the field of analogy, and if there was found there a somewhat similar instrument to the one in question which had been held to be subject to certain duties, to charge the new instrument with the same duties on the ground of its similarity to the other, that no such duty as that which complainants claim could, by force of any general rule of law, be held to rest upon the defendants.

The only other means by which the duty in question could have been created is by statute. The complainants say that it is imposed by the Statute which created the defendants a body corporate. They do not say that it is imposed in express words; on the contrary, they admit that there are no words which, in plain terms, impose it; but their contention is that it should be implied from the powers granted and the general purpose of the statute. Thus it will be seen that the court, to sustain the complainants' claim, must be able to find evidence of an intention, not expressed in words, on the face of this Statute so clear and strong that it may, without fear of usurping legislative power, declare that such intention is part of the legislative will.

The defendants were created a corporation by a Statute passed in 1873. Pub. Laws 1873, p. 920. They are given power to locate, construct and maintain all necessary yards and other structures, with "aqueducts, and railway tracks, switches and turnouts, for the reception, safekeeping, feeding, watering, marketing, killing, packing and rendering, and for the weighing, delivery and transport of cattle and live stock of every description, and also dead and undressed animals, that may be at or passing through the County of Hudson, and for the accommodation and transaction of a general stock-yard and market establishment for cattle and live stock." They are also given authority

their business, in transporting live stock and dressed animals, in and about the harbor of New York and the Hudson River.

By the 4th section of their charter, it is enacted that it shall and may be lawful for the defendants to make contracts with the several railroad companies in, or (having) lines running through the County of Hudson, for the transportation and delivery of live stock, of every description, at the yards of the defendants; and they are given power to lay tracks and turnouts to connect with the lines or tracks of each, or all of the different railroad companies, said tracks to be used in the delivery of live stock to and from the defendants' yards. Authority is also given to the defendants to lay their tracks across the streets of Jersey City in such manner as to grade, as the common council may direct, but in no case to lay their tracks parallel with the line of the street.

In considering what construction should be given to this Statute, it will be important to keep in mind that the Legislature, in enacting it, were creating a corporation to establish and carry on a business which was in its infancy even where it had existed longest, and which, in this State, was entirely new. The business was one which it was believed would be likely to be of great public utility, if it was successful; but whether or not it could be made successful was uncertain when the Statute was passed. To make the experiment somebody had to risk his capital.

In this state of affairs it is not difficult to believe that there would be a natural disposition, on the part of the representatives of the people, to give those who were willing to embark their money in the venture an opportunity free from any sort of restriction, to make the business a success, knowing that if it was made a success, and the public good should, at any time in the future, render it necessary that the corporation should be controlled in its conduct towards the public, the Legislature could exercise such control. This, probably, is the reason, or one of the reasons, why the least trace cannot be found anywhere in this Statute of a purpose to impose a single duty on the defendant even in behalf of the public.

Railroad corporations, it will be observed, are nowhere mentioned in it, except in the 4th section, and the provisions of that section make it conspicuously clear, as I think, that it was not the intention of the Legislature to impose any duty on the defendants, in favor of railroad corporations, except such as they should voluntarily take upon themselves by contract. The very service which the complainants say the defendants are bound to render to them, as a legal duty, arising by implication from the terms of this Statute, it will be observed is the only thing in respect to which the defendants are made competent, by express words, to make contracts with railroad corporations concerning, the language of the Statute in that regard being that it shall be lawful for the defendants to make contracts with the several railroad companies having lines running through Hudson County, for the transportation and delivery of live stock at the defendants' yards.

lation of the defendants to railroad corporations having a terminus in Hudson County? The Legislature probably believed that the works the defendants proposed to construct would be of great advantage to the railroads, affording them a safe and convenient place for making delivery of live freight to its consignee, and for that reason they gave the defendants permission to lay tracks connecting their yards with the railroads, and also authorized them to make contracts with the railroads for the delivery of live stock at their yards; but they went no further. They neither imposed upon the railroads the duty of making delivery of live stock, against their will, to the defendants, nor upon the defendants the duty of receiving live stock, against their will, from the railroads. It was obviously the intention of the Legislature to leave the matter of the delivery of live stock by the railroads, and the reception of it by the defendants, to be controlled entirely by such contracts or arrangements as the parties might see fit to make. No duty in that regard is imposed by the Statute, in express words, upon either, and, so long as this continues to be the case, no duty can be imposed by the courts without usurping legislative power.

A remark made by *Mr. Justice Buller* in *Jones v. Smart*, 1 Tr. 44, and quoted with approbation by *Chief Justice Beasley* in *Palmtree v. Tilton*, 18 Stew. (40 N. J. Eq.) 555, is directly in point. He said: "We are bound to take the Act of Parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make laws."

Thus far the case has been considered as if it were the proper subject of equity jurisdiction. That, however, is not my opinion; on the contrary, I think, both in its substance and details, it is entirely outside of the proper jurisdiction of a court of equity. It is without a single equitable feature or element. The suit is not brought to protect an exclusive franchise, as was the action in *Camden Horse R. Co. v. Citizens Coach Co.* 31 N. J. Eq. 525; *S. C.* on appeal, 33 N. J. Eq. 267, but the complainants' case stands on nothing but the violation of an alleged legal right, which right is, as a matter of law, disputed and unsettled, has the support of neither precedent nor principle, and rests on nothing but analogies and implications.

A court of equity may interpose under some circumstances to protect a legal right, as when a violation is threatened or is being actually committed which will do irreparable damage; but it must be made clearly to appear that the complainant has the right he claims, for, if he is without right, the court is without jurisdiction. There can be no damage, irreparable or otherwise, where there is no violation of a right.

To justify the interference of a court of equity, in such a case, the legal right set up by the complainant must be clear; for, as was said by *Mr. Justice Dixon*, speaking for the court of errors and appeals, in *Outcall v. George W. Helme Co.* 43 N. J. Eq. 665, 8 Cent. Rep. 347, where the question is one of legal right, a condition precedent to the right of the complainant to bring his adversary into

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cannot be shown unless it is made to appear that the defendant has violated a legal right which had been previously established against him by a judgment at law, or which, on the admitted facts of the case, appears to be free from doubt or question.

The complainants do not complain that the defendants have invaded their property, and are there wantonly committing great and serious damage, nor that the defendants are so using their own property as to cause irreparable injury to the complainants' property; but their complaint is that the defendants refuse to give them such use of their (the defendants') property and servants as they are entitled to by law, and that they suffer irreparable harm in consequence. What the complainants want is, that the court shall, for their benefit, control the defendants not only in the use of their property, but in the conduct of their business. Nothing short of a case of the most extreme necessity, where the legal right is entirely free from doubt, the injury great and ruinous, and the defendants' conduct wholly indefensible, would justify the exercise of so strong a power by any judicial tribunal.

Besides, it is quite apparent, as I think, that the court could not attempt to extend to the complainants the relief they ask in this case, without very soon being confronted by a condition of affairs which would compel it either to usurp power, or to very greatly relax its control over the defendants. By the express terms of their charter, the defendants are given power to adopt regulations for the well ordering of their business. Under this power they would probably have the right, among other things, to make a regulation requiring that when live stock is delivered to them some evidence shall be delivered with it, showing that it is in a healthy condition, or that they shall have the right to have it inspected by their own inspector before receiving it, and also to prescribe other regulations, fixing the hours in each day when stock may be delivered, and the places on their yards at which each particular kind must be delivered.

The power of making such regulations as may be necessary and convenient, for the well ordering of their business, has been committed by the Legislature to the defendants and belongs to them alone. Their power in this respect is subject to but a single condition, and that is, the regulations they make must be reasonable. In all other respects the defendants are the judges and their judgment is final.

If the reasonableness of any regulation they may adopt should be disputed in a court of law, the question whether it was reasonable or not would, in the first instance, have to be settled by a jury. A common-law judge has no authority to pass upon a question of that kind except in reviewing the verdict of a jury. *State v. Overton*, 4 Zab. (24 N. J. L.) 435; *Morris & E. R. Co. ads. Ayres*, 5 Dutch. (29 N. J. L.) 393.

Up to the time this controversy arose the defendants had adopted no regulations for the conduct of their business with railroad companies. There was no reason they should, for,

and advantageous.

Now, however, if the court should decide that the complainants were entitled to the right they claim, the defendants would, without doubt, exercise their right to conduct their business, in their own way, by the adoption of such regulations as to them might seem proper. These regulations would undoubtedly become at once a new subject of controversy. The defendants would probably so frame them as to narrow the right accorded to the complainants to its smallest possible limit.

Whose province would it be to settle the many questions which would certainly be raised respecting the reasonableness of the regulations adopted by the defendants—the chancellor or a jury? Could a court of equity, in a case where the sole ground of its jurisdiction is a right to interpose to prevent irreparable damage, draw to itself, as incident to the jurisdiction thus acquired, so many litigations, which, according to the well-established boundary between the two jurisdictions, belong exclusively to the common-law courts? If the chancellor should assume jurisdiction in this case, he would, in my judgment, undertake to exercise what Judge Sharswood, in *Audenried v. Philadelphia & Reading Railroad Company*, 68 Pa. 370, called a dangerous and alarming power. He would, in effect, deprive the directors of the defendant corporation of their right to manage its affairs and substitute himself as its supreme manager. This I cannot advise him to do.

Both for the want of legal right, and also because the case is not the proper subject of equity jurisdiction, the complainants' bill should, in my judgment, be dismissed, with costs.

Messrs. Joseph D. Bedle and Flavel McGee for appellant.

Mr. Leon Abbett, for appellee:

The rights of a railroad company are limited strictly by its charter, and it cannot go beyond that.

Morris & E. R. Co. v. Sussex R. Co. 20 N. J. Eq. 542.

There is nothing in complainant's charter which gives it the power to create a stock-yard or provide stock-yard accommodation for stock, except as an incident to the discharge of its duty as a common carrier to deliver its live-stock freight to its consignee.

It was the duty of the Lackawanna Company to deliver live stock carried by it to the consignee only, or upon his order, and a delivery to a stock-yard company is not a delivery to the consignee.

North Penn. R. Co. v. Commercial Bank of Chicago, 123 U. S. 727 (81 L. ed. 287).

A doubtful charter does not exist, because whatever is doubtful is decisively certain against a corporation.

Pennsylvania & U. N. J. R. & O. Co. v. National R. Co. 23 N. J. Eq. 441.

A mandatory injunction should not be granted to any new or doubtful case, or in a case not coming within well-settled and established principles of law.

Longwood V. R. Co. v. Baker, 27 N. J. Eq. 166; *Morris C. & Bleg. Co. v. Central R. Co.* 16 N. J. Eq. 419.

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Dixon, J., dissenting:

The nature of this controversy is fully stated in the opinion of the learned vice-chancellor reported in 45 N. J. Eq. 50.

In my judgment, the business of the Cent Stock-Yard & Transit Company is public. I infer this from the nature of the business, indicated by the Company's charter (Pub. La 1873, p. 920), from the character of the power granted for its conduct, and from the explicit declarations of the charter. The chief features of the defendant's business are the location of construction and maintenance, within Hudson County, and adjacent to the tide-water of the Hackensack or the Hudson River, of stock yards, slaughter-houses, markets for live stock and dead animals and hotels. Of these objects two seem essentially public,—markets and hotels. At common law, the institution of a market was deemed a matter of such universal concern to the Commonwealth that no person could lawfully hold a market unless it were granted from the King or by prescription, which supposes such a grant; and if any person set up a market without such authority *a quo warranto* would lie against him. Bacon, *At Fairs and Markets*; 12 Petersd. Abr. 553, no.

Every person had, of common right, the liberty of going into the market for the purpose of buying and selling. *Northampton v. War* 2 Strange, 1238.

The public nature of a hotel, which is but a modern name for an inn or public house, must be assumed without reference to authority. That the law gave the public the right to enter and use such establishments was one of the doctrines in *The Six Carpenters' Case*, 8 Coke, 146. The branches of defendant's business are so closely interwoven with the others that they should be adjudged to give a public character to the whole enterprise, in the absence of indication of a contrary legislative purpose. Such indications, I am sure, cannot be found. The business of maintaining stock yards for the reception of cattle belonging to others than the proprietor of the yards is in itself so analogous to the business of warehousemen that, in the present trend of judicial opinion, it would probably be considered lawful for the Legislature to deal with it as a public employment even if established and conducted by private individuals. *Munn v. Illinois*, 94 U. S. 11 [24 L. ed. 77]; *People v. Budd*, 26 N. Y. S. R. 538; *People v. Walsh*, Id. 554.

When established and conducted under corporate franchises, it should be deemed *ipso facto* a public employment; and when, as under the defendant's charter, such a business is required to be located upon public navigable waters near the terminus of great trunk-lines of railroad, the legislative design to make it public is plain. Corroborative of these inferences drawn from the nature and location of the defendant's business, are those warranted by the character of the powers given to the Company for carrying it on. By the charter the defendant is empowered to build railroads connecting its yards with all the railways in the County of Hudson, and to lay its tracks across all the public streets of Jersey City; and by a supply

offender to arrest without warrant, and to fine and imprisonment, while the officers necessary to empower these regulations are to be appointed by the Company, and may exercise the functions of constables in criminal cases. It is certainly unreasonable to presume that these extraordinary public powers were delegated for the promotion of a private project. The explicit declarations of the charter lead to the same conclusion. One of these declarations is to the effect that the business of the Company shall be that of a "general stock-yard and market establishment for cattle and live stock." In this sentence, the adjective "general" modifies the noun "establishment," in connection with the term "market" as well as with the term "stock-yard," so that one of the ideas expressed is that of "a general market establishment for cattle and live stock."

As applied to a market, the word "general" might denote either the commodities to be sold or the dealers at liberty to frequent it. Here it can scarcely have been used in the former sense, because the commodities are clearly indicated by other words in the Act, and they are not general merchandise, but particular sorts only. It should therefore be regarded as denoting the persons entitled to the privileges of the market, and, so applied, it is equivalent to "common" or "public." But a succeeding clause in the charter expresses this thought without any ambiguity. The Company's hotels are required to be kept "for the accommodation of the public doing business at the said yards." This language clearly indicates an expectation and purpose that the public might do business at the Company's yards. Taking all these signs together, I think they render it perfectly manifest that the business of the defendant is public.

If this be established, then it follows that the Company, in the management of its business, is bound to deal with all members of the community impartially, and on reasonable terms. *Messenger v. Pennsylvania R. Co.* 38 N. J. L. 407, 37 N. J. L. 581; *Stewart v. Lehigh Valley R. Co.* 38 N. J. L. 505; *State v. Delaware, L. & W. R. Co.* 48 N. J. L. 55, 2 Cent. Rep. 726.

This duty is owed not only to natural persons, but likewise to all artificial persons whose chartered powers are such as may require a demand for its performance. At the common law, all individuals, associations and corporations, within the scope of their functions, have equal right to participate in the benefits of public occupations. *Atchison, T. & S. F. R. Co. v. Denver & N. O. R. Co.* 110 U. S. 667 [28 L. ed. 291].

This obligation does not need for its support any statute expressly creating it, but is inferred judicially from the fact that employment is public. It should therefore be enforced against the defendant, and in favor of the complainant, unless some reason is adduced to the contrary. Such a reason is said to be found in the fourth section of the defendant's charter, which authorizes "the corporation to make contracts with the several railroad companies in, or lines running through, the County of Hudson, for the transportation and delivery of live stock of every description at the yards of the said corporation." This provision, it is alleged, makes

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tarly take upon itself by contract. If the business of the defendant is a private one, then it is true that the Company owes to these railroad corporations no duty in the premises except such as it assumes by contract. But that would be true if this provision of the fourth section did not exist. On the same supposition, also, the Company's power to contract would have been as complete without this provision as with it. So that, if the Company's business is private, this clause is utterly meaningless and nugatory. If, on the other hand, the business is public, this clause becomes important. Its importance, however, does not consist in showing a purpose to exclude railroad corporations from the benefits secured to the public, and presumably to these corporations as members of the community. Of such a purpose I find not the least trace. The language is affirmative, not negative; conferring power, not withholding or withdrawing rights. It delegates a special power, given for an end not attainable under the general grant of authority to conduct this public business, and, in my judgment, can have no other office than to allow this Company to contract with these corporations for special terms, different from those enjoyed by the public at large.

It is also contended that as these stock-yards are not on the line of the complainant's railway, the complainant is under no public duty to deliver cattle at these yards, and therefore can have no right so to do, and consequently the defendant is not required to permit such a delivery. Assuming that the complainant was bound to transport cattle over its road, it was also bound to make reasonable provision for delivering them to the consignees at the end of the journey. As the defendant's yards were within a third of a mile of the railway, and there was no other place, fit for the keeping of cattle, so convenient, it is by no means clear that shippers would not have a right to demand of the carrier a delivery in those yards. But, if the common duty did not exist, the right of the complainant to contract for delivery at such a place is beyond reasonable doubt. Such delivery is a mere incident of the transportation which the carrying Company was obliged to afford. Whether the complainant's obligation to deliver at the yards arose from public duty or from contract incidental to such duty, it acquired the right to discharge that obligation; and to that end the defendant was bound to concede to it such facilities as were due to the public generally.

The cause is now on final hearing. The right of the complainant is, in my judgment, clear, under the plain interpretation of the defendant's charter, and a thoroughly settled rule of law. I therefore think an injunction should issue. It is not worth while to consider in detail the proper terms of such injunction. It may suffice to state my belief that the case presents data adequate for declaring the defendant's duty specifically, and that if the defendant should attempt to thwart or evade the writ, an effort which I am confident the Company would not make, lawful means could be found for its enforcement.

END OF CASES IN BOOK VI.

RÉSUMÉ OF THE DECISIONS PUBLISHED IN THIS BOOK

SUBJECTS Discussed and Points Decided During the Second Quarter of the Judicial Year, Beginning with Oct., 1889, Classified as follows.

- I. GOVERNMENTAL AND POLITICAL RELATIONS.
- II. CONTRACTUAL RELATIONS.
- III. COMMERCIAL RELATIONS.
- IV. FIDUCIARY RELATIONS.
- V. DOMESTIC RELATIONS.
- VI. PROPERTY RIGHTS AND REMEDIES.
- VII. DAMAGES FOR TORTS.
- VIII. CRIMINAL LAW AND PRACTICE.

I. GOVERNMENTAL AND POLITICAL RELATIONS.

Postal Department. A postal card on which is written a demand for the payment of a debt, and a threat to sue if the debt is not paid, is not mailable matter. Sending such cards is an indictable offense. (U. S. D. C. Mo.) 742. A postal card saying: "Please call and settle account, which is long past due, and for which our collector has called several times, and oblige,"—is not of a threatening character. *Id.*

Public lands. The purchaser from the government of lands bordering on non-navigable inland lakes takes all the land within the full subdivision of which such lot forms a portion, including that part beyond the meandering line and covered by the water. (Ind.) 387. After the auditor of state has appeared, and pleaded to the complaint, he cannot avoid the judgment on the ground that he represents the State, and that the State cannot be sued. *Id.*

Constitutional law. An amendment to the Constitution requires for its adoption a majority of all the votes cast at the election for senators and representatives. (Ohio) 422. The statute which prohibits persons and corporations from selling any merchandise or supplies to their employes at a greater per cent of profit than they sell to others is unconstitutional and void, as being class legislation. (W. Va.) 359. But no special privileges are conferred, nor any unjust discrimination made, by a statute requiring payment to employes at least once every two weeks, and prohibiting all contracts by such employes to accept anything but lawful money of the United States in payment. The Statute operates alike upon all who enter the classes named, and leaves all citizens free to enter them. (Ind.) 578. A statute which prohibits certain persons from issuing for the payment of labor any order or paper, except such as is specified in the Act, is unconstitutional and void. (W. Va.) 621. It is not competent for the Legislature to single out owners and operators of mines, and manufacturers, and impose on them burdens not imposed on others, and prohibit their making contracts which others may make. *Id.* The Act authorizing the formation of borough govern-

ments in seaside resorts is a special local law and unconstitutional. (N. J.) 57. The twenty years' limitation on the existence of a corporation, under the Statute, does not apply to a corporation whose charter reserves the right in the Legislature to amend or repeal it "at any time hereafter." (Mo.) 84. Where the limitation re-enacted in a Repealing Act in the same language in which it appeared in the original law leaves such corporations in the same condition they were in before, subject to the same limitation. *Id.* The right to make amendments to existing special charters of municipal corporations, even though local legislation, is reserved by the Constitution. (Colo.) 444.

Eminent domain. A third party, not interested in lands taken for a right of way by a railway company cannot raise the objection that the corporation has no power under its charter to acquire the specific lands for railway purposes. (Minn.) 111. Where land is taken for its use by a railway corporation having the right to exercise the power of eminent domain the question whether the use is public or private depends upon the right of the public to use the road. *Id.* A covenant by which land owner agrees that the products of a stone quarry shall be transported to market exclusively over one line of railroad, does not run with the land. *Id.* A purchaser is bound to inquire into the title of his vendor, and is affected with notice of any equities which appear upon the same. Covenants relating to land and its mode of use are not such as, in strict legal contemplation, run with the land; they may be such as relate to or concern the land or its use. *Id.* An Act creating a board of drainage commissioners for the drainage and reclamation of a certain district, although a special Act, is not within the inhibition of the Constitution, as it falls within the police power. (Wis.) 894. The Legislature may delegate to an officer or corporation the right to determine the necessity of the exercise of the power of eminent domain. *Id.* Granting power to drainage commissioners to determine what lands will be benefited, and be assessed therefor, is not an unlawful delegation of power.

process of law. *Id.* A person owning real property located on a street cannot be deprived, without compensation, of his outlet through such street; so closing a street without furnishing another convenient and reasonable outlet, or making compensation for the damages, is taking private property without due compensation. (Ky.) 840.

Dedication of land to public use. In dedicating lands to the public, the dedicatory may attach reasonable restrictions to its use by the public; no one can dedicate to public use the lands of another without the latter's consent. (Or.) 259. Where parties were jointly engaged in laying out a town, and had a common interest in its growth and development, and the recording of the plat, and one of them recorded the plat and dedicatory writing in furtherance of their common design, which plat and writing stood upon the record for more than thirty-six years without dissent of the others, or of the city, the act of one should be considered the act of all, and the writing should be regarded as cogent proof of the conditions upon which the public squares were dedicated. *Id.* Building a city hall upon such public squares would be a use foreign to the purpose for which they were both dedicated; and owners of a lot which would be affected by such appropriation had a remedy in equity to inhibit such use. *Id.* A general dedication of land for public squares implies that they were to be for the enjoyment of the public at large, and not for the use of the city in the management and conduct of its economic affairs. *Id.*

Taxes and assessments. The right of the board of equalization to summon witnesses, even by the Assessment Act, does not make it the duty of the board to summon them unless justice demands evidence from them. (Tenn.) 207. The action of the board is final, and certiorari cannot be demanded to review its action. *Id.* "Sufficient cause" for a writ of certiorari, as provided by the Constitution, does not exist for the purpose of reviewing a decision on the merits, except where it lies as a substitute for an appeal or writ of error, or possibly instead of *audita querela*. *Id.* No appeal lies from the action of the board of equalization of taxes where not provided for by statute. *Id.* A suit cannot be maintained for the collection of taxes in the absence of legislative authority. (Ky.) 69. A suit to enforce payment of taxes levied in a particular year is separate and distinct from suits relating to the taxes levied in previous years; hence judgments in previous suits constitute no bar to the latter suit. (Mo.) 222. A promise to pay taxes, made by a taxpayer after the expiration of the time prescribed for collection, will take them out of the operation of the Statute. (Md.) 198. A redemption from a tax sale is effected by the payment of the amount which redemptioner is informed by the proper officer is necessary, although by mistake of the officer the amount paid is too small. (Iowa) 50.

Exemption from taxation. The prohibition of the Constitution against exempting property from taxation applies to a corporation formed by consolidation of two or more companies un-

der the consolidation had not taken place. (Mo.) 222. Where the only corporate purpose mentioned in a corporate charter was "to establish, maintain and conduct a seminary of learning," it is a scientific institution within the meaning of the Act exempting "property of library, benevolent, charitable and scientific institutions" from taxation, although it has a capital stock, and its expenses are met by tuition charges. (Mich.) 97. The obligation of a charitable institution to maintain footwalks in front of its property is not affected by an exemption of all its property from taxation. (Pa.) 531. The exemption from taxation of the property of a kind used solely for public purposes does not extend to a special tax for public improvements. (Ill.) 155. An ordinance for the paving of certain streets is not insufficient because it does not state the width of the streets to be paved. *Id.* The same ordinance may legally provide for the paving of several streets, although one is wider than the others. *Id.* Where local improvements are made by a city under authority of an Act which is subsequently declared unconstitutional, the Legislature may pass an Act authorizing a reassessment to meet the cost. (Pa.) 802. A local assessment, or special tax for a public improvement, is an exercise of the taxing power, and not of the power of eminent domain. *Id.*

Taxation of corporations. The consolidation of the rights, privileges, franchises and properties of two or more railroad companies leaves the portions of the road subject to the same rules of taxation that existed before the consolidation. (Mo.) 222. The word "incorporated," as used in the Tax Laws, includes any combination of individuals upon terms which embody or adopt as rules or regulations the enabling provisions of the Statute. (N. Y.) 803. The company formed within this State, organized as a "joint-stock company," for continuance a certain number of years, its capital stock divided into shares, the business to be managed by a board of directors, suits to be brought in the name of the president, and all deeds to run to and be made by him, and the death of members less than a majority interest of the whole not to dissolve the company, is either a "corporation, joint-stock company or association," within the laws for the taxation of such concerns. *Id.* The St. Paul Union Depot Company is not liable to pay, as taxes, a percentage on its receipts or gross earnings. (Minn.) 234. Payment of such a percentage by the railway companies which own the stock and use the depot constitutes payment of taxes on all property of the latter. *Id.* A tax upon the corporate franchise or business of express companies doing business within the State is not obnoxious to the Federal Constitution, as interfering with commerce. (N. Y.) 303.

Licensing occupations, etc. That portion of the Code which provides that no person, without a state license therefor, shall "keep in his possession, for another, spirituous liquor," etc., is unconstitutional and void. (W. Va.) 847. "An Act to Regulate the Practice of Dentistry in the State of Minnesota" is constitutional as under the police power. (Minn.)

and courts will not interfere with the discretion exercised in fixing it. (Ark.) 509. The provision in the charter of the City of Minneapolis authorizing the city council "to license and regulate hackmen," applies only to those who are engaged in business as carriers of persons or property for hire, not such as merely hire out teams and vehicles to those who have property to transport, the hirer himself using and controlling the team and vehicle. (Minn.) 339.

Courts of justice, and judicial officers. A federal court cannot by attachment of property acquire jurisdiction where the owner is not a resident of the district and is not served therein so as to authorize a personal judgment. (U. S. C. C. Conn.) 252. If substantial doubt exists concerning the jurisdiction of the court, the orders and proceedings of the court or judge pending such doubt are entitled to the same consideration as when the objection to jurisdiction is not raised. (Colo.) 430. For jurisdictional purposes a legal domicile once existing continues until another is acquired. (N. H.) 716. Domicil or residence in insolvency proceedings is not lost by departure from the State, until another is gained. *Id.* District courts and the judges thereof have general jurisdiction to issue the writ of habeas corpus. (Colo.) 430. A court of chancery is not clothed with legislative power. It may, in cases where no adequate remedy at law exists, enforce the specific performance of an existing legal obligation arising out of contract, law or usage; but it cannot create the obligation. (N. J.) 855. The interest which disqualifies a judge is a property interest in the action or its result, and not an interest of feeling or sympathy or bias that would disqualify a juror. (Fla.) 713. Affinity is the tie between a husband or wife and the blood relations of his or her spouse, but it does not exist between the blood relations of either party to the marriage and those of the other party; hence the brother of her husband is not disqualified by affinity to preside in the trial of his wife's brother for a crime. *Id.* Social and friendly relations, which lead him to fear that he might not be able to do the State justice, do not disqualify the judge from presiding in the trial of such brother for a criminal offense. *Id.* An affidavit that plaintiff "believes that he cannot have a fair and impartial trial before the regular judge of this court" is insufficient to secure a change of judge. (Ind.) 469. A sheriff's custody of property cannot be disturbed by a court of chancery unless by consent of all parties. (Ark.) 714.

Jurisdiction. The superior court has jurisdiction in proceedings under the Code to hear and determine a question of contested heirship. (Cal.) 594. Unless a duty has been so created courts cannot be called on to give it effect. (N. J.) 855. A statute denying plaintiff costs in a district court if his recovery is below \$50 does not limit the jurisdiction of the court to cases in which that sum is involved. (Dak.) 87. Where decrees are rendered against two defendants, separately, and reversed in the appellate court, appeal to the supreme court 6 L. R. A.

jury unless it present ent inferences from The decision of a judging cases; it is only ev 321. A question of l in an agreed stateme the judgment in the c court does not pass up the decree sought to conflicting deposition the appellate court w finding or decree, might warrant a diff 427. Refusal to repe error. (Ind.) 241. A question of law to t where the court has fusing to set aside the

Court records. The notice to everyone, a to know the facts th When the records of t final settlement of the payment of all proved ministration, land of devised, may be purch

Contempts; summary Statute providing that cases of contempt shi sive has reference only not to the mode. (Col proceedings may be brou from the final judge the jurisdiction of the ment. *Id.* If the fac do not show that a committed, the court will but if sufficient to sho take jurisdiction, and will not be reviewed for district courts of this power to summarily co a contempt of court; th does not extend to cas power to punish summ very existence of a cou bility for abuse of the the press is declared in stitution which guarant

Liberty of the press. Liability to punishment interest of the public good of judges, court officer witnesses, in connection been wholly determined the integrity of a litiga or other court officer is pending, the legal reme tion. *Id.* The privile ing with the administ discriminate newspaper bribery or corruption those conducting the t tional right. *Id.* A di judge has no authority lease a prisoner under c inal court for contempt. *Id.* With us the judi every citizen may fully fitness or unfitness of

wanton defamation, to prejudice the rights of litigants, degrade the tribunal, impede, embarrass or corrupt the due administration of justice, cannot be sanctioned. *Id.*

Citizenship. A declaration of intention to become a citizen of the United States, made before a clerk of a court, need not be made in his office or in open court. (Mich.) 288.

Office; eligibility. Women cannot be appointed notaries public, in the absence of any statute authorizing such appointment. (Mass.) 842.

Elections, and election contests. The provision of the Ballot Act, which requires ballots to contain the names, etc., of all candidates in nomination for any offices specified in the ballot, is not in conflict with the constitutional requirements that ballots for general officers shall be returned to the Secretary of State for safe keeping, etc. (R. I.) 778. Statutory proceedings for election contests are not exclusive of *quo warranto* proceedings, unless the legislative intent to that effect is clearly expressed. (Colo.) 444. Inquiry by *quo warranto* into usurpations of office is not abolished by the Constitution directing specific legislation for the trial of election contests. As to election contests purely, the statutory remedy directed by the Constitution is exclusive. *Id.* An opposing candidate may be the relator in *quo warranto* proceedings if he is otherwise qualified; but his own claim to the office cannot be adjudicated in that proceeding. *Id.* The constitutional declaration that ballots may be examined in election contests does not prohibit their examination in *quo warranto* proceedings. *Id.*

County indebtedness. A proportion of the debt of a county may be imposed upon another county to which part of its territory is attached, not merely by the Act segregating the territory, but by subsequent legislation. (Ark.) 665. A claim given by special statute in favor of one county against another need not, unless required by such Act, be authenticated, as required in the case of ordinary claims against counties. *Id.*

Common schools. A child cannot be suspended from a common school under a rule of the school board for failure to replace or pay for property destroyed or damaged by mere carelessness. Such carelessness does not constitute "gross misdemeanor" authorizing suspension within the Statute. (Mich.) 554.

Roads and highways. A statute changing the policy of the State by transferring the burden of repairing turnpikes to the separate townships, but excepting therefrom any county having a county public-road board, is a private, local or special law and unconstitutional. (N. J.) 56. The liability of a town for damages resulting from the insufficiency or want of repairs of "any bridge, sluiceway or road" does not extend to those happening upon a mere temporary passageway over private property. The overseer has no authority under the statutes to open a way over private property. (Wis.) 59. In the Statute authorizing commissioners of highways to remove obstructions therein, the word "may" is to be construed as 6 L. R. A.

or a public duty is imposed upon public officers. *Id.* A writ of mandamus may be issued to compel highway commissioners to remove a fence from across a public highway. *Id.*

Municipal government. The board of supervisors is not so far a part of the legislative department of the State as to be entirely independent of any judicial control in the exercise of its duty under the Constitution in fixing water rates. (Cal.) 756. An arbitrary fixing of water rates by the board of supervisors is not a compliance with their duty to fix such rates, and it may be set aside by the courts as a fraud on the rights of the company; but notice to a water company of an intention to fix water rates by the board of supervisors is not necessary under the Constitution. *Id.* The reasonableness of water rates cannot be reviewed by courts unless there was actual fraud in fixing them, or they were so palpably and grossly unreasonable as to amount to the same thing. *Id.* A requirement that a water company shall furnish meters to those who desire the water used by them to be measured is not unreasonable. *Id.* The fact that one price is fixed for the consumer who has a meter, and a different price for one who has none, does not make the ordinance uncertain and indefinite. *Id.* A suit for relief against an ordinance fixing unreasonable water rates is an equitable one, and is within the jurisdiction of the superior courts, and the mayor of the city is not a necessary party to such suit. *Id.* The prior passage of an ordinance prescribing the kind of sidewalk to be built is necessary in order to make one liable for failure to build it, providing for the punishment of those who fail to comply with the resolution or ordinance. (Mich.) 54. Where a municipal corporation is authorized "to remove and abate any nuisance injurious to the public health," it may resort to a court of equity to aid it in enforcing its public duties, and maintain in its own name an action to abate a public nuisance within its corporate limits affecting the public health of the municipality. (Minn.) 763.

Municipal legislation. The votes of a majority of a quorum of a city council are sufficient to carry a measure when a quorum is present, although an equal number who are present refrain from voting. (Ind.) 815. The refusal of half the members of a council to vote when all are present will not defeat action when a majority of those necessary for a quorum vote in favor of a measure. *Id.* The declaration of a presiding officer that a resolution is adopted is equivalent to a casting vote in its favor if the other votes are equally divided. *Id.* The title of an "Act in Relation to the Lighting of Cities and Towns" is sufficient to cover a provision giving a city council power to make contracts for lighting the streets. *Id.* A city council is authorized to buy and operate the plant and machinery necessary for the production of electric lights for the use of the city. *Id.* Bonds may be issued by a city to pay for property lawfully purchased, in the absence of statutory or constitutional prohibition. *Id.*

Meetings of board. An injunction prohibiting members of a municipal board from meeting and acting without giving a certain person notice and permitting him to act with them, is not mandatory. (Tenn.) 808.

Election of municipal officers. Four ballots are not sufficient to elect an officer by an official board when eight members are present, although one blank vote is cast. (Tenn.) 808. The majority of those present at a meeting of a select body consisting of a definite number of voters must concur in order to do any valid act, in the absence of a special provision. *Id.* A declaration of a presiding officer that a certain person is elected is not equivalent to casting his own vote in favor of such person. *Id.* No ratification of an election declared by a municipal officer to a municipal board can be made except by another ballot, where the board has no power to elect except on ballot. *Id.* The statement of the recorder of a municipal board, in a paper that he was not required to make, notifying a person of his election to office, that it was done by order of the board, is not evidence of that fact. *Id.* The legality and validity of an election by the mayor and aldermen of a city by ballot may be inquired into by mandamus to compel recognition of the claimant's title. *Id.*

Street improvements. By the charter of the

City of East Portland, the common council has full power to improve the streets and all parts of streets within the city limits fully or partially. (Or.) 290. The power to contract inheres in every corporation, and is coextensive with its corporate powers. *Id.* The plea of *ultra vires* should not prevail, whether for or against a corporation, when it would not advance justice, but would accomplish a legal wrong. *Id.*

Annexation of cities and towns. The annexation of two or more cities, incorporated towns or villages to each other, all of which are indebted, the indebtedness of some being in excess of constitutional limit, is not prohibited by the restrictive provisions of a statute passed thereunder. (Ill.) 266.

Street railroads; police power. Where the tracks of two competing railroads run nearly parallel through distinct sections of a city, an ordinance which limits the speed of trains in one section only is void. (Ill.) 268.

Poor laws. A person receiving aid as a poor sick person from a city or county incurs no liability to repay the amount, at least in the absence of some application or request by him for aid more than the usual solicitation for charity. (N. Y.) 212. A presumption that a request for aid was made will not be entertained; such request must be proved. *Id.*

II. CONTRACTUAL RELATIONS.

Contract distinguished from sale. An agreement to manufacture engravings and lithographs for theatrical purposes is not a sale, but a contract to furnish work and labor. (Wis.) 788. Where engravings and lithographs are burned while in the possession of the manufacturer, after they are ready for delivery, the person for whom they were made must suffer the loss, and the manufacturer may recover from him for his work and labor done thereon. *Id.* One who has ordered goods to be manufactured for him, to be paid for as they are delivered, is liable to the manufacturer for damages if he fails to accept and take them away according to contract. *Id.* Insurance by the manufacturer, of goods which he holds as bailee, had no bearing on the question of their ownership, or of his right to collect the amount due him. *Id.*

Consideration. An agreement by a partner after dissolution, but before full settlement, to allow his copartner compensation for services out of the assets, for a definite number of months' past service, is not without consideration, but is supported by a strong moral obligation, sufficient to render the agreement obligatory as a contract. (Ga.) 72. An agreement by an attorney to prosecute, and if possible to collect, certain claims, and extinguish the debt due for past services, is consideration for an agreement that the latter shall receive a fixed share of what is obtained as the result of such prosecution. (N. Y.) 475. An agreement that the attorney shall have a fixed share of the results obtained by the prosecutors constitutes an equitable assignment of the stipulated share, although the sole right to compromise and to bring suit upon the claims is reserved to the creditor. *Id.* A subscription towards the erec-

tion of a church building, entirely voluntary and unsupported by any consideration, is revoked by the subscriber's death. (N. Y.) 807. A release from a contract to run a bus from passenger trains to a hotel is valid without any new and independent consideration to support it. (Wis.) 551.

Parol evidence of contemporaneous agreement. Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change or reform the instrument. (Pa.) 88. Direct, positive and uncontradicted testimony of two witnesses is sufficient, when distinct and highly probable and reasonable. *Id.* Evidence of parol agreement as to a warranty of the power of an engine made prior to the order for the outfit which contained an express warranty is incompetent to vary the written contract. (Mich.) 412. Testimony must be plain and convincing to overcome the presumption that a written contract expresses correctly the intention of the parties thereto. (Wis.) 200. Testimony of mortgagees, who had taken the mortgage for purchase money on a sale of insured property, is insufficient, especially when disputed by the agent, to warrant a reformation of the contract of indorsement so as to make a separate independent contract of insurance. *Id.* Parol evidence to prove want of consideration cannot be admitted to show that the transaction was a mere offer and not an actual contract. (Ill.) 164.

Building and construction. Representations as to the quality and amount of earth necessary for constructing a levee, made to induce one to contract for its construction, are mere expressions of opinion, and not a sufficient ground for an action for damages. (Cal.) 219. A col-

the quantity or kind is not as represented, shows that these representations were not material. *Id.* A contractor continuing work, after discovering that the representations inducing him to contract were false, waives any claim for damages because of such representations. *Id.* Failure to file in the recorder's office a contract for the construction of a building, as required by the Code of Civil Procedure, makes the owner liable to sub-contractors and materialmen without regard to the provisions of the contract or the amount remaining unpaid thereon. (Cal.) 588. The Legislature may provide that the owner of a building shall be liable to materialmen and laborers, although he has paid the contractor the contract price. *Id.*

Commercial paper. A promissory note signed "John Roach, Treasurer," over which is stamped into the paper a seal bearing the name of a corporation, declaring "We promise to pay," is the note of the corporation, and not the individual obligation of the treasurer. (Mass.) 71. A note payable to the "estate" of a certain person, deceased, or order, is not invalid for want of a sufficiently definite payee. (Mass.) 848. A promissory note is not delivered so as to be valid, where the maker signs his name to it through fear of violence, and it is snatched and carried away against his will. (Ind.) 469. The verified plea of *non est factum* is unaffected by other answers containing admissions. *Id.* Inserting the figure "8" in a blank before the words "per cent interest" in a promissory note is a material alteration. *Id.* Under an answer denying the execution of a note, it may be proved that the note was altered after it had been signed, as well as that it had not been delivered. *Id.* An indorser cannot deny the validity of an original note, as against a bona fide holder, although the indorsement was merely for accommodation. (Mass.) 879. The rule that a negotiable instrument made payable to a fictitious person or order is, in effect, payable to bearer, does not apply where the maker is induced by the fraud of another to so draw it. (Ohio) 625. Where, by the fraud of a third person, a depositor is induced to draw his check payable to a non-existing person or order, in ignorance of the fact and intending no fraud, the bank is not authorized to pay it on the indorsement of the party presenting it, and the payment thereon by the bank confers no right on it as against the drawer. *Id.* The duty of a banker is, in all cases, to pay to the person named, or his order, where the terms of the check are such; and he may and should withhold payment until fully satisfied as to the genuineness of the indorsement. *Id.* A judgment in favor of the makers of a note upon the merits, in an action by an indorsee, is a bar to a subsequent suit brought in another State by the payee against the makers. (Ill.) 62.

Guaranty. An agreement "to stand good for, or, in other words, . . . guarantee to pay for," timber that shall be furnished to a third person is an original undertaking, and no notice to him of acceptance, or of failure to pay, is necessary. (Ind.) 686. An order to let a person named therein "have what goods she wants," and agreeing to "stand good for the money and

the same time and throw full streams over the highest buildings is in the nature of a condition precedent, the performance of which is necessary to enable him to recover the agreed price for the use of the water. (Mass.) 342.

Landlord and tenant. There is no implied covenant in the lease for a year of a furnished house against external defects originating on premises of a stranger, without fault of the lessor, such as noxious odors from an adjacent livery stable. (N. Y.) 770. A lease for twenty years, or during lessees' natural lives, is a lease for twenty years only, and, if lessees die before the expiration of that time, the lease expires. (Ga.) 703. After the twenty years the lessees are merely tenants at sufferance. *Id.* While a verbal lease of real property for a longer term than one year is void by the Statute of Frauds, yet if the lessee enter into possession of the property under it, and the lessor accepts the rent, obligations may thereby be created which will be legally binding upon the parties. (Or.) 257. The acts of the parties under such a lease may create in the lessee an estate from year to year. *Id.* To terminate an estate from year to year by notice, notice as prescribed by the Code must be given. *Id.* A tenant in possession of demised premises, without any written lease or agreement therefor, cannot be dispossessed under the Act, unless he is in by wrong. *Id.* The provision of the Forcible Entry and Detainer Act can only be enforced as against a tenant who is wrongfully in possession of the demised premises or who is violating some duty owing to his landlord, in view of the relations existing between them. *Id.*

Fire insurance contract. Under a policy of insurance upon certain fixtures which constituted a part of the real estate, and which included personal property on the farm of various classes, but not exceeding a certain amount on each class, and a provision against subsequent incumbrance, the execution of a mortgage on the realty would not prevent recovery for loss of the personality. (Neb.) 524. The fact that assured had given chattel mortgages on the personality will not defeat recovery for its loss where the mortgages were paid and canceled before the loss. *Id.* Where two agents of the insurer were present at the fire which caused the loss, and soon thereafter the adjuster of the insurer appeared and adjusted the loss, the company was sufficiently notified of the loss within the provision of the policy which required notice of loss to be given within thirty days. *Id.* Where by mistake the policy described the land as the N. E. $\frac{1}{4}$ of the section, and the proof showed it to be the N. W. $\frac{1}{4}$ of the section, the variance was immaterial; and it was not necessary to reform the policy before the trial. *Id.* An insurance policy may be reformed by correcting a mutual mistake in the description of the premises. (Ill.) 885. So of a policy issued by mistake to a man who had no title to the premises insured, which were owned by his wife and her children. *Id.* Refusal to pay a policy solely on the ground that the insured has no title to the premises is a waiver of objections as to proofs of loss. *Id.* A shipper who contracts to give the carrier the

Life insurance contract. The whole premium, and not merely a *pro rata* part of it, is earned, although the insurer is relieved from liability by the default of the assured to pay an installment due. (Dak.) 87. An agreement that the premium note of the assured shall remain binding upon him although the insurer is relieved from liability by default in payment of a sum due is not illegal or contrary to public policy. *Id.* An assured person is not entitled to a reduction, or the return of insurance premiums, if he forfeits his insurance by failing to pay an installment due on the note after the risk has attached and been in operation for one year. *Id.* The next of kin of a person who has sold his benefit certificates by a void contract cannot compel a purchaser to account to them for the proceeds where the society recognized the sale, issued new certificates to the assignee, and paid over the money to him on the death of the insured. (Ala.) 140. A stipulation that the company shall not be liable while any promissory note given for the premium remains past due and unpaid is not invalid. (Mich.) 95. The effect of such condition cannot be avoided by an oral statement of the agent that the insured would be notified when and where to pay. *Id.* The two years' limitation in a life insurance certificate includes the defenses of fraud in obtaining the insurance, and lack of insurable interest in the beneficiary. (N. Y.) 731. An assignment of a life insurance policy to a person who has no insurable interest is void. (Va.) 136. A creditor who takes an assignment of a life insurance policy as security for a loan can hold the proceeds of the policy only to the extent of the sums actually advanced by him. *Id.* A coroner's inquest, sealed up and filed with the clerk of the circuit court, may be used as evidence to show the cause of the person's death, in an action to recover insurance on his life. (Ill.) 65.

Master and servant. A contract between master and servant for the rendition of personal services is dissolved by the death of the master. (N. Y.) 728. A contract by an employé to accept something other than money in payment for his services is valid in the absence of any statutory provisions to the contrary. (Ind.) 576.

Municipal corporations. One contracting for a certain compensation to perform work for a municipal corporation cannot recover damages for the refusal of the corporation to complete its improvement. (Ind.) 518. But if such corporation in making an improvement wholly within its power enters into a contract beyond its authority, but not prohibited by statute or public policy, it cannot, after work has been done thereunder which inures to its benefit, refuse to complete the contract without making compensation to the one conferring the benefit, at least for the value of the labor done. *Id.*

Municipal bonds. Municipal bonds, in the absence of any provision as to the place of payment, are payable at the treasury of the municipality. (Pa.) 636. Interest does not run after maturity on municipal bonds which specify no place of payment, if funds for payment are then provided at the municipal treasury. *Id.*

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proves the claim made against them. (C. 176. In an action to charge one with a debt a copartner he may prove that when the debt was contracted the partnership had been actually dissolved. *Id.* A writing signed himself and P. at a time it bore date, but which P. denied ever having signed, was not admissible to show that no partnership in fact existed or that any partnership had been dissolved. *Id.* It was further held that the facts and circumstances of the case, with his testimony to protect himself, he prepared the writing, and had it signed, negatived any inference that was intended as part of a transaction to dissolve the copartnership. *Id.*

Stockholder of foreign corporation. A stockholder in a corporation organized under the laws of a foreign State contracts with reference to the laws of that State, as to the extent of individual liability for corporate debts. The remedy, however, is governed by the law of the forum. (Minn.) 676. Where by arrangement stock is issued as fully paid up, equity will, aside the arrangement for its payment and hold the shareholders liable in favor of creditors, and not in favor of creditors having full knowledge of the arrangement. *Id.*

Transfer by will. Where the writing has the essential element of a disposition of property after death, its being in the precatory form is immaterial. (Pa.) 353. The first name of testator may be a sufficient signature to a will. *Id.* A will in testator's own handwriting which has no signature at the end, and in which testator's name appears only at the beginning although indorsed with the words "My will on the outside of a sealed envelope, is not sufficiently signed under the Code. (Va.) 77. The impairment of the mind of a testator by age and disease need not be lunacy or absolute imbecility in order to invalidate the will. (Ill.) 167. The capacity sufficient to comprehend few details and make a simple will may be sufficient to dispose of a large estate. *Id.* A person is possessed of a sound mind at memory if he has such mind and memory enables him to understand the business which he is then engaged in and the effect of the disposition made by him of his property; otherwise not. *Id.* The disposal by will of bequest certificates insuring testator's life is not invalid because of his previous attempt to transfer them to the legatee by a sale which is void as against public policy. (Ala.) 140. If the omission to enter a testamentary direction "upon the record of the supreme master of the chequer," as required by the certificates, is immaterial, no one but the society can object thereto. *Id.*

Transfer by deed. Fractions of a day will not be recognized to defeat the manifest intention of the parties to a contract. (Colo.) 54. Deeds to different purchasers of land, separately sold on the same day by a probate judge, trustee, take effect at the same time, and are construed together in determining a conflict of title between the purchasers. *Id.* A deed naming a creek as a boundary conveys only the bank of the creek, where at the same sale the bed of the creek is separately sold and con-

the operative words "grant, bargain, sell, convey and warrant." (Minn.) 360. The effect of an informal instrument transferring an interest in real estate depends upon the intention of the parties as collected from the whole instrument. (Pa.) 668. The assignment under seal of all a grantee's "right, title, claim, interest and property whatever in and to" a deed, on the back of which it is written, and which gave the grantee an estate in fee simple, is sufficient to transfer the fee without the use of the word "heirs" or its equivalent. *Id.*

Illegal contracts are void. A contract for the sale of an interest in stock not yet issued or paid for is illegal and void. (Ala.) 218. A contract wholly void is void as to everybody whose rights would be affected by it if valid. (Cal.) 588. A sale for a valuable consideration of certificates of a mutual benefit society insuring a member's life, made by such member during his life, is void. (Ala.) 140. Courts will take notice of their own motion of illegality of contracts coming before them for adjudication, and will leave the parties where they have placed themselves. (Mich.) 457.

Contracts void as against public policy. A contract by railroad companies to refrain from any effort to obtain a grant of public lands from the Legislature, and to aid another company to procure it by all reasonable and proper assistance in consideration of a share of the grant obtained by the latter, is void as against public policy. (Wis.) 601. The organization of a corporation to control the manufacture and trade in matches in the United States and Canada, and to buy off others who might propose to engage in the business, is an unlawful enterprise, being an attempt to create a monopoly. (Ind.) 457. An agreement intended to

public policy. *Id.* An agreement between owners of rival steamboats to divide profits, and that in case either party goes out of business he shall not engage in it again for one year, is void as an attempt to prevent competition in business. (Ky.) 890. If the object of a contract is to prevent or impede free and fair competition in trade, it is void as being against public policy. *Id.* An agreement which by its terms gives the exclusive right of way to a railway, so far as it attempts to exclude other railway corporations from acquiring a right of way over the same tract, is against public policy and void. (Minn.) 111. An agreement to satisfy a contract by adjustment of differences is not necessary to make an agreement void as an option contract. (Ill.) 164. A contract for the sale of stock "if taken on or before" a certain future day, is void as an option contract. *Id.* A defendant is not entitled to insist, in an action upon a special contract for personal services, that the contract was void as against public policy, if there is some evidence of a lawful contract. (Mass.) 808. A contract to pay a lawyer to advocate before the street commissioners the laying out of a street through land of the promisor, and to get as much as he can as damages therefor, is not against public policy. *Id.* A contract by a board of supervisors with the county treasurer to allow him a percentage upon the amount collected upon the delinquent personal-property tax-list as compensation therefor, is against public policy and void. (Iowa) 615.

Damages for breach. Before any liability to pay liquidated damages can attach to the party in default his breach of agreement must have resulted in something more than mere nominal damages to the other party. (Wis.) 551.

III. COMMERCIAL RELATIONS.

Interstate transportation. Natural gas, when brought to the surface and placed in pipes for transportation, is an article of commerce, and a State Legislature cannot prohibit conducting it in pipes from points within to points without the State. (Ind.) 579.

Corporations. Carrying on business in a corporate name, where there is no law authorizing the members to become incorporated, will not aid legal existence. (Mich.) 102. The amendment of an Act entitled "An Act for the Incorporation of Manufacturing Companies," which makes it include mercantile companies, is in violation of the Constitution. *Id.* One dealing with persons claiming to be a corporation is not estopped from denying such corporate existence, if he never knew of their claim to be a corporation and always thought he was dealing with a partnership; and that he was so informed by a member of it is admissible. *Id.* The fact that persons took counsel and acted in good faith in organizing themselves into a corporation does not relieve them from individual liability for obligations incurred by the concern if the law proves invalid. *Id.*

Carriers of goods. It is not unlawful to stipulate in a bill of lading that no notice of dis-

charge need be given to the consignee. (U. S. C. O. N. Y.) 172. Where a consignee stipulates that goods may be discharged without notice to him and at his risk, no negligence will render the ship liable for injuries to the goods after their discharge at a place and time and in a manner unobjectionable. *Id.* A condition in a bill of lading by which the consignee agrees to be ready to receive his goods when the ship was ready to unload, exempts the ship from the duty of giving him any notice, but not from the duty of exercising reasonable care to discharge them at a suitable time and place. *Id.* Where the article is uniform in bulk, and the act of separation throws no additional burden on the buyer, a tender of too much, from which to take the proper quantity, is a good delivery, especially where small orders were commonly shipped in bulk. (Pa.) 48. The contract of sale embracing thirty carloads of corn, a defect of quality in some of the corn accepted and paid for will not justify rejecting ten other carloads, neither party electing to rescind the contract in whole or in part. (Ga.) 874. On the supply by a manufacturer or dealer of a specific article of a known and recognized kind and description, there is no implied

and be of good workmanship and materials. (Minn.) 392. In the sale of goods by words of description, which comprehend quality as well as variety, the descriptive words may be trusted by the purchaser as a warranty of both, and though inspection will exclude from patent, it will have no influence on latent defects. (Ga.) 374. Defects not discovered by the inspection are properly classed as latent. Hence corn, musty and "blue-eyed," packed in a bulk beneath sound corn is a latent defect, acceptance being made without breaking bulk. *Id.* A custom of trade contrary to the general law of the State is not binding, except upon those who have adopted it for their own dealings. *Id.* A valid contract limiting the liability of a carrier may be made where it is just and reasonable and a reduced rate of freight is made the consideration for it. (Va.) 849.

Carriers of passengers. A regulation that a passenger who fails to purchase a ticket must pay ten cents more than the regular fare, for which extra charge a check will be given by the conductor, which will be cashed at any ticket office, is not unreasonable. (Pa.) 529. This extra demand is not a part of the fare or "charge for transportation" within the statute fixing the maximum rate of fare. *Id.* A pas-

amount. (Cal.) 836. Five dollars is not an unreasonable amount for a passenger to tender to the street-car conductor in payment of his fare. *Id.*

Carrier of telegraph messages. A prompt delivery is of the essence of a contract to transmit a telegram, and a failure in that respect is such a breach as will authorize the recovery back of the consideration paid. (Tex.) 844. Ignorance of the relations that exist between the sender and receiver of a message will not excuse a telegraph company for its neglect, if the sender intended to serve the receiver and the latter accepted the act. *Id.* The question as to who may maintain a suit for damages for delay in delivering a telegram does not depend upon the payment of the fee, but upon the question who was in fact to be served, and who is damaged. *Id.* Evidence that a person felt and exhibited mental anguish is admissible in an action where damages are allowable for such negligence. *Id.* Failure to disclose the relationship of the parties to a telegraph company when sending a message stating that a person named is dying, and saying "come quick," will not prevent a recovery for delay in delivering the message. *Id.*

IV. FIDUCIARY RELATIONS.

Trust estates created by will. A bequest or devise to educate the public in any branch of science by the dissemination of the works of a given author is a good, charitable use, provided such works contain nothing hostile to morals, religion or law. (N. J.) 511. A fund given by will to trustees "to establish a female academy," etc., may be used for the support of a public school in connection with the town, when it has become impracticable to maintain a female academy with it. (N. H.) 785. Land devised as the site of a city hospital may be sold by order of court and the proceeds invested to provide for the current expenses of the hospital, by the application of the doctrine of *cy pres*, where the particular site is not suitable for a hospital, and the hospital has in the mean time received by gift from other parties all the real estate needed. (Mass.) 147. Parol evidence of circumstances surrounding the testator is sufficient to show his meaning and intention, where there is a slight discrepancy in the description of the donee of a charitable gift. (Va.) 821. The incorporation of church agencies is not within the prohibition of the Constitution against the incorporation of a church or a religious denomination. Charities for religious purposes are not against the policy of the law. *Id.* The Statute of 43 Elizabeth, whether it was ever in force in Virginia or not, is of no effect in determining the validity of a gift for charitable uses. *Id.* A simple bequest of money to be paid to a foreign corporation is valid even if the law of the State where the will is made forbids the execution of such a trust as that for which the corporation is created. *Id.* To make an annuity given by will a rent charge upon trust lands from the rents

of which it is to be paid, there must be words creating it and power given to distrain if the annuity be not paid. (Ill.) 745. Under a will creating a trust for the testator's widow and children, in the remainder of the rents and profits of certain real estate during their lives the fee to be conveyed to his grandchildren, a son acquires no interest in the real estate. *Id.* The devise of an annuity or yearly portion out of net rents and profits of a trust estate carries no interest in the realty where the donee can assert no right during his lifetime but that of tenant of the trustee. *Id.* No such devise of rents and profits will constitute a devise of the land where a yearly sum contingent upon the exigences of the trust is given. *Id.*

Assignment for benefit of creditors. An assignment of personal property, valid by the laws of the State or country where made, is valid everywhere. But the rule is subject to exceptions; and a transfer made in another State will not be upheld here as to property situated therein if in contravention of the policy and laws of the State. (Minn.) 108. In proceedings in insolvency, debts due an insolvent who has his domicile in this State will be deemed to have a *situs* therein. *Id.* Foreign creditors who acknowledge the receipt of a "dividend in matter of composition" in case of a certain insolvent, become bound thereby in the same manner as if they were residents of the State. (Mass.) 346. A claim is proved within the meaning of the Statutes relating to the discharge of claims proved in insolvency proceedings, when the creditor, with full notice of all that has been done, has accepted a dividend declared thereon. *Id.* An assignment, by the surviving partners of an insolvent firm which

trary, although it provides that some creditors shall be paid before others. (Va.) 569. Unsworn admissions or declarations made by an insolvent after a controversy has arisen in insolvency proceedings upon his estate are not admissible for the purpose of determining the question of his residence. N. H. 716.

Trustee cannot deal in trust property. The attorney of an assignee for the benefit of creditors has no right to borrow the trust funds, paying interest, and use them to buy claims against the debtor below their face value, and then have them allowed by the assignee, nor can he use his own funds for that purpose. (Ind.) 869. If he buys claims of creditors who have replevied goods sold to the debtor, he is accountable to the estate of the insolvent for the actual value of the goods, and not for the amount of the judgments in replevin. *Id.* It is the duty of an assignee who has collected a large part of the assets to have a dividend declared as soon as he can ascertain the probable amount of the claims; he is liable for interest

interest of the other member, and assumes all the partnership debts, the firm and both members being at the time insolvent, and shortly thereafter the purchasing partner conveys the whole of the assets to a trustee to devote the whole to payment of his individual debts, the sale is ineffectual to convert the social assets into individual property; and as to the firm creditors the trust deed is fraudulent and void. (W. Va.) 740.

Insolvent national banks. The prohibition under U. S. Rev. Stat., § 5242, against transfers by a national banking association after an act of insolvency, or in contemplation thereof, does not include a pledge of its securities to a reasonable amount. (U. S. C. C. N. Y.) 226. Where securities are delivered to a bank specifically to protect the banker, the bank has no lien upon them for any other purpose. *Id.* The amount of an overdraft upon a bank account is the amount drawn less the amount to which the drawer is entitled. *Id.*

V. DOMESTIC RELATIONS.

Marriage and divorce. Marriage is not shown by a man's acknowledgment of a woman as his wife in the presence of others, and by their living together as man and wife for one week prior to his death. (Pa.) 717. A relation illicit at its commencement, and known to be so by the parties, raises no presumption of marriage. *Id.* Adultery of plaintiff is a good defense to an action for divorce on the ground of cruel and inhuman treatment. (Wis.) 58. A wife who continues to live with her husband after the last act of personal violence condones the offense. (Ill.) 548. Excessive indulgence in the morphine habit is not a ground for divorce under the provision of the Statute which permits a divorce on the ground of habitual drunkenness. *Id.* The husband's violent resistance to his wife's efforts to prevent him from using morphine does not constitute extreme cruelty within the Statute making such cruelty a ground for divorce, especially when the action is brought on the ground of habitual drunkenness. *Id.* In a suit for divorce from bed and board, a plea of former adjudication based on dismissal of a former suit for absolute divorce will not oust the jurisdiction to allow temporary alimony where the present bill is based upon an alleged subsequent marriage. (Mich.) 399. The act of a woman in leaving her husband for cause is not desertion within the law authorizing a divorce for desertion. (Iowa) 187. A woman in a suit for divorce may be allowed a reasonable sum (in this case \$200) for an attorney's fee in prosecuting an appeal as appellee. *Id.* A sentence to imprisonment in the state prison of a foreign State is not a ground of divorce within the Statute providing that a divorce may be decreed when either party has been sentenced to confinement in "the state prison." (Mass.) 632.

Husband and wife; contracts between. Contracts between husband and wife are not made valid at law by the Statutes of New York. If
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any exception exists it is under the Act of 1887. (N. Y.) 559. Where a wife living separate from her husband agreed to repay him out of money given her by the will of his deceased father advances made by him towards the support of her and her children, if she expends the whole sum for such support, the husband has no equity for the enforcement of the contract. *Id.* A valid tripartite agreement for separation of husband and wife is not affected by a subsequent act of adultery nor by a decree of absolute divorce therefor. (N. Y.) 487. A provision in an agreement for a separation of husband and wife, that the husband shall pay to a third party, who signs the agreement as surety, a certain sum yearly towards her support, constitutes such third party a trustee of an express trust, and requires an action to enforce or execute the trust to be brought in his name. (N. Y.) 132. A valid agreement for an immediate separation, and for a separate allowance for her support, may be made through the medium of a trustee. *Id.* The provision for an annual payment of money for the maintenance of the wife is not affected by a subsequent decree of divorce in her favor, which makes no provision for alimony. *Id.* Where she and her trustee have covenanted to accept in full for her support and maintenance during her life the provision made for her therein, no further provision can be made on divorce. The contract is still in force. (N. Y.) 488.

Rights and liabilities of married women. A married woman can maintain an action for the enticement of her husband away from her, and her consequent deprivation of his comfort, aid, protection and society. (N. Y.) 553. The repeal by the provisions of the Acts giving the wife the right to maintain an action for injury to her person or character, merely removed sections no longer regarded as operative. *Id.* Payment by a wife of her husband's debt, induced by threats of his arrest, and her fear of

may recover it back. (N. Y.) 491. An equitable-ejectment action by the wife in the name of her next friend may be maintained in Pennsylvania against her husband, from whom she is at the time separated. (Pa.) 506. Whether the character of the occupation by a husband of his wife's real property was consistent with an agreement to make it their home is a question for the jury. *Id.* A married woman who indorses blank promissory notes at her husband's request for him to fill up and use is liable to the bank as indorser under statutes which give her the unrestricted right to contract except with her husband. (Mass.) 379. It is not a void gift to him as against bona fide holders. *Id.* A wife can maintain an action against another woman for alienating her husband's affections and the husband is not a necessary party to such action. The fact that a man and his wife continue to live together does not prevent her from maintaining the action. (Conn.) 329. A married woman is "a person" subject to compulsory insolvency proceedings in case of failure to dissolve an attachment before return day, although the Public Statutes re-enacting the Insolvent Law do not mention a married woman *eo nomine*. (Mass.) 379. To sustain a petition in insolvency for failure to dissolve an attachment, the declaration need not be inserted in the writ or filed before the return day. *Id.*

Parent and child. A statement of counsel in the course of argument does not amount to an admission in the cause, and letters from the mother of an illegitimate child to its nurse are incompetent for the purpose of proving paternity. (Cal.) 594. Photographs of the putative father, and of the child, are admissible to show resemblance between the two. *Id.* The statutes in reference to adoption are to be strictly construed, but the Code is to be liberally construed. *Id.* Secret and clandestine maintenance of, or contributions to the support of, an illegitimate child will not constitute adoption. *Id.* In the absence of a written acknowl-

or, the father, only by knowledge of it as his of a natural child as a guardian for it by statutory authority, from an order appointing (Md.) 705.

Right to custody of who voluntarily assumed after divorce by the father, or any report it, or anything pose to abandon it, compensation for its right to the custody of the obligation to support reciprocal rights and wise fixed by judicial decision on divorce settlement and giving alimony to their rights, so far as the child then unborn mother to her daughter the family and render she shall receive compensation though made in his presence him, unless he knew reliance upon the promise cannot recover for suffering in the facts and overcome the presumption was no implied promise. The principle of rescission as to the custody habeas corpus. (Mo.) is that it is for the best left with its father and grandparents. *Id.* father to give his infants will not of itself him of his right to the of a minor not entitled father's estate even when applied to the payment deceased father's estate

VI. PROPERTY RIGHTS AND REMEDIES.

Real property. Proof of the payment of taxes upon land upon an issue as to a claim of ownership by adverse possession, tends to establish such claim. (Conn.) 80. In such case, the assessor who made the assessment from an actual view of the land may testify as to whether or not the strip was actually assessed to claimant. *Id.* An instruction as to the effect of the interruption of possession by a stranger, even if erroneous, is immaterial where there was no evidence of any interruption by a stranger or anybody else. *Id.* Open and notorious possession under a deed from a stranger to the title is sufficient to put an intending purchaser from one holding the record title on inquiry. (Cal.) 883. A release of a grantee from a covenant in the deed assuming an outstanding mortgage cannot prejudice mortgagee's right to hold the grantee as his debtor, at least where the creditor knows of grantee's promise and has assented to it. (N. Y.) 610. Where a cardinal knew of a deed

made to him by a priest, and retained an express assumption the property was insured the cardinal's name, and priest and paid over to the cardinal, it was sustained a finding that he accepted. (N. Y.) 610. partition tenants in common shall enter and take apples in an orchard of purchaser of the orchard such right, at least in the of the agreement, to the therefrom. (N. Y.) to valuable consideration subject to a vendor's lien, death purchases otherwise must have the land first sold under the proceeds applied in satisfaction the extent of the unpaid

under proceedings to enforce the lien therefor. (Ala.) 451.

Fixtures. In determining whether an article is a fixture, its nature and object, effect and mode of annexation are usually considered. (Mass.) 249. Articles placed in a building subject to a mortgage, by the mortgagor or those claiming under him, become a part of the realty although removable without injury either to themselves or the building. *Id.* Loom beams, although not fastened to the looms or to the buildings, constitute part of the realty. *Id.* Machinery in a cotton mill, for use in manufacturing cotton cloth, and not intended to be moved from place to place but to be used until worn out, constitutes part of the realty. *Id.*

Water rights. The distinction between the rights in surface and in subterranean waters is founded on the fact of knowledge, actual or reasonably acquirable, of their existence, location and course. (Pa.) 280. One who has taken and continued to use the water of a stream for a period beyond the limit of the Statute of Limitations as to real actions cannot restore it to its original state to the injury of property through or by which it formerly flowed. (Mich.) 849.

Right to use of land. The rule that a land owner may improve his own land for the purpose for which similar land is ordinarily used, and may do what is necessary for that purpose, is applied to a railroad company constructing its road across a prairie country. (Minn.) 578. The use of a driveway under a license cannot be added to prior adverse possession so as to create a prescriptive right thereto. (Ind.) 159. An irrevocable license to use a driveway exists where expense has been incurred upon the faith of an agreement for a perpetual easement, the use for more than thirty years being acquiesced in. *Id.* Knowledge of a writing which is in form a lease to a person in possession does not relieve a purchaser from the duty of inquiring as to the possessor's rights. (Pa.) 205.

Dower rights of widow. A widow's right to dower is not barred by adverse possession of the property by a third party during her husband's lifetime, though it continues for a period sufficient to defeat his title. (Ky.) 637. An attempted release by a widow of her dower right, before assignment, is ineffectual if made to one who is neither legal nor equitable owner of the estate. (Ill.) 871. A former tenant in common of land sold in proceedings for partition is not a warrantor in the chain of title. He cannot relieve himself from liability upon his covenants by buying in outstanding dower rights. *Id.* A purchaser at partition sale, before confirmation, has no such interest as will enable him to take a release of an unassigned dower right. *Id.* A tenant in common cannot, as such, take a release from the widow of his deceased co-tenant of her right to unassigned dower. *Id.* Dower may be assigned to the widow of a tenant in common upon her cross-bill where she consents to the decree and sale and elects to take her dower interest in money; and the purchasers at the partition sale are not necessary parties. *Id.*

Homestead right. Where a homestead is ex-
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one making the exchange; and such liability cannot be defeated as to existing debts by the procuring, without valuable consideration, of new conveyances to be made to his children. (Ark.) 783. A husband and wife living together constitute a "family" within the meaning of the word as used in the first section of the ninth or homestead article of the Constitution. (Fla.) 818. The third section of the same article provided that the exemption of the homestead should accrue to the heirs of the head of the family; and under it the exemption passed on his death to whomsoever the title of the homestead descended and became incident to the inheritance. *Id.* The term "heirs" includes an adult son and an adult grandson, notwithstanding they were not at his death living at the home place. *Id.* Residence by the heirs on the homestead of the ancestor after his death is not necessary to continue the exemption of it from his debts. *Id.* A creditor seeking to satisfy a judgment against the administratrix can claim no advantage from the fact that the wife has elected to take a child's part in lieu of dower. The heirs took the entire homestead. *Id.* Improving premises is not sufficient, without actual occupancy, to give the homestead character. (Iowa) 92. Application of payments should be made by the law so as to preserve a homestead right of the debtor, where part of the indebtedness was created before the property became exempt. *Id.*

Personal rights; trade-mark and trade-name. A man may acquire the right of a trade-mark in his own name or the name of any person, but to the exclusion of the right of another person by the same name. (Fla.) 823. When a man manufactures at a particular place, he may use the name of that place as a trade-mark. *Id.* A party whose trade-mark has been violated may recover all profits realized by the wrong doer from sales of the spurious articles, and also all damages resulting from such violation. *Id.* A general demurrer to a bill as for want of equity will be overruled if there is any equitable ground of relief stated in the bill. *Id.* Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells by a peculiar label, symbol or trade-mark which no other person has a right to adopt. *Id.* A person has no right to exclusive use of recipes made by himself for the preparation of medicines. He cannot prevent their use by one who comes honestly to a knowledge of them and signifies to the public that his medicines are made according to such recipes. (Mass.) 889. One who obtains a conveyance by deed of the recipes has a right to use them, although his deed excepts from its operation rights previously granted. *Id.* The grant of the trade-name and trade-marks pertaining to medicines will confer no right upon the grantee to enjoin the use of such name and marks by other persons having a right to use the recipes. *Id.*

Corporations. A corporation may sell any or all of its property if the charter does not prohibit it. (La. Ann.) 661. The same person may fill the office of president of two distinct corporations, and this will not, of itself, inval-

date dealings between the two corporations.

Id. Where one corporation sells property to another for a fixed price, to be paid for in stock, delivery of the certificates to a designated officer, or to another by his order, operates a discharge for the price. *Id.* Corporate property is held subject to corporate debts, and equity, in proper cases, will subject the property in the hands of the purchaser to the payment of such debts; but the purchaser of specific property is not bound to follow the price into the hands of the seller and see to its distribution among its stockholders, in the absence of fraudulent connivance. *Id.* Where one corporation seeks judicial redress against another corporation, the complaining corporation, to succeed, must show, affirmatively, that the service or duty which it claims exists by force of a statute, or a contract, or a usage having the force of law. (N. J.) 855. A warehouseman cannot have the possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will. *Id.* The Legislature has power to declare what service warehousemen shall render to the public, and to fix the compensation.

Id. The presence in the defendants' charter of a provision authorizing them to make contracts shows clearly that the Legislature did not intend that the defendants should be subject to any duty to railroad companies, in that respect, except such as they should voluntarily take upon themselves by contract. *Id.* To justify the interference of a court of equity on the ground that its interference is necessary to prevent irreparable damage, the complainant's legal right must be clear, and he must show that his adversary's conduct is unconscientious.

Id. A division cannot be made among the stockholders of a California corporation, prior to dissolution or expiration of its term of corporate existence, of stock issued to it by a new corporation in consideration of the transfer of its corporate property to the latter upon the formation thereof by the former and a foreign corporation, even if such division is unanimously agreed upon by all the stockholders, and has actually been made among the stockholders of the foreign corporation. (Cal.) 520. Where a creditor has not dealt with the corporation on the faith of any capital represented by new shares issued, he cannot insist on contribution by holders of a greater amount of capital than the corporation itself could claim from them as assets. (Minn.) 676. It will be presumed that directors of a corporation were rightfully in session where they met and took official action. (Iowa) 52. Authority given by a board of directors to execute a note for a certain sum does not authorize the inclusion in the note of a stipulation for a further sum as an attorney's fee. *Id.*

Liens. A lien is the right which a creditor has of detaining in his possession the goods of his debtor until the debt is paid. (Conn.) 82. At common law it can exist only when the creditor has the actual possession of the goods for which the debt was incurred. *Id.* Parting with possession operates as a waiver or forfeiture of a lien. *Id.* A lien for the price of keeping animals, although created by statute, like a common-law lien, can exist only in favor of a person in possession of the animals.

Id. The statute lien of a livery-stable keeper on a horse under a special contract by which the owner had the right to use it, is devested when the owner rightfully takes the horse from the stable and sells it while away to an innocent purchaser for value. *Id.* A statute which provides that a lien of a laborer or furnisher of materials shall not be defeated by any agreement between the owner and contractor or sub-contractor, is an unconstitutional attempt to subject property to sale for obligations to which the owner never became bound. (Mich.)

204. "Manual labor" in cutting, banking or driving logs or timber includes the use of all improvements or instrumentalities actually used in and necessary to the performance of such labor by the lumberman. (Minn.) 862. Hence a lien on the logs extends to the use of the team, and that the employer may afterwards put the man and his team to work separately, on different parts of the work, is immaterial.

Id. Where the whole of the service is performed under one contract of employment, the laborer may claim and enforce his lien for his entire services upon that part bearing one character of mark. *Id.* Delivery of personal property in order to pass title requires an acceptance, and an actual, notorious and unequivocal change of possession. (Colo.) 641. A chattel mortgage, in which the name of the mortgagee is left blank, is of no effect as against a third party where the same formalities are required as in the case of a conveyance of real estate.

Id. *Right of redemption.* The obligor upon bonds, reserving the right of redemption, may, upon electing to redeem, demand, as a condition of payment, the surrender of all coupons, including those past due and detached as well as the bonds themselves; and a tender of the amount due on such bonds and coupons with a demand for their surrender will be sufficient to stop the running of interest although it is not accepted because of an unwillingness to surrender coupons past due. (N. Y.) 563.

Rights of beneficiary in certificate. The beneficiary in a certificate of membership in a benefit society need not resort to equity to compel the making of an assessment in case the society fails to make it. (N. Y.) 495. Lack of money in the death fund to pay a claim is no defense to an action at law to recover the amount due on the certificate, although the promise was to pay from the death fund. *Id.* Suicide is not a crime under the Penal Code, which makes it a crime to attempt to commit suicide. *Id.* A contract of insurance will be strictly construed as against the insurer for the purpose of upholding it. *Id.* The death by suicide of a person insured does not render the policy void where the Statute does not cover a case of suicide actually accomplished. *Id.*

Gift. To constitute a valid parol gift, there must be an actual delivery according to the nature of the article; but if the donor relinquishes all dominion over the thing given, and recognizes the possession of the donee as being in his own right, and the latter accepts the gift and retains the possession in virtue thereof, the gift is complete. (W. Va.) 515. A gift *inter vivos* by an aunt, to her nephew, of certain money, which was shortly before, and perhaps at the time of, the gift, in the possession of the

where depositor deant many years with the account as his own, and by the rules of the bank payments could be made to any person presenting the book, but to no one else. (N. Y.) 403. A valid gift *causa mortis* exists where a person executed a bill of sale and delivered it, together with the subject matter thereof, to his attorney with directions to deliver the same to a certain person named after the donor's death. (N. Y.) 366. No trust can be implied from a mere deposit in a savings bank by one person in the name of another. (N. Y.) 403.

Assignee of claim. The assignee of the claim of a mortgagee to damages for seizure of mortgaged goods under an execution cannot recover unless he is also assignee of an interest in the mortgage debt. (Iowa) 877. One who pays for the maker a note secured by a chattel mortgage intending to cancel it, and receives a new note and mortgage therefor, cannot claim as assignee of the former mortgage when his own proves defective. (Colo.) 641. The recital in a subsequent mortgage of a chattel mortgage upon the same property, duly recorded, is not notice to third parties of the lien of the former mortgage. *Id.* The test of an equitable assignment of a claim is whether the debtor would be justified in paying the debt, or the portion contracted about, to the person claiming to be assignee. (N. Y.) 475. The pledgee of a claim cannot compromise with the debtor without the assent of the pledgor, at least where the debtor has notice of the pledge. *Id.* A mere pledgee of claims acquires no right to a share of them which has previously been equitably assigned. *Id.* The moment a creditor attains legal title and possession of bonds received in payment of a claim, the equity of an equitable assignee of a share becomes a legal title, and the creditor's possession as to that share is the possession of the assignee. *Id.* The equity of an attorney, to whom an equitable assignment was made of a share of claims collected by his efforts, is not inferior to that of one to whom they were assigned as collateral security for a precedent debt. *Id.*

Revocation of authority by death. The death of the mortgagor revokes the authority to sell goods to a third person on the security of a mortgage given to secure his indebtedness. (Mass.) 383.

Action on a contract; damages for breach. When a contract has been performed in a substantial part and the other party has voluntarily accepted and received the benefit of the part performance, performance of the residue cannot be insisted on as a condition precedent to payment for the benefits already received. (Mass.) 342. The difficulty of determining the measure of damages will not prevent a substantial part performance from changing a warranty which constitutes a condition precedent into an independent covenant. *Id.* Damages suffered by individuals in their property by reason of failure to furnish a stipulated supply of water to a town cannot be taken into account in determining the damage to the town. *Id.* A recoupment may be made, in a suit for the price of a water supply under a contract, of the damages sustained from plaintiff's failure. 6 L. R. A.

of this meeting the controversy of suit had not arisen. *Id.*

Action on bond. A contract under seal may be discharged, even before breach, by an executory parol agreement, and performance thereof. (N. Y.) 503. In the absence of special circumstances a claim for interest will not survive payment of the principal. *Id.* One who executes a bond may be liable upon it, though his name does not appear in the body of it. (Minn.) 278. An action cannot be maintained on an indemnity bond until indemnitor has actually paid the costs and damages incurred by the officer indemnified. *Id.* An indorsement upon a bond payable on demand of a part payment and of an agreement that no more shall be demanded thereon until the happening of a certain event, is not so far a part and parcel of the instrument as to require notice in the declaration in an action thereon. (Va.) 693.

On covenant in deed. A judgment against a covenantor in possession upon foreclosure is a constructive eviction giving a right of action upon the covenant. (Ark.) 107. Interest on the purchase price of land bought with warranty, where the covenantor purchased on a foreclosure sale, may be recovered from the time of thus extinguishing the incumbrance, but not from the date of the original purchase. *Id.*

To recover money paid. Where one bank accepts and cashes a check drawn on a bank in another county, to which the signatures of the drawer and payee have both been forged, without requiring identification of the parties to whom payment is made or taking steps to preserve any evidence of their identity, the bank upon which it was drawn, upon discovering the forgery, may recover back the amount so paid. (Tenn.) 724. An action for money had and received will lie to recover the consideration paid for land where the purchaser is entitled to rescind and has tendered a sufficient reconveyance. (Wis.) 121. If the wrong land is pointed out to a purchaser by the vendor's agent, inducing him to purchase a wrong tract believing it to be that shown him, he is entitled to rescind the contract; otherwise if pointed out by another than the vendor or his agent. *Id.* Showing land to a prospective purchaser is a mere executive or ministerial act which an agent for the sale thereof may employ another to perform. *Id.* Lack of knowledge on the part of one making statements as an inducement to a contract, that such statements are false, is immaterial. *Id.*

To recover money embezzled. Loaning cash and securities to a county treasurer, knowing him to be an embezzler, to enable him to conceal his embezzlement, does not render the lender liable to an action to recover money subsequently embezzled by such treasurer. Any damage which may have resulted is too remote and indefinite to constitute a cause of action. (Dak.) 230. An allegation of conspiracy in the complaint will not change the nature of an action. *Id.*

For purchase price of goods. A promise by a

Payment by a third person, accepted by the creditor in satisfaction of the debt, is a defense to a suit for the purchase price of articles. *Id.* It is not a valid defense to a suit against the maker of a note given to secure the purchase price of land, that the maker has sold the land to a third party, who has assumed payment of the note, and that payee has agreed to release the maker and look only to such third party for payment, where such agreement was without consideration and the maker of the note has not, by acting upon faith of the promise, changed his position to his own hurt. (Ind.) 688.

For a specific performance. The right to bring an action for purchase money of land under a contract accrues when such time has expired, although no conveyance is made. (Cal.) 591. If a contract fixes the time for a payment agreed upon, but fixes no time for doing that which is the condition of payment, performance of the condition is not a condition precedent to an action. *Id.* Equitable considerations which will justify a court in refusing to compel specific performance of a valid contract must have some connection with the contract itself. (Minn.) 236. That the vendor has an independent claim against the vendee, which he is unable to enforce, is no reason for refusing specific performance on the application of the vendee. *Id.* Where a contract is rescinded while in the course of performance, no claim in respect of performance can be made unless expressly or impliedly reserved upon the rescission. (N. Y.) 508. Where the parties to an executory contract mutually agree to discharge each other from reciprocal obligations thereunder, the agreement of each will respectively furnish a sufficient consideration for the agreement of the other. *Id.*

Actions for death of person. A right to support from the person killed is not necessary to give a right of action under the Statute by the personal representative of a person negligently killed. (U. S. C. C. Vt.) 75. The pecuniary injury resulting from the death of a person from whom the beneficiaries of the action had no right to claim support is the loss of what deceased would probably have accumulated afterward if he had lived. *Id.* A declaration which sets forth adequately the right of a personal representative to recover need not allege specifically the rights of the respective distributees. *Id.*

Actions to recover property; ejectment. Crops growing on the premises at the time of a recovery in ejectment are regarded as part and parcel of the realty recovered, where no bond is given in accordance with the provisions of the Code. (Ala.) 617. The title to land cannot be questioned collaterally in a personal action to recover crops. *Id.* A judgment in ejectment is conclusive on collateral attack as to the title of the lands and crops, although not a bar to a further suit in ejectment. *Id.* Neither a verdict and judgment in a criminal prosecution for removing crops, nor the result of an action for malicious prosecution, based on such criminal prosecution, can be admitted in evidence in a civil action for the crops. *Id.*

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cut upon lands held in common against either the purchaser or his assignee with notice. (Pa.) 38.

Limitation of right of action. Actions upon duplicate school warrants taking the place of original warrants which have been destroyed will be barred by the Statute of Limitations at the same time the originals would have been. (Ark.) 510. An action to recover back freight charges in excess of those charged other shippers is a law action, and fraudulent concealment will not bring it within the exception to the Statute of Limitations. (Iowa) 799. But such concealment will bring it within the rule of law that where the party prevents another from obtaining knowledge of a fraud, the Statute of Limitations will only commence to run from the time the right of action is, or by the use of diligence may be, discovered. *Id.* The specification by the Legislature of exceptions in the general Statute of Limitations will not preclude the court from applying other exceptions recognized by the common law. *Id.*

Reference. A reference to an auditor to examine claims and vouchers and hear the parties thereon includes all claims, and therefore embraces a question as to the division lines. (Mass.) 283. Power to refer a case at issue, whether in contract, tort or replevin, extends to all civil proceedings at law, including a writ of entry. *Id.* Statements as to boundaries, made by an officer, may be proved after his death against the corporation or its subsequent grantees. *Id.* Declarations of the treasurer of a corporation, who had no authority to bind it by his statements, may be admissible as to negotiations for the corporation by himself and the president, where the declarations of the president would be competent evidence. *Id.* A general objection to declarations of two persons is insufficient to question the admissibility of the declarations of one of them. *Id.* The possession of a tenant beyond the boundaries contained in the lease will not be the possession of the landlord, if the latter never had possession of the land or claimed it. *Id.*

Practice. The publication of notice to take depositions is completed on the fourth issue of the newspaper containing it. (W. Va.) 515. An allegation that suits were duly entered in court and are still pending, implies that the writs were served on the defendant. (Mass.) 379. Depositions will be suppressed if taken upon notice insufficient both as to the persons upon whom it was served and as to time of service. (Iowa) 52. A motion for a new trial, continued from a day set for hearing it in vacation to the next term of the court, need not be further continued from day to day during the term. Once in court in term time, it remains there disposed of. (Ga.) 214.

Costs in actions. A statute providing for the allowance of an attorney's fee as part of the costs in actions applies to actions pending at the time of its passage. (Iowa) 533. Where an item of costs is disallowed by the trial court, the aggrieved party may have such disallowance alone reviewed in the supreme court, though not sufficient in amount to give that

ing the value of services by the amount of labor performed as shown by the record. *Id.*

Provisional remedies; attachment. Where a garnishee proceeding is to be determined on the disclosure alone, the statute does not contemplate any findings of fact. (Minn.) 838. Whether one is a "laboring man or woman," within the Statute exempting wages, is, the kind of work done being shown, a question of law, and not of fact. *Id.* That subdivision means only those whose work is manual. *Id.* An agent who sells goods by sample is not within its meaning. *Id.* Possession by a receiver does not exempt property, when taken into another jurisdiction, from attachment by creditors of such debtor therein, or give him any right to hold it against the claims of such attaching creditors. (Cal.) 792.

Claim and delivery. A notice of a distinct claim of title to property about to be sold at sheriff's sale is sufficient to render the property liable to the claim in the hands of an intending purchaser, although not explicit and definite as to the nature and character of the claim. (Pa.) 88. The law of Arkansas will be applied in an attachment suit by a person claiming the chattels under a mortgage given in the Indian Territory, where there is no proof of the laws of the Territory. (Ark.) 715. Delivery of chattels to a mortgagee cures all defects in the mortgage. *Id.* A mortgagee of chattels who has possession does not lose his security by lending them to the mortgagor, although the mortgage is not filed or recorded. *Id.*

Injunction. To justify a mandatory preliminary injunction a clear case of prospective injury for which the plaintiff will have no adequate remedy at law is indispensable. (Cal.) 90. In addition to the allegation of special damage, it must be alleged that other or further acts are threatened, that defendant is not responsible for the amount of the damage, and that there will be extraordinary impediment in the way of recovering the amount by an action at law to justify a mandatory writ of injunction. *Id.* A preliminary injunction will not be retained where the acts to be restrained had been performed before the order was made or served. *Id.* A decree for injunction, and the abatement of a saloon nuisance, obtained by one citizen of a county, is a bar to a suit by another citizen of the same county, in the absence of anything to show why such first decree remains unenforced. (Iowa) 721. Where a contract stipulates for personal services, such as involve special merit, skill, knowledge or ability which could not be easily obtained from others, nor be compensated in damages at law, preventive remedy by injunction will apply because of the inadequacy of the remedy at law to compensate in damages for their breach. (Or.) 653.

Mandamus. The existence of another specific remedy is not a bar to a writ of mandamus which will afford a proper and sufficient remedy (Ill.) 161.

Judicial sale. A specific lien upon property sold, for payment of the purchase money, with no defeasance provided for, is not subject to sale under execution. (Colo.) 708. An execu-

tion was intended to be sold, was present thereat and consented to the application of the proceeds on the judgment against him, and receives the surplus and demands the securities pledged for the payment of the judgment debt. *Id.* On foreclosure of deeds of trust on land across which a railroad is constructed, the decree should not except the right of way from the sale; where it is not shown that the company holds its right of way by a title superior to the trust deeds. (Iowa) 52. Land may be sold in parcels to separate purchasers at one sale under a power in a mortgage, if the sale is made in such a manner as to obtain the most money for the land. (Mass.) 288. An assignee of a mortgage for collateral security can, as against the mortgagor and those who claim under him, execute a power of sale as fully as if the assignment were absolute. *Id.* Neither the mortgagor nor his grantee holds adversely to the mortgagee until he has distinctly disclaimed holding under him, and asserted title in himself. *Id.*

Remedy in equity; bill to set aside will. The dismissal of a bill to set aside a will is proper as to a defendant named in the will as executor; and where he files a disclaimer of any interest in the estate it renders him a competent witness for either party to the suit. (Ill.) 167. Persons who are both heirs and devisees, and made defendants in a bill to set aside the will, should be permitted to testify in behalf of the contestants, unless interested with the latter. *Id.*

Relief from fraud. The fact that a transaction is against public policy in law will not prevent a remedy against the party guilty of fraud, in favor of the other who is not consciously wrong. (Mich.) 498. The maker of a note given for Bohemian oats, induced to give it by persistent acts and misrepresentations, will not be denied relief on the ground that he is *in pari delicto*. *Id.* Fraudulent representations as to an alleged corporation whose pretense of legal existence is a fraud need not be in writing in order to sustain an action for fraud. *Id.* One who sells a note which is void in his hands, on grounds of public policy, fraudulently representing it to be good, is liable to the purchaser for the money paid therefor, although the purchaser might have collected it from the maker. (Mich.) 501. Fraudulent intent in an action for deceit may be maintained by proof of a false statement, not mere matter of opinion, estimate or judgment, made as of the party's own knowledge, without proof of actual intent to deceive. (Minn.) 149. It is immaterial whether such statements are made innocently or knowingly. It is as fraudulent to affirm the existence of a fact about which one is in entire ignorance as it is to affirm what is false, knowing it to be so. *Id.* Where tax receipts are received by a bank, it becomes at once legally liable to the depositor as for so much cash deposited. (Ind.) 191. In determining the liability of a bank for fraudulent representations as to solvency, made for the purpose of inducing certain deposits in the form of tax receipts, the time of deposit is the time when they were delivered and cred-

books of the bank for five days thereafter, in resolving the question whether the whole amount has been checked out after such representations. *Id.* No relief can be granted under a bill based on fraud, where the charge of fraud is not sustained. (U. S. C. C. N. Y.) 565. The condition in income bonds and a mortgage on a railroad securing them, that no right of action shall exist until the board shall adjudge and award the ascertained net earnings, does not preclude remedy when the directors improperly neglect or refuse to take the necessary action. *Id.* Merely passing a resolution that no income has been earned is not conclusive as to the rights of the holders of income bonds where the duty of the board of directors is to ascertain, fix and declare the amount of net earnings, and as to what net earnings have been made. *Id.* In a mortgage to secure income bonds, describing the lines of road to be included, the words "hereafter to belong to the party of the first part," do not cover additional lines outside of the specified limits, which are subsequently acquired by the mortgagor. *Id.* The net earnings due to holders of income bonds are to be ascertained by deducting the amounts necessary for ordinary expenses, betterments, etc., from the gross earnings of the particular line mortgaged, not of a larger system of which the mortgaged line has become a part; the bondholders are entitled to have those earnings separately kept and divided. *Id.*

Relief from usurious contract. Where usurious interest has been paid upon a debt, equity, in stating the account between the parties, will credit upon the principal unpaid whatever usurious interest has been paid. (W. Va.) 427. A note for the payment of a sum of money given bona fide for purchase money for land is a part of the purchase price and not usurious, and the rate of interest called for in it will be enforced. *Id.* Where questions purely of fact are referred to a commissioner, his finding, though not as conclusive as the verdict of

Doctrine of contribution. When a vendor sells part of a tract subject to a mortgage which covers the entire tract, the vendor and purchaser stand on the same level and must contribute towards payment of the mortgage. (Ala.) 451. A bona fide purchaser, with a stipulation for a good and sufficient title, of a portion of lands subject to a vendor's lien, is entitled to have the remaining portions of the land first sold to satisfy the lien. *Id.* Parties to a suit to enforce the lien for the purchase price of land charged by a testator with the payment of a vendor's lien upon that and other lands are not estopped from enforcing contribution by a purchaser at a sale under the decree. *Id.* Where land so charged is resold under a decree in a proceeding to enforce the lien, if the purchaser at such resale buys subject to the original lien, he has no claim to a preference over the devisees of the other lands subject to such lien. *Id.* Creditors who attach goods in good faith are not such wrongdoers as to be denied the right of contribution between each other. (Ill.) 400. One of several attaching creditors may be required to contribute to the payment of the damages recovered in the trespass suits against the other attaching creditors. *Id.*

Right of subrogation. A person who loans money to pay a mortgage may be subrogated to the rights of the former mortgagee, where the mortgagor, with intent to defraud the lender, conveys the property to a third person who has full knowledge of the loan and agreement. (Wis.) 61. Though property be sold at a judicial sale under a junior mortgage, and purchased by the junior mortgagee, the proceeds of the sale belong to the debtor, under the maxim *caveat emptor*. The junior mortgagee has no right of subrogation to the position originally held by the owners of the superior liens discharged out of the proceeds of a subsequent sale and the senior mortgage sale. (Ga.) 73.

VII. DAMAGES FOR TORTS.

Actions for torts. A bill of particulars need not be ordered to be filed in an action of tort where the case is sufficiently stated in the declaration. (Va.) 349. A suit for a tort, brought against a husband and wife jointly, does not abate upon the death of the husband during its pendency, but may proceed against the wife alone. (R. I.) 118. An averment that connected acts were done by several in pursuance of a conspiracy does not so change the nature of the action if it is shown that the acts were done by one only. (Mass.) 629. Applied to a case where a city officer corruptly agrees with another to use his influence to induce a purchase at an advanced price, the profits to be divided between them. *Id.* After a declaration has been amended, a motion to dismiss raises only the question of the sufficiency of the declaration as amended. (Ga.) 152. Where a right of action for a tort is given by statute of another State, the *lex fori*, not the *lex loci*, applies. 6 L. R. A.

plies on the subject of limitation. *Id.* Where there is a general verdict, and also special findings of fact, one of the findings of fact cannot be set aside without a new trial of that particular fact, especially if when set aside it would require a different judgment, as contrary to the evidence. (Minn.) 573. Actions relating to the existence of a nuisance are not within the provisions of the Code making the right of appeal depend upon the amount in controversy. (Iowa) 538.

For libel and slander. No averment of special damages is necessary in an action to recover damages for slander spoken with reference to the official position of a political officer. (Mass.) 680. While spoken words to be defamatory of a public officer need not import a charge of crime, yet they must impute to him some incapacity or lack of due qualification to fill the position, or some past misconduct or the holding of principles which are hostile to the

not actionable without averment and proof of special damages. *Id.* The old doctrine of *scandalum magnatum* has never been adopted in Massachusetts as a special remedy. *Id.* Saying "That's a lie," of material testimony of a witness on the opposite side, is not actionable when spoken during the trial of an action against a corporation by its manager. (N. C.) 780. The manager of a corporation on a trial has the privilege he would have if he was himself a party, in respect to words spoken by him. *Id.* A party to an action is protected against all inquiry into his motives in uttering words, during the course of the trial, that are pertinent to the issue. *Id.* A letter saying that a person "expects to pay a claim out of what he hopes to beat my company in a suit now pending" is irrelevant in an action by him for alleged slanderous words spoken in the course of the trial. *Id.* A publication charging that the books of another person infringed a copyright is privileged when made by a person claiming exclusive rights under the copyright, unless made with express malice. (N. Y.) 363.

Breach of promise of marriage. The sufficiency of the evidence to support a verdict cannot be considered on an error for refusal to grant a nonsuit or to arrest judgment. (Pa.) 481. Evidence that the settlement of a suit for money loaned, and of a prosecution for fornication committed, included a cause of action for breach of a promise of marriage made on the same day, is admissible in a suit for breach of promise. *Id.* Communications to a law student, although made while he is employed to advise and assist in a lawsuit, are not privileged. *Id.*

Trespass on real property. The attempt to seduce and debauch the wife of another man will not sustain an action of trespass for breaking and entering his close, when alleged merely by way of aggravation. (Ind.) 736. A person who enters another's premises under an express license does not become a trespasser *ab initio* by wrongful acts while upon the premises. *Id.* A representation by a defendant that he wanted to enter the premises and obtain a shovel is sufficient without averring facts necessary to establish fraud. *Id.* Everyone must so enjoy his property as not to injure the property of another. (Ind.) 449. The measure of damages for removing the lateral support to land whereby it sinks and falls away is the diminution of the value of the lot by reason of the act. *Id.* The natural right of lateral support to land does not extend to buildings placed thereon, if reasonable care has been exercised, and the earth would not have given away except for the added weight of the buildings. *Id.* It is proper to limit the re-cross-examination of a witness who has been examined and fully cross-examined. *Id.* An action for trespass upon lands in another State cannot be brought in Massachusetts by trustee process under the Statute, authorizing personal actions including trespass *quare clausum* to be brought by trustee process. The Statute did not give a new jurisdiction or make local actions transitory. (Mass.) 416.

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sance, but such result flows from a particular manner of doing the act, the legislative license is no defense. (Minn.) 763. Damages for injuries to wells of clear, fresh water, caused by boring for gas or oil, may be recovered if the party boring knew or ought to have known of the existence of the stratum of fresh and the deeper stratum of salt water, and that the boring would inevitably mix the two, which at a reasonable expense could have been avoided. (Pa.) 280. A lot owner whose only means of ingress and egress to and from his lot by vehicles is through an intersecting street, may maintain an action for the special injury resulting from a blockade of the entrance to the latter street by railroad cars. (Colo.) 254. The amount of deterioration in the rental value of premises as affected by the nuisance is the measure of damages for the nuisance. *Id.* A mill-dam, which has become a nuisance by the gradual growth of a city around it, will not be abated in equity; the fact that it is a nuisance must be first established at law. (Pa.) 737. Where a railroad is so constructed as to cause water to occasionally overflow lands adjacent, an action will lie to recover damages resulting, and the Statute of Limitations will begin to run upon the happening of the injury complained of. (Ark.) 804. The fact that telegraph and telephone poles and wires prevented the extinguishment of a fire does not make the company owning them liable for the loss, where the land owner had built by the side of them, and had never objected to them in any way before the fire. (Mich.) 455.

Negligence of bailee. A hotel proprietor incurs a liability for the safe keeping of baggage of a guest the moment the hotel porter indicates the conveyance by which he can reach the hotel and takes charge of his baggage check. (Ga.) 483. Any private arrangement between the proprietor and carrier unknown to the guest is immaterial. *Id.* The failure of the guest to inform the porter that the baggage contains valuable jewelry and clothing will not prevent his recovery against the proprietor for the loss of the baggage. *Id.* A sleeping-car company, rendering service similar to an innkeeper, is subject to the same liabilities. (Neb.) 809. The business of a stock-yard corporation corresponds in many respects with the business of warehousemen. (N. J.) 855.

For neglect of towns, etc., to repair highway. Failure of a town to provide railings on barriers at dangerous places on public highways will render it liable for injuries thereby resulting. (Mich.) 695. The duty of townships, villages, etc., to keep highways safe and convenient for public travel is made imperative by statute. *Id.* It is a question for the jury whether railings or barriers are necessary to make a highway reasonably safe for travelers. *Id.* Notice to township officers of the necessity of barriers or railings in a highway is sufficient, where it is shown that they lived in close proximity and some of them frequently passed over it. *Id.* Whether an injury would have occurred if proper railings or barriers had

been provided at the place, is a question for the jury. *Id.* Whether a particular vehicle is unsuitable and not roadworthy is a question for the jury. *Id.* It is not negligence, as matter of law, for a person in charge of a vehicle to place his shoulder to the vehicle to prevent overthrowing. The most that can be claimed against him is that it is a question for the jury. *Id.* A general custom and usage as to placing railings or barriers along the highway embankment is of no importance in determining the liability of a town. *Id.*

For negligence causing death. The pendency of a former suit is not a ground for abatement of an action unless both actions are pending in the same jurisdiction. (R. I.) 719. An action may be maintained in one State by the personal representative of one killed by the negligent act of a common carrier in another State to recover damages resulting from such negligence, where the cause of action survives by the statutes of the State where it arose, and a similar statute exists in the State where the suit is brought. *Id.* A statute providing that when administration is taken in the State upon the estate of a nonresident decedent the estate found there is to be applied there primarily to the payment of domestic creditors, will not prevent the administrator from bringing suit wherever he can upon a cause of action for the negligent act of a common carrier causing personal injury to him. *Id.* In an action for damages for death caused by negligence, plaintiff may prove the speed at which the train was running, on the questions of due care on the part of the deceased, and of the bearing of other alleged acts and omissions of the company's servants upon the injury. (Ill.) 418. In an action by a father as administrator, defendant cannot show that plaintiff was wealthy and able to hire others to perform the services. *Id.* A railroad company is subject to the General Statutes of the State respecting the signals at public highway crossings, notwithstanding other rules are provided by its charter; and positive and direct testimony is not absolutely required to prove the fact that the required signals were not given; it is sufficient if the jury believe that such signals were not given. *Id.* Damages in such cases may be allowed for the loss of service or earnings during the period of minority. *Id.*

For personal injuries caused by negligence. Evidence that plaintiff was dependent upon his earnings for the support of himself and wife is admissible as tending to show that he was unable to employ a physician of special skill to rebut a claim that he had not used ordinary care. (Follett, *Ch. J.*, and Potter, *J.*, dissent.) (N. Y.) 765. An attorney may waive the privilege of his client as to information acquired by a physician in attending him, and may call the physician as a witness. *Id.* The opinion of a physician may be given as to what will be the result of a disease in the natural and ordinary course. *Id.* A physician may testify as to the length of time that a diseased person will live, although he can only give the probability from the history of other similar cases. *Id.* A photograph showing how a person's limbs have been contracted is admissible where a physician testified that it was taken in his presence and accu-

rately represented the condition of the limbs. *Id.*

Contributory negligence to defeat recovery. Where a shipper, by consent of a railroad company, undertakes, with the help of his own employes alone, to run cars down a grade to the place where they are needed for loading, the railroad company is not liable to an action for damages on account of injuries resulting. (Tenn.) 727. For a postal clerk to ride in a mail car while off duty, in the absence of any rule of the railroad company forbidding him, is not contributory negligence. (Md.) 706. Where the want of care and diligence as imputed to a fireman relates to his failure to keep the engineer awake or take measures for his own safety, the question whether his conduct would or would not be negligence is for the jury. (Ga.) 214.

Negligence of third party not imputable to party injured. Where a child suffers personal injuries through another's negligence, the contributory negligence or wrongful act of his parent without volition on his part is not imputable to him. (Iowa) 545; (Mo.) 537. Nor will the negligence of another child ten years old, his only protector, defeat the action. (Mo.) 537. The right of recovery in favor of the estate of a child killed by another's negligence is not affected by the fact that the parents, who are entitled to his estate by inheritance, contributed to the accident. (Iowa) 545. Children are required to exercise only that degree of care which persons of like age, capacity and experience might be reasonably expected to naturally or ordinarily use in the same situation and like circumstances. (Ala.) 418. The negligence of the driver of a private vehicle cannot be imputed to one who is riding with him merely by invitation. (Pa.) 148. One who might have seen the danger, but neglected to warn the driver, or ask to get out, is guilty of negligence and cannot recover for injuries received in a collision with the engine at the railroad crossing. *Id.*

For injuries through negligence of employes and agents. A machinist employed by a corporation in its factory, to keep machinery, takes the risk of the incompetency or negligence of other employes or officers or agents of the corporation, rendering it dangerous. (Ga.) 190. A corporation the membership in which is limited to officers and agents of fire insurance companies is a private and not a public corporation, nor is it a public charity; and it is liable in damages for injuries resulting from the negligence of its servants, notwithstanding the saving of life and property is referred to in its charter in general terms. (Mass.) 778. A municipal corporation is not liable for injuries resulting from negligent acts of one employed by it to enforce an ordinance. (Ill.) 270. A master mechanic in a machine shop, having control of the shop, whose duty is to manage a distinct department of the master's business as a foreman, is not the fellow servant of a machinist employed in the shop. (Ind.) 584. An employe, in entering the service, does not assume a risk created by the negligent act of the master's representative. *Id.*

Master and servant. The measure of risk which a fireman ought to incur is that only which his duty and obligations to the company

eral days after the event, supported by affidavit, are not admissible in evidence. *Id.* It being in question whether a fireman could, by reporting the facts of his situation to an official, have obtained relief from his peril, evidence is admissible to show that relief would probably have followed in a specified way. *Id.* An employé, though obligated in writing to "study the rules governing employes, carefully keep posted and obey orders," is not bound by rules of which he is ignorant. *Id.* Trackmen are not fellow servants with trainmen on the same road. (U. S. C. C. Vt.) 75. Trackmen on a hand-car have a right to suppose that an approaching train will slow up on warning sent by a flagman, and may remain upon the hand-car with their boss until it appears that it will be struck by the train. *Id.* To run a train towards a hand-car after warning, without any lookout ahead, is a neglect of duty of the trainmen, for which the railroad company is liable. *Id.* Although the conductor may employ the surgical aid demanded by the urgency of the occasion, yet when a competent surgeon has been procured, or his procurement confirmed by the conductor, the company will not be liable for further services rendered at the latter's request. (Ind.) 820. A brakeman has a right to assume, in the absence of notice to the contrary, that a tunnel is of equal height throughout. (N. Y.) 246. Judicial notice may be taken of the height of the human body and the measurement of its several parts, on a verdict finding, without any evidence as to plaintiff's height, that while sitting on a car he was struck on the head by an arch four feet seven inches above the top of the car. *Id.* A master is not bound to warn his servant, a boy twelve years of age, of the danger of injury from a rapidly revolving cog-wheel in plain sight, where he has been employed about the machinery for nearly two months and possesses the intelligence common to boys of his age. (Mass.) 738. If, however, the boy possesses less than average intelligence, which the master ought to have known, evidence may justify a jury in finding the master negligent in failing to give him warning, in an action to recover damages for injuries received in that way. *Id.*

Carriers liable for injuries to passengers. A railroad company must make it safe for passengers to leave its cars and stations. (Ind.) 198. It must light its stations and platforms if passengers are discharged after dark, and must keep them in safe condition when used in common by different companies, and it will be responsible, although the defect which causes the injuries is in fact located upon the portion of the platform belonging to the other company. *Id.* It is competent, on cross-examination, to ask a medical witness his opinion as to the probable results of an injury, for the purpose of testing his skill. *Id.* The omission of mere formal statements will not vitiate a special verdict. *Id.* The petition in an action for damages for personal injuries inflicted through negligence need not allege that authority to carry passengers was given to the conductor in charge of the train. (Mo.) 409. If one is riding on a freight train, the company owes him a duty, 6 L. R. A.

person to ride on such train, even without payment of fare. *Id.* When a car containing a sleeping passenger becomes detached, the failure on the part of the trainmen either to warn the passenger or to signal a coming train at a proper distance from the standing car, there being ample time, will furnish evidence of gross negligence. *Id.* One who is on a freight train with the knowledge and consent of the agents in charge is not there wrongfully. *Id.* Where a passenger was riding on a car with his elbow resting on the window sill, and slightly projecting out of the window, the question of his contributory negligence was for the jury. (Or.) 656. A railroad company owes the duty to a passenger thrown on its tracks by fault of its servant, producing mental incapacity, to prevent injury to him from its trains. (Ind.) 241. The wrong of leaving a passenger with mental incapacity on its track exposed to great and known peril is the proximate cause of his death resulting from his being subsequently struck by a train. *Id.* The drunken condition of a passenger will not excuse a carrier from liability for negligently exposing him to danger. *Id.* Recklessness, reaching in degree to an utter disregard of consequences, may supply the place of a specific intent, and be sufficient to establish willfulness. *Id.* In an action to recover damages for death of a person wandering in a dazed condition along a railroad track, evidence of negligence on the part of defendant's servants, which may have caused decedent to be upon the track in such condition, is admissible. *Id.* It is the duty of those in charge of a grip cable-car to be on the lookout and take all reasonable measures to avoid injuries to persons who may be upon the street; this duty is not discharged as a matter of law by ringing the bell and seeing that the track before the car is clear, without looking to the right or the left. (Mo.) 536. Objection to want of evidence is not considered on appeal when the point was admitted in the answer and not questioned on the trial. *Id.*

Carrier's negligence the proximate cause of the injury. A carrier's negligent act, from which an injury results, will be deemed its proximate cause, unless the consequences were unnatural and unusual, although the precise accident which occurred might not have been anticipated. (Ind.) 198. One negligent person cannot escape liability for his negligence because of the negligence of a third person. *Id.* One injured by another's negligence, who did all that the most prudent person could well have done under the circumstances, will be absolved from the charge of contributory negligence. *Id.*

Carriers; for loss or injury to property. It is the statutory duty of an express company to receive a package of money "whenever tendered" except at times for repose, or for taking meals according to the usages of the place; therefore a rule of the company prohibiting the receipt of money packages except on the same day of, and prior to, the arrival and departure of trains, is void. (N. C.) 271. One engaged in transporting baggage is liable for the value of articles contained in a valise deliv-

ered to his agent for transportation and lost solely through such agent's negligence, where the owner of the valise was ignorant of posted notices to the contrary. (Ind.) 619. A catalogue prepared by a traveling salesman, his own individual property and carried as an article convenient and necessary in his business while traveling, is personal baggage for which he may recover when lost by a baggage transfer carrier. *Id.* Where the shipper accompanying his stock voluntarily placed himself in a posi-

tion of known danger, and not to look after or care for his stock, the railroad company is not liable in damages for his injuries. (Kan.) 616.

Railroads; for injury to stock. In an action for damages for injury to a horse, expenses incurred in good faith in attempting a cure may be recovered in addition to the actual value of the animal at the time the injury occurred, although defendant was not consulted in relation to the matter of the attempted cure. (Mich.) 454.

VIII. CRIMINAL LAW AND PRACTICE.

Crime. The nonperformance of an impossible act cannot be made a crime, for which the delinquent may be punished; so a statute which makes criminally liable any person for failure to construct, keep and maintain good sidewalks is unconstitutional. (Mich.) 54. Furnishing oleomargarine to patrons of a restaurant as part of a meal ordered by them, although they do not eat it, but carry it away with them, is a sale thereof subjecting the proprietor to a penalty under the Statute. (Pa.) 638.

Party accused entitled to bail. Where a party is in custody under an information charging him with a bailable felony, and the judge refuses to act in the case, either as to bail or trial, on the ground that he is disqualified to act, and on habeas corpus it does not appear that he is disqualified, bail conditioned for the party's appearance before the criminal court of record will be allowed. (Fla.) 718. A bail bond must be approved by the court, if given while the court rendering the judgment or sentence is in session. (Fla.) 821. Where a statute authorizes a special remedy against parties to a particular instrument, an instrument of the character specified is necessary to such remedy. *Id.* A seal, or a scrawl to which the statute gives the same effect, is essential to a bond; and an instrument to which there is no seal or scrawl is not a bond. *Id.* The bail which the Act authorizes any person convicted to give is to be by bond, taken and approved in open court; and unless given in the form required it will not authorize the execution required by statute on its return. *Id.* That a bail surety had importuned the court to impose a fine instead of imprisonment, and assured the court that he would give the bond required by the statute to secure the payment of the fine, and thereupon the prisoner was released, does not estop the surety from questioning the legality of an execution issued by the clerk upon the return of the paper. *Id.*

Prosecution for murder. When the indictment charges the murder of one whose name is to the grand jury unknown, the accused cannot allege error by reason of the absence of proof of the name of the murdered man, and that a witness testified to the name of the deceased is ground for a reversal of the conviction. (Wyo. T.) 385. Where it is not claimed that the defendant was not actually present in court, the record is sufficient evidence of his presence on reception of the verdict. *Id.* The accused is presumed to be innocent until his guilt is established, and every element of guilt must be established beyond reasonable doubt or the accused must be acquitted; the burden of proof

is never upon the accused. *Id.* On a trial for murder, where every circumstance of the killing is proved, it is for the jury to decide whether the killing was malicious, giving to the accused the presumption of innocence. *Id.*

Neglect and refusal to support wife. A proceeding under the statute against a man for neglecting and refusing to support his wife is a criminal prosecution, and a complaint which charges the offense in the words of the Statute, without alleging a marriage to her, is sufficient. (Conn.) 125. Parol evidence is admissible on the question of marriage, and a certificate purporting to be an original marriage certificate is admissible in connection with the testimony of the alleged wife to prove marriage. *Id.* Evidence of cohabitation is admissible as tending to prove a marriage. The fact raises a presumption of legal marriage, and the professed husband's confession that he married her is admissible. *Id.* The presumption is that the neglect or refusal of a husband to support his wife is unlawful, and the burden is on him to prove its lawfulness. *Id.* The adultery of a wife is a sufficient defense to the charge of unlawfully neglecting and refusing to support her; and the burden of proof as to a distinct defense is on the defendant. *Id.* Whenever a defense is so proved that a reasonable doubt is raised as to any part of the case, the defendant is entitled to the benefit of that doubt and should be acquitted. *Id.* A witness cannot be asked, even on cross-examination, concerning his knowledge of the conduct of one charged with an offense or of particular acts of one whose character is involved in the issue. (Ala.) 801.

Self defense against assault. An assault by a husband for intimacy with his wife in his presence, raising a well-founded belief that a criminal act is just over or about to take place, will not justify the adulterer, though in danger, to defend himself with a deadly weapon. (Ga.) 424. Where the verdict is correct, if the testimony of the prosecutor is true, and the jury believed it to be true, the result coincides with the substantial merits of the case. *Id.*

New trial. Newly discovered testimony, for the purpose of impeaching a witness examined on the trial, will not justify a new trial. (La.) 79. More importance attaches to testimony given on the trial than to statements which the witness may make either before or after trial. *Id.* The same principles apply to contradictory statements of persons *in extremis* as to those of a witness examined under oath. *Id.*

Sentence and execution. A law substituting the state penitentiary for the county jail as the

post facto law in respect to crimes already committed. (Colo.) 472. A law shortening the time between sentence and execution of a person condemned to death is *ex post facto* and void as to previous offenses. *Id.* A "week of time," not less than two weeks from the day of sentence, appointed, within which a condemned person shall be executed, means a period beginning and ending Saturday night at midnight. *Id.*

Conditional pardon. A pardon on condition that the prisoner "leave the State within forty-eight hours, never to return," may be lawfully granted by a governor who has authority to grant pardon on terms. (S. C.) 743. On forfeiture of a pardon by breach of the conditions, a convict becomes liable to serve that part which he has not already served of his sentence. *Id.*

Prosecution under Excise Law. An Act entitled "An Act to Further Provide against the

excise law" is not in conflict with the Constitution, and is a valid law. (Ohio) 749. The term "beer," in the absence of all evidence as to its quality and effect, does not import an intoxicating beverage. (N. Y.) 669. Although exclusive jurisdiction is given to the court of special sessions over prosecutions for violations of the Excise Law, yet if during the preliminary examination the case is withdrawn from the magistrate with his consent, it may be subsequently presented to the grand jury and tried in the court of sessions. (N. Y.) 128. Where a number of persons purchase and store liquor and appoint an agent to manage it, and he, without a license, deals it out to customers, the transaction is a sale and subjects the agent to prosecution for violation of the Excise Law although he acts as steward for a social club which owns the liquor. *Id.*

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ABATEMENT. See ACTION OR SUIT, 11, 12.

ACADEMY. See CHARITABLE USES, 5.

ACCORD AND SATISFACTION.

1. The technical distinction between a satisfaction before or after breach of a contract is disregarded in the State of New York, and a new agreement by parol, followed by actual performance of the substituted agreement, whether made and executed before or after breach, is a good accord and satisfaction of the covenant. *McCreery v. Day* (N. Y.) 508

2. A new agreement, although without performance, if based on a good consideration, will be a satisfaction of the old one if accepted as such. *Id.*

ACTION OR SUIT. See also RELEASE; TAXES, 10; TELEGRAPH COMPANIES, 2.

1. If a contract fixes the time for a payment agreed upon, but fixes no time for doing that which is the condition of the payment, performance of the condition is not a condition precedent to an action. *Donovan v. Judson* (Cal.) 591

2. The right to bring an action for purchase money of land, under a contract by which one party agrees to convey, without fixing any time therefor, while the other agrees to pay the price a certain time after final judgment in his favor in a certain pending suit, accrues when such time has expired, although no conveyance is made. *Id.*

3. Loaning cash and securities to a county treasurer, knowing him to be an embezzler, for the purpose of enabling him to conceal his embezzlement by showing the money and securities as the property of the county, does not render the lender liable to an action in favor of the county, on the ground that the discovery of his embezzlement and opportunity to prosecute him therefor were thereby delayed. *Nelson County v. Northcott* (Dak.) 280

4. An action for trespass upon lands in another State cannot be brought in Massachusetts by trustee process, under Mass. Pub. Stat. chap. 183, §§ 1, 3, authorizing personal actions, including trespass *quare clausum*, to be brought by trustee process in the county of the trustee's residence or place of business. The statute did

not give a new jurisdiction transitory, but in cases which the court may bring, and to the venue the process specially *necticut River Lum*

5. The mayor of a city is a proper party to a suit to set aside a deed established by the board of *Valley Waterworks* *County* (Cal.)

6. After a decree of partition of the land, the decree and sale take her dower into her rights by cross-partition purchasers (Ill.)

7. An action cannot indemnifying bond execution of mortgage of the mortgagee's bond, unless such assignment of the bond is made. *v. Ferrall* (Iowa)

8. The husband is not liable for an action by his wife for alienating his estate (Conn.)

9. One with whom an agreement is made for a loan, and the party in support by the husband, express trust, who has his own name to end the loan. *Clark v. Fossdick* (N. Y.)

10. The dismissal of a suit is proper as to a defendant as executor and administrator, with legal title, if he refuses to act either as executor or administrator and files a disclaimer. *Campbell v. Co*

11. The pendency of a suit is the same cause of action abatement of an act subsequent actions at law. *O'Reilly v. R. Co.* (R. I.)

12. A suit for tort and her husband join her in consequence of the pendency. *Baker v.*

ADOPTION. See 1-3.

boundaries of the land contained in the lease, even if he believes that he is occupying only the land demised, will not be the possession of the landlord, if the latter never had possession of the land or claimed it. *Holmes v. Turners Falls Lumber Co.* (Mass.) 283

2. Neither the mortgagor nor his grantee holds adversely to the mortgagee until he has distinctly disclaimed holding under him, and asserted title in himself. *Id.*

3. A widow's dower is not barred by adverse possession during her husband's lifetime, though for a period sufficient to defeat his title. *Williams v. Williams* (Ky.) 637

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ANNUITIES.

1. The devise of an annuity or yearly portion out of the net rents and profits of a trust estate carries no interest in the realty, where the donee can never assert any right of possession, control, or ownership during his lifetime, unless as tenant of the trustee. *De Haven v. Sherman* (Ill.) 745

2. An annuity given by will is not made a rent charge upon trust lands from the rents of which it is to be paid, where there are no words creating a legal rent charge, and no power given to distrain if the annuity be not paid. *Id.*

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APPEAL AND ERROR. See also TAXES, 8.

1. Where a decree is rendered against two defendants separately, on a bill to compel con-
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cedence against whom the judgment was for less than \$1,000. *Farwell v. Becker* (Ill.) 400

2. Actions relating to the existence of a nuisance are not within the provisions of Iowa Code, § 8173, making the right of appeal to the supreme court depend upon the amount in controversy or a certificate of the trial judge; and they may therefore be appealed to that court without regard to the amount involved. *Farley v. Geisecker* (Iowa) 533

3. No appeal will lie from an order appointing the mother guardian of a natural child. *Ramsay v. Thompson* (Md.) 705

4. On the death of an administrator against whom a decree for the payment of money out of the assets of the estate has been rendered, the proper party to appeal is not his administrator, but an administrator *de bonis non*. *Miller v. McMechen* (W. Va.) 515

5. An administrator *de bonis non* need not make himself a formal party to the record in order to appeal from a decree against his predecessor, who is dead, but may simply petition for an appeal, stating the other's death and exhibiting his own appointment. *Id.*

6. On appeal from a conviction of murder, where the record recites the going into court of defendant and his counsel, the calling and coming in of the jury, the continuance of the trial, the argument of counsel, the instructions to the jury, their retirement, and the return of the jury into court with the verdict, and the verdict itself, all in one entry, it sufficiently shows defendant's presence at the rendition of the verdict. *Trumble v. Territory* (Wyo.) 384

7. Appellee's additional abstract and argument will not be stricken from the record, with costs of printing the same, because not served within the time required by the rules, where the final submission of the cause was not retarded thereby. *Doolittle v. Doolittle* (Iowa) 187

8. A general objection to declarations of two persons whose statements are not distinguished is insufficient to question the admissibility of the declarations of one of them. *Holmes v. Turners Falls Lumber Co.* (Mass.) 283

9. An appeal will be dismissed where the judgment has been performed. *Hintrager v. Mahony* (Iowa) 50

10. Affidavits as to oral agreements between counsel will not be considered on appeal, under Iowa Code, § 218, at least so far as they are in conflict. *Hardin v. Iowa R. & Constr. Co.* (Iowa) 52

11. On appeal from a conviction for murder, defendant, who has objected in the trial court to testimony that it was impossible for the grand jury finding the indictment to obtain the name of the deceased, cannot complain of the absence of proof that such is the case, and so insist that the indictment, charging him with the murder of a person to the grand jury unknown, is at variance with the evidence, which shows the name of such person. *Trumble v. Territory* (Wyo.) 384

the supreme court would have affirmed the appeal, the aggrieved party may have such disallowance alone reviewed in the supreme court, notwithstanding the fact that such item alone is not sufficient in amount to give that court jurisdiction of the controversy. *Farley v. Geisacker* (Iowa) 538

13. The sufficiency of the evidence to support a verdict cannot be considered on an assignment of error for refusal to grant a nonsuit. *Dierstein v. Schubkagel* (Pa.) 481

14. The Colorado statute providing that judgments or orders in cases of contempt shall be final and conclusive does not prevent a writ of error from the final judgment, but restricts the review to an inquiry into the jurisdiction of the court entering the judgment. *Cooper v. People, Wyatt* (Colo.) 430

15. An objection that there is no evidence that the defendant was operating a cable railroad at the time of the accident will not be considered on appeal, when no such question was raised on the trial, and the operation of the road by defendant is an admitted fact in the case. *Winter v. Kansas City Cable R. Co.* (Mo.) 586

16. An objection that the cause should not be tried as an equitable action will not be considered when raised for the first time on appeal. *Adams County v. Hunter* (Iowa) 615

17. An insurer who, in cross-examining the assured as to his having incumbered the property, particularly inquired of him whether the incumbrance had been paid before the fire, cannot object on appeal that the finding of payment was not established by the answers of the assured that they had been paid. *State Ins. Co. v. Schreck* (Neb.) 524

18. A party who, upon cross-examining his adversary, insisted upon making the very proof objected to cannot be heard on appeal to object that the evidence was not within the legal form presented by the pleadings. *Id.*

19. Findings of fact of a commissioner, though not as conclusive as the verdict of a jury, will be sustained on appeal, where they have been approved by the court below, unless plainly not warranted by any reasonable view of the evidence. *Roger v. O'Neal* (W. Va.) 427

20. The findings or decree of a chancellor may be sustained on conflicting evidence, although so doubtful and unsatisfactory that the appellate court, if acting on it in the first instance, would have pronounced a different decree. *Id.*

21. An instruction as to the effect of the interruption of possession by a stranger, even if erroneous, is immaterial where there was no evidence of any interruption by a stranger or anybody else. *Wren v. Parker* (Conn.) 80

22. An error in submitting a question to the jury is not material, where the court has sufficiently ruled in accordance with the jury's decision by refusing to set aside the verdict. *Central Lith. & Eng. Co. v. Moore* (Wis.) 788

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his wife in his presence, raising a well-founded belief that the criminal act is just over or about to begin; and the adulterer, though in danger, has no right to defend himself by using a deadly weapon. *Drysdale v. State* (Ga.) 424

ASSESSMENTS.

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See also TAXES.

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ASSIGNMENT. See also DEED, 2; MORTGAGE, 18; NOVATION.

1. An agreement that an attorney shall have a fixed share of the proceeds of certain claims in consideration of their prosecution by him and the extinguishment of a debt due him for past services, although the sole right to compromise them and the power to bring suit is reserved to the creditor, constitutes an equitable assignment of the stipulated share. *Fairbanks v. Sargent* (N. Y.) 475

2. The test of an equitable assignment is whether the debtor would be justified in paying the debt, or the portion contracted about, to the person claiming to be assignee. *Id.*

3. The equity of an attorney to whom an equitable assignment is made of a share of claims which are to be, and which are, collected by his efforts, although the power to bring suit and the sole right to compromise is reserved to the creditor, is not inferior to that of one to whom they are assigned as collateral security for a precedent debt, and who cannot prevent a compromise by the creditor if sufficient is obtained to satisfy his claim. *Id.*

4. The moment a creditor attains legal title and possession of bonds received in payment of a claim, the equity of another to whom he had previously made an equitable assignment of a share of the claims becomes a legal title, and the possession as to that share is the possession of the assignee. *Id.*

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ASSUMPSIT.

1. An action for money had and received will lie to recover the consideration paid for land, where the purchaser is entitled to rescind the contract and has tendered a sufficient reconveyance. *McKinnon v. Vollmar* (Wis.) 121

2. Payment by a wife of her husband's debt, induced by threats of his arrest on the eve of their departure for Europe, and her fear of the effect thereof on his shattered and feeble health, even if there is a lawful ground for his arrest, constitutes duress, and she can recover back the money paid. *Adams v. Irving Nat. Bank* (N. Y.) 491

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BAGGAGE. See CARRIERS, 9.

BAIL AND RECOGNIZANCE.

1. Where a party is in custody under an information charging him with a bailable felony, and the judge of the criminal court of record before which he is charged refuses to take any action whatever in the case, either as to bail or trial, on the ground that he is disqualified by reason of interest and affinity to act, and it does not appear to the supreme court, on a habeas corpus proceeding, that the judge is disqualified, bail conditioned for the party's appearance before the criminal court of record will be allowed. *Ex parte Harris* (Fla.) 718

2. A bail bond given under the Florida Act of Jan. 6, 1848 (McClel. Dig. 439, 440), must be approved by the court, if given while the court rendering judgment or sentence is in session. *Williams v. State* (Fla.) 821

3. Unless an instrument given as bail, under the Florida Act of Jan. 6, 1848 (McClel. Dig. 439, 440), has a seal, it is not a bond as required by the Act, and will not authorize execution thereon, under the statute, "as if there had been judgment at law upon such bond." *Id.*

4. A bail surety who requests the court to impose a fine, instead of imprisonment, on a prisoner, and offers to give bond to secure payment of the fine, and who signs a paper purporting to be a bond, and informs the court he has given the bond required by law, whereupon the prisoner is released and works as a tenant for the surety until the paper falls due, —is not estopped from questioning the legality of an execution issued by the clerk upon the return of the paper, on the ground that there was no seal to such paper, where it was taken and approved in open court by the judge. *Id.*

BAILMENT. See also STOCKYARDS, 1; WAREHOUSEMEN, 2.

1. An agreement to manufacture engravings and lithographs for theatrical purposes for the special use of a person, to be taken and paid for by him during a theatrical season, the work to be ready for delivery by a certain day, is not a sale, but an agreement for work and labor; and the manufacturer holds the work merely as bailee subject to the lien of the consignor to be paid. *Central Lith. & Eng. Co. v. Moore* (Wis.) 738

2. Where engravings and lithographs were burned while in the possession of the manu-
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suffer the loss. *Id.*
3. Insurance of goods manufactured to order by the manufacturer, who holds them as bailee, although taken by him as nominal owner, is not material as bearing on the question of their ownership, or of his right to collect the amount due him on the contract from the person for whom they were made. *Id.*

NOTES AND BRIEFS.

Innkeepers; guests, who are. 809
By letting to hire; carriers as bailees. 619

BANKS AND BANKING. See also GIFT, 1.

1. Where tax receipts are received by a bank in good faith as deposits and credited as so much money, it becomes at once legally liable to the depositor as for so much cash deposited. *Wasson v. Lamb* (Ind.) 191

2. In determining the liability of a bank for fraudulent representations as to solvency to induce certain deposits, where this depends on the question whether the depositor had checked out the whole amount deposited after such representations, the time of deposit of tax receipts is the time when they were delivered and credited on the depositor's tax book, and the same marked paid by him on the tax duplicate, although he was not credited therewith on the books of the bank for five days thereafter. *Id.*

3. No trust can be implied from a mere deposit in a savings bank by one person in the name of another. *Beaver v. Beaver* (N. Y.) 408

4. The prohibition, under U. S. Rev. Stat. § 5242, against transfers by a national banking association after commission of an act of insolvency or in contemplation thereof, with a view to the preference of one creditor, does not include a pledge of its securities to a reasonable amount to raise money to meet an unexpected run, although the bank is then in fact insolvent, if it has not become reasonably apparent to its officers that it will presently be unable to meet its obligations, and will be obliged to suspend its ordinary operations. *Armstrong v. Chemical Nat. Bank* (C. C. S. D. N. Y.) 226

5. Where securities are delivered to a bank specifically to protect the banker in a particular transaction or series of transactions, the bank has no lien upon them for any other purpose, and cannot assert one for any other indebtedness, whether arising upon general account or otherwise. *Id.*

6. The amount of an overdraft upon a bank account is not necessarily the sum drawn, but it is the amount drawn less the amount to which the drawer, at the time, is entitled to as a credit balance upon his account. *Id.*

7. Where, by the fraud of a third person, a depositor of a bank is induced to draw his check payable to a nonexistent person or order, the drawer being in ignorance of the fact and intending no fraud, the bank on which the

senting it, although it appears to have been previously indorsed by the party named as payee. Such indorsement is, in effect, a forgery, and the payment thereon by the bank confers no right on it as against the drawer of the check. *Armstrong v. Pomeroy Nat. Bank* (Ohio) 625

8. In the absence of a course of dealing or understanding to the contrary between the parties, the duty of a banker is, in all cases, to pay to the person named or his order, where the terms of the check are such; and he may and should withhold payment until fully satisfied as to the genuineness of the indorsement. *Id.*

9. Where a bank accepts and cashes a check drawn on a bank in another county, to which the names of the drawer and payee have been forged, without requiring any identification of the parties to whom payment is made, the bank on which it purports to have been drawn, and by which it is paid on its being transmitted by the former bank, can recover back the amount so paid. *People's Bank v. Franklin Bank* (Tenn.) 724

NOTES AND BRIEFS.

National; adjustment by creditors; lien on assets; banker's lien on deposits. 226

Knowledge of depositor's signature; effect of payment of check. 724

BILLS AND NOTES. See also ALTERATION OF INSTRUMENTS; CORPORATIONS, 11; HUSBAND AND WIFE, 2; PRINCIPAL AND AGENT, 3.

1. A note payable to "the estate" of a certain person, deceased, or order, is not invalid as a promissory note for want of a sufficiently definite payee. *Shaw v. Smith* (Mass.) 348

2. The rule that a negotiable instrument made payable to a fictitious person or order is, in effect, an instrument payable to bearer, applies only where it is so made with the knowledge of the party making it, and does not apply where the maker, supposing the payee to be a real person, and intending payment to be made to such person or his order, is induced by the fraud of another to draw it. *Armstrong v. Pomeroy Nat. Bank* (Ohio) 625

3. A promissory note is not delivered so that it can become valid, even in the hands of a bona fide purchaser, where the maker signs his name to it through fear of violence, and it is snatched up as soon as signed and carried away against his will. *Palmer v. Poor* (Ind.) 469

4. One who sells a note which is void in his hands on grounds of public policy, fraudulently representing it to be good, is liable to the purchaser for the money paid therefor, when the maker has refused payment, although the purchaser, as a bona fide holder, might have collected it from the maker. *Evans v. Stuhberg* (Mich.) 501

5. An indorser cannot deny the validity of an original note, as against a bona fide holder, 6 L. R. A.

6. It does not constitute a defense to her husband's liability on a note, for a married woman's signature on blank notes.

NOTES

For Bohemian oat

Use of fictitious name
Payable to "estate"
Delivery.

Release of surety

BOHEMIAN OAT
NOTES AND BRIEFS
TENDENT CONVEYANCE

BONDS. See also

1. A seal, or a signature, gives the same effect and an instrument which is not a bond, although thereof that the obligor set their hands and (Fla.)

2. One who executes upon it, although his body of it. *Ca.*

3. An action on a bond is harmless from all damages of a claim, and to the extent to which he may be liable does not accrue until costs and damages.

4. Municipal bonds are provision as to the payment of the same at the treasury. *Friend v. Pittsburgh*

5. Bonds may be issued for property lawful seizure of any statute prohibition, although they are issued to be placed in order to obtain money. *Rus* (Ind.)

NOTES

See also COUPONS.

Of indemnity; valid

Of municipal corporation payable.

BOUNDARIES.

1. The purchaser of lands bordering on a river, divided therefrom in a straight line, and designating a lot, giving the number, takes all the land including that part beyond the boundary and covered by the river. (Ind.)

2. A deed of land, made by a person, of town-site lots, and

is separately sold and is conveyed the same day to another purchaser. *Pearce v. Denver* (Colo.) 541

BURDEN OF PROOF. See EVIDENCE, II

CARRIERS. See also LIMITATION OF ACTIONS, 1, 2; STREET RAILWAYS, 1, 2.

1. A regulation that a railroad passenger who fails to purchase a ticket must pay 10 cents more than the regular fare, for which extra charge a check will be given by the conductor, which will be cashed at any ticket office, is not unreasonable. *Reese v. Pennsylvania R. Co.* (Pa.) 529

2. An extra demand of 10 cents from a passenger without a ticket, which will be refunded at any regular ticket office or presenting a check given him by the conductor, is not a part of the "fare or charge for transportation," within the meaning of a statute fixing the maximum rate of fare. *Id.*

3. A railroad company is under a duty to a passenger who was thrown on its tracks by the fault of its servant, producing mental incapacity, to take steps to prevent injury to him from the danger it knew he was likely to incur from its trains. *Cincinnati, I. St. L. & O. R. Co. v. Cooper* (Ind.) 241

4. The drunken condition of a passenger will not excuse a carrier for negligently leaving him exposed on a railroad track, where he had fallen from a train through the fault of the carrier, and was in consequence dazed and his mental faculties impaired. *Id.*

5. A passenger riding with his elbow slightly projecting out of a car window is not thereby precluded from recovering for an injury to his hand and wrist, which were inside the car, from a stick of wood coming in through the open window, unless the fact that his elbow was out of the window contributed to the injury. *Moakler v. Portland & W. V. R. Co.* (Or.) 656

6. For a postal clerk to ride in a mail car while off duty, in the absence of any rule of the railroad company forbidding him to do so, is not contributory negligence which will prevent recovery of damages caused by a collision of trains. *Baltimore & O. R. Co. v. State, Wiley* (Md.) 706

7. Where a shipper of stock on a freight train voluntarily went on top of the train in obedience to an order or direction of the conductor to help signal, and, while watching a brakeman trying to make a coupling, was severely injured by a sudden forward motion or jerk of the train, no recovery can be had against the railroad company for his injuries, as he voluntarily placed himself in a position of known danger. *Atchison, T. & S. F. R. Co. v. Lindley* (Kan.) 646

8. A sleeping-car company, so far as it renders services similar in kind to an innkeeper, is subject to the same liabilities; and where an article of wearing apparel belonging to a passenger in one of such cars has been placed in

9. A catalogue prepared by a traveling salesman at his own expense, and which was his own individual property, and carried with him as an article convenient and necessary for use in his business while traveling, is an article of personal baggage for which he may recover when lost, with other articles in a valise, by a baggage-transfer carrier. *Staub v. Kendrick* (Ind.) 619

10. A valid contract limiting the liability of a carrier to a certain agreed valuation of the property carried may be made where it is just and reasonable in its terms, and a reduced rate of freight is made the consideration for it. *Richmond & D. R. Co. v. Payne* (Va.) 849

11. A condition in a bill of lading by which the consignee agrees to be ready to receive his goods when the ship is ready to unload, that in default thereof the ship may land, warehouse, or place them in a lighter without notice, immediately, at his risk and expense, after the goods leave the deck of the ship, exempts the ship from the duty of giving him any notice, but not from the duty of exercising reasonable care to discharge them at a suitable place. *Rolfe v. The Boskenna Bay* (C. C. S. D. N. Y.) 172

12. It is not unlawful to stipulate, in a bill of lading which requires a ship to use reasonable care in discharging goods at a proper time and place, that no notice of discharge need be given to the consignee. *Id.*

13. It is the duty of an express company, under N. C. Code, § 1964, which requires that agents shall receive articles for transportation "whenever tendered at a regular depot, . . . and shall forward the same by the route selected by the person tendering the freight, under existing laws," to receive a package of money "whenever tendered," except at times for repose or for taking meals according to the usages of the place; the words "under existing laws" refer only to the time of forwarding. Therefore a rule of the company prohibiting the receipt of money packages except on the same day of, and prior to, the arrival and departure of trains going towards the destination of the package, is unreasonable and void. *Alsop v. Southern Exp. Co.* (N. C.) 271

NOTES AND BRIEFS.

See also SHIPPING.

Of passengers; duty as to platforms and approaches; duty to light stations. 193

Of passengers; care and diligence required; care required of passenger; negligence of railroad agents and servants. 241

Duty toward drunken passengers. 242

Who is common carrier. 619

Liability to volunteer. 646

Injury to passenger; effect of passenger's having his arm resting upon window sill. 657

Injury to passenger riding in baggage car. 706

Liability to person wrongfully on train; effect of consent of conductor to such presence. 410

Right to benefit of insurance. 805
 As bailees; duty of; liability of sleeping car company as innkeeper. 809
 Of freight: liability for loss of goods; liability as insurer limiting or restricting by contract; restriction in bill of lading; restriction by valuation; continuous rights; liability of bailee; liability for wrong delivery; stipulations for exemptions as to negligence. 849

CERTIORARI.

1. A writ of certiorari cannot be demanded by a complaining taxpayer to review on the merits the action of a board of equalization, under the Tennessee Act of March 25, 1887, which declares that the action of the board shall be final. *Tomlinson v. Board of Equalization* (Tenn.) 207

2. "Sufficient cause" for a writ of certiorari, as provided by Tenn. Const. art. 6, § 10, must be defined, either by statute or judicial decision, and does not exist for the purpose of reviewing a decision on the merits, except where the writ lies as a substitute for an appeal or writ of error, or, possibly, instead of *audita querela*. *Id.*

CHARITABLE USES. See also NEGLIGENCE, 1.

1. A bequest or devise to educate the public in any branch of science by the dissemination of the works of a given author is a good charitable use, provided such works contain nothing hostile to religion or law. *George v. Braddock* (N. J.) 511

2. A testamentary disposition for the purpose of circulating the works of Henry George upon the land question, etc., is a valid charitable use. *Id.*

3. Charities for religious purposes are not against the policy of the law in Virginia. *General Assembly Presby. Church v. Guthrie* (Va.) 321

4. The Statute of 43 Elizabeth, whether it was ever in force in Virginia, or not, is of no effect in determining the validity of a gift for charitable uses. *Id.*

5. A fund given by will to trustees "to establish a female academy," etc., may be used for the support of a public school in connection with the town, when it has become impracticable to maintain a female academy with it. *Adams Female Academy v. Adams* (N. H.) 785

6. Land devised as the site of a city hospital may be sold by order of court and the proceeds invested to provide for the current expenses of the hospital, by the application of the doctrine of *cy prés*, where the will, which gives a sum of money also for such hospital, does not indicate any intent to make the gift depend on the occupation of that particular site, and it, by reason of its location and other causes, is not a suitable site for a hospital, and the hospital has in the mean time received by gift from other parties all the real estate needed. *Weeks v. Hobson* (Mass.) 147

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Administering; *cy prés*. 1.
 Favor towards. 5.

CHattel MORTGAGES. See MORTGAGE, 12-15, NOTES AND BRIEFS.

CHECK.

NOTES AND BRIEFS.

Duty of banker. 6

CITIZENS.

NOTES AND BRIEFS.

How persons become; declaration of intention; before whom made. 24

CLUBS. See INTOXICATING LIQUORS, 1. NOTES AND BRIEFS.

COMMERCE.

1. Natural gas is as much an article of commerce as any other product of the earth. *State, Corwin, v. Indiana & O. O. G. & Min. Co.* (Ind.) 57

2. The Indiana Act of March 9, 1889, providing that it shall be unlawful for any person natural or artificial, to conduct natural gas out of the State, violates the provision of the Federal Constitution against the regulation of States of interstate commerce. *Id.*

NOTES AND BRIEFS.

Power of Congress to regulate; exclusive authority; includes transportation and intercourse; police power of State. 57

CONDITION.

NOTES AND BRIEFS.

Precedent; acceptance; estoppel. 84

CONFESSIONS. See EVIDENCE, V.

CONFLICT OF LAWS.

1. The law of Arkansas will be applied in an attachment suit in that State on an interplea by a person claiming chattels under a mortgage given in the Indian Territory, when there is no proof of the laws of the Territory. *Garner v. Wright* (Ark.) 71

2. Although, as a general rule, an assignment of personal property valid by the laws of the State or country where made is valid every where, a transfer giving preferences to certain creditors, made in another State, will not be upheld in the State where the property is situated, if in contravention of its policy and laws. *Re Dalpay* (Minn.) 104

3. A stockholder in a corporation organized under the laws of a foreign State contracts with reference to the laws of that State; and the extent of his individual liability for corporate debts must be determined by the laws of that State. *Deadwood First Nat. Bank v. Gustin-Minerva Consol. Min. Co.* (Minn.) 876

4. Although the liability of a stockholder in a foreign corporation may be enforced by

of the necessary parties, yet the remedy is governed by the law of the forum. *Deadwood First Nat. Bank v. Gustin-Minerva Consol. Min. Co.* (Minn.) 676

5. Where a right of action for a tort is given by a statute of another State, and no period of limitation is prescribed otherwise than by the general law of limitation prevailing in that State, the *lex fori*, not the *lex loci*, applies on the subject of limitation. *O'Shields v. Georgia P. R. Co.* (Ga.) 152

6. An action may be maintained in one State by the personal representative of one killed by the negligent act of a common carrier in another State, to recover from the carrier damages resulting from such negligence, where the cause of action survives to the personal representative by the statutes of the State where the suit is brought. *O'Reilly v. New York & N. E. R. Co.* (R. I.) 719

NOTES AND BRIEFS.

As to insolvency; comity. 107
As to remedies; Statute of Limitations. 152
As to liability of stockholder of foreign corporation. 676

CONSPIRACY.

Where a city officer corruptly agrees with another person that the latter shall buy certain property selected by a board of which the officer is a member as suitable for a certain public purpose, and that the officer will use his influence to induce the board to purchase it from the other at an advanced price, the profits to be divided between them; and the fraud is consummated by means of the officer's information and influence,—they are alike liable to the city for the injury sustained. *Boston v. Simmons* (Mass.) 629

NOTES AND BRIEFS.

Liabilities of joint conspirators. 230
To commit tort. 629

CONSTITUTIONAL LAW. See also COMMERCE; INTOXICATING LIQUORS, 2, 3; LIENS, 6; MASTER AND SERVANT, 1, 2.

1. A statute requiring that a person, in order to be eligible for examination for license as a dentist, shall have a diploma from some dental college in good standing, but giving the board discretion to dispense with this in case of one who has practiced dentistry for ten years before the passage of the Act, is not unconstitutional as discriminating between persons or classes, although some may not be pecuniarily able to attend a dental college. *State v. Vandersluijs* (Minn.) 119

2. A provision in a statute regulating the practice of dentistry, that allows students under the direct supervision of a preceptor or a licensed dentist to practice on the teeth and jaws during the period of their enrollment in a dental college and attendance upon a regular uninterrupted course therein, does not unlawfully discriminate between dental students. *Id.*

3. A statute which singles out owners and proprietors of mines and manufacturers of every kind, and provides that they shall bear bur-

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den of employers of labor, and prohibits them from making contracts which it is competent for other owners of property or employers of labor to make,—is unconstitutional and cannot be sustained as an exercise of the police power. *State v. Goodwill* (W. Va.) 621

4. A statute which prohibits persons engaged in mining and manufacturing from issuing for the payment of labor any order or paper which is not redeemable within thirty days in lawful money, with interest, is unconstitutional and void. *Id.*

5. A statute prohibiting persons and corporations engaged in mining and manufacturing and interested in selling merchandise and supplies, from selling any merchandise to their employes at a greater per cent profit than they sell to others not employed by them, is unconstitutional and void because it is class legislation and an unjust interference with private contract and business. *State v. Fire Creek Coal & C. Co.* (W. Va.) 359

6. Giving an appeal from the decisions of drainage commissioners in classifying lands for assessment, and fixing amounts of damages and benefits, as well as on every other question except that of necessity for drainage, provides due process of law. *State, Baltzell, v. Stewart* (Wis.) 394

7. Granting power to drainage commissioners to determine what land will be benefited by the proposed drainage and shall be assessed therefor, where the locality is specified and the nature and extent of the proposed drainage is clearly indicated by the statute,—is not an unlawful delegation of power. *Id.*

8. A law substituting the state penitentiary for the county jail as the place of confinement and execution of persons sentenced to be hanged is not invalid as an *ex post facto* law in respect to crimes already committed. The fact that the confinement is designated as solitary is unimportant where the statute in fact gives the prisoner as many liberties as the former one. *Re Tyson* (Colo.) 473

9. A law shortening the time between sentence and execution of a person condemned to death is void as to previous offenses as an *ex post facto* law. *Id.*

NOTES AND BRIEFS.

Guaranty of rights to pursue calling. 119
Natural gas as a subject of commerce within the power of Congress. 530
Ex post facto law; changing mode of punishment. 473
Class legislation; police power. 621
Deprivation of property; withdrawal of free right to contract; protection of laborer. 576

CONTEMPT. See also APPEAL AND ERROR, 14; TRIAL, 1.

1. Fair and reasonable review and comment upon court proceedings, as they take place from time to time, is not a contempt of court. *Cooper v. People, Wyatt* (Colo.) 430

2. If the facts presented by an affidavit as a basis of a proceeding for contempt do not show that a contempt has been committed, the

jurisdiction, and its subsequent orders will not be reviewed for mere errors. *Id.*

3. District courts of Colorado have inherent power summarily to convict and punish as for contempt of court those responsible for articles published in reference to a pending cause, which are calculated to interfere with the due administration of justice in such causes. *Id.*

4. An attempt by wanton publication to prejudice the rights of litigants in a pending cause, degrade the tribunal, and impede, embarrass, or corrupt the due administration of justice,—is a contempt of court. *Id.*

NOTES AND BRIEFS.

Power of court to punish; libelous articles; conclusiveness of decision; relief from imprisonment for. 435

CONTINUANCE. See **NEW TRIAL**, 2.

CONTRACTS.

- I. NATURE AND REQUISITES.
- II. VALIDITY; CONSTRUCTION.
- III. PERFORMANCE; LIABILITY.
- IV. CHANGE OR EXTINGUISHMENT.

NOTES AND BRIEFS.

See also **GUARANTY**, 2; **MASTER AND SERVANT**, 3; **MUNICIPAL CORPORATIONS**, 2, 3, 5; **NOVATION**.

I. NATURE AND REQUISITES.

1. A promise by a wife in the presence and hearing of her husband, that her daughter by a former husband should be paid for her services rendered as a daughter in the family after she became of age, is not binding upon the husband's estate unless he knew that the stepdaughter continued her service in reliance upon the promise. *Harris v. Smith* (Mich.) 702

2. Where services are rendered to one standing *in loco parentis*, there is no implied promise to pay for them, unless it is raised by the facts and circumstances of the case. *Id.*

3. An implied promise to pay for the services of a stepdaughter after she became of age is not established by evidence that she lived in the family from the time she was nine years of age, was cared for as one of the family from that time forward until her marriage, after she became of age; that she performed the same duties and dwelt there as a member of the family, and had her board and clothing, and from time to time was given money, after her majority as before. *Id.*

4. A release from a contract to run a bus from passenger trains to a hotel is valid without any new and independent consideration to support it. *Hathaway v. Lynn* (Wis.) 551

5. A promise by a third person to pay for articles if the seller, who is holding them as security for the price, will turn them over to the purchaser, is a collateral promise, and must be in writing if the original purchaser is not thereby released. *Gray v. Herman* (Wis.) 691

II. VALIDITY; CONSTRUCTION.

6. An agreement by one partner who had, 6 L. R. A

7. A contract by something other than his services is valid, *ute. Hancock v. Ya*

8. The fact that public policy in law against one party, v means of his persuas the other party, in f not consciously wron ceived by the fraud the former party. 1

9. A contract w everybody whose righ if valid. *Kellogg v.*

10. A contract for a subscriber's interes scribed for with the should have \$5 of stock illegal and void, unde § 6, providing that stock except for mon or property actually increase of stock or h *Williams v. Evans* (

11. An agreement steamboats to divide t in a certain proportio partnership or any c towards each other; party sells his boat fo out of business he sha for one year,—is voi policy as an attempt t business. *Anderson v*

12. If the object of or impede free and fa and it may in fact h void as being against p

13. A contract to sum to appear before t and advocate the laying land of the promisor, he can as damages the lic policy, but it is a v not be invalidated by e the subsequent use by sonal influence as ch mittee of a political pa of the contract. *Bar*

14. A contract by re frain from any effort to lic lands from the Leg other company to proo and proper assistance, share of the grant obt void as against public ley & S. R. Co. v. Chic Co. (Wis.)

15. An agreement right of way to a railr

upon land not appropriated or required for the use of the former company, is void as against public policy. *Kettle River R. Co. v. Eastern R. Co.* (Minn.) 111

16. An agreement intended to aid in the formation and organization of an illegal corporation designed to secure a monopoly of a certain business, by which, and in consideration of indorsements and other financial aid to a shareholder to enable him to raise funds necessary to join the enterprise, the indorsers are to have a share of the net earnings of his stock,—is void on grounds of public policy. *Richardson v. Buhl* (Mich.) 457

17. A contract reciting that for a certain consideration one agrees to sell to another certain stock for a certain sum, "if taken on or before" a certain future day, is a contract to give the latter the option to buy stock at a future time. *Schneider v. Turner* (Ill.) 164

18. An agreement to satisfy a contract by adjustment of differences between the contract and the market price is not necessary to make an agreement void as an option contract, under Ill. Crim. Code, § 180. *Id.*

19. A contract for a sale of stock, "if taken on or before" a certain day, is void as an option contract, under Ill. Crim. Code, § 180, although it would not be void at common law. *Id.*

20. Courts will take notice, of their own motion, of illegal contracts which come before them for adjudication, and will leave the parties where they have placed themselves. *Richardson v. Buhl* (Mich.) 457

21. The organization of a corporation for the purpose of controlling the manufacture and trade in matches in the United States and Canada, by getting all manufacturers of matches to enter into a combination giving such corporation the whole control of the business, or by buying out those who would not enter, and buying off any others who might propose to engage in the business,—is an unlawful enterprise, being an attempt to create a monopoly. *Id.*

22. A contract by a municipal corporation to pay a public officer a percentage compensation, in addition to, or instead of, that prescribed by law, is against public policy and void. *Adams County v. Hunter* (Iowa) 615

23. A contract for constructing a levee within a certain time at a certain price per cubic yard, with a forfeiture for delay, describing the kind of earth to be worked and its quantity, which fails to provide for any different rates in case the quantity or kind is not as represented,—shows that those representations were not considered material. *Nounnan v. Sutter County Land Co.* (Cal.) 219

III PERFORMANCE; LIABILITY.

24. A contractor continuing work under a contract to construct a levee at a certain price per cubic yard, after discovering that the representations of the other party as to the quantity and kind of earth to be handled were false, waives any claim for damages because of such 6 L. R. A.

25. When a contract has been performed in a substantial part, and the other party has voluntarily accepted and received the benefit of the part performance, knowing that the contract is not being fully performed, the performance of the residue cannot be insisted on as a condition precedent to payment for the benefits received from the part performance. *Wiley v. Athol* (Mass.) 349

26. The difficulty of determining the measure of damages for failure fully to comply with the terms of a contract for a water supply will not prevent a substantial part performance from changing a warranty which constitutes a condition precedent into an independent covenant. *Id.*

27. One who has ordered goods to be manufactured for him, to be paid for as they are delivered, is liable to the manufacturer for damages in case he fails to accept and take away the completed goods at the time he is required by the contract to do so. *Central Lith. & Eng. Co. v. Moore* (Wis.) 768

IV. CHANGE OR EXTINGUISHMENT.

28. If the wrong land is pointed out to a purchaser by the vendor's agent, inducing him to purchase a tract erroneously believing it to be that shown him, he is entitled to rescind the contract; but the case is otherwise if the person pointing it out is not the vendor or his agent. *McKinnon v. Vollmar* (Wis.) 121

29. The ancient technical rule of common law, that a contract under seal cannot be varied or discharged by a parol agreement, is practically superseded. *McCreery v. Day* (N. Y.) 503

30. Where a contract is rescinded while in the course of performance, any claim in respect of performance, or of what has been paid or received thereon, will ordinarily be referred to the agreement of rescission, and in general no such claim can be made unless expressly or impliedly reserved upon the rescission. *Id.*

31. A subscription towards the erection of a church building, which is entirely voluntary on the part of the subscriber and unsupported by any consideration, and which remains unpaid at the subscriber's death, is thereby revoked, and the subsequent erection of the church, although undertaken in reliance partly upon such subscription, will furnish no reason for compelling payment by his executors. *23d Street Bapt. Church v. Cornwell* (N. Y.) 607

NOTES AND BRIEFS.

See also ATTORNEYS; INSURANCE; SALES.

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Liability of party who does not sign. 418

Of guaranty; acceptance, when necessary. 639

Of guaranty; necessity of notice of acceptance. 636

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CONTRIBUTION.

1. Creditors who attach goods in good faith in the exercise of ordinary prudence and caution, with no intention of committing a trespass or injuring anyone, but with the honest belief that transfers by the debtor were fraudulent, are not wrongdoers such as to be denied the right of contribution between each other for the damages thereby incurred, although the seizure turns out to have been unlawful. *Farwell v. Becker* (Ill.) 400

2. One of several attaching creditors who has assisted in defending actions brought by a claimant of the goods, and whose debt has been fully paid from moneys arising out of a sale of the goods under the attachment, may be required to contribute to the payment of the damages recovered against the other attaching creditors. *Id.*

NOTES AND BRIEFS.

See also TORT.

Between wrongdoers; in what cases enforce-
able. 401

COPYRIGHT. See LIBEL AND SLANDER,
1.

CORONERS. See EVIDENCE, 13.

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CORPORATIONS.

I. NATURE; EXISTENCE.

II. POWERS; LIABILITIES; OFFICERS.

III. STOCK AND STOCKHOLDERS.

IV. DISSOLUTION.

NOTES AND BRIEFS.

See also BANKS AND BANKING; CONFLICT OF
LAWS, 3, 4; CONSTITUTIONAL LAW, 5; CON-
TRACTS, 10, 16, 21; NEGLIGENCE, 1; TAX-
ES, 1-6.

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istence of a corpora-
1845, chap. 84, § 1,
poration may have
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of the *Sacred Hear*

2. There can be n
there is no law auth
file articles of associ
rated. *Eaton v. W*

3. Carrying on
name is not evidenc
sidered in aid of
where there is no la
to file their articles
come incorporated.

II. POWERS; L

4. The plea of a
general rule prevail
against a corporati
vance justice, but,
comply a legal wr
& *Mfg. Co. v. East*

5. The power to
corporation, and is
rate powers.

6. There is no su
a corporation selling
provided the charie
tion, and it acts in
pressed will of its
Leathers v. Janney (

7. The same per
president of two dis
identity does not of
between the two cor

8. Where one co
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the latter, to be deli
its designated officer
of stock to such offi
der, operates as a dis

9. If a sale of
and fair, for a sound
to the terms of the
shadow of fraud on
the latter is not bou
of the officers in
among the stockhold

10. When a corpo
erty and rights to a
they are charged wit
in a proper case, wi
his hands to the pay

11. Authority giv
to execute a note fo
and interest does not
in the note a stipula
if collected by an att
& *Constr. Co. (Iowa)*

a trust as for which the corporation is created in the State where the will is made. *General Assembly Presby. Church v. Guthrie* (Va.) 821

13. Where one corporation seeks judicial redress against another corporation, on the ground that the other has refused to give a service or to perform a duty which it owes the complaining corporation, to succeed, it must show affirmatively that the service or duty which it claims exists by force of a statute, or a usage having the force of law. *Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co.* (N. J.) 855

14. Unless a duty has been created against a corporation by usage, or by contract, or by a statute, the courts cannot be called on to give it effect. *Id.*

III. STOCK AND STOCKHOLDERS.

15. The purchaser of shares of stock on which a dividend is subsequently declared, before the stock is actually transferred, cannot make the execution of an order for the dividend a condition of completing the sale, although the dividend belongs to him as a legal incident of the stock. *Phinney v. Murray* (Ga.) 426

16. Where stock is issued as fully paid up, without having been paid for to the full amount, shareholders are liable for the amount not actually paid, in favor of creditors giving credit in reliance upon its professed capital having been fully paid in, but not to creditors who dealt with full knowledge that the stock was fictitiously issued as paid up. *Deadwood First Nat. Bank v. Gustin-Minnesota Consol. Min. Co.* (Minn.) 676

17. Where a corporation issues new shares after the claim of a creditor arose, the latter, not having dealt with the company on the faith of any capital represented by such shares, cannot insist on contribution, by the holders, of a greater amount of capital than the corporation itself could claim from them as part of its assets. *Id.*

IV. DISSOLUTION.

18. A division cannot be made among stockholders of a California corporation, prior to dissolution or expiration of the term of corporate existence, of the stock of a new corporation to which it, in common with a foreign corporation, has transferred its property for the purpose of uniting their conflicting interests, even if such division was unanimously agreed upon by all the stockholders, and among those of the foreign corporation has actually been made, as Cal. Civ. Code, § 809, prohibits payment to the stockholders of any part of the capital stock before dissolution or expiration of the term of corporate existence, and the stock of the new corporation received in exchange for their property is included in the term "capital stock." *Kohl v. Lilienthal* (Cal.) 520

NOTES AND BRIEFS.

What necessary to create. 895

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Private; common-law powers; may mortgage; borrow money; enter into auxiliary transaction; make contracts. 661

Foreign; liability of stockholder; enforcement of; paid-up certificates; watered or fictitious stock; power of directors to sell property. 676

Declaration of agent; how far bound by. 284

Dividends; to whom payable after sale of stock. 426

Foreign; rights of. 323

COSTS AND FEES. See also STATUTES, 4.

In the absence of evidence, the court, in fixing an attorneys' fee, must be guided in estimating the value of his services by the amount of labor performed as indicated by the record. *Farley v. Geisecker* (Iowa) 533

COUNTIES. See also WATER COMPANIES, 8.

1. A proportion of the debt of a county may be imposed upon another county to which territory detached from the former is attached, not merely by the Act segregating the territory, but, if that is silent on the subject, by subsequent legislation. *Perry County v. Conway County* (Ark.) 665

2. A claim given by a special statute in favor of one county against another need not, unless required by such Act, be authenticated, as required in the case of ordinary claims against counties. *Id.*

NOTES AND BRIEFS.

Latest decisions as to indebtedness. 665

COUPONS.

NOTES AND BRIEFS.

As distinct and separate instruments. 563

COURTS. See also CORPORATIONS, 14.

1. A suit for relief against an ordinance fixing unreasonable water rates is an equitable one, within the jurisdiction of the superior courts of California. *Spring Valley Water-works v. San Francisco City & County* (Cal.) 756

2. A statute denying plaintiff costs in a district court, if his recovery is below \$50, does not limit the jurisdiction of the court to cases in which that sum is involved. *St. Paul F. & M. Ins. Co. v. Coleman* (Dak.) 87

3. Although exclusive jurisdiction is given to the court of special sessions by N. Y. Code Crim. Proc. § 56, subd. 32, as amended by N. Y. Laws 1884, chap. 879, over prosecutions for violations of the excise law, in which com-

shall issue, the case is withdrawn from the magistrate with his consent, it may be subsequently presented to the grand jury and tried in the court of sessions. *People v. Andrews* (N. Y.) 128

4. A federal court cannot, by attachment of property within the district where suit is brought, acquire jurisdiction to render judgment against such property, where the owner is not a resident of the district and is not legally found and served therein so as to authorize a personal judgment. This rule is not changed by the Act of Congress of March 8, 1887. *Harland v. United Lines Teleg. Co.* (C. C. D. Conn.) 252

5. A sheriff's custody of attached property cannot be disturbed by a court of chancery, and the property transferred to the custody of its receiver, in a suit by the attachment defendant, unless by consent of all parties. *Ford v. Judsonia Mercantile Co.* (Ark.) 714

6. An affidavit that plaintiff "believes that he cannot have a fair and impartial trial before the regular judge of this court" is insufficient to secure a change of judge. *Palmer v. Poor* (Ind.) 469

7. The interest which disqualifies a judge, under McClell. (Fla.) Dig. § 28, p. 837, is a property interest in the action or its result, in contradistinction to an interest of feeling or sympathy or bias that would disqualify a juror. *Ex parte Harris* (Fla.) 718

8. Affinity is the tie between a husband and the blood relations of the wife, and between a wife and the blood relations of the husband, but it does not exist between the blood relations of either party to the marriage and those of the other party; and hence there is no affinity between a brother of a wife and the brother of her husband, and the latter is not disqualified by affinity to preside in the trial of the former for a crime. *Id.*

9. That a judge has boarded with his sister-in-law, and that she is and has been a daily visitor at his home, remaining there sometimes for days, and that the judge has always been a great admirer and friend of a brother of the sister-in-law, and has always regarded him as scrupulously honest, and that these considerations lead him to fear that he might not be able to do the State justice,—do not disqualify the judge from presiding in the trial of such brother for a criminal offense. *Id.*

10. The decision of a judge is not law for succeeding cases; it is only evidence of the law. *General Assembly Presby. Church v. Guthrie* (Va.) 821

NOTES AND BRIEFS.

Federal; jurisdiction not conferred by attachment process. 252

Concurrent jurisdiction; exclusive where first attaches; equity; extent of jurisdiction. 714

COVENANT. See also **CONTRACTS**, 26; **LANDLORD AND TENANT**, 5.

1. At common law a covenant of seisin is not implied in a deed of real property by the 4 L. R. A.

2. A judgment session upon foreclosed to the covenant, re warrantor to appertive eviction giving covenant. *Collier*

3. A covenant that the products ceded to market exclusive railroad, is with the land. *K. R. Co.* (Minn.)

4. Covenants re of use or enjoyment grantees with notice of estate, and as, in strict legal land.

5. It is not sufficient in equity of a covenant of the land or its lateral way, but if the land or its use.

NOTE

Defined and compared
What run with the land
Of seisin; running
When barred by statute
Performance of,

CRIMINAL LAW, 8, 9; **HUSBAND AND WIFE**, 26; **TITLE**

CROPS. See **LANDLORD AND TENANT** AND **BARRIERS**

CUSTODY OF CHILDREN AND **CUSTOM AND USAGE**

1. A custom of Georgia, by which a landowner, by oral law of the State and paying for it, is considered as waiving or releasing the answer for not binding except in the case of a person who adopted it for the *Moore* (Ga.)

2. A general cutting railings or barrier is of no value in the liability of a person who has such barriers at a statute imposes at highways safe for *Twp.* (Mich.)

CY PRES. See **LANDLORD AND TENANT** AND **BARRIERS**

DAMAGES. See **CONTRACTS**, 26; **LANDLORD AND TENANT**, 5.

1. A party who is entitled to a remedy is entitled to a remedy from the wrongdoer from

2. Before any liability to pay liquidated damages can attach to the party in default, he must have been guilty of a substantial breach of his agreement, resulting in something more than mere nominal damages to the other party. *Hathaway v. Lynn* (Wis.) 551

3. Damages suffered by individuals in their property by reason of failure to furnish a stipulated supply of water to a town cannot be taken into account in determining the damages to the town. *Wiley v. Athol* (Mass.) 342

4. The difference between the rental value of premises free from the effect of a nuisance, and subject to it, is the measure of damages for the nuisance. *Kiel v. Jackson* (Colo.) 254

5. The measure of damages for removing the lateral support to land is not the cost of repairing it, but the diminution of value by reason of the act. *Moellering v. Evans* (Ind.) 449

6. Expenses incurred in good faith in attempting a cure may be included, in addition to the actual value of the animal, in the damages for an injury by which an animal is made entirely worthless. *Ellis v. Hilton* (Mich.) 454

7. The pecuniary injury resulting from the death of a person from whom the beneficiaries of the action had no right to claim support is the loss of what the deceased would probably have accumulated afterward if he had lived. *Howard v. Delaware & H. Canal Co.* (C. C. D. Vt.) 75

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For negligent injury to animals. 454

For negligent injury; how far plaintiff's pecuniary condition can be considered in determining. 765

For results too remote from alleged cause. 230

For injury to personal property; duty of party injured. 454

Railroad in street; measure of. 255

Assignment of mortgagee's right to, for unlawful seizure of mortgaged goods. 378

DEATH. See also CONFLICT OF LAWS, 6.

A right to support from the person killed is not necessary to give a right of action under the statute providing for an action, in the name of the personal representative of a person wrongfully or negligently killed, for the benefit of his wife or next of kin. *Howard v. Delaware & H. Canal Co.* (C. C. D. Vt.) 75

DECEIT. See FRAUD AND FRAUDULENT CONVEYANCES, NOTES AND BRIEFS.

DECLARATIONS. See EVIDENCE, VI.

DEDICATION. See also PARKS AND SQUARES.

1. In dedicating lands to the public, the dedicatory may attach such reasonable restrictions to their use by the public as he may see fit. *Church v. Portland* (Or.) 259

2. One person cannot dedicate to the public L. R. A.

Of land to public use; restriction to particular use; estate created; presumption from user. 259

DEED. See also MORTGAGE, 12.

1. The effect of an informal instrument transferring an interest in real estate depends, not upon any particular words or phrases found in it, but upon the intention of the parties as collected from the whole instrument. *Lemon v. Graham* (Pa.) 663

2. The assignment under seal of all a grantee's "right, title, claim, interest, and property whatever in and to" a deed, on the back of which it is written, and which gave the grantee an estate in fee simple, is sufficient to transfer the fee, without the use of the word "heirs" or its equivalent. *Id.*

3. Deeds to different purchasers of land separately sold on the same day, at the same public sale of town-site lots, by a probate judge as trustee, must be held to take effect at the same time, and be construed together in determining a conflict of title between the purchasers. *Pearce v. Denver* (Colo.) 541

NOTES AND BRIEFS.

Assignment of; effect. 664

DEFINITIONS. See also COURTS, 8; INN-KEEPERS, 4; LIENS, 1; TIME, 2.

A lodger is one who, for the time being, has his home at his lodging-house. *Pullman Palace-Car Co. v. Lowe* (Neb.) 809

DENTISTS. See CONSTITUTIONAL LAW, 1, 2.

DEPOSITIONS.

The publication of notice to take depositions, under W. Va. Code, chap. 121, § 2, which requires notice once a week for four successive weeks, is completed on the fourth issue of the newspaper containing it, and is sufficient if a reasonable time elapses between the date of said fourth issue and the taking of the depositions. *Miller v. McMechen* (W. Va.) 515

DESCENT AND DISTRIBUTION.

Land descended or devised may be purchased in good faith and for value, free from its conditional liability, under Maryland statutes, for debts of the decedent, when the records of the orphans' court show a final settlement of the personal estate and full payment of all proved debts and costs of administration, although the statutes do not expressly make any saving of the rights of bona fide purchasers, or fix any time for terminating such liability. *Van Bibber v. Reese* (Md.) 333

DIVORCE. See HUSBAND AND WIFE.

DOMICIL.

1. For jurisdictional purposes a legal domicile once existing continues until another

2. Domicil or residence, to give jurisdiction to the probate court in insolvency proceedings, is not lost by departure from the State, until another is gained. *Id.*

DOWER. See also ADVERSE POSSESSION, 8.

1. An unassigned right of dower is not the subject of transfer or sale, and cannot be released to one not in privity with the title under which the dowress claims. *Hart v. Burch* (Ill.) 871

2. The unassigned right of dower can exist only in the person upon whom it is cast by operation of law; and a deed or conveyance of it will pass no title, and can only be effective as a release and extinguishment of the right. *Id.*

3. While it is not necessary that the releasee of an unassigned right of dower should hold the fee, yet he must be the legal or equitable owner of title, or stand in such relation thereto that the dower right, upon execution of the release, will unite with the fee. *Id.*

4. A purchaser at a sale on partition cannot, before confirmation, acquire a release of an unassigned dower right. *Id.*

5. A deed by the widow of a tenant in common before assignment of her dower does not take effect as a release of her dower as to a cotenant of her husband. *Id.*

6. Since, under the Illinois statutes, there is no provision for the assignment of dower in lands held in common, in determining the mode of assignment where partition between the tenants in common is not made, resort must be had to the rules of the common law. *Id.*

NOTES AND BRIEFS.

Release of; to whom may be made. 872

DRAINS AND SEWERS. See also CONSTITUTIONAL LAW, 6, 7; STATUTES, 7

The fact that no appeal is allowed from the decision of commissioners as to the necessity of drainage does not invalidate an Act providing for the condemnation of lands for drainage purposes. *State, Baltzell, v. Stewart* (Wis.) 894

DRUMMERS. See LICENSE, 3, 4.

DUE PROCESS. See CONSTITUTIONAL LAW, 6.

DURESS. See ASSUMPSIT, 2.

NOTES AND BRIEFS.

Acts done under, may be annulled; equitable relief; recovery of money. 491

EASEMENTS.

1. A prescriptive right to use a driveway is not established by continuing its use for more than thirty years, under an agreement for a perpetual easement, made before the previous use had continued long enough to ripen into a right by prescription. *Nowlin v. Whipple* (Ind.) 159

2. A right in the nature of an easement 6 L. R. A.

ding because a severance session. *Taylor v. I*
8. The right to a ples growing or to b a farm, if merely a at pleasure; and a coi out reference theret but if not a parol lic duly placed upon re as against one purcha recording Act.

NOTES A

Defined; distinguished How created.

Protection of, by i interference with.

EJECTMENT. 8
WIFE, 6; JUDGME

1. Crops growing time of a recovery in general rule of the co part and parcel of the party recovering the *breu* (Ala.)

2. Where no bond with Ala. Code 1880 growing on the land belong to the party r

EMBEZZLEMEN

NOTES A

Aiding officer in co

EMBLEMMENTS.

NOTES A

What constitute; g

EMINENT DOM
WAYS, 3.

1. Whether the railway company un domain is public or i right of the public quire the corporation transport freight or the amount of bush *v. Eastern R. Co.* (M

2. A third party taken for a right of cannot object that it under its charter to for railway purpos

3. The Legislatu or corporation the ri sity of the exercise domain. *State, Balt*

NOTES

What is a public i

EQUITY. See al 2.

1. A court of cl than a court of lay

issuing legal obligation arising out of contract, law, or usage, but it cannot create the obligation. *Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co.* (N. J.) 855

2. To justify the interference of a court of equity on the ground that its interference is necessary to prevent irreparable damage, the complainant's legal right must be clear. There can be no damage, irreparable or otherwise, where there is no violation of a right. *Id.*

3. Where the only ground laid to support the jurisdiction of a court of equity is that the defendant is violating a legal right of the complainant to his irreparable injury, the complainant, to be entitled to the aid of the court, must show that his adversary's conduct is unconscientious. *Id.*

NOTES AND BRIEFS.

Protection of legal rights.

855

ESTOPPEL. See also BAIL AND RECOGNIZANCE, 4.

An execution sale may constitute an equitable assignment or transfer of a vendor's lien, on the principles of estoppel, although the vendor had no interest subject to execution, where he acquiesced in the sale knowing what was intended to be sold, being present at the sale, consenting to the application of the proceeds to the satisfaction of a judgment against him, receiving the surplus, and demanding collateral which had been pledged for the payment of the debt. *Fallon v. Worthington* (Colo.) 708

EVIDENCE.

I. JUDICIAL NOTICE.

II. PRESUMPTIONS AND BURDEN OF PROOF.

III. BEST AND SECONDARY, DOCUMENTARY, AND DEMONSTRATIVE EVIDENCE.

IV. PAROL EVIDENCE CONCERNING WRITINGS.

V. OPINIONS; CONFESSIONS.

VI. DECLARATIONS.

VII. RELEVANCY AND MATERIALITY.

VIII. WEIGHT, EFFECT, AND SUFFICIENCY.

NOTES AND BRIEFS.

I. JUDICIAL NOTICE.

1. Judicial notice may be taken of the height of the human body and the measurement of its several parts, for the purpose of reversing a judgment on a verdict which necessarily involves a finding, without any evidence as to plaintiff's height, that while sitting on a car he was struck on the head by an arch 4 feet 7 inches above the top of the car. *Hunter v. New York, O. & W. R. Co.* (N. Y.) 246

II. PRESUMPTIONS AND BURDEN OF PROOF.

2. The burden of proof as to a distinct defense in a criminal prosecution is on the defendant. *State v. Schweitzer* (Conn.) 125

6 L. R. A.

4. A relation illicit at its commencement, and known to be so by the parties, raises no presumption of marriage. *Grimm's Appeal* (Pa.) 717

5. The fact of cohabitation as man and wife raises a presumption of legal marriage. *State v. Schweitzer* (Conn.) 125

6. The presumption is that the neglect or refusal of a husband to support his wife is unlawful; and the burden is on him, when charged therewith, to prove its lawfulness. *Id.*

7. While malice may be presumed from a deliberate act causing another's death, or from the cool and deliberate use of a deadly weapon, yet where a full declaration of all the facts and circumstances leading up to the homicide obviates all necessity for presumption, all such facts and circumstances taken together constitute the only basis for a finding that the homicide was committed with malice aforethought. *Trumble v. Territory* (Wyo.) 384

8. A presumption that a request for aid was made by one assisted by public officers as a poor person will not be made as the foundation of an alleged right to recover compensation therefor from her estate. *Albany v. McNameara* (N. Y.) 212

9. The term "beer," in the absence of all evidence as to its quality and effect, does not import an intoxicating beverage. *Blatz v. Rohrbach* (N. Y.) 669

10. It will be presumed that directors of a corporation were rightfully in session, where the record shows that they met and took official action. *Hardin v. Iowa R. & Constr. Co.* (Iowa) 52

III. BEST AND SECONDARY, DOCUMENTARY, AND DEMONSTRATIVE EVIDENCE.

11. Parol evidence of an alleged wife is admissible on the question of marriage. *State v. Schweitzer* (Conn.) 125

12. A verdict and judgment in a criminal prosecution for removing crops cannot be proved in a civil action for the crops. *Carlisle v. Killebrew* (Ala.) 617

13. A coroner's inquisition, under the Illinois statute by which coroners are required to proceed substantially as at common law, and the inquest, sealed up, is to be filed with the clerk of the circuit court, may be used as evidence to show the cause of the person's death, in an action for insurance on his life. *United States L. Ins. Co. v. Kielgast* (Ill.) 65

14. The records of the votes in a meeting of stockholders, reciting that the object of certain works was to improve the quality of water furnished by the corporation, are admissible to show the purpose of the works voted for, where at the time of this meeting the controversy in suit had not arisen. *Wiley v. Athol* (Mass.) 342

15. A writing purporting to have been signed by alleged partners, stating that all partnership that may have existed between them, either express or implied, is that day at

an end, is not admissible in favor of one of the parties when sued as a partner, where he testifies that no partnership ever existed, but that he obtained the writing to protect himself from the declarations of the other party to the effect that a partnership existed, and the other party denies that he ever signed or was asked to sign the writing, or had any conversation upon the subject. *Dawson v. Pogue* (Or.) 176

16. Letters from the mother of an illegitimate child to its nurse may be admitted in evidence for the purpose of showing her assent to the disposition that is being made of the child, and the manner in which it is being provided for, but are incompetent for the purpose of proving paternity. *Re Jessup's Estate* (Cal.) 594

17. The declaration in Colo. Const. art. 7, § 8, that ballots may be examined in election contests, does not prohibit their use in *quo warranto* proceedings. *People, Burton, v. Londoner* (Colo.) 444

18. A certificate purporting to be an original marriage certificate is admissible, in connection with the testimony of the alleged wife, to prove marriage. *State v. Schweitzer* (Conn.) 125

19. Pictures of a putative father and of the illegitimate child, taken by photography, are not inadmissible in evidence for the purpose of showing resemblance between the two, but are entitled to but little weight. *Re Jessup's Estate* (Cal.) 594

20. A photograph of a person, showing the manner in which his limbs have been contracted, is admissible in an action for personal injuries, where a physician has testified that the photograph was taken in his presence and accurately represented the condition of the limbs. *Alberti v. New York, L. E. & W. R. Co.* (N. Y.) 765

IV. PAROL EVIDENCE CONCERNING WRITINGS.

21. Parol evidence is admissible to establish a contemporaneous oral agreement which induced the execution of a written contract, though it may vary, change, or reform the instrument. *Ferguson v. Rafferty* (Pa.) 33

22. An oral agreement to give the vendor security on the logs may be proved to show an inducement to him to sign a release to parties who had purchased of him by written contract certain timber, and the substitution in their place of other persons, although the written agreement contained no stipulation for such security. *Id.*

23. Evidence of a parol agreement as to a warranty of the power of an engine to run a certain separator, made prior to the giving of an order for the outfit, which contained an express warranty that the engine was of good material, and if properly run was "capable of driving said separator to do good business in threshing,"—is incompetent. *Nichols v. Crandall* (Mich.) 412

24. Parol evidence to prove want of consideration for a written contract reciting payment of the consideration cannot be admitted for the purpose of showing that the transaction was a 6 L. R. A.

mere offer to sell, and not an actual contract. *Schneider v. Turner* (Ill.) 164

V. OPINIONS; CONFESSIONS.

25. The opinion of a physician may be given as to what may be the result of a disease in the natural and ordinary course. *Alberti v. New York, L. E. & W. R. Co.* (N. Y.) 765

26. A physician may testify as to the length of time that a person suffering from disease will live, although stating that he can only give the probability from the history of other similar cases. *Id.*

27. Confession of a man that he has been married to a certain woman is admissible as evidence of the marriage. *State v. Schweitzer* (Conn.) 125

VI. DECLARATIONS.

28. The acts and declarations of parties to an action are not competent evidence in their behalf, unless they constitute a part of a transaction which bars or disproves the claim made against them, or are a part of a material fact in the case. *Dawson v. Pogue* (Or.) 176

29. Communications to a law student, although while he is employed to advise and assist in a lawsuit, are not privileged. *Dierstein v. Schubkagel* (Pa.) 481

30. An attorney may waive the privilege of his client as to information acquired by a physician in attending him, and may call the physician as a witness. *Alberti v. New York, L. E. & W. R. Co.* (N. Y.) 765

31. Unsworn admissions or declarations made by an insolvent, after a controversy has arisen between his attaching creditors and petitioners in insolvency proceedings upon his estate, are not admissible in a suit between such parties, for the purpose of determining the question of his residence. *Ayer v. Weeks* (N. H.) 716

32. Reports to a general manager of the company touching the facts, circumstances, and results of a railroad accident, and who was to blame therefor, made several days after the event, by the superintendent and the conductor, supported by the affidavit of the latter and several other employees, are not admissible in evidence to affect the company, whether such reports were exacted or made under standing rules requiring the same, or under special orders for the particular occasion, no question of notice to the company being involved in the controversy. *Carroll v. East Tennessee, V. & G. R. Co.* (Ga.) 214

33. Statements as to boundaries, made by an officer of a corporation while negotiating a sale or lease of real estate which he had authority to sell or lease, may be proved, after his death, against the corporation or its subsequent grantees. *Holmes v. Turners Falls Lumber Co.* (Mass.) 293

34. Declarations of the treasurer of a corporation, who had no authority to bind it by his statements, may be admissible if made in the course of negotiations for the corporation by himself and the president, and in the presence of the latter, who did not dissent therefrom, where the declarations of the president would be competent evidence. *Id.*

as tending to prove a marriage. *Seitz v. Schweitzer* (Conn.) 125

86. Evidence that the settlement of a suit for money loaned and of a prosecution for fornication committed on a certain day included a cause of action for breach of a promise of marriage, made on the same day, is admissible in a suit for such breach of promise. *Dierstein v. Schubkagel* (Pa.) 481

87. In order to render proof of the dissolution of a partnership admissible in favor of a defendant charged as a partner, it must tend to show an actual dissolution of the partnership relation. *Dawson v. Pogue* (Or.) 176

88. Evidence that plaintiff was dependent upon his earnings for the support of himself and wife, although not admissible upon the question of damages in an action for personal injuries, is admissible as tending to show that he was unable to employ a physician of special skill from a distant city, to rebut a claim that he had not used ordinary care to cure and restore himself, where defendant had, on cross-examination of plaintiff's witnesses, shown that he had employed only local physicians with no special skill in respect to such injuries, and had communicated with, but had not employed, a physician of special skill in the city. *Alberti v. New York, L. E. & W. R. Co.* (N. Y.) 765

89. On the question whether defendants were liable as a partnership or not, where their firm never had any corporate existence even as a *de facto* corporation, evidence of the plaintiff that he did not deal with them as a corporation, but was informed by one member that they were a partnership, is admissible. *Eaton v. Walker* (Mich.) 102

40. Proof of the payment of taxes is admissible on the question of ownership of land by adverse possession. *Wren v. Parker* (Conn.) 80

41. In an action for personal injuries causing death to plaintiff's intestate,—his son, who was performing services for plaintiff at the time,—defendant cannot show that plaintiff was wealthy and able to hire others to perform the services, and thus shield his son from exposure to the incident dangers, where there is no showing that deceased was unable to take care of himself. *Illinois C. R. Co. v. Slater* (Ill.) 418

42. A letter saying that a person "expects to pay a claim out of what he hopes to beat my company in a suit now pending" is irrelevant in an action by him for alleged slanderous words spoken in the course of the trial of the former suit. *Nissen v. Cramer* (N. C.) 780

43. Evidence that a person felt and exhibited mental anguish on account of the delay in delivering a telegraph message is admissible in an action where damages are allowable for such negligence. *Western U. Teleg. Co. v. Adams* (Tex.) 844

48. It being in question whether a fireman could, by reporting the facts of his situation to an official of the company by telegraph, have obtained relief from his peril, evidence is admissible to show that, under the usage and practice of the company in like or analogous circumstances, relief would probably have followed. *L. R. A.*

45. In an action for injuries by a railroad train causing death to plaintiff's intestate, plaintiff may prove the speed at which the train was running, as tending to shed light on the question of defendant's due care. *Illinois C. R. Co. v. Slater* (Ill.) 418

46. Under a paragraph of an answer denying the execution of a note, it may be proved that the note was altered after it had been signed, as well as that it had not been delivered. *Palmer v. Poor* (Ind.) 469

VIII. WEIGHT, EFFECT, AND SUFFICIENCY.

47. Parol evidence of circumstances surrounding the testator is sufficient to show his meaning and intention, where there is a slight discrepancy in the description of the donee of a charitable gift. *General Assembly Presby. Church v. Guthrie* (Va.) 821

48. Direct, positive, and uncontradicted testimony of two witnesses to the fact of a contemporaneous verbal agreement as an inducement to sign a writing is sufficient where it is precise, definite, and distinct, and highly probable and reasonable. *Ferguson v. Rafferty* (Pa.) 33

49. The statement of the recorder of a municipal board, in a paper that he was not required to make, that it was done by order of the board, is not evidence of that fact. *Lawrence v. Ingersoll* (Tenn.) 308

50. A finding that a deed from a parish priest to a cardinal of the Roman Catholic Church, containing an express assumption by the grantee of a mortgage, was delivered and accepted, is sustained by evidence that the cardinal, having knowledge of the deed, when a demand for the debt was made simply referred the creditor to the parish priest in possession of the property, and that the latter insured it in the cardinal's name, and regularly collected the rents and paid them over to the chancery office, which managed the cardinal's business affairs relating to the church. *Gifford v. Corrigan* (N. Y.) 610

51. In an action on a policy requiring proof of loss within thirty days, but not requiring that such proof shall be in writing, or that it be given to any particular person or officer, testimony of the assured that at the time of the fire the agents of the company were present and informed him that they would notify the company, and that a short time thereafter the adjusters of the company came and adjusted the loss, is sufficient proof of the loss and of the agency of the parties who acted as agents and adjusters. *State Ins. Co. v. Schreck* (Neb.) 524

52. Testimony must be plain and convincing beyond reasonable controversy, in order to overcome the presumption that a written contract expresses correctly the intention of the parties. *Meiswinkel v. St. Paul F. & M. Ins. Co.* (Wis.) 200

53. Whenever a defense in a criminal prosecution is so proved that a reasonable doubt is caused as to any part of the case, the defendant is entitled to the benefit of that doubt, and

should be acquitted. *State v. Schweitzer* (Conn.) 125

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Presumption as to regularity of acts of officer. 219

Parol to show agreement collateral to written contract. 418

Parol to vary writing. 287

Parol and extrinsic, to aid construction; of intention; declarations of testator; to remove latent ambiguities; to identify beneficiary; to identify land; to supply omissions. 831

Written instruments; parol, to contradict; as to consideration of contract; of prior negotiations; of conversations between parties; of their acts and declarations; of extrinsic facts and circumstances; of collateral agreement prior, contemporaneous, or subsequent; to vary terms of contract, or legal effect; of intention; to explain ambiguity; of meaning of words; to identify person and property; of contracts partly written; of fraud, accident, or mistake; of illegal contracts; of trust. 38

Parol, of mistake in writing. 888

Parol, of consideration of written contract. 164

Coroner's inquisition as. 65

Privileged communications between attorney and client; waiver; exceptions; testimony of third persons. 481

Communications to physician; waiver of privilege. 765

Declarations of deceased owner of land. 284

EXECUTION. See also BAIL AND RECOGNIZANCE, 8; LEVY AND SEIZURE, 1.

A sale by a master in chancery, or other person authorized to execute the decrees in chancery, is not a "sale" in the legal sense, until confirmation. *Hart v. Burch* (Ill.) 871

EXECUTORS AND ADMINISTRATORS. See also DESCENT AND DISTRIBUTION.

1. The court has jurisdiction, in proceedings under the article of the California Code providing for partial distribution, to hear and determine a question of contested heirship. *Re Jessup's Estate* (Cal.) 594

2. A state statute providing that when administration is taken in that State upon the estate of a nonresident decedent, the estate found there is to be applied there primarily to the payment of domestic creditors, will not prevent the administrator from bringing suit wherever he can, upon a cause of action which accrued in such State to his intestate by reason of the negligent act of a common carrier causing personal injury to him. *O'Reilly v. New York & N. E. R. Co.* (R. I.) 719

NOTES AND BRIEFS.

Real property; liable for debts. 832

EXEMPTION. See LEVY AND SEIZURE, 2, 8.

EX POST FACTO LAW. See CONSTITUTIONAL LAW, 8, 9.

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EXPRESS COMPANIES. See CARRIERS, 13.

FAMILY.

NOTES AND BRIEFS.

Defined; head of, who is. 818

FINDINGS. See GARNISHMENT.

FIRE. See also BAILMENT, 2.

The fact that telegraph and telephone poles and wires prevented the extinguishment of a fire does not make the company owning them liable for the loss, where the owner of the building burned, on whose land they stood, had built by the side of them, and had permitted a tenant to use one of the wires, and had never objected to them in any way before the fire. *Chaffee v. Telephone & Teleg. Constr. Co.* (Mich.) 455

FIXTURES.

1. In determining whether an article is a fixture, its nature and the object, effect, and mode of its annexation are all usually to be considered. *Hopewell Mills v. Taunton Sav. Bank* (Mass.) 249

2. Articles placed in a building subject to a mortgage, by the mortgagor or those claiming under him, to carry out the obvious purpose for which it was erected, or permanently to increase its value for occupation or use, become a part of the realty, although removable without injury either to themselves or the building. *Id.*

3. Machinery in a cotton-mill, procured for use in manufacturing cotton cloth, most of it being heavy and not intended to be moved from place to place, but, when put in position, to be used with the building until worn out or for some unforeseen cause the real estate is put to a different use,—constitutes part of the realty. *Id.*

4. Loom beams, although not fastened to the looms or to the buildings, constitute part of the realty when the looms to which they belong are permanently fixed in a cotton-mill. *Id.*

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What constitutes. 249

FOOD.

Furnishing oleomargarine to patrons of a restaurant as part of a meal ordered by them, although they do not eat it, but carry it away with them, is a "sale thereof," subjecting the proprietor to a penalty, under the Pennsylvania Act of May 21, 1885. *Com. Allegheny County, v. Miller* (Pa.) 683

NOTES AND BRIEFS.

Prohibition of sale of oleomargarine. 683

FORCEFUL ENTRY AND DETAINER.

1. The provisions of the Forceful Entry and Detainer Act of Oregon do not apply to a tenant from year to year holding under a verbal lease for more than one year, until the tenancy is determined by notice or by agree-

2. A tenant in possession of demise premises without any written lease or agreement therefor cannot be dispossessed, under the Oregon Forcible Entry and Detainer Act, unless he is in by wrong. *Id.*

FORGERY. See **BANKS AND BANKING**, 9.

FORMULAS. See **RECIPES**, 1.

FRAUD AND FRAUDULENT CONCEALMENTS. See also **ACTION OR SUIT**, 8; **BILLS AND NOTES**, 4; **CONTRACTS**, 8, 24.

1. Lack of knowledge by one making false statements as an inducement to a contract, that the statements are false, is immaterial. *McKinnon v. Vollmar* (Wis.) 121

2. If one makes an untrue representation as of his own knowledge, not knowing whether it is true or false, it is a fraud. An unqualified affirmation amounts to an affirmation as of one's own knowledge. *Bullitt v. Farrar* (Minn.) 149

3. The maker of a note given for Bohemian oats purchased at a price greatly beyond their value and never delivered, who was induced to give it by persistent arts and misrepresentations concerning the salable prospects of the oats to be grown, and the responsibility and legal character of a mythical corporation whose bond is given him, agreeing to sell for him twice as many bushels at the same price per bushel,—may recover from the person defrauding him the damages thereby sustained, when he has been compelled to pay the note to a bona fide holder; and he will not be denied relief on the ground that he is *in pari delicto*. *Hess v. Oulwer* (Mich.) 498

4. Fraudulent representations as to an alleged corporation which has no legal existence, and whose pretense of legal existence is a fraud, are not within the Michigan statute which requires fraudulent representations as to the character, etc., of another party to be writing in order to sustain an action for fraud. *Id.*

5. Representations as to the amount of earth necessary for constructing a levee, and its quality or kind, made to induce another to enter into a contract for constructing the levee within a certain time, with a forfeiture for failure to complete it in that time, are mere expressions of opinion equally within the power of both parties to ascertain, and therefore not a sufficient ground for an action for damages, although the contractor was not within 150 miles of the place of the work when he entered into the agreement, and it would have taken many days to have ascertained the truth of the representations. *Nounnan v. Suttler County Land Co.* (Cal.) 219

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Fraud; what constitutes; action for; investigation by purchaser; statements of opinions or trade talk. 149

False representations inducing entry into contract. 219

Misrepresentation; absence of knowledge on the part of maker. 123

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determined on the disclosure alone, no supplemental complaint being filed and no claim made by a third person, no findings of fact are necessary. *Wildner v. Ferguson* (Minn.) 333

NOTES AND BRIEFS.

Exemption of laborers' wages. 333

GIFT.

1. A deposit of money in a savings bank in the name of the depositor's son, who does not appear ever to have known of it, does not show a gift to him, where the depositor retained the passbook for many years afterwards, dealing with the account as his own, and by the rules of the bank payments could be made to any person presenting the book. *Beaver v. Beaver* (N. Y.) 403

2. To constitute a complete *parol gift* there must be an actual delivery of the thing given, but the delivery must be according to the nature of the thing given. *Miller v. McMechen* (W. Va.) 515

3. If property is in possession of the donee at the time of a gift, as agent for the donor or otherwise, he need not surrender it in order that it may be redelivered in execution of the gift. Therefore the gift is complete if the donor relinquishes all dominion over the thing given, and recognizes the possession of the donee as being in his own right, and the latter accepts the gift and retains possession in virtue thereof. *Id.*

4. A bill of sale executed to his niece shortly before his death, by an intestate who had previously had two strokes of paralysis, containing a clause empowering him to revoke the transfer at any time during his life, the instrument and the subject matter thereof being delivered to his attorney, who, after his death, delivered them to the niece,—is a gift *causa mortis*, and shows a clear intent that the niece should have the benefit of the gift unless revoked during his life. *Williams v. Guile* (N. Y.) 366

NOTES AND BRIEFS.

Causa mortis; what essential to constitute. 366

Defined; intent alone not sufficient; delivery essential; deposit of fund in trust. 403

Inter vivos; what constitutes. 515

GUARANTY.

1. The death of the mortgagor revokes the authority to sell goods to a third person on the security of a mortgage given in part to secure indebtedness arising from future sales to him by the mortgagee. *Hyland v. Habich* (Mass.) 383

2. An agreement "to stand good for, or, in other words, . . . guarantee to pay for," any timber of a certain class that shall be furnished to a third person, with whom the promisor states that he has a contract for such timber, is an original undertaking, and no notice of acceptance or of failure to pay is necessary. *Nading v. McGregor* (Ind.) 686

what goods she wants" is not necessary, where it was given after refusal of credit to her. *Wright v. Griffith* (Ind.) 689

4. An order to let a person have "what goods she wants," and agreeing to "stand good for the money and settle the bills," is a continuing guaranty. *Id.*

NOTES AND BRIEFS.

Contract of. 688
Necessity of notice of acceptance. 686
When notice of acceptance to guarantor necessary. 639

GUARDIAN AND WARD.

The father of a natural child cannot appoint a testamentary guardian for such child, in the absence of express statutory authority. *Ramsay v. Thompson* (Md.) 705

NOTES AND BRIEFS.

Guardianship of natural child. 705

GUEST. See **INNKEEPERS**, 4.

HABEAS CORPUS. See also **JUDGMENT**, 1.

The district courts and judges of Colorado have general jurisdiction by statute to issue the writ of habeas corpus; and the jurisdiction to issue it in a particular case will be presumed, in the absence of a showing to the contrary. *Cooper v. People, Wyatt* (Colo.) 480

HEIRS. See **EXECUTORS AND ADMINISTRATORS**, 1.

HIGHWAYS. See also **CUSTOM AND USAGE**, 2; **PUBLIC IMPROVEMENTS**, 1; **STATUTES**, 5; **TRIAL**, 4, 6, 7.

1. A lotowner whose only means of ingress and egress to and from his lot by vehicles is from a street into which opens the one on which his premises front, and which terminates just beyond them, may maintain an action for the special and peculiar injury resulting to him from a blockade of the entrance to the latter street by railroad cars on the other street, into which it opens. *Kiel v. Jackson* (Colo.) 264

2. A person owning real property located on a street cannot be deprived, without compensation, of his outlet through such street to other streets, in either direction, by stopping up the street on either side between his property and the nearest intersecting street, although the part of the street discontinued is not in front of his land. *Gargan v. Louisville, N. A. & C. L. Co.* (Ky.) 840

3. Closing the street between the land of an abutting owner and the nearest intersecting street, without furnishing another convenient and reasonable outlet in that direction, or making compensation for the damages, is taking private property without due compensation. *Id.*

4. The prior passage of an ordinance prescribing the kind of sidewalk to be built, its dimensions and materials, and the time thereof L. R. A.

the common council ordinance the grade sidewalks, their construction, and pr of those who fail to or ordinance. *Port.*

5. A statute which any person owning, interest in, real estate construct, keep, and is unconstitutional, if who may be unability required.

6. The obligation tion to maintain foot erty is not affected l property from taxati the walk is not a tax, in the nature of a t *estant Women v. Wi*

7. Failure of a town barriers at dangerous highway will render thereby resulting, w railing or barrier is a precaution to guard *Molloy v. Walker Twp*

8. The duty of to keep highways in shall be safe and con is made imperative § 1445.

9. Notice to town necessity of barriers or place in a highway is it appears that they l the place, and some c over it.

10. It cannot be l of law for a person in because of the lack o on the point of slidin to place his shoulder overthrowing. The against him is that it

11. The liability of or want of repairs of or road" therein, und does not extend to a way over private pro a snowdrift in the hi seer has done some knowledge and appro he had no authority open a way over pr *Waupun* (Wis.)

12. Under a city common council fu parts of streets in a c provide for everythin to the exercise of the the common council tract for doing the w therefor out of the g although the charter improvements in a pa ing the cost thereof t

18. An ordinance for the paving of certain streets is not insufficient because it does not state the width of the streets to be paved. *Adams County v. Quincy* (Ill.) 155

14. The same ordinance may legally provide for the paving of several streets, although one is wider than the others. *Id.*

15. The words "may remove any such fence or other obstruction," in Ill. Rev. Stat. 1939, chap. 121, § 71, authorizing commissioners of highways to remove obstructions, imposed upon them the imperative duty of removing obstructions from the public highway; and the word "may" is to be construed as "shall." *People, Brokaw, v. Highway Comrs.* (Ill.) 161

NOTES AND BRIEFS.

Duty of towns and villages to keep in safe condition; liability for neglect. 695

Duty to repair; liability of municipal corporation; care by traveler. 59

Guards to embankments; necessity for maintaining. 696

Improper use of, by railroad. 254

Obligation of lotowner to maintain sidewalk. 532

Power to vacate. 340

HOMESTEAD. See also PAYMENT, 2.

1. Improving premises with a design to use them for a homestead is not sufficient, without actual occupancy, to give the homestead character. *Stuart First Nat. Bank v. Hollingsworth* (Iowa) 92

2. A husband and wife living together constitute a "family," within the meaning of the word as used in Fla. Const. 1868, art. 9 (homestead article), § 1. *Miller v. Finegan* (Fla.) 818

3. The term "heirs," in Fla. Const. art. 9 (homestead article), § 8, includes an adult son, and an adult grandson, the son of a daughter deceased at the death of the head of the family, notwithstanding they were not at his death living at the home place. *Id.*

4. Residence by the heirs on the homestead of the ancestor after his death is not necessary to continue the exemption of it from his debts. *Id.*

5. A creditor seeking to satisfy a judgment which he has recovered against the administratrix, out of the homestead of her intestate, who was the head of the family residing in Florida, can claim no advantage from the fact that the wife has elected to take a child's part in lieu of dower. If by her election she forfeited her dower interest, the heirs took the entire homestead. *Id.*

6. A judgment rendered against an administratrix on an indebtedness of her intestate, not excepted from the exemption provisions of the homestead provisions of the Florida Constitution of 1868, was not a lien on the homestead of the intestate, who was the head of a family residing in Florida. The title to the homestead descended at his death to his heirs exempt from any liability for the indebtedness. *Id.*

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quantity to which the laws of such State permit a homestead exemption to attach, the surplus beyond what may be held as exempt becomes liable for the debts of the one making the exchange, at the instant the title vests in him. *Campbell v. Jones* (Ark.) 783

8. Liability of lands exceeding the amount allowed for a homestead, for debts of the owner, cannot be defeated as to existing debts by the simple surrender and cancellation by the owner of his deed, and the procuring, without valuable consideration, of new conveyances to be made to his children. *Id.*

NOTES AND BRIEFS.

Exemption; in different States. 813

Exchange of; how far exemption extends to property acquired. 784

How far subject to mechanics' lien. 204

HOMICIDE. See ASSAULT AND BATTERY; EVIDENCE, 7.

HUSBAND AND WIFE. See also ACTION OR SUIT, 6, 9, 12; CONTRACTS, 1; DOWER, 1-3, 5, 6; EVIDENCE, 4; INDICTMENT, ETC.; INSOLVENCY AND ASSIGNMENT FOR CREDITORS, 7.

1. No marriage is shown by a man's acknowledgment of a woman as his wife in the presence of others, and by their living together as man and wife for one week prior to his death, where their intention was to have a marriage ceremony performed the next week, and this was prevented by his death. *Grimm's Appeal* (Pa.) 717

2. A married woman who indorses blank promissory notes, at her husband's request, for him to fill up and use, which afterwards and in her absence he fills up and negotiates for value at a bank, is liable to the bank as indorser, under the Massachusetts statutes, which give her the unrestricted right to contract except with her husband. *Binney v. Globe Nat. Bank* (Mass.) 879

3. A wife cannot, acting as the agent of her husband, bind him by her contracts except for necessaries. *Harris v. Smith* (Mich.) 703

4. Contracts between husband and wife are not made valid at law by the statutes of New York. If any exception exists it is under the Act of 1887. *Hendricks v. Isaacs* (N. Y.) 559

5. The agreement of a wife living separate from her husband to repay advances by him for the support of herself and children, out of money given her by the will of his deceased father expressly for the support of herself and children, will be enforced in equity if the money thus given by will has not been expended for their support. If she has expended the whole sum for such support, the husband has no equity for the enforcement of the contract. *Id.*

6. An equitable ejectment action by the wife in the name of her next friend may be maintained in Pennsylvania against her hus-

right to a separate estate and to maintain actions therefor, where the property is not occupied by them as a home and the husband's possession is inconsistent with such occupation. *McKendry v. McKendry* (Pa.) 506

7. A married woman can maintain an action for enticing away her husband, and depriving her of his comfort, aid, protection, and society. *Bennett v. Bennett* (N. Y.) 558

8. The repeal by the New York Act of 1880, of the provision of the Acts of 1860 and 1862 giving a wife the right to maintain an action for injury to her person or character, was not intended to take away any rights of action, but merely to remove sections no longer regarded as operative. *Id.*

9. A wife can maintain an action against another woman for alienating her husband's affections. *Foot v. Card* (Conn.) 829

10. The fact that a man and his wife continue to live together does not prevent her from maintaining an action against another woman for alienation of his affections. *Id.*

11. A valid agreement for an immediate separation between husband and wife, and for a separate allowance for her support, may be made through the medium of a trustee. *Clark v. Fosdick* (N. Y.) 182

12. The provision for an annual payment of money for the maintenance of the wife, in an agreement for separation, is not affected by a subsequent decree of divorce in her favor, which makes no provision for alimony. *Id.*

13. A wife is entitled to a divorce for inhuman treatment where her husband, besides frequently abusing her and her children, habitually addressing her in profane and obscene language, and applying to her opprobrious epithets, has on several occasions treated her with physical violence, and once, in the presence of her children, has accused her of improper relations with another man, while he has been indifferent to her in sickness, inviting farm hands to sit in the same room she was occupying, with aggravating language and irritating manner, although no single act was sufficient to endanger her life. *Doolittle v. Doolittle* (Iowa) 187

14. The allowance of \$3,500 as permanent alimony to a wife who is nearly helpless, requiring the constant attention of an assistant, and not likely to recover her health, is not excessive where her property is less than \$2,000 and that of her husband is worth not less than \$14,000. *Id.*

15. The act of a woman in leaving her husband for cause is not desertion, within the meaning of the law authorizing a divorce for desertion. *Id.*

16. A woman, in a suit for divorce, may be allowed a reasonable sum for an attorneys' fee in prosecuting an appeal. *Id.*

17. Where no intricate questions of law were involved, but a large amount of work was necessarily required of plaintiff's attorney in a divorce suit, a total allowance of \$200 for prosecuting an appeal was held reasonable. *Id.*

18. In a suit for divorce from bed and board a plea of former adjudication, based on the dis-

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allow temporary alimony before the plea has the present bill admitted marriage set up in t upon an alleged subv. *Wiler* (Mich.)

19. No additional t to a wife on divorce, ment for separation m which she and her tr accept in full for her during her life, is sti *Galusha* (N. Y.)

20. A valid tripartit tion of husband and v subsequent decree of no relief is asked in th ment, or its validity at

21. Ill. Rev. Stat. habitual drunkenness t not include intoxicatio of morphine by means tion. *Youngs v. You*

22. Violent resistant tempts by the wife to t while he is in a state of does not constitute ext elty, within the meanin 40, § 1, making such vorce.

23. A wife who co husband after an act c done the offense.

24. A divorce will ground of cruelty, wh habitual drunkenness, in general terms, such forward as a mere afte apparent that the bill on the ground of d

25. The adultery defense to a charge c and refusing to suppo Stat. § 8402. *State v*

26. A proceeding a ing and refusing to Conn. Gen. Stat. § 84 tion.

27. A sentence to i prison in a foreign St vorce within the stat vorce may be decree been sentenced to c prison." *Leonard v.*

28. The adultery c fense to an action for cruel and inhuman *Hubbard* (Wis.)

29. A divorced w tains the custody of vorce was granted, a the child without an or any refusal on his cannot maintain an cover compensation *sey v. Ramsey* (Ind.)

30. An adjudicati parties as they exist

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INDICTMENT, INFORMATION, AND COMPLAINT.

A complaint which charges in the words of the statute the offense of neglecting and refusing to support a wife, under Conn. Gen. Stat. § 3402, without alleging marriage to her, is sufficient. *State v. Schweitzer* (Conn.) 125

INFANTS. See also EVIDENCE, 8; JUDGMENT. 1.

1. A parol agreement by a father to give his infant child to its grandparents will not be sufficient, at least upon doubtful proof of such contract, to deprive him of his right to the custody of the child, in the absence of proof that it is not for the child's interest to remain with him. *Weir v. Marley* (Mo.) 672

2. The application, with a minor's consent, of part of his wages to the payment of a debt due from his deceased father's estate to his employer, will not be binding on him in a subsequent action on *quantum meruit*, although the employer's remedy against the estate has been lost in the mean time, where the minor had no pecuniary interest in the payment of the debt because he was not entitled to anything from his father's estate. *Dubé v. Beaudry* (Mass.) 146

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Contract of, how far binding.	146
Liability for negligence.	419
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1. Where a contract stipulates for special, unique, or extraordinary personal services such as involve special merit, skill, knowledge, or ability, so that in case of default the same services could not be easily obtained from others or be compensated in damages at law, an injunction may be granted to prevent performance of such services for a third party; but not if such services be ordinary, without special merit, and such as could be easily supplied, without much difficulty or expense. *Cort v. Lassard* (Or.) 653

2. To justify a mandatory preliminary injunction, a clear case of prospective injury for which the plaintiff will have no adequate remedy at law is indispensable. *Gardner v. Strover* (Cal.) 90

3. An allegation that plaintiff will be damaged in a certain sum by a building already erected which obstructs his use of a road, without any allegation that any other or further act to his damage is threatened, or that defendant is not responsible for that sum, or that there will be any extraordinary impediment in the way of recovering that sum by an action at law,—is not sufficient to justify a mandatory injunction. *Id.*

4. A preliminary injunction will not be retained where the acts sought to be restrained have been performed before the order for the injunction was made or served. *Id.*

5. An injunction prohibiting members of a municipal board from meeting and acting without giving a complainant notice, and permitting him to act with them, is not mandatory. *Lawrence v. Ingersoll* (Tenn.) 306

6. A municipal corporation authorized to remove and abate any nuisance injurious to the public health, and to do all acts and make all regulations necessary and expedient for the preservation of health, may resort to a court of equity to aid in enforcing its public duties to preserve the public health, and maintain in its own name an action to abate a public nuisance affecting the public health. *Pine City v. Munch* (Minn.) 763

NOTES AND BRIEFS.

To restrain service in breach of contract.	653
To protect easement.	262
To restrain threatened wrong.	90
For violation of legal right; for violation of specific contract as a preventive remedy; mandatory injunction.	855

INNKEEPERS. See also CARRIERS, 8.

1. Where a porter of a hotel meets a guest at a railroad depot, and indicates to him a conveyance by which he can reach the hotel, and receives from him a check for his baggage, the hotel proprietor at that instant incurs a liability for the safe keeping of such baggage and its redelivery to the owner; and the limitation of the authority of the porter, unknown to the guest, which permits him simply to advertise the hotel and suggest it to strangers, and forbids him to receive baggage, is immaterial. *Coskery v. Nagle* (Ga.) 463

eliry and clothing is not such negligence as will prevent his recovery against the proprietor for the loss of the baggage. *Id.*

3. The proprietor of a hotel is liable for the loss of baggage of guests through the negligence of a carrier to whom it has been delivered for transportation to the hotel, and whose apparent duty is, by authority of such proprietor, to transport guests and baggage to such hotel; and any private arrangement between the proprietor and carrier unknown to the guest is immaterial. *Id.*

4. Anyone away from home receiving accommodations at an inn as a traveler is a guest. *Pullman Palace-Car Co. v. Lowe* (Neb.) 809

NOTES AND BRIEFS.

Innkeeper and guest; when relation exists; "inn" defined; responsibility as bailees; injury or loss of guest's property; insurer of property; negligence of guest; noncompliance with regulations; notice. 488

Liability of sleeping-car company as. 809

INSOLVENCY AND ASSIGNMENT FOR CREDITORS. See also CONFLICT OF LAWS, 2; DOMICIL, 2.

1. In proceedings in insolvency, debts due the insolvent, who has his domicile in the State, will be deemed to have a situs therein. *Re Dalpay* (Minn.) 108

2. An assignee's attorney has no right to borrow the trust funds, paying interest, and buy claims against the debtor below their face value, and then file them and have them allowed. *Manhattan Cloak & S. Co. v. Dodge* (Ind.) 369

3. The attorney of an assignee, who buys claims of creditors who have replevied goods sold to the debtor, and enters judgments in the replevin suits, declaring the goods to be of a certain value, and sells them at private sale for a less sum, is accountable to the estate of the insolvent for the actual value of the goods only, and not for the amount of the judgment. *Id.*

4. It is the duty of an assignee to have a dividend declared as soon as he has collected a large part of the assets and has ascertained the probable amount of the claims; but where he neglects so to do, without excuse, he is liable for interest from the time when he could have secured an order declaring a dividend. *Id.*

5. Foreign creditors who acknowledge the receipt of a "dividend in matter of composition" in case of a certain insolvent thereby recognize, ratify, and submit to the insolvency proceedings so as to become bound thereby in the same manner as if they were residents of the State. *Murray v. Roberts* (Mass.) 346

6. A claim is proved, within the meaning of Mass. Pub. Stat. §§ 80, 81, relating to the discharge of claims proved in insolvency proceedings, when the creditor, with full notice of all that has been done, has accepted a dividend declared thereon, although the only proof of the claim and the amount thereof was the schedule of creditors filed by the insolvent. *Id.*

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under Mass. Pub. case of failure to fore return day, as and give a bond; although she could not insolvent law v Statutes re-enactin tion a married wor *Globe Nat. Bank* (M

8. To sustain against a debtor for attachment, it is suff that the attachmen mand probable agai vent debtor; the d serted in the writ day.

NOTES

Insolvency; defini construed; validity of law of comity.

Effect on foreign Assignment by su

INSURANCE. ERROR, 17, 18; 51.

1. A provision c cate, that "no quest application or certifi be raised unless . . . date of the certifiat member, includes t taining the insuranc terest in the benef *Ben. L. Asso.* (N. Y

2. Lack of suffi fund to pay a claim is no defense to an promise was to pay by the same contra to make a call upc was then insufficie *row v. Family Fu*

3. A contract of construed as again pose of upholding

4. The death b sured, does not ren provision that it a die "in violation o criminal law," alth suicide is made a statute does not cc accomplished.

5. A sale, for mutual benefit cer life, is void, not c regulations, where also as against *Thornton* (Ala.)

6. The next of l his benefit certifi void as against p purchaser to acco where the societ issued new cert

7. The disposal, by will, of benefit certificates insuring testator's life, is not invalid because of his previous attempt to transfer them to the legatee by a sale which is void as against public policy. *Id.*

8. An assignment of a life insurance policy to a person who has no insurable interest is void. *Roller v. Beam* (Va.) 136

9. A creditor who takes an assignment of a life insurance policy as security for a loan can hold the proceeds of the policy only to the extent of the sums actually advanced by him. *Id.*

10. Where a separate valuation was put, by the parties to an insurance policy, upon the different subjects of the insurance, including both real estate and personal property thereon which is not specifically named, the parties evidently considering the different species of property as distinct matters of contract, the effect of the separate valuation is to make them distinct; and the execution of a mortgage upon the real estate will not prevent a recovery for the personal property destroyed by fire, although the policy contained a condition against subsequent incumbrances. *State Ins. Co. v. Schreck* (Neb.) 524

11. A policy on all the personal property of the assured, without specifically naming it, is avoided by a transfer of the legal title to the insured property by mortgage or sale, so far only as that particular property is concerned, during the existence of the title in the mortgagee, and not as to property which had been mortgaged during the existence of the policy, which mortgage had been paid before the fire. *Id.*

12. A variance between the petition and proof in describing the premises where the property insured was situated is immaterial where the mistake originally occurred in the policy and was made by the agent, who had full knowledge of the situation of the property. *Id.*

13. It is not necessary that a policy misdescribing the place where the property insured is situated shall be reformed before bringing an action upon it, where the mistake was that of the agent who examined the property and knew its situation, and where the assured continually resided on the premises during the entire time covered by the policy. *Id.*

14. The whole premium, and not merely a *pro rata* part of it, is earned on default in payment of an installment due on a policy of insurance providing that no liability of the insurer shall exist after default in the payment of any installment or an installment note given for the premium, or a part thereof. *St. Paul F. & M. Ins. Co. v. Coleman* (Dak.) 87

15. An agreement that the premium note of the assured shall remain binding upon him, although the insurer is relieved from liability by default in payment of any sum due, is not illegal or contrary to public policy. *Id.*

16. An assured person is not entitled to a reduction, under Dak. Civ. Code, §§ 1542-1544, providing for the return of insurance premiums in certain cases, in the amount of his premium note which he has given for five
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after the risk has attached and been in operation for one year. *Id.*

17. A stipulation in an insurance policy, that the company shall not be liable for any loss or damage which may be incurred while any promissory note given for the premium remains past due and unpaid, is not invalid. *Robinson v. Continental Ins. Co.* (Mich.) 95

18. The effect of a condition in an insurance policy, that no liability shall exist while any part of a premium note is due and unpaid, cannot be avoided by an oral statement of the agent that the insured would be notified when to pay, and by a custom of the company to give notice when and where to pay, where, by the terms of the policy itself, the note was payable at the company's office or to any authorized person having it in his possession for collection. *Id.*

19. An insurance policy may be reformed by correcting a mutual mistake in the description of the premises. *German F. Ins. Co. v. Gueck* (Ill.) 835

20. A policy issued by mistake to a man who had no title to the premises insured, which were owned by his wife, will be reformed and enforced in her favor, where the agent who issued it, and who was wholly relied upon by the insured to have the papers in proper form, knew the facts as to the title. *Id.*

21. Refusal to pay a policy solely on the ground that the insured has no title to premises is a waiver of objections as to proofs of loss. *Id.*

22. Testimony of mortgagees who had taken the mortgage for purchase money on a sale of insured property, that on making an indorsement assigning the policy making the loss payable to them, they requested the agent to put the policy in a shape that would fully protect them, and he agreed to do so, and said, after making the indorsement, that he had insured them, and not the mortgagor,—is insufficient, especially when disputed by the agent, to warrant a reformation of the contract of indorsement so as to make a separate independent contract of insurance with them, which would not be affected by the mortgagor's breach of the conditions contained in the policy. *Maiswinkel v. St. Paul F. & M. Ins. Co.* (Wis.) 200

23. A shipper who contracts to give the carrier, who may become liable for the loss of the goods shipped, the benefit of any insurance that may be effected thereon, cannot, in case of loss through the carrier's negligence, recover upon a policy insuring his goods which stipulates that in case of loss the insurer shall be subrogated to all claim of the shipper against the carrier, and that if any right of the insurer to recover against any person is lost by any act of the insured, or if the insurance is made for the benefit of any carrier, the insurer shall not be liable to pay any loss. *Payerweather v. Phantis Ins. Co.* (N. Y.) 805

NOTES AND BRIEFS.

Life; insurable interest; wagering policies. 136

Life; death caused by crime. 495

rights and interest of assignee.	140
Benefit certificates; fund for payment of death claims.	495
Contracts of; how far severable; breach of condition as to one portion of property; effect.	525
Default in payment of premium; effect on policy.	87
Indisputable policy; how far conclusive.	781
Note for premium; how far policy in force.	96
Reformation of contract.	200
Reformation of policy for mistake.	838

INTEREST.

1. Interest does not run after maturity on municipal bonds which specify no place of payment, if funds for payment are provided, unless payment is demanded and refused. It is not necessary to seek out the creditor and tender payment. *Friend v. Pittsburgh (Pa.)* 636
2. Interest on the purchase price of land bought with warranty, where the covenantee has again purchased the land on a foreclosure sale, which constituted a constructive eviction, may be recovered from the time of thus extinguishing the incumbrance, but not from the date of the original purchase. *Collier v. Cowger (Ark.)* 107

NOTES AND BRIEFS.

On municipal bonds; where payable. 636

INTOXICATING LIQUORS. See also EVIDENCE, 9.

1. Where a large number of men buy a quantity of liquor which they store, and appoint an agent to manage it, and on the application of one of the purchasers the agent, without a license, separates a small quantity from the mass of liquor, fixes its value, delivers the quantity so separated as directed, and receives its value or price in money, this constitutes a sale without a license. *People v. Andrews (N. Y.)* 128
2. A statute which provides that no person without a state license therefor shall "keep in his possession for another spirituous liquors," etc., is unconstitutional and void. *State v. Gilman (W. Va.)* 847
3. The Ohio Act of March 8, 1888, "To Further Provide against the Evils Resulting from the Traffic in Intoxicating Liquors, by Local Option, in any Township in the State," is a valid law and is not in conflict with the Constitution. *Gordon v. State (Ohio)* 749

NOTES AND BRIEFS.

Validity of local-option laws.	750
Validity of law preventing the keeping of.	847
Evasion of law by social club.	123
Illegal sale; defense to indictment; jurisdiction over; duty of magistrate.	180
Abatement of saloon; place for sale a nuisance.	721
6 L. R. A.	

JOINT TENANCY IN COMMONS; DOWER, 5

JUDGE. See C

JUDGMENT.

1. The principle of a decision as to the writ of habeas corpus remains the same.
2. A judgment on collateral attack and therefore of title a part of the freehold, although it was suit in ejectment.

3. A decree for the removal of a saloon from a county, bar to a suit for title by a citizen of the same county. *Horn (Iowa)*

4. A judgment upon the merits in another State to a subsequent judgment in this State. *Leslie v. Payees.*

5. A question of fact upon which counsel make a comment of facts upon which judgment upon a controversy there is a controversy in the court does not pass. *Keokuk & W. R. Co.*

6. Parties to a sale of land at a purchase price of a testator with the purpose, are not estopped from enforcing at a sale under the judgment to the original owner thereof. *Aderhold*

NOTE

Upon promissory

JUDICIAL NO

JURISDICTION

NOTE

Of State over property over lands lying within concurrent jurisdiction; exclusive

JURY. See TRI

LABORERS.

NOTE

Right of Legislature to control over.

ty years, or during our natural lives," after the expiration of the twenty years the lessees are mere tenants holding over. *Sutton v. Hiram Lodge No. 51* (Ga.) 708

2. A lease "for the space of twenty years, or during our natural lives," is a lease for twenty years only, provided the lessees live that long, and if they die before the expiration of that time the lease expires. *Id.*

3. A verbal lease of land for a longer term than one year, although invalid, may become a tenancy from year to year if the tenant enters under it, pays rent, and remains longer than one year, with the assent of the landlord. *Rosenblat v. Perkins* (Or.) 257

4. To terminate an estate from year to year by notice requires the giving of such a notice as is prescribed in Or. Code Gen. Laws, § 2987. *Id.*

5. There is no implied covenant, in the lease of a furnished house for immediate occupation as a residence, against external defects originating on premises of a stranger,—such as noxious odors from an adjacent livery-stable,—and unknown to the lessor when he entered into the contract. *Franklin v. Brown* (N.Y.) 770

NOTES AND BRIEFS.

Lease extending beyond a year; validity of. 257

Implied covenants in lease of furnished house. 771

LATERAL SUPPORT. See also DAMAGES, 5.

The right of lateral support to land does not extend to buildings placed thereon; and an adjacent proprietor is not liable for the giving way of the earth on account of his excavations, if he has exercised reasonable care, and the earth would not have given away except for the added weight of the buildings. *Moellering v. Evans* (Ind.) 449

LAW OF PLACE. See CONFLICT OF LAWS.

LEASE. See LANDLORD AND TENANT.

LEVY AND SEIZURE.

1. A specific lien upon property sold for payment of the purchase money, with no defeasance provided for by forfeiture or otherwise, is not a right, title, or interest in the property itself subject to execution. *Fallon v. Worthington* (Colo.) 708

2. Only those whose work is manual are laboring men or women whose wages are exempt under Minn. Gen. Stat. chap. 66, § 810, subd. 11. *Wildner v. Ferguson* (Minn.) 838

3. An agent who sells goods by sample is not a laboring man or woman, within the meaning of a statute exempting wages. *Id.*

LIBEL AND SLANDER. See also PLEADING, 7.

1. A publication charging that the books of another person infringed a copyright is 6 L. R. A.

the copyright was improperly allowed, or that the copyrighted works were not the subject of a valid copyright, does not destroy the privilege. *John W. Lovell Co. v. Houghton* (N.Y.) 363

2. Saying "That's a lie," of the testimony of a witness on the opposite side, is not actionable when spoken by a manager of a corporation representing it on the trial, although it was represented also by attorney. *Nissen v. Cramer* (N. C.) 780

3. The manager of a corporation, representing it on a trial, has the same privilege that he would have if he was himself a party, in respect to words spoken by him in the course of the proceedings. *Id.*

4. A party to an action is protected against all inquiry into his motives in uttering words during the course of the trial, concerning the opposite party or his witness, that are relative and pertinent to the issue, however defamatory they may be. *Id.*

5. While spoken words, in order to be defamatory of one in respect to his public office, need not import a charge of crime, yet they must go at least so far as to impute to him some incapacity or lack of due qualification to fill the position, or some positive past misconduct which will injuriously affect him in it, or the holding of principles which are hostile to the maintenance of the government. *Sillars v. Collier* (Mass.) 680

6. The expression of an opinion that a certain person, as a member of the Legislature, is corrupt in his heart and might be induced to change his course from improper motives and inducements, is not actionable without averment and proof of special damages. *Id.*

7. The old doctrine of *scandalum magnatum* has never been adopted in Massachusetts as a special remedy. *Id.*

NOTES AND BRIEFS.

Statements concerning quality of goods. 364

Criticism of public officer. 680

Privileged communications; malice. 363

Right to prove malice. 781

LICENSE. See also EASEMENTS, 3.

1. An irrevocable license to the use of a driveway exists where expense has been incurred in erecting and maintaining gates upon the faith of an agreement for a perpetual easement, and for more than thirty years the use has been acquiesced in. *Nowlin v. Whipple* (Ind.) 159

2. An ordinance requiring a license of every person who shall "hire out, keep, or use for hire upon the streets, . . . any vehicle of any description or name whatever, either for the conveyance of passengers or for the conveying or transportation of goods, wares or merchandise, or other articles,"—does not require a license of the owners of wagons and teams who hire them out by the day for the transportation of freight to persons who use and control the teams. *State v. Robinson* (Minn.) 839

(Ark.) Dig. § 151, giving them power to regulate drumming, or soliciting persons who arrive on trains or otherwise, for hotels, boarding-houses, etc., and to license such drummers, and punish by fine any violation, depends upon the extent and expense of the municipal supervision made necessary by the business in the city or town where it is licensed; it cannot be made large enough to become a source of revenue to the city. *Fayetteville v. Carter* (Ark.) 509

4. Under Mansf. (Ark.) Dig. § 751, providing that all municipal corporations shall have power to regulate drumming, or soliciting persons who arrive on trains or otherwise, for hotels, boarding-houses, etc., and to license such drummers, and punish by fine any violation, if the fee required is not plainly unreasonable the courts will not interfere with the discretion of the council in fixing it; and unless the contrary appears on the face of the ordinance requiring it, or is established by proper evidence, it will be presumed that the fee was reasonable. *Id.*

NOTES AND BRIEFS.

See also EASEMENTS.

To public vehicles; power of city to issue. 339

Of occupation. 509

LIENS.

1. A lien is the right which a creditor has of detaining in his possession the goods of his debtor until the debt is paid. *Fishell v. Morris* (Conn.) 82

2. A lien at common law can exist only when the creditor has the actual possession of the goods over which the lien is claimed, and the debt was incurred in respect to those very goods. *Id.*

3. Parting with possession operates as a waiver or forfeiture of a common-law lien. *Id.*

4. A lien for the price of keeping animals, under Conn. Gen. Stat. § 8047, although created by statute, is the same in kind as a common-law lien, and can exist only in favor of a person in possession of the animals. *Id.*

5. The lien of a livery-stable keeper on a horse for keeping it under a special contract by which the owner had the right to use it, if any lien exists under Conn. Gen. Stat. § 8047, is devested when the owner rightfully takes the horse from the stable, and sells it, while away, to an innocent purchaser for value. *Id.*

6. A statute which provides that the lien of a laborer or furnisher of materials of a building erected by a contractor shall not be defeated by any agreement between the owner and the contractor or subcontractor, or by any payment made to either of them, or by failure to perform the contract, in case the laborer or furnisher complies with the provisions of the Act, is an unconstitutional attempt to subject property to sale for obligations to which the owner never became bound, and strikes at the 6 L. R. A.

Co. (Mich.) 7. Failure to file contract for the contract price of required by Cal. Code the owner liable to materialmen for the labor, without regard to the amount on, although they contract. *Kellogg v.*

8. It is within the power to provide that shall be liable to make the full value of the fails to execute his and file it in the record has paid the contract.

9. "Manual labor and driving logs and logging of Minn. Gen. Stat. includes the use of mentalities actually the performance of and the lien thereby of a team, where the employed at a gross bank logs. *Martin*

10. The fact that and his team at a gross logs puts them to work parts of the work done lien for the use of the work of the man.

11. Where the lien is performed under on in getting out a sing marks, however, but tions of them accordingly, the laborer may for his entire service one of these marks.

NOTES

To secure enforcement of gage; enforcement of On animals for cost On logs.

Mechanics' lien; instruction of; how to

LIMITATION OF ACTION OR SUIT

1. A cause of action of freight charges compelled to pay over is founded on the independent of fraud of the fact; and the Statute to run only from the such excess had been that it might have been of reasonable diligence. *R. I. & P. R. Co. (I*

2. An action to recover freight charges while to pay over the rates

ence of which excess was fraudulently concealed from plaintiff, is an action at law, and is not within Iowa Code, § 2580, providing that in actions for relief on the ground of fraud or mistake the cause of action shall not be deemed to have accrued until the fraud or mistake shall have been discovered by the party aggrieved. *Carrier v. Chicago, R. I. & P. R. Co. (Iowa)* 799

3. Actions upon school warrants issued as duplicates to take the place of original warrants which had been destroyed, bearing the same date as the originals, and having the word "duplicate" written across the face of each, will be barred by the Statute of Limitations at the same time the originals would have been. *Eureka Springs School Dist. v. Oromer (Ark.)* 510

4. Where a railroad is so constructed as to cause water to occasionally overflow lands adjacent to it, an action will lie to recover damages resulting from such overflowing at each successive recurrence thereof; and the Statute of Limitations will begin to run upon the happening of the injury complained of, and not at the time of the building of the road. *St. Louis, I. M. & S. R. Co. v. Biggs (Ark.)* 804

5. A promise to pay taxes, made by a taxpayer after the expiration of the time prescribed for collection by Md. Code, art. 81, § 88, will take them out of the operation of the statute and make them enforceable. *Perkins v. Dyer (Md.)* 198

6. It seems that the specification by the Legislature of exceptions to the operation of the general Statute of Limitations will not preclude the court from applying exceptions to such statute which were recognized by the common law, other than those prescribed by the Legislature. *Carrier v. Chicago, R. I. & P. R. Co. (Iowa)* 799

NOTES AND BRIEFS.

See also CONFLICT OF LAWS.

Acknowledgment to take debt out of statute. 510

When statute a bar to right of action on covenant. 593

In case of concealed fraud. 799

LIVERY STABLE. See LIENS, 5.

LOGS. See LIENS, 9-11.

MAIL. See POSTOFFICE, 2.

MANDAMUS.

1. The legality and validity of an election by the mayor and aldermen of a city by ballot, where no other official is in terms directed to declare or certify it, and no provision is made for a contest, may be inquired into by mandamus to compel recognition of the claimant's title. *Lawrence v. Ingersoll (Tenn.)* 808

2. Another specific remedy is not a bar, under Ill. Rev. Stat. chap. 87, § 9, to a writ of mandamus which will afford a proper and sufficient remedy. *People, Brokaw, v. Highway Comrs. (Ill.)* 161

3. A writ of mandamus may be issued to

compel highway commissioners to remove a fence from across a public highway that has been used as such for more than twenty years, which makes it impossible to travel such highway, where the facts are conceded. *Id.*

NOTES AND BRIEFS.

To compel performance of officer's duty; or removal of obstruction from highway. 161

MARRIAGE. See HUSBAND AND WIFE, 1, NOTES AND BRIEFS.

MASTER AND SERVANT. See also CONTRACTS, 2, 8, 7.

1. A statute prohibiting employes from making any contracts in advance to accept anything else than lawful money of the United States is not unconstitutional. *Hancock v. Yaden (Ind.)* 576

2. No special privileges are conferred, nor any unjust discrimination made, by a statute requiring all persons, firms, corporations, etc., engaged in mining or manufacturing, to pay their employes at least once every two weeks, and prohibiting all contracts by such employes to accept anything but lawful money of the United States in payment. The statute operates alike upon all who enter the classes named, and leaves all citizens free to enter them. *Id.*

3. An oral contract to labor for a year is dissolved by the death of the master before the end of the year; and if the servant continues to work under the direction of the life tenant, such life tenant, and not the executor, is liable for his services. *Lacy v. Getman (N. Y.)* 723

4. Trackmen on a hand car have a right to suppose that an approaching train will slow up in obedience to a warning that has been sent by a flagman, and are not negligent in remaining at their places upon the hand car, with their boss, until it appears that the train is not about to heed the signal. *Howard v. Delaware & H. Canal Co. (C. C. D. Vt.)* 75

5. A brakeman, seeing that the entrance to a tunnel is high enough to permit safe passage while standing on top of a train, has a right to assume, in the absence of notice to the contrary, that the tunnel is of such height throughout. *Hunter v. New York, O. & W. R. Co. (N. Y.)* 248

6. A machinist employed by a corporation in its factory, not to use machinery, but to keep it in good order, and having knowledge that some of it is imperfect and that employes cannot be relied upon to prevent it from becoming dangerous from lack of oil, takes the risk of discovering the condition of the machine at the time he attempts to repair it, such risk being incident to his vocation, although the dangerous condition has resulted from the incompetency or neglect of other employes, officers, or agents of the company. *Dartmouth Spinning Co. v. Achard (Ga.)* 190

7. The measure of risk which a fireman ought to incur by remaining upon a locomotive to assist a sleeping engineer to run a train is only that which his duty and obligations to the company, under all the circumstances, impose upon him. If he subjects himself to any

greater risk and is thereby injured, he cannot recover. *Carroll v. East Tennessee, V. & G. R. Co. (Ga.)* 214

8. Where the fireman on an engine knew for some time before a collision happened that the engineer was falling asleep, the question of his negligence in remaining upon the engine as he did cannot be restricted in point of time to the moment of collision, or immediately previous thereto. *Id.*

9. An employé of a corporation, though obligated in writing as terms of his employment, to "study the rules governing employes, carefully keep posted, and obey orders," is not bound by rules as such, of which he is ignorant and which have never been promulgated to him by the company. *Id.*

10. If a boy twelve years old possesses less than average intelligence, which the master ought to have known, and is sent on an errand requiring haste to a dimly lighted place, between machinery with gearing so arranged that it is likely to catch his clothing and draw him into it and injure him, and there has been nothing in his previous employment to cause him to consider the danger of an accident happening in that way, there is evidence which will justify a jury in finding the master negligent in failing to give him warning, in an action to recover damages for injuries received in that way. *O'Riack v. Merchants Woolen Co. (Mass.)* 733

11. A master is not bound to warn his servant—a boy twelve years of age—of the danger of injury in case he comes in contact with rapidly revolving cog-wheels in plain sight upon machinery into the immediate vicinity of which he is about to be sent, where he has been employed about the machinery for nearly two months, and possesses the intelligence common to boys of his age. *Id.*

12. A master mechanic in a machine shop, having entire control of the shop as well as of all the work and employes therein, and having full authority to employ and discharge workmen, and to select and change machinery,—is not a fellow servant of a machinist employed. *Taylor v. Evansville & T. H. R. Co. (Ind.)* 584

13. Where an agent whose negligence causes an injury is at the time in the master's place, he is not a coemployé, but a representative of the employer, and his breach of duty is the employer's wrong. *Id.*

14. The rule that the employé assumes all the risks incident to the service he enters does not apply where a superior agent representing the master orders the employé to do a designated act, in the performance of which the latter is injured by the superior's negligence. *Id.*

15. Where a shipper, by consent of a railroad company, undertakes, with the help of his own employes alone, to run cars down a grade to a place where they are needed for loading, and while so employed one of such employes is injured by the negligence of his coemployes, the railroad company is not liable to an action for damages on account of such injuries. *Hanna v. Chattanooga & N. R. Co. (Tenn.)* 727

16. Trackmen are not fellow-servants with
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trainmen on the same
Ware & H. Canal

17. To run a train without warning, without is a neglect of duty, for which the men, for which the in case of injuries

NOTE

Service terminated
Assumption of

Duty of servant
assumption of his representative.

Master's duty to
instructions as to duty
intelligence in employment

Fellow-servants;
master's duty; ass

MAXIMS.

1. Cessante rati
lins v. Chartiers V

2. Damnum abs

3. Everyone m
as not to injure the
loring v. Evans (Ind)

4. Expressio ut
State v. Gilman (V

5. Salus populi
Goodwill (W. Va.)

6. Sic utere tuo,
State v. Gilman (V

NOTE

Right to use and
erty.

MECHANICS'

NOTES AND B

MINORS. See

MISTAKE. See

NOTE

Defined; remedie
ception of legal rig
strument.

As ground for re

MORTGAGE.

7. GUARANTEE,

1. The words "party of the first part of railroad between which are included come bonds, do not side of the specifically acquired by
Chicago & E. I. R.

2. Net earnings bonds secured by line of railroads pa earnings are to be amounts necessary terments, etc., from be determined by t

and the bondholders are entitled to have those earnings separately kept and divided. *Spies v. Chicago & E. I. R. Co.* (C. C. S. D. N.Y.) 565

8. Merely passing a resolution that no income has been earned, without an attempt to ascertain the fact, is not conclusive as to the rights of the holders of income bonds secured by a railroad mortgage which makes it the duty of the board of directors to ascertain, fix, and declare the amount of net earnings, and provides that their resolve shall be in the nature of a final and conclusive award on the question as to what, if any, net earnings have been made. *Id.*

4. The condition in income bonds and a mortgage on a railroad securing them, that no right of action shall exist in favor of the holders until the board of directors shall have adjudged and awarded an ascertained amount as net earnings, does not preclude the bondholders from a remedy whenever the directors improperly neglect or refuse to take the necessary action. *Id.*

5. A bona fide purchaser, with a stipulation for a good and sufficient title, of a portion of lands subject to a vendor's lien, is entitled to have the remaining portions of the land first sold to satisfy the lien, whether the same have been subsequently sold or devised, if the subsequent alienees have notice, actual or constructive, of the antecedent conveyance. *Aderholdt v. Henry* (Ala.) 451

6. When a vendor sells part of a tract subject to a mortgage which covers the entire tract, the vendor and purchaser stand on the same level, and must contribute in proportion to their several interests. *Id.*

7. A purchaser subject to a vendor's lien has no claim to a preference in respect thereto over the devisees of the person from whom he purchased. *Id.*

8. A purchaser for a valuable consideration of a portion of land subject to a vendor's lien, who after the vendor's death purchases other lands subject thereto, which are specially charged with the payment of his debts, and are sold for that purpose, thereby becomes liable for the purchase money, and, instead of having preference over devisees of other lands, must have his land first sold under the vendor's lien. *Id.*

9. An assignee of a mortgage for collateral security can, as against the mortgagor and those who claim under him, execute a power of sale as fully as if the assignment were absolute. *Holmes v. Turners Falls L. Co.* (Mass.) 283

10. Land may be sold in parcels to separate purchasers at one sale, under a power in a mortgage, if the sale is made in such a manner as to obtain the most money for the land. *Id.*

11. On foreclosure of deeds of trust on land across which a railroad is constructed, a decree should not except the right of way from the sale, where the deeds for the land, and the trust created therein, make no exception thereof, and the record does not show that there is any right of way through the lands. *Hardin v. Iowa R. & Constr. Co.* (Iowa) 52

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where the same formalities are required as in case of real-estate mortgages. *Herr v. Denver Mill. & Min. Co.* (Colo.) 641

18. One who pays for the maker a note secured by a chattel mortgage, and receives a new note and mortgage therefor, cannot claim as assignee of the former mortgage when his own proves defective, if the original intention was to cancel the former note and mortgage. *Id.*

14. Delivery of chattels to a mortgagee cures all defects in the mortgage. *Garner v. Wright* (Ark.) 715

15. A mortgagee of chattels who has them in possession does not lose his security by lending them to the mortgagor, although the mortgage is not filed or recorded. *Id.*

NOTES AND BRIEFS.

By corporation; of railroad incomes, rents and earnings; rights of bondholders. 565

Remedies of mortgagee; right against vendee who has assumed mortgage; release of grantee by mortgagor. 610

Of chattels; what constitutes; title in mortgagee; delivery and acceptance; sale on condition. 641

Construed to cover property existing at time of execution. 566

Equitable assignment. 62

Of goods; seizure of goods under execution; assignment of claim to damages. 378

Chattel; validity of; enforcement in other State; property in possession of mortgagor. 715

MUNICIPAL CORPORATIONS. See also BONDS, 4, 5; HIGHWAYS, 12; LICENSE, 3, 4; RAILROADS, 1; STATUTES, 6-8; VOTERS AND ELECTIONS, 2-4, 5; WATER COMPANIES, 3.

1. The annexation of two or more cities, incorporated towns, or villages to each other, all of which are indebted, and the indebtedness of one or more of which is in excess of the limit allowed by Ill. Const. art. 9, § 12, is not within the prohibition of that section against incurring indebtedness by municipal corporations "in the aggregate exceeding 5 per cent on the value of the taxable property therein." *True v. Davis* (Ill.) 266

2. One contracting for a certain compensation to perform work for a municipal corporation in connection with a public improvement is bound to take notice that the corporation may at any time change the plan of the work or even abandon it altogether; and he cannot recover damages for the refusal of the corporation to complete its improvement, even although the effect of such refusal is to deprive him of the compensation agreed upon. *Schipper v. Aurora* (Ind.) 318

3. If a municipal corporation in making an improvement wholly within its power enters into a contract beyond its authority, but not prohibited by statute or public policy, for the performance of work thereon, it cannot, after work has been done thereunder which inures

to its benefit, refuse to complete the contract without making compensation to the one conferring the benefit, at least for the value of the labor.

4. A city council is authorized to buy and operate the plant and machinery necessary for the production of electric lights for the use of the city, under a provision of an Act that it shall "have power to light the streets," etc., with electric or other form of light. *Rushville Gas Co. v. Rushville* (Ind.)

5. A technical defect in a notice for letting a contract by a municipal corporation, which ordinary judgment and sagacity could hardly guard against, will not prevent a recovery by the contractor after performance of his contract. *Portland Lumbering & Mfg. Co. v. East Portland* (Or.)

6. A municipal corporation is not liable for injuries resulting from negligent acts of one employed by it to enforce an ordinance forbidding the running at large of unmuzzled dogs, committed while in the discharge of the duties of his employment. *Culver v. Streater* (Ill.)

NOTES AND BRIEFS.

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Annexation of territory.	266
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Liability for acts of officers.	270
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Power to authorize agent to execute promissory note.	58
Validity of ordinances.	155
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How far a subject of commerce. 580

NATURALIZATION. See ALIENS.

NATURAL RIGHTS.

NOTES AND BRIEFS.

Right to practice a profession. 119

NEGLIGENCE. See also MASTER AND SERVANT; PLEADING, 5; RAILROADS, 2.

1. A corporation the membership in which is limited to officers and agents of fire insurance companies doing business in a certain city, having power to provide for and assist in the saving of life and property at fires, the funds of which are raised by assessments upon the companies doing business in such city, is a private, and not a public corporation; nor is it a public charity; and it is liable in damages for injuries resulting from the negligence of its servants in driving through the public streets; notwithstanding the facts that the saving of life and property are referred to in its charter in general terms, and that it in fact makes no distinction in its efforts to save property between insured and uninsured. *Newcomb v. Boston Protective Depart.* (Mass.)

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2. The wrong of a juryed passenger on it and known peril, wit for himself, is the pr resulting from his *Cincinnati, I. St. L. (Ind.)*

8. In Iowa the wrongful act of the part of the child latter. *Wymore v.*

4. The right of estate of a child killed by negligence is not affected by the fact that the parents, who are entitled to compensation, contributed to the injury.

5. In an action by a person injured by the negligence of a person of mature age, the negligence of the person injured is no defense. *Winter v. (Mo.)*

6. An action by a person injured by the negligence of a person of mature age, the negligence of the person injured is no defense. *Winter v. (Mo.)*

7. The negligence of a driver of a vehicle cannot be imputed to a passenger with him merely by the fact that he is in the vehicle at the time of the accident through whose negligence the accident occurred. *Pennsylvania R. Co. v. (Pa.)*

8. The consent of a person to ride on a train having entire control over the train is not a defense to an action for injury to the person although the person required to pay fare, and the conductor's authority to require the person to pay fare is not a defense. *M. & S. R. Co. (Mo.)*

9. If one is riding on a train without the consent of the agent in charge, the company owes him a duty to protect him against the rules of the train.

10. One who is on a train without knowledge and consent of the agent in charge of it, cannot be held liable for injury to the person although he has no control over the train in violation of the rules of the company.

11. Where passengers are on a train after dark, it is the duty of the agent in charge to light the stations and the train. *N. A. & O. R. Co. v. (Pa.)*

12. A passenger has no right to rely upon the negligence of the company in the management of its depot is a defense to an action for injury to the person.

13. A carrier of passengers is under a duty to provide and maintain a safe train and must respond in damages for injury to the person without contributory negligence on the part of the injured party.

14. Although a railroad company is not bound to foresee and provide against accident that no one could by the highest degree of practicable care anticipate, yet it is bound to use the highest degree of practicable care to provide against accidents to passengers that may be foreseen and prevented. *Louisville, N. A. & C. R. Co. v. Lucas* (Ind.) 193

15. A railroad company is liable for an injury to a passenger resulting from an unsafe condition of a platform of its depot, notwithstanding the negligence in not repairing the platform, of another company which used it jointly with itself. *Id.*

16. A railroad company which leaves the platform of its depot in an unsafe condition will be held to have contemplated the general nature of any injuries to a passenger, and it is not necessary that precisely such an accident as actually occurred might be anticipated. *Id.*

17. One negligent person cannot escape liability for his negligence because the negligence of another concurred in producing the injury. *Id.*

18. The Illinois statute prescribing signals to be given by railroad companies at highway crossings is applicable to the Illinois Railroad Company, despite the fact that the charter of that company lays down different rules for giving signals. *Illinois C. R. Co. v. Slater* (Ill.) 418

19. Children are required to exercise only that degree of care and caution which persons of like age, capacity, and experience might be reasonably expected to naturally or ordinarily use in the same situation and under the like circumstances, provided that the parents or persons having the control of such children have not been guilty of want of ordinary care in allowing them to be placed in such circumstances. *Id.*

NOTES AND BRIEFS.

See also TRIAL.

Proximate and remote cause of injury; contributory; mere error in judgment in case of danger. 194

Recklessness to supply want of specific intent. 241

Injury of animals; damages. 454

Occasioning injury; effect of slight negligence on the part of a person injured; passenger's arm on window sill. 657

Contributory; suit by infant. 536

Of parent or guardian; imputing to child. 545

Imputed. 143

NEW TRIAL.

1. Newly discovered testimony for the purpose of impeaching a witness who has testified on the trial is insufficient to justify the allowance of a new trial. *State v. Burt* (La.) 79

2. A motion for a new trial continued to a certain term remains in full life until heard or otherwise disposed of, and need not be further continued from one day to another during the term. *Carroll v. East Tennessee, V. & G. R. Co.* (Ga.) 214

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NOTARY.

Women cannot be appointed notaries public by the governor by and with the advice and consent of the council, under the clause of the Massachusetts Constitution providing for the appointment of notaries, in the absence of any statute authorizing such appointment. *Women as Notaries Public* (Mass.) 842

NOTES AND BRIEFS.

Upon ground of newly discovered testimony; when granted. 79

NOTICE. See also GUARANTY, 8; HIGHWAYS, 9.

1. Knowledge of a writing which is in form a lease of real property to a person in possession does not relieve a purchaser from the duty of inquiring as to the possessor's rights. *Brinsor v. Anderson* (Pa.) 205

2. A notice of a claim against property about to be sold at sheriff's sale is sufficient to render the property liable to the claim in the hands of an intending purchaser, if it contains a distinct claim of title to the property and is sufficient to put such purchaser upon inquiry, although it is not explicit and definite as to the nature and character of the claim. *Ferguson v. Rafferty* (Pa.) 33

3. An open and notorious possession under a deed which appears by the records to be from a stranger to the title is sufficient to put a purchaser on inquiry. *Mendocino Bank v. Baker* (Cal.) 833

NOTES AND BRIEFS.

Possession of land as notice of ownership. 81, 833

NOVATION.

An agreement by the payee of a note to release the maker and look for payment to a third person, who had assumed the obligation, is not a valid novation unless made on a valuable consideration. *Pope v. Vajen* (Ind.) 688

NOTES AND BRIEFS.

What constitutes. 688

NUISANCES. See also FIRES; HIGHWAYS, 1; INJUNCTION, 6.

1. To justify a nuisance by legislative authority it must be the natural and probable result of the act authorized, so that it may fairly be said to be covered by the legislation conferring the power; and if the authorized act does not necessarily or naturally create a nuisance, but such result flows from a particular manner of doing the act, the legislative license is no defense. *Pine City v. Munch* (Minn.) 763

2. A milldam which, if a nuisance at all, has become so by the gradual growth of a city around it, will not be abated in equity as a nuisance, where the fact that it is a nuisance has not been established at law. *McClain v. New Castle* (Pa.) 737

NOTES AND BRIEFS.

See also INTOXICATING LIQUORS.

Public; abatement. 763

By injury to well. 280

Maintenance of telegraph poles and wires. 455

Milldam as; right of municipality to abate. 738

Railroad in street; who may maintain action for; measure of damages. 255

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OIL.

NOTES AND BRIEFS.

As part of the soil. 281

OLEOMARGARINE. See **FOOD**, **NOTES AND BRIEFS**.

OPINIONS. See **EVIDENCE**, V

PARDON.

1. A pardon on condition that the prisoner "leave the State within forty-eight hours, never to return," may be lawfully granted by a governor who has authority, under the State Constitution, to "grant pardon on such terms and under such restrictions as he shall think proper." *State v. Barnes* (S. C.) 743

2. On forfeiture of a pardon by breach of the conditions, a convict becomes liable to serve that part which he has not already served of the term of imprisonment for which he was sentenced, although the original term has long since expired. *Id.*

PARENT AND CHILD. See also **HUSBAND AND WIFE**, 29, 30; **INFANTS**, 1.

1. The California statute of 1850 and the statute of 1870 in reference to the adoption of illegitimate children are to be strictly construed; but the provisions of the Code on that subject are to be liberally construed, when applied to acts of the putative father done since the adoption of the Codes. *Re Jessup's Estate* (Cal.) 594

2. In the absence of written acknowledgment attested by competent witnesses, an illegitimate child can be adopted by, and given a right of inheritance in the estate of, the father, only by the father's "publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child." "Public acknowledgment" requires that he should have held the child out to his relatives, friends, acquaintances, and the world as his child. *Id.*

3. Secret and clandestine maintenance of, or contributions to the support of, an illegitimate child kept outside the circle of the father's daily association, never allowed to hear his name, never visited by the father at the place of its abode, never entertained by the father at his own place of abode, the father denying its paternity to his relatives, and concealing it from his business and daily associates,—will not constitute adoption, or establish a right of inheritance in the estate of the father, even though the father may have, in the presence and hearing of the child's nurse, and of a few persons with whom he was brought in contact in connection with providing for the wants of

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the child, spoken of as son."

4. The right to a child, and the obligation it, are reciprocal unless otherwise provided. *Ramsay v. Ramsay*

NOTES

See also **GUARDIAN**

Custody and support of divorce.

Right to custody to relinquish.

PARKS AND S

1. A general dedication of squares implies that the public at large, and not a particular class, be appropriated by of the city in the management of its economic affairs.

2. Building a city square dedicated for which building is to be of city business, with a use foreign to the and the owners of town proprietors which would be affliction, have a remedy use.

3. A plat filed in support of a tract of land to which lots had been writing recorded the squares on the plat and not otherwise, within six years no dissent is necessary,—must be considered, and as cogent proof which the squares were

NOTES

Common right of

PARLIAMENTARY MATTERS AND BRIEFS.

PARTITION. See **MENTS**, 2.

A parol partition owned by tenants in common party takes and retains the portion allotted to it (N. Y.)

NOTES

By parol; effect.

PARTNERSHIP

1. A sale by one firm to the other in summing to pay all the firm and both insolvent or on the whole shortly after

ual property, and as to the equitable rights of the firm creditors such trust deed is fraudulent and void. *Darby v. Gilligan* (W. Va.) 740

2. An assignment, by the surviving partners of an insolvent firm which has been dissolved by the death of one of its members, of the partnership effects for the benefit of the social creditors, is valid, in the absence of any statutory provision to the contrary, although it provides that some creditors shall be paid before others. *Patton v. Leftwich* (Va.) 569

NOTES AND BRIEFS.

Application of property to partnership debts. 740

Rights and liabilities of surviving partner; application of assets; assignment for creditors. 569

Compensation of partner for services. 72

PATENT MEDICINES. See RECIPES.

PAYMENT. See also BONDS, 4.

1. Payment by a third person, accepted by the creditor in satisfaction of the debt, is a defense to a person sued for the purchase price of articles. *Gray v. Herman* (Wis.) 691

2. The application of payments should be made by the law so as to preserve a homestead right of the debtor, where neither party has directed the application of the payments, and a part of the indebtedness, which is an entire unsecured claim, was created before the property constituting the homestead became exempt. *Stuart First Nat. Bank v. Hollingsworth* (Iowa) 63

3. No part of a debt is secured, within the meaning of the law with reference to the application of payments, because of the fact that a part of the debt was created before the homestead of the debtor became exempt. *Id.*

NOTES AND BRIEFS.

By third person; effect of; bond; indorsement upon; effect of. 698

Application of. 92

PLEADING. See also EVIDENCE, 46.

1. An allegation that suits were duly entered in court and are still pending implies that the writs were served on the defendant. *Binney v. Globe Nat. Bank* (Mass.) 879

2. After a declaration has been amended, a motion to dismiss the action raises no question as to the right to amend, but only touching the sufficiency of the declaration as amended. *O'Shields v. Georgia P. R. Co.* (Ga.) 153

3. No relief can be granted under a bill based on fraud, where the charge of fraud is not sustained. *Spies v. Chicago & E. I. R. Co.* (C. C. S. D. N. Y.) 565

4. A bill of particulars need not be ordered in an action of tort, where the case is stated in the declaration with sufficient fullness to apprise the defendant of its character. *Richmond & D. R. Co. v. Payne* (Va.) 849

5. The petition in an action for injury 6 L. R. A.

authority was given by the company to the agent in charge of the train to carry passengers. *Whitehead v. St. Louis, L. M. & S. R. Co.* (Mo.) 409

6. A declaration which sets forth adequately the right of a personal representative to recover for causing the death of a person is sufficient without alleging specifically the rights of the respective distributees. *Howard v. Delaware & H. Canal Co.* (C. C. D. Vt.) 75

7. No averment of special damages is necessary in an action to recover damages for slander consisting of defamatory words spoken of plaintiff with reference to his official position as member of the State Legislature. *Silars v. Collier* (Mass.) 680

8. An averment characterizing as fraudulent a representation by a codefendant in trespass that he was to enter the premises and obtain a shovel is insufficient to raise the question of fraud therein, without averring facts necessary to establish fraud. *Bennett v. McIntire* (Ind.) 736

9. An averment that a series of connected acts, resulting in damage and constituting a tort, was done by several in pursuance of a conspiracy, does not so change the nature of the action that it cannot be maintained against one of the defendants alone, if it is shown that the acts were done by him only. *Boston v. Simmons* (Mass.) 629

10. An indorsement on a bond of the receipt of a certain sum, and an agreement to refrain from demanding anything further for a limited time, does not so change the original contract that it must be noticed in the declaration in an action of debt on the bond. *Carter v. Noland* (Va.) 693

11. The verified plea of *non est factum* is unaffected by other answers containing admissions. *Palmer v. Poor* (Ind.) 469

12. An answer which sets up matter showing that the court has no jurisdiction, although in form an answer in abatement, is not such within the rule that an appeal cannot be taken from a judgment on an answer or plea in abatement. *Allin v. Connecticut River Lumber Co.* (Mass.) 416

13. Whether an answer is in abatement must depend upon the substance, and not the form, of it. *Id.*

14. A general demurrer to a bill as for want of equity will be overruled if there is any equitable ground of relief stated in the bill, even if there are any number of grounds of special demurrer. *Gato v. El Modelo Ogar Mfg. Co.* (Fla.) 832

NOTES AND BRIEFS.

Plea of former adjudication; how made. 399

PLEDGE AND COLLATERAL SECURITY.

1. A mere pledgee of claims acquires no right to a share of them which has previously been equitably assigned. *Fairbanks v. Sar gent* (N. Y.) 475

2. Neither the pledgee nor the pledgor of a claim can compromise with the debtor without the assent of the other; at least where the debtor has notice of the pledge. *Id.*

POOR AND POOR-LAWS.

A person receiving aid as a poor sick person from the officers of the poor in a city or county, in the absence of representations as to his responsibility or physical condition, incurs no liability to repay the amount expended on his or her behalf by such city or county. *Albany v. McNamara* (N. Y.) 212

NOTES AND BRIEFS.

Poor; support of; duty of relatives to repay money expended by town. 212

POSTOFFICE.

1. A postal card on which is written a demand for the payment of a debt, and a threat to sue or place the demand in the hands of a lawyer for suit if the debt is not paid, is not mailable matter. Persons sending such postal cards are liable to indictment under the Act of Congress of Sept. 26, 1888. *United States v. Bayle* (D. C. E. D. Mo.) 742

2. A postal card saying, "Please call and settle account, which is long past due and for which our collector has called several times, and oblige,"—is not of a threatening character, or intended to reflect injuriously upon the person addressed, within the meaning of the Act of Congress as to unmailable matter. *Id.*

PRESUMPTIONS. See EVIDENCE, II.

PRINCIPAL AND AGENT.

1. Showing land to a prospective purchaser is a mere executive or ministerial act which an agent for the sale thereof may employ another to perform. *McKinnon v. Vollmar* (Wis.) 121

2. A conductor who has procured or consented to the attendance of a competent surgeon upon an injured brakeman cannot bind the company by engaging additional surgeons. *Louisville, N. A. & O. R. Co. v. Smith* (Ind.) 320

3. A promissory note saying, "We promise to pay," but naming no maker in the body of it, and having for signature the written words "John Roach, Treasurer," over which is stamped into the paper a large round seal bearing the name of a corporation,—is the note of the corporation, and not the individual obligation of the treasurer. *Miller v. Roach* (Mass.) 71

NOTES AND BRIEFS.

Principal's liability for act of agent; power of agent to appoint subagent. 123

PRINCIPAL AND SURETY.

NOTES AND BRIEFS.

Mortgage by wife for husband's debt. 384

PRIVILEGED COMMUNICATIONS.

See EVIDENCE, NOTES AND BRIEFS; LIBEL AND SLANDER, 2, 3.

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PROPERTY.

BRIEFS.

PROTECTIVE

NEGLIGENCE,

PROXIMATE

NEGLIGENCE,

PUBLIC IMPROVEMENTS.

HIGHWAYS, 6.

1. The exemption of a kind used does not extend to improvements,—such which the premises *Quincy* (Ill.)

2. The levy of a tax for public improvement property for of eminent domain taxing power.

3. Where local which the Legislature an assessment upon are made by a city which is subsequent, it is competent to an Act authorizing cost of such improvement (Pa.)

NOTES

See also ASSESSMENTS for.

PUBLIC LANDS.

NOTES

Surveys, meander

QUORUM.

NOTES

What constitutes.

QUO WARRANTO.

17.

1. Statutory proceedings are not excluded, unless the effect is clearly expressed. *Londoner* (Colo.)

2. Inquiry by petition of office is not art. 7, § 12, directing the trial of election cases cannot be made and his claim to the As to election controversy directed by remedy.

3. An opposing petitioner in *quo warranto* Code Civ. Proc. ch qualified, on the direct act, but his own claim adjudicated in that

NOTES

Use of, in determining

RAILROADS. See also **CONTRACTS**, 15; **EMINENT DOMAIN**, 1; **MASTER AND SERVANT**; **NEGLIGENCE**, 11, 13, 18; **PRINCIPAL AND AGENT**, 2.

1. A city ordinance limiting the speed of trains in only one part of a city where a railroad runs is unreasonable and void, where there is no material difference between the character of such part and of another part of the city through which a competing line runs. *Lake View v. Tate* (Ill.) 268

2. One who might have seen the danger of a reckless attempt by the driver of a vehicle in which he was riding, to cross railroad tracks, and who knew that a train was due about that time, but did not himself look or listen, or warn the driver, or ask to get out, is as guilty of negligence as the driver is, and cannot recover for injuries received in a collision with the engine at the railroad crossing. *Dean v. Pennsylvania R. Co.* (Pa.) 148

NOTES AND BRIEFS.

Grant of exclusive right to; validity; covenant as to use of land; who may enforce. 112

Duty to person exposed to danger on track; recklessness. 241

REAL PROPERTY. See **EASEMENTS**, 8; **LATERAL SUPPORT**.

NOTES AND BRIEFS.

See also **EMBLEMENTS**.

Right to use; *damnum absque injuria*. 578

RECEIVERS.

The possession of a receiver appointed in one jurisdiction, of the personal property of a debtor taken by him under order of court, does not exempt it, when taken into another jurisdiction, from attachment by creditors therein, or give the receiver any right to hold it against the claims of such attaching creditors. *Humphreys v. Hopkins* (Cal.) 792

NOTES AND BRIEFS.

Appointment of; as officers of court; extra-territorial authority; comity. 792

RECIPES.

1. A person has no right to the exclusive use of recipes made by himself for the preparation of medicines, further than to prevent another from obtaining or using them through breach of trust or of contract. He cannot prevent their use by one who comes honestly to a knowledge of them, and the latter may signify to the public that the medicines which he makes are made according to such recipes. *Chadwick v. Corvell* (Mass.) 839

2. One who obtains a conveyance by deed of the recipes for medicines from the administrator of their deceased maker has a right to use them, notwithstanding they had been previously conveyed to a third person; and his deed excepts from its operation rights previously granted. *Id.*

3. The grant of the trade-name and trade-marks pertaining to medicines made according to correct secret recipes, to one whose right to

use the recipes is not exclusive, and who is neither successor to the business of the maker of such recipes nor owner of his manufactory or plant, will confer no right upon the grantee to enjoin the use of such name and marks by other persons having a right to use the recipes. *Id.*

RECORD.

The records of the courts are notice to everyone, and all persons are bound to know the facts disclosed. *Van Bibber v. Reese* (Md.) 332

REFORMATION OF INSTRUMENTS. See **INSURANCE**, 16, 20, **NOTES AND BRIEFS**.

REFERENCE.

1. A reference to an auditor, in a writ of entry, "to examine the claims and vouchers and hear the parties thereon," includes all claims made by the parties, and therefore embraces a disputed question as to division lines. *Holmes v. Turners Falls Lumber Co.* (Mass.) 263

2. Power to refer a cause at issue, under Mass. Pub. Stat. chap. 159, § 51, "whether the form of the action is contract, tort, or replevin," is not restricted to actions of the forms specified, but extends to all civil proceedings at law, including a writ of entry. *Id.*

RELEASE. See also **CONTRACTS**, 4.

A release of the grantee by the grantor, from a covenant in the deed assuming an outstanding mortgage on the premises, cannot prejudice the mortgagee's right to hold the grantee as his debtor; at least where the creditor has already learned of the grantee's promise and has assented to and adopted it. *Gifford v. Corrigan* (N. Y.) 610

NOTES AND BRIEFS.

Parol promise for; validity. 688

RELIGIOUS SOCIETIES.

The incorporation of church agencies—such as a missionary society—is not within the prohibition of the Virginia Constitution against incorporation of a church or religious denomination. *General Assembly Presby. Church v. Guthrie* (Va.) 821

NOTES AND BRIEFS.

Validity of 821

RENT. See **WILLS**, 4.

RENT CHARGE. See **ANNUITIES**, 2.

REPLEVIN.

1. Replevin may be maintained by one co-tenant in common in his own name, without joining his co-tenants, to recover possession of all the logs cut upon lands held in common, under a contract made by him alone with the consent of the life tenant and the passive acquiescence of his co-tenants, for the sale of such logs, by which he reserved a lien thereon for security of the purchase money, against either the purchaser or his assignee with notice; at least where the other co-tenants never inter-

tered with the possession taken under the contract. *Ferguson v. Rafferty* (Pa.) 88

2. The title to land cannot be questioned collaterally in a personal action to recover crops. *Carlisle v. Killebrew* (Ala.) 617

RESUME OF DECISIONS.

Subjects discussed and points decided. 865

SALE. See also **BAILEMENT; CORPORATIONS,** 10, 15.

1. Where the article is uniform in bulk, and the act of separation throws no additional burden on the buyer, a tender of too much, from which the buyer is to take the proper quantity, is a good delivery. *Brownfield v. Johnson* (Pa.) 48

2. A tender of 400 hectolitres of nuts to a purchaser, to be taken from a ship's hold containing 582 hectolitres of uniform quality, where the nuts are shipped as ordered except as to additional quantity, which is consigned to the seller, and the purchaser was to furnish bags,—is a good delivery; especially where it was common to ship small orders of nuts in common bulk in this manner. *Id.*

3. Delivery of personal property, in order to pass title, requires acceptance, and an actual, notorious, and unequivocal change of possession. *Herr v. Denver Mill. & M. Co.* (Colo.) 641

4. If an order be given to a manufacturer or dealer for a specific article of a known and recognized kind and description, and if the defined and described thing be actually supplied, there is no implied warranty that it will answer the purpose for which it is intended to be used; the only implied warranty or condition is that it will conform to the description and be of good workmanship and materials. *Goulds v. Brophy* (Minn.) 392

5. In the sale of goods by words of description which comprehend quality as well as variety, the descriptive words may be trusted by the purchaser as a warranty of both, and though inspection by him before acceptance will exclude from the warranty all patent defects, it will have no influence on those which are latent. *Miller v. Moore* (Ga.) 871

6. Defects not discovered by the inspection actually made, and not discoverable by such as ought to have been made, are properly classed as latent. Hence corn, musty and "blue-eyed," packed in bulk beneath sound corn, is a latent defect in the whole lot as a carload, delivery and acceptance being made without breaking bulk or unloading the car. *Id.*

7. A contract of sale embracing thirty carloads of corn in bulk, to be delivered on board by the carload at the point of destination, a defect of quality in some of the corn accepted and paid for will not justify the buyer in rejecting ten other carloads subsequently tendered according to the contract, neither of the parties electing or intending to rescind or abandon the contract in whole or in part. *Id.*

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Distinguished from contracts to manufacture. 788

Caveat emptor.

• 6 L. R. A.

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1. The equitable justify a court in performance of a warranty estate must have connection with, the ties of the parties *v. Winter* (Minn.)

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STATUTE OF LIMITATIONS. See LIMITATION OF ACTIONS.

STATUTES. See also HIGHWAYS, 15.

1. The title of an Act which is "An Act in Relation to the Lighting of Cities and Towns, and Furnishing the Inhabitants Thereof with Electric Light," etc.,—is sufficient to cover a provision giving a city council power to make contracts for lighting the streets. *Rushville Gas Co. v. Rushville* (Ind.) 815

2. The amendment of an Act entitled "An Act for the Incorporation of Manufacturing Companies," which makes it include mercantile companies, is in violation of the constitutional provision that the object of an Act shall be expressed in its title. *Eaton v. Walker* (Mich.) 102

3. The word "may" will be construed to mean "shall" whenever the rights of the public or third persons depend upon the exercise of the power of performance of the duty to which it refers; and such is its meaning in all cases where the public interests or rights are concerned, or a public duty is imposed upon public officers, and the public or third persons have a claim *de jure* that the power shall be exercised. *People, Brokaw, v. Highway Comrs.* (Ill.) 161

4. A statute providing for the allowance of an attorneys' fee as part of the costs in a certain class of actions applies to actions of that class pending at the time of its passage, and the refusal to allow such fee therein is error. *Farley v. Geisecker* (Iowa) 533

5. A statute changing the policy of the State by transferring the burden of repairing turnpikes acquired by a county, from the board of chosen freeholders of the county to the separate townships, but excepting therefrom any county having a county public-road board, is in violation of N. J. Const. art. 4, § 7, ¶ 11, prohibiting private, local, or special laws regulating the internal affairs of towns or counties. *Lodi Twp. v. State* (N. J.) 56

6. The right to make amendments to existing special charters of municipal corporations, even though local legislation, is reserved by Colo. Const. art. 14, § 14. *People, Barton, v. Londoner* (Colo.) 444

7. An Act creating a board of drainage commissioners with certain corporate powers, for the purpose of promoting the public health and welfare, in the drainage and reclamation of a certain district, although a special Act, is not within the inhibition of Wis. Const. art. 4, § 31, subd. 7, against special or private laws giving corporate powers or franchises except to cities, as it falls within the police power. *State, Baltzell, v. Stewart* (Wis.) 394

8. A statute providing for the incorporation of the inhabitants of any township which is a seaside resort for summer visitors, having 6 L. R. A.

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Retroactive; to provide remedy for equitable claim. 668

Special and local. 395

The word "may" construed. 161

STOCK.

NOTES AND BRIEFS.

Sale of; right to dividends. 426

STOCKYARDS.

1. The business of a stockyard corporation, except in the character of the property which is the subject of bailment, corresponds in many respects with the business of warehousemen. *Delaware, L. & W. R. Co. v. Central Stockyard & Transit Co.* (N. J.) 855

2. The presence in the charter of a stockyard company of a provision authorizing them to make contracts with the several railroad companies having a terminus in Hudson County, for the transportation and delivery of livestock at their yards, shows clearly that the Legislature did not intend that the defendants should be subject to any duty to railroad companies, in that respect, except such as they should voluntarily take upon themselves by contract. *Id.*

STREET RAILWAYS.

1. A passenger on a street car need not tender the exact fare, but must tender a reasonable sum, and the carrier must furnish change to a reasonable amount. *Barrett v. Market Street Cable R. Co.* (Cal.) 336

2. Five dollars is not an unreasonable amount for a passenger on a street car to tender in payment of his fare. *Id.*

3. It is the duty of those in charge of a grip cable car running on the streets of a populous city to be on the lookout, and to take all reasonable measures to avoid injuries to persons who may be on the streets; and this duty is not discharged as a matter of law by ringing the bell and seeing that the track before the car is clear, without looking to the right or the left. *Winter v. Kansas City Cable R. Co.* (Mo.) 536

STREETS. See HIGHWAYS.

SUBROGATION. See also MORTGAGE, 13.

1. A junior mortgagee who has purchased the property on foreclosure of his mortgage is not, on a subsequent sale under the senior mortgage, entitled to be subrogated to the right of holders of liens superior to both mortgages, which have been satisfied from the proceeds of the first sale under the junior mortgage. In purchasing he is subject to the maxim *cautem emptor*. *Love v. Rawlins* (Ga.) 73

2. A person who loans money to pay a mortgage, under agreement for a new mortgage to himself, may be subrogated to the rights of the former mortgagee, where the mortgagor,

instead of executing the mortgage, with intent to defraud the lender, conveys the property to a third person who has full knowledge of the loan and agreement. *Wilton v. Mayberry* (Wis.)

NOTES AND BRIEFS.

Mortgagee paying statutory liens; right to.

To rights of mortgagee.

SUBSCRIPTION. See CONTRACTS, 81.

NOTES AND BRIEFS.

Not enforceable.

SUICIDE.

Suicide is not a crime, under N. Y. Pen. Code, §§ 2, 178, which make it a crime to attempt to commit suicide. *Darrow v. Family Fund Soc.* (N. Y.)

SUMMARY PROCEEDINGS.

Where a statute authorizes a special remedy against parties to a bond or other particular instrument, an instrument of the character specified is necessary to such remedy. *Williams v. State* (Fla.)

TAXES. See also CERTIORARI, 1; HIGHWAYS, 6; LIMITATION OF ACTIONS, 5.

1. In N. Y. Laws 1880, § 8, as amended by N. Y. Laws 1881, chap. 361, providing that every corporation, joint-stock company, or association now and hereafter incorporated or organized under any law of the State shall be subject to and pay a state tax upon its corporate franchise or business, the word "incorporated" is not to be confined to an association brought into being according to the formality of a statute, but as including any combination of individuals upon terms which embody or adopt as rules or regulations the enabling provisions of the statute. *People, Platt, v. Wemple* (N. Y.)

2. The United States Express Company, composed of individuals who signed an agreement that the organization should continue a stated period, the articles describing the association as a "joint-stock company," its capital being divided into shares represented by certificates or scrip made assignable, managed by a board of directors and officers, and having the incidents of corporations in general,—is not a mere private partnership, but has the characteristics of a corporation, and is taxable by the State, under the New York Laws of 1880 for raising taxes for the use of the State upon certain corporations, joint-stock companies, and associations. *Id.*

3. The tax authorized by N. Y. Laws 1880, § 8, as amended by N. Y. Laws 1881, chap. 361, providing that every corporation, joint-stock company, or association organized under any law of the State shall be taxable upon its corporate franchise or business within the State, is not obnoxious to the provision of the Federal Constitution against state interference with commerce, foreign or domestic, as it is confined to capital employed in the State by an entity existing under its laws; and the man-

ner in which its value is determined is at the rate of taxation discretion.

4. The St. Paul not liable to pay, a receipts or gross earnings tax, as percentage on their gross receipts, which constitutes payment of the latter. *State v. (Minn.)*

5. The consolidation of franchises, as railroad companies, provision of the statute, leaves the former subject to that existed before. *Wine, v. Kookuk &*

6. The prohibition against exertion applies to a corporation under the Missouri Act of 1820, which provides in such cases the former company "stock in the new company" shall be subject to taxation, and entitled to the same privileges, as if the place. Such a corporation under that Act, from its dissolution, and the continuance of all the property of a

7. The property used by it in its ordinary business of learning, pursued in such industry, is charged, and which is a "scientific meaning of Mich. A. exempting from tax benevolent, charitable institutions." *Detroit Ho (Mich.)*

8. No appeal lies of equalization of taxes for by statute. *Tol (Tenn.)*

9. "The right witnesses," given by the Tennessee Act of 1887, § 42, does not give any right to it the duty of the of their own selective demands evidence

10. A suit cannot for the collection of taxes in authority, especially when made against corporations, among not included. *Lou (Ky.)*

11. A redemption when a party entitled to the proper office amount to redeem pays it and takes it

12. A valid redemption from a tax sale will not be affected by a mere notice by the official to the redemptioner that there was a mistake in the amount paid, and by his neglect to pay the balance on request. *Id.*

NOTES AND BRIEFS.

See also ASSESSMENTS.

On consolidated corporation.	222
On franchise or business of corporation.	308
Exemption from; local assessments.	531
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Double taxation; what constitutes; validity.	234
Duration of lien; defense of Statute of Limitation; laches.	198
Reassessment.	803
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TELEGRAPH COMPANIES. See also FIRES.

1. Failure to disclose the relationship of the parties to a telegraph company when sending a message stating that a person named is dying, and saying, "Come quick," will not prevent a recovery of damages for suffering on account of the inability of the receiver to be with a dying brother because of delay in delivering the message. *Western U. Teleg. Co. v. Adams (Tex.)* 844

2. The question as to who may maintain a suit for damages for delay in delivering a telegram does not depend upon the payment of the fee, or upon the question whether the sender had been previously constituted an agent for that purpose by the party to whom the despatch is sent, but upon the question, Who was in fact to be served, and who is damaged? *Id.*

3. Ignorance of the relations that may exist between the sender and receiver of a message will not excuse a telegraph company for its neglect, if the sender intended to serve the receiver and he accepted the act. *Id.*

4. A prompt delivery is of the essence of a contract to transmit a telegram, and a failure in that respect is such a breach as will authorize the recovery back of the consideration paid. *Id.*

NOTES AND BRIEFS.

Maintenance of poles and wires; nuisance. 455

TELEPHONE COMPANIES. See FIRES.

TENDER AND PAYMENT INTO COURT. See also SALE, 1, 2; STREET RAILWAYS, 1, 2.

The obligor upon bonds, reserving the right of redemption after a certain time, may, upon electing to redeem, demand, as a condition of payment, the surrender of all coupons in the possession of the holder of the bonds, including those past due and detached, as well as of the bonds themselves; and a tender of the 6 L. R. A.

agent to stop the running of interest, although it is not accepted because of an unwillingness to surrender coupons past due. *Bailey v. Buchanan County (N. Y.)* 562

NOTES AND BRIEFS.

Tender of deed by vendor.

691

TIME.

1. Fractions of a day will not be recognized to defeat the manifest intention of the parties. *Pearce v. Denver (Colo.)* 541

2. A "week of time," within the meaning of the statute prescribing that a week shall be appointed within which a condemned person shall be executed, means a period beginning and ending Saturday night at midnight. *Re Tyson (Colo.)* 473

3. Fixing a week of time, not less than two weeks from the day of sentence, within which execution of a criminal must take place, does not shorten the minimum time which a prior statute fixes at not less than fifteen days. *Id.*

NOTES AND BRIEFS.

Meaning of word "week." 473

Computation of; fraction of a day. 541

TORT. See also ACTION OR SUIT, 3; CONSPIRACY.

Recklessness reaching in degree to an utter disregard of consequences may supply the place of a specific intent, and be sufficient to establish willfulness. *Cincinnati, I. St. L. & C. R. Co. v. Cooper (Ind.)* 241

NOTES AND BRIEFS.

Injury to right imports damage. 553

By several; liability of each; contribution. 629

TRADEMARK. See also DAMAGES, 1; RECIPES, 3.

1. When a man manufactures his goods at a particular place, he may use the name of that place in combination with other words as a trademark to distinguish the origin or ownership of his goods; and no other person will be permitted to use the name of the same place upon goods manufactured by him at another and different place. *Gato v. El Modelo Cigar Mfg. Co. (Fla.)* 833

2. Every manufacturer has the unquestionable right to distinguish the goods that he manufactures and sells, by a peculiar label, symbol, or trademark; and no other person has a right to adopt his label or trademark, or one so like his as to lead the public to suppose that the article to which it is affixed is the manufacturer's. *Id.*

3. A man may acquire the right of a trademark in his own name or in the name of any person, but he cannot acquire the right of a trademark in the use of his own name to the exclusion of the right of another person by the same name, and whose place of business is in the same place. *Id.*

NOTES AND BRIEFS.

- Trademark and tradename. 823
 Assignee of; how far entitled to protection. 840
 What may be protected as; family name; individual name; names of places. 826

TRESPASS. See also ACTION ON JURY, 4.

1. The attempt to seduce and debauch the wife of another man upon the latter's own premises will not sustain an action of trespass by breaking and entering plaintiff's close, in which such attempt was alleged merely by way of aggravation, if the defendant had license to go upon the premises. *Bennett v. Malnfire* (Ind.) 786
2. A person who enters another's premises under an express license, if it was not fraudulently obtained, does not become a trespasser *ab initio* by wrongful acts while upon the premises, although he would become such if he had entered by authority conferred by law. *Id.*

NOTES AND BRIEFS.

- Upon land; action for; how far transitory. 416

TRIAL. See also HIGHWAYS, 10.

1. The right of trial by jury does not extend to cases of contempt. *Cooper v. People, Wyatt* (Colo.) 480
2. A statement of counsel, in the course of argument, to the effect that he has no doubt the court will hold, from the rulings already made and the evidence adduced, that the fact of paternity is established, does not amount to an admission, in the cause, of the fact of paternity, binding upon the parties. *Re Jessup's Estate* (Cal.) 594
3. Where there is a general verdict, and also special findings of fact, it is not proper practice to move to set aside one of the findings of fact as contrary to the evidence, without asking for a new trial of the whole issue, or of that particular question of fact, especially if setting it aside would require a judgment different from what would be required if it were allowed to stand. *Jordan v. St. Paul, M. & M. R. Co.* (Minn.) 573
4. It is a question for the jury whether railings or barriers are necessary to make a highway reasonably safe for travelers. *Molloy v. Walker Twp.* (Mich.) 695
5. Whether an injury to the hand and wrist of a passenger, which were inside the car, from a stick of wood entering through the window, was caused or contributed to by the fact that his elbow slightly projected from the window, is a question for the jury. *Moakler v. Portland & W. V. R. Co.* (Or.) 656
6. Whether an injury on a highway by the sliding of the rear end of a vehicle over an embankment would have occurred if proper railings or barriers had been provided at the place is a question for the jury. *Molloy v. Walker Twp.* (Mich.) 695
7. Whether a particular vehicle is unsuitable and not roadworthy, because unwieldy and unmanageable, is a question for the jury. *Id.* 6 L. R. A.

8. Whether the by a husband of consistent with a home is a question living apart from illy into the house (Pa.)

9. Whether on woman," within § 810, subd. 11, the kind of work law, and not of (Minn.)

10. A case should unless it presents differences being direct where, on undisputed be arrived at is as is properly directed given by the trial (N. Y.)

11. In an action for injury causing instruction that the earnings and until such son is that the jury has no right this case for any kind [naming deceased minority,"—is proper *Co. v. Slater* (Ill.)

12. Refusal to error. *Cincinnati Cooper* (Ind.)

13. Defendant's action to recover personal services, to the jury that the services to be rendered as to be again some evidence of a *Capen* (Mass.)

14. Where the testimony of the where the jury must order to render the with the substantial *date v. State* (Ga.)

NOTE

- Question for judgment.
 General and special

TRUSTS. See

NOTE

- Purchasing trust

USURY.

1. Where usury upon a debt, and unpaid, a court of account between the principal of what interest has been payment. *Reger*
2. A note for money, given bond land, and not as a

ance of money, though it call for interest on that sum in excess of the rate allowed by law, is not usurious. What is thus called "interest" is as much a part of the purchase price of the land as the principal sum, and the rate of interest so called for will be enforced. *Reger v. O'Neal* (W. Va.) 427

VENDOR AND PURCHASER. See also MORTGAGE, 5-8; NOTICE, 3; RELEASE.

A purchaser is affected with notice of any equities which appear upon the title of his vendor. *Kettle River R. Co. v. Eastern R. Co.* (Minn.) 111

NOTES AND BRIEFS.

See also TENDER AND PAYMENT INTO COURT.

Waiver of vendor's lien. 708

VOTERS AND ELECTIONS.

1. An amendment to the Ohio Constitution, submitted by the Legislature under the provisions of § 1, art. 16 of that instrument, requires for its adoption a majority of all the votes cast at the election for senators and representatives at which it is submitted to the electors of the State for their approval or rejection. *State, Cope, v. Foraker* (Ohio) 422

2. The votes of a majority of a quorum are sufficient to carry a measure when a quorum is present, although an equal number who are present refrain from voting. *Bushville Gas Co. v. Bushville* (Ind.) 815

3. The refusal of half the members of a council to vote when all are present will not defeat action when a majority of those necessary for a quorum vote in favor of a measure. *Id.*

4. The declaration of a presiding officer that a resolution is adopted is equivalent to a casting vote in its favor, if the other votes are equally divided. *Id.*

5. Four ballots are not sufficient to elect an officer by an official board when eight members are present, although one blank vote is cast. *Lawrence v. Ingersoll* (Tenn.) 308

6. The majority of those present at a meeting of a select body consisting of a definite number of voters must concur in order to do any valid act. *Id.*

7. A declaration of a presiding officer that a certain person is elected as the result of a ballot, which without his vote was not sufficient to elect for lack of a majority of the members present, is not equivalent to casting his own vote in favor of such person. *Id.*

8. No ratification of an election as declared by the presiding municipal officer to a municipal board, on a vote which in fact did not make an election, can be made except by another ballot, where the board has no power to elect except by ballot. *Id.*

9. The provision of the Rhode Island ballot Act (R. I. Pub. Laws, chap. 781, § 6), which requires ballots to contain the names, etc., of all candidates in nomination for any offices specified in the ballot, is not in conflict with the constitutional requirements that ballots for general L. R. A.

eral officers shall be returned to the secretary of state for safe keeping, while ballots for other officers must be returned to other persons, since the names of candidates for general offices may be printed on ballots distinct from those of local officers, or, if printed on the same ballot, it may be separated into two pieces, and each part returned to the required custodians. *Re Ballot Act* (R. I.) 773

NOTES AND BRIEFS.

Contested elections; manner of determining: *quo warranto.* 444

Vote; when carried; majority; casting vote. 308

Rule for determining when a proposition is carried. 423

WAREHOUSEMEN.

1. The Legislature has power to declare what service warehousemen shall render to the public, and to fix the compensation that may be demanded for such service, but until such power is exercised warehousemen are at liberty to use their warehouses as they please. *Delaware, L. & W. R. Co. v. Central Stockyard Transit Co.* (N. J.) 855

2. A warehouseman cannot have possession of another man's property, with its accompanying duties and responsibilities, forced upon him against his will. *Id.*

NOTES AND BRIEFS.

As bailees. 857

WARRANTS. See LIMITATION OF ACTIONS, 8.

WARRANTY. See SALES, 4.

WATER COMPANIES.

1. An arbitrary fixing of water rates by the board of supervisors, without any exercise of judgment or discretion, is not a compliance with its duty, under Cal. Const. art. 14, § 1, giving it power to fix such rates; and it may be set aside by the courts as a fraud on the rights of the company. *Spring Valley Waterworks v. San Francisco City & County* (Cal.) 756

2. The reasonableness of water rates fixed by the board of supervisors after full and fair investigation cannot be reviewed by courts, unless there was actual fraud in fixing the rates, or they were so palpably and grossly unreasonable as to amount to the same thing. *Id.*

3. The board of supervisors is not a part of the legislative department of the State so as to be entirely independent of any judicial control in the exercise of its duty, under the California Constitution, in fixing water rates. *Id.*

4. Notice to a water company of an intention to fix water rates, by the board of supervisors, is not necessary under the California Constitution. *Id.*

5. The fact that one price is fixed for the consumer who has a metre, and a different price for one who has none, does not make an ordinance fixing water rates uncertain and indefinite. *Id.*

6. A requirement that a water company

shall furnish metres to those who desire to have the water used by them measured is not unreasonable. *Id.*

7. A guaranty, by one furnishing a water supply, of a sufficient supply to run a certain number of hydrants at the same time and throw full streams over the highest buildings, is in the nature of a condition precedent, the performance of which is necessary to enable him to recover the agreed price for the use of the water for any period. *Wiley v. Athol* (Mass.) 343

WATERS AND WATERCOURSES.

See also BOUNDARIES, 2.

1. The distinction between the rights in surface and in subterranean waters is not founded on the fact of their location above or below ground, but on the fact of knowledge, actual or reasonably acquirable, of their existence, location, and course. *Collins v. Chartiers Valley Gas Co.* (Pa.) 280

2. Damages for injuries to wells of clear fresh water by the rising and mixing of salt water from a lower stratum, caused by boring for gas or oil, may be recovered from the party boring, if he knew or ought to have known of the existence of the stratum of clear water, and of the deeper stratum of salt water, and could, at a reasonable expense, have shut off the salt water from the fresh and thus prevented the injury. *Id.*

3. A railroad company which, for the purpose of properly constructing its roadbed, takes earth from one part of its premises and uses it upon the roadbed, thus leaving an excavation or ditch on each side of it for a number of miles through low and wet land, with several culverts from the embankment, in consequence of which considerable quantities of water are carried through the culverts and run over lands of other persons,—is not liable for injuries occasioned by such surface water, although except for such ditch and culverts it would not have been thrown on such land. *Jordan v. St. Paul, M. & M. R. Co.* (Minn.) 573

4. One who has taken water of a stream from the original channel, and has continued to divert and enjoy it beyond the limit of the Statute of Limitations as to real actions, cannot afterwards be permitted to restore it to its original state when it will have the effect of destroying or materially injuring the property through or by which it formerly flowed. *Mathewson v. Hoffman* (Mich.) 349

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Waters; surface.	573
Diversion from stream; prescription.	349
Subterranean streams; diversion of; damages.	281

WILLS. See also ANNUITIES, 1; CORPORATIONS, 12.

1. The impairment of the mind of a testator by age and disease need not amount to lunacy or absolute imbecility in order to make his will invalid. *Campbell v. Campbell* (Ill.) 187

2. The capacity sufficient to comprehend a few details and make a simple will may be insufficient to dispose of a large estate by a will. *L. R. A.*

complicated will run many facts and details.

8. Under a will testator's widow as after certain payment of certain real estate to be conveyed by children when the one year of age, a the real estate. *De.*

4. There is no profits as will consist where a yearly sum of the trust trustee out of the from lands in his trust.

5. The precatory writing is immaterial element of being a take effect after death merely a request, addressed to no specifically to those who control of the property.

6. The first name signature to a will, complete execution.

7. A will in testator which has no signature testator's name appears although it is in sealed envelope, is not Va. Code, § 2514, requires "in such manner as name is intended as in *v. Warwick* (Va.)

NOTES

Holographic.

Capacity to make firmity.

Precatory words trust; sufficiency of

Devise of net income devise of the property

WITNESSES.

1. Witnesses who sees of a testator sign in behalf of the will, unless it is proved with the testator (Ill.)

2. The same principle to the contrary stands as to those of under oath. *Stat.*

3. It is competent the purpose of testator's witness his results of an injury *A. & C. R. Co. v.*

4. A part of the expenses of real estate being a witness to inquire of him only as to the amount

whether they had been paid or not. *Miller v. Moore* (Ga.) 374

5. A witness cannot be asked, even on cross-examination, concerning his knowledge of the conduct, or of particular acts, of a defendant or other person whose character is involved in the issue. *Moulton v. State* (Ala.) 301

6. It is proper to limit the re-cross-examination of a witness who has been examined and fully cross-examined and subsequently recalled
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and re-examined in chief, to the matters testified to by the witness upon such re-examination. *Moellering v. Evans* (Ind.) 449

WOMEN. See NOTARY.

WRIT OF ENTRY.

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Appointment of auditors; evidence. 263

L. R. A. CASES AS AUTHORITIES

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L. R. A. CASES AS AUTH

CASES IN 6 L. R. A.

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Parol evidence to vary written instrument.

Cited in *Baum v. Lynn*, 72 Miss. 939, 30 L. R. A. 443, 18
lease embodied in conveyance as consideration not contradic
referring approvingly to annotation in 6 L. R. A. 33; *Am*
v. Swoope, 16 Pa. Super. Ct. 456, holding evidence of represe
tents, inducing signing of contract by one unable to read
to vary it.

Cited in footnotes to *Brook v. Latimer*, 11 L. R. A. 805,
evidence that note given as receipt for advancement to mak
Collum v. Boughton, 35 L. R. A. 480, which holds parol e
deed of trust of legal estate is security for husband alone
him and others, inadmissible; *Horn v. Hansen*, 22 L. R. A
oral evidence inadmissible to contradict unilateral agreement

Cited in notes (13 L. R. A. 622) on admissibility of par
terms of written instrument; (17 L. R. A. 271, 274) on ad
evidence to vary, add to, or alter written contract; (13 L. R. A
dence as affecting indorsement; (6 L. R. A. 165) on parol evi
tion.

Distinguished in *Russell v. Glass Works*, 3 Lack. Legal Nev
R. 458, holding evidence of preceding negotiations inadmissit
contract.

Criticized in *Newman v. Baker*, 10 App. D. C. 199, holding
agreement that deed should take effect upon subsequent conc

— To identify person named in.

Cited in *Carl v. State*, 125 Ala. 102, 28 So. 505, holding par
ble to identify person as beneficiary in will.

— To supplement deficiencies.

Cited in *Myers v. Taylor*, 107 Tenn. 370, 64 S. W. 719, and
Co. v. Bullen Bridge Co. 29 Or. 561, 46 Pac. 138, holding, wh
contain entire agreement, parol evidence admissible.

Cited in footnote to *Colgate v. Latta*, 26 L. R. A. 321, whic
show order by agent for shipment of goods to have been fi
pressed in instrument.

Cited in note (6 L. R. A. 324) on parol and extrinsic ev
struction.

— **To prove contemporaneous collateral agreement.**

Cited in *Barnett v. Pratt*, 37 Neb. 352, 55 N. W. 1050, holding provable by parol promise to assume debt, on faith of which written agreement was executed; *Hines v. Willcox*, 96 Tenn. 153, 34 L. R. A. 827, 54 Am. St. Rep. 823, 33 S. W. 914, holding landlord's agreement to repair, as inducement to make written lease provable by parol; *Davis v. Reyner*, 12 Montg. Co. L. Rep. 53, holding evidence of contemporaneous parol promise not to enter judgment admissible to vary judgment note; *Smith v. Harvey*, 4 Pa. Super. Ct. 382, 40 W. N. C. 232, holding evidence of contemporaneous parol agreement as to water supply, inducing its execution, admissible to vary lease; *Smith v. Kugler*, 14 Montg. Co. L. Rep. 84, raising, without deciding, how far a written, sealed lease may be modified by contemporaneous parol agreement.

Distinguished in *Continental Title & T. Co. v. Harvey*, 27 Pa. Co. Ct. 584, holding, in absence of fraud or mistake, evidence of contemporaneous oral agreement whereby written release of damages was in certain event to become inoperative, inadmissible.

Nature of proof required.

Cited in *Streator v. Paxton*, 201 Pa. 145, 50 Atl. 926, holding clear, precise, indubitable proof of contemporaneous parol agreement required to vary written instrument; *Yeager v. Cassidy*, 12 Pa. Super. Ct. 235, 16 Lanc. L. Rev. 308, holding evidence of several witnesses as to parol reservation of crop from written agreement of sale properly submitted to jury; *Todd v. Braught*, 6 Pa. Dist. R. 602, holding preponderance of parol evidence necessary to vary written instrument.

Replevin; right to maintain.

Cited in *Ferguson v. Lauterstein*, 160 Pa. 432, 34 W. N. C. 320, 28 Atl. 852, holding lessor may replevin furniture from purchaser under judgment against lessee; *Brown v. Ravenscraft*, 88 Md. 225, 44 Atl. 170, holding one cotenant may maintain replevin if nonjoinder of other not pleaded in abatement.

6 L. R. A. 48, *BROWNFIELD v. JOHNSON*, 128 Pa. 254, 18 Atl. 543.

6 L. R. A. 50, *HINTRAGER v. MAHONY*, 78 Iowa, 537, 43 N. W. 522.

Redemption from tax sale.

Cited in *Bray & C. Land Co. v. Newman*, 92 Wis. 274, 65 N. W. 494, holding land owner paying taxes included in treasurer's statement not affected by sale for taxes negligently omitted.

Cited in notes (9 L. R. A. 768) on redemption from tax sale; (20 L. R. A. 489) on validity of tax sales where nonpayment is due to mistake or negligence of tax officers.

Appeal from executed judgment.

Cited in *Weaver v. Stacy*, 93 Iowa, 688, 62 N. W. 22, holding election to file separate petitions against defendants waives error in striking out for misjoinder; 93 Iowa, 691, 62 N. W. 24, holding payment to redeem from sheriff's sale waives appeal, so far as affecting estate redeemed; *State v. Lambert*, 52 W. Va. 250, 43 S. E. 176, dismissing, after election, writ of error to judgment of mandamus commanding placing of candidate's name on ballot; *Loesche v. Goerd*, 123 Iowa, 57, 98 N. W. 571, holding resistance of mandamus action to compel school town-

ship secretary to certify tax will not prevent imputation of seeking to enjoin its collection.

6 L. R. A. 52, *HARDIN v. IOWA R. & CONSTR. CO.* 78 Iowa Attorneys; disputed verbal stipulation.

Cited in *Council Bluffs Loan & T. Co. v. Jennings*, 81 Iowa, holding disputed verbal agreement to postpone trial not prove adverse party or attorney.

Corporations; directors' meetings.

Cited in *Singer v. Salt Lake Copper Mfg. Co.* 17 Utah, 1773, 53 Pac. 1024, holding meetings of duly constituted board sumptively regular; *Moore v. First Ruthven Circuit M. E. C.* 90 N. W. 492, holding person seeking to show agreement with trustees need not show regularity of meeting.

Corporation's liability for unauthorized acts.

Cited in *Edwards v. Carson Water Co.* 21 Nev. 486, 34 Pac. 104, holding corporation not liable on unauthorized note.

Distinguished in *Gribble v. Columbus Brewing Co.* 100 Cal. 100, holding corporation estopped from questioning president's authority to make provision for attorney's fees.

6 L. R. A. 54, *PORT HURON v. JENKINSON*, 77 Mich. 414, 43 N. W. 923.

Unreasonable or impossible requirements.

Cited in *Benton Harbor v. St. Joseph & B. H. Street R. Co.* 6 L. R. A. 246, 47 Am. St. Rep. 553, 60 N. W. 758, holding city liable to compel insolvent street railway company to pave between General v. Hoffman, 129 Mich. 542, 89 N. W. 348, holding order on lot owner for cost of walk built by city, upon his failure to pay, void.

Expense of local improvements.

Cited in note (28 L. R. A. 499) on charging expense of grading abutting owner.

6 L. R. A. 56, *LODI TWP. v. STATE*, 51 N. J. L. 402, 18 Atl. 104, Constitutional law; class legislation.

Cited in *State, Alexander, Prosecutor, v. Elizabeth*, 56 N. J. L. 529, 28 Atl. 51, holding act regulating race-courses, distinguished as established prior and subsequent to certain date, unconstitutional; *Davidson County*, 104 Tenn. 329, 59 S. W. 1105, holding act providing for county officers, not operating uniformly, unconstitutional; 104 Cal. 647, 38 Pac. 500, holding arbitrary classification of cities applicable to one city unconstitutional; *Wagner v. Milwaukee*, 608, 88 N. W. 577, holding act providing for construction of bridges only to one county, unconstitutional; *Edmonds v. Herbrandts*, 6 L. R. A. 727, 50 N. W. 970, holding act regulating relocation of cepting counties having buildings then worth more than 1000 dollars unconstitutional.

Cited in footnotes to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local.

Cited in note (7 L. R. A. 195) on constitutionality of classification of cities by statute.

Distinguished in *State, Miles, Prosecutor, v. Bergen County*, 52 N. J. L. 304. 19 Atl. 718, holding act excepting roads under county road board not special.

6 L. R. A. 57, *STATE ex rel. STOCKTON v. SOMERS' POINT*, 52 N. J. L. 32. 18 Atl. 694.

Constitutional law; special or class legislation.

Cited in *State, Alexander, Prosecutor, v. Elizabeth*, 56 N. J. L. 80, 23 L. R. A. 529, footnote, p. 525, 28 Atl. 51, holding act distinguishing between race-courses established prior and subsequent to certain date unconstitutional; *State, Bowker, Prosecutrix, v. Wright*, 54 N. J. L. 132, 23 Atl. 116, holding act authorizing laying out of streets on ocean front of cities bordering on ocean, constitutional; *Wagner v. Milwaukee County*, 112 Wis. 608, 88 N. W. 577, holding act providing for construction of viaduct, applicable to one county only, unconstitutional; *Edmonds v. Herbrandson*, 2 N. D. 275, 14 L. R. A. 727, 50 N. W. 970, holding act regulating relocation of county-seats, excepting counties having buildings then worth more than \$35,000, unconstitutional.

Cited in footnotes to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes not applying to all parts of state unconstitutional; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county local; *Sutton v. State*, 33 L. R. A. 589, which holds classification of counties according to previous census, without regard to actual population, void.

Cited in note (7 L. R. A. 195) on constitutionality of classification of cities by statute.

Subject of act must be expressed in title.

Cited in *Cooper v. Springer*, 65 N. J. L. 161, 46 Atl. 589, holding title "Act Requiring Payment of Debts of Certain Illegal Borough Governments" cannot support creation of boroughs.

Effect of act providing for municipal government in places of temporary resort.

Cited in *State, Green, Prosecutor, v. Clarke*, 56 N. J. L. 69, 27 Atl. 924, holding act providing for borough government in places of temporary resort does not repeal prior legislation by implication.

Illegal borough governments.

Cited in *Cooper v. Springer*, 65 N. J. L. 595, 48 Atl. 605, holding legislature may compel payment of debts by illegally organized borough.

6 L. R. A. 58, *HUBBARD v. HUBBARD*, 74 Wis. 650, 43 N. W. 655.

Divorce; adultery of plaintiff as defense.

Followed in *Decker v. Decker*, 95 Ill. App. 655, holding adultery of complainant defense to action for divorce for cruelty and impotency.

Cited in footnote to *Decker v. Decker*, 55 L. R. A. 697, which up adultery of plaintiff suing for divorce for cruelty, in an cross-bill.

6 L. R. A. 59, *BOGIE v. WAUPUN*, 75 Wis. 1, 43 N. W. 667.

Liability for defect in footpath not part of highway.

Cited in footnote to *State ex rel. James v. Kent County*, 33 L. R. A. 11, which denies liability of county commissioner for nonrepair of footpath by public to avoid going around bend in highway.

6 L. R. A. 61, *WILTON v. MAYBERRY*, 75 Wis. 191, 17 Am. N. W. 901.

Equitable subrogation to rights of prior lienor.

Cited in *Stewart v. Stewart*, 90 Wis. 521, 48 Am. St. Rep. 1, holding grantees under void deed discharging mortgage in good faith to rights of mortgagee; *Union Mortg. Bkg. & T. Co. v. Peters*, 13 L. R. A. 833, 18 So. 497, and *Bank of Ipswich v. Brock*, 13 So. 436, holding lender of money on third mortgage to pay first mortgagor's promise to satisfy second, equitable assignee of first; *First Nat. Bk. v. Bierstadt*, 168 Ill. 625, 61 Am. St. Rep. 146, 48 N. E. 161, *Affirmed*, 168 Ill. 625, 61 Am. St. Rep. 146, 48 N. E. 161, *Affirmed*, 168 Ill. 625, 61 Am. St. Rep. 146, 48 N. E. 161, holding person advancing money to pay lien on promise to execute promised new mortgage, equitable assignee of first mortgage; *Cumberland Bldg. & L. Asso. v. Sparks*, 49 C. C. A. 1, holding one loaning money on defective mortgage to discharge mortgage, equitable assignee of first mortgage, subrogated as against subsequent purchaser.

Cited in footnotes to *Dorrah v. Hill*, 32 L. R. A. 631, which holds one loaning money on invalid deed of trust to be subrogated to rights of first mortgagee; *Meeker v. Larson*, 57 L. R. A. 901, holding one furnishing money to discharge mortgage, to be subrogated to rights of first mortgagee; *Campbell v. Foster Home Asso.* 26 L. R. A. 117, which holds one loaning money on defective mortgage to discharge mortgage, equitable assignee of first mortgage, subrogated to rights of first mortgagee; *valid mortgage.*

Cited in note (13 L. R. A. 619) on doctrine of subrogation.

6 L. R. A. 62, *LESLIE v. BONTE*, 130 Ill. 498, 22 N. E. 594.
When judgment a bar.

Cited in *Stanton v. Kenrick*, 135 Ind. 392, 35 N. E. 19, holding that where same parties a bar, because all issues might have been raised in first action.
Merger of cause of action in judgment.

Cited in *Jocelyn v. White*, 201 Ill. 30, 66 N. E. 327, holding judgment on interest coupon cannot be included in amount of foreclosure sale declared on.

6 L. R. A. 65, *UNITED STATES L. INS. CO. v. KIELGAST*, 135 Ind. 392, 35 N. E. 467.

Second appeal in *Gooding v. United States L. Ins. Co.* 46 Ill. 100.

Admissibility of coroner's inquisition.

Cited in *Overtoom v. Chicago & E. I. R. Co.* 80 Ill. App. 522, holding stenographic notes of testimony at coroner's inquest inadmissible in action for death produced by negligence; *Overtoom v. Chicago & E. I. R. Co.* 181 Ill. 329, 54 N. E. 898, holding transcript of stenographer's notes, taken on coroner's inquest, inadmissible in action for negligent killing of intestate; *Chicago City R. Co. v. McLaughlin*, 146 Ill. 361, 34 N. E. 796, holding evidence taken before coroner inadmissible to show that it does not contradict one's own witness; *Pyle v. Pyle*, 158 Ill. 300, 41 N. E. 999, holding verdict of coroner's jury admissible to show suicide of testator; *Supreme Lodge K. of H. v. Fletcher*, 78 Miss. 388, 29 So. 523, holding finding of coroner's inquest admissible on question whether insured was suicide; *Metzradt v. Modern Brotherhood*, 112 Iowa, 526, 84 N. W. 498, holding verdict of coroner's jury admissible, but not conclusive, on question of suicide; *Grand Lodge I. O. M. A. v. Wieting*, 108 Ill. 412, 61 Am. St. Rep. 123, 48 N. E. 59, Affirming 68 Ill. App. 130, holding findings of coroner's inquisition on body of insured admissible; *Supreme Court of Honor v. Barker*, 96 Ill. App. 49, holding instruction to jury relating to coroner's inquest not in proper form; *Lake Shore & M. S. R. Co. v. Taylor*, 46 Ill. App. 509, holding coroner's inquisition, but not depositions taken at inquest, admissible in action for negligently causing death; *National Woodenware & Cooperage Co. v. Smith*, 108 Ill. App. 480, holding finding of coroner's inquest that death due to deceased's carelessness admissible in administrator's negligence action; *Fein v. Covenant Mut. Ben. Assn.* 60 Ill. App. 276, holding verdict of coroner's jury admissible in action on life policy.

Cited in note (21 L. R. A. 425) on right to impeach one's own witness.

Distinguished in *Palenzke v. Bruning*, 98 Ill. App. 648, holding coroner's inquest not judicial proceeding so as to protect him from action for mutilating body; *Colquit v. State*, 107 Tenn. 383, 64 S. W. 713, holding verdict of coroner's jury inadmissible in trial for murder; *Knights Templars & M. Life Indemnity Co. v. Crayton*, 209 Ill. 563, 70 N. E. 1066, holding depositions taken at coroner's inquest inadmissible to show cause of insured's death.

Disapproved in effect in *Olwell v. Milwaukee Street R. Co.* 92 Wis. 334, 66 N. W. 362, expressing opinion that record of coroner's inquest on body of child cannot be used in action for negligently causing its death; *Wasey v. Travelers' Ins. Co.* 126 Mich. 127, 85 N. W. 459, holding verdict of coroner's jury not evidence to show insured a suicide; *Cox v. Royal Tribe of Joseph*, 42 Or. 370, 60 L. R. A. 624, footnote, p. 620, 95 Am. St. Rep. 752, 71 Pac. 73, which holds verdict of coroner's jury inadmissible to prove facts found.

6 L. R. A. 69, *LOUISVILLE WATER CO v. COM.* 89 Ky. 244, 12 S. W. 300.

Report of second appeal in 94 Ky. 47, 21 S. W. 246.

Action to collect taxes.

Cited in *State v. Baltimore & O. R. Co.* 41 W. Va. 91, 23 S. E. 677, holding action to recover taxes against railroad not maintainable without statutory authority; *Hanson County v. Gray*, 12 S. D. 125, 76 Am. St. Rep. 591, 80 N. W. 175, holding taxes on personal property can be collected by distress and sale, but not by action; *Central R. & Bridge Co. v. Com.* 106 Ky. 330, 49 S. W. 456, holding state can maintain action to collect franchise taxes under statute.

Cited in footnote to *Marye v. Diggs*, 51 L. R. A. 902, which is in equity of suit for collection of taxes.

Cited in note (60 L. R. A. 855) on taxation of municipal w

6 L. R. A. 71, *MILLER v. ROACH*, 150 Mass. 140, 22 N. E. **What is corporation note.**

Cited in *Reeve v. First Nat. Bank*, 54 N. J. L. 211, 16 L. J. p. 143, 33 Am. St. Rep. 675, 23 Atl. 853, holding note signed by its president, corporation paper; *Gleason v. Sar Co.* 93 Me. 548, 74 Am. St. Rep. 370, 45 Atl. 825, holding "promise to pay," and signed with name of company and several note of corporation and treasurer.

Cited in note (19 L. R. A. 660) on personal liability of officers for corporation.

Distinguished in *Nunnemacher v. Poss*, 116 Wis. 448, 92 officers personally liable on note stating that corporation signed, "promise to pay," signed with corporate name "by" the

6 L. R. A. 72, *GRAY v. HAMIL*, 82 Ga. 375, 10 S. E. 205.

Compensation for partner's extra services.

Cited in *McAllister v. Payne*, 108 Ga. 519, 34 S. E. 165, holding for extra services cannot be recovered by one partner in absence of agreement; *Miller v. Hale*, 96 Mo. App. 430, 70 S. W. 258, holding partnership agreement, entitled to equal compensation.

Cited in note (9 L. R. A. 424) on compensation of partners

Moral obligation as consideration.

Cited in *C. H. Davis & Co. v. Morgan* (Ga.) 61 L. R. A. 141, 171, 43 S. E. 732, holding moral obligation will not support payment of wages than stipulated in contract of employment for a year.

Cited in note (12 L. R. A. 471) on moral obligation as consideration

6 L. R. A. 73, *LOWE v. RAWLINS*, 83 Ga. 320, 10 S. E. 204.

Right of subrogation.

Cited in footnotes to *Dorrah v. Hill*, 32 L. R. A. 631, which is one loaning money on invalid deed of trust, to be subrogated to mortgage paid off with money loaned; *Campbell v. Foster Home Assoc.* which denies subrogation to prior mortgage paid without contribution out of proceeds of invalid mortgage.

6 L. R. A. 75, *HOWARD v. DELAWARE & H. CANAL CO.* 40

Who are fellow servants.

Cited in *Dixon v. Chicago & A. R. Co.* 109 Mo. 426, 18 L. J. 412, holding quarry laborer and trainmen not fellow servants; & *St. J. R. Co.* 109 Mo. 402, 18 L. R. A. 815, 19 S. W. 1119 (majority holding section hands ballasting track not fellow servants); *Relyea v. Kansas City, Ft. S. & G. R. Co.* 112 Mo. 100, 18 L. J. 480 (dissenting opinion), majority holding brakeman fellow servant.

other train; *Pike v. Chicago & A. R. Co.* 41 Fed. 97, holding bridge watchman not fellow servant with trainmen.

Cited in footnotes to *Baltimore & O. R. Co. v. Andrews*, 17 L. R. A. 190, which holds conductor and engineer fellow servants of brakeman on other train; *Clarke v. Pennsylvania Co.* 17 L. R. A. 811, which holds section boss of one gang and member of another gang fellow servants; *Fisher v. Oregon Short Line & U. N. R. Co.* 16 L. R. A. 519, which holds section foreman and conductor not fellow servants.

Cited in notes (50 L. R. A. 434) on what servants are deemed to be in same common employment apart from statutes, where no questions as to vice principalship arises; (7 L. R. A. 500) on who are fellow servants.

What risks assumed by employee.

Cited in footnotes to *Jacksonville, T. & K. W. R. Co. v. Galvin*, 16 L. R. A. 337, which holds risk from projecting articles assumed by brakeman; *Williamson v. Newport News & M. Valley R. Co.* 12 L. R. A. 297, which holds brakeman assumes risk of bridge known to be too low; *McKee v. Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, which holds risk from wing fences at cattle-guards assumed by brakeman; *Mensch v. Pennsylvania R. Co.* 17 L. R. A. 450, which holds danger from projection of bolt from end of car assumed by brakeman.

Cited in note (12 L. R. A. 342) on assumption by employee of ordinary risk of employment.

Liability for injury to servant.

Cited in footnote to *St. Louis, A. & T. R. Co. v. Triplett*, 11 L. R. A. 773, which holds master's duty to protect repair track not fulfilled by adopting rule, sufficient if faithfully observed by employees; *Wallin v. Eastern R. Co.* 54 L. R. A. 481, which holds failure to provide suitable rules for operation of hand cars used by bridge gangs negligence.

Cited in note (8 L. R. A. 464) on master's liability for injuries caused through negligence of servant.

Measure of damages.

Cited in *Hutchins v. St. Paul, M. & M. R. Co.* 44 Minn. 10, 46 N. W. 79, holding damages recoverable for negligent killing of deceased measured by pecuniary loss; *Lazelle v. Newfane*, 70 Vt. 447, 41 Atl. 511, holding son not entitled to even nominal damages for death of aged and almost helpless mother by defective highway, unless pecuniary loss shown.

Cited in footnote to *San Antonio & A. P. R. Co. v. Long*, 24 L. R. A. 637, which denies right to recover for death by one receiving from estate more than prospective benefit had death not ensued.

Cited in note (17 L. R. A. 72, 76) on measure of damages for death caused by negligence.

Distinguished in *Lake Erie & W. R. Co. v. Mugg*, 132 Ind. 175, 31 N. E. 564, holding damages for loss of support and maintenance suffered by widow and minor children recoverable.

Allegations as to personal representatives.

Criticized and distinguished in *Serensen v. Northern P. R. Co.* 45 Fed. 409, holding complaint should allege as to existence of widow and next of kin in action for negligent killing of intestate.

6 L. R. A. 79, *STATE v. BURT*, 41 La. Ann. 787, 6 So. 631.

Newly discovered evidence.

Cited in *State v. Crenshaw*, 45 La. Ann. 499, 12 So. 628; La. Ann. 370, 8 So. 934; *State v. Chambers*, 43 La. Ann. 1109, v. Maxey, 107 La. 802, 32 So. 206, — denying right to new trial where evidence contradicting or impeaching witnesses at trial.

Cited in note (56 L. R. A. 444) on dying declarations as evidence.

Distinguished in *State v. Washington*, 108 La. Ann. 229, 32 So. 206, holding that new trial where affidavit of witness seeking to impeach his signed also by his attorney.

6 L. R. A. 80, *WREN v. PARKER*, 57 Conn. 529, 14 Am. St. Rep. 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

Cited in *Ward v. Edge*, 100 Ky. 770, 39 S. W. 440, holding on question of taxes competent as tending to show ownership; *Merwin v. Merwin*, 42 Atl. 855, holding rejection of evidence of payments of taxes on portion of land in dispute not error where party had benefit of taxes and in view of charge to jury; *De Foresta v. Gast*, 20 Colo. 100, 34 P. 100, holding one holding under tax deed, and paying all taxes for period, entitled to deed's protection as in good faith.

6 L. R. A. 82, *FISHELL v. MORRIS*, 57 Conn. 547, 18 Atl. 717. **Liens.**

Cited in footnotes to *Sullivan v. Clifton*, 20 L. R. A. 719, where stable keeper's lien subject to prior recorded mortgage; *Hauch v. Hauch*, 61 Ill. 61, which holds agister's lien inferior to chattel mortgage.

Distinguished in *Heckman v. Tammen*, 84 Ill. App. 551, holding that giving laborers and servants preferred claim upon assets given over prior chattel mortgages.

Devestment of lien.

Cited in *Goldsmith Bros. v. Gensenleiter*, 28 Pa. Co. Ct. 400, 100 Pa. 400, 101 Pa. 400, 102 Pa. 400, 103 Pa. 400, 104 Pa. 400, 105 Pa. 400, 106 Pa. 400, 107 Pa. 400, 108 Pa. 400, 109 Pa. 400, 110 Pa. 400, 111 Pa. 400, 112 Pa. 400, 113 Pa. 400, 114 Pa. 400, 115 Pa. 400, 116 Pa. 400, 117 Pa. 400, 118 Pa. 400, 119 Pa. 400, 120 Pa. 400, 121 Pa. 400, 122 Pa. 400, 123 Pa. 400, 124 Pa. 400, 125 Pa. 400, 126 Pa. 400, 127 Pa. 400, 128 Pa. 400, 129 Pa. 400, 130 Pa. 400, 131 Pa. 400, 132 Pa. 400, 133 Pa. 400, 134 Pa. 400, 135 Pa. 400, 136 Pa. 400, 137 Pa. 400, 138 Pa. 400, 139 Pa. 400, 140 Pa. 400, 141 Pa. 400, 142 Pa. 400, 143 Pa. 400, 144 Pa. 400, 145 Pa. 400, 146 Pa. 400, 147 Pa. 400, 148 Pa. 400, 149 Pa. 400, 150 Pa. 400, 151 Pa. 400, 152 Pa. 400, 153 Pa. 400, 154 Pa. 400, 155 Pa. 400, 156 Pa. 400, 157 Pa. 400, 158 Pa. 400, 159 Pa. 400, 160 Pa. 400, 161 Pa. 400, 162 Pa. 400, 163 Pa. 400, 164 Pa. 400, 165 Pa. 400, 166 Pa. 400, 167 Pa. 400, 168 Pa. 400, 169 Pa. 400, 170 Pa. 400, 171 Pa. 400, 172 Pa. 400, 173 Pa. 400, 174 Pa. 400, 175 Pa. 400, 176 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Charitable use.

Cited in *State v. Laramie County*, 8 Wyo. 134, 55 Pac. 451, holding state penitentiary a "charitable institution" within limitation of taxation clause in Constitution.

Cited in notes (12 L. R. A. 415) as to charitable uses and trusts; (13 L. R. A. 218) as to power of municipal corporation to take and administer property in trust for charitable uses.

6 L. R. A. 87, *ST. PAUL F. & M. INS. CO. v. COLEMAN*, 6 Dak. 458, 43 N. W. 693.

Effect on premium note of provision releasing insurer upon nonpayment.

Cited in *Equitable Ins. Co. v. Harvey*, 98 Tenn. 642, 40 S. W. 1092, holding that suspension of liability on insurance policy while premium note over due, no defense to liability on note; *Phenix Ins. Co. v. Rollins*, 44 Neb. 750, 63 N. W. 46, holding insured liable for full amount of premium note for five years' insurance, notwithstanding provision for suspension of policy during default.

Reduction of premium.

Cited in *Joshua Hendy Mach. Works v. American Steam Boiler Ins. Co.* 86 Cal. 252, 21 Am. St. Rep. 33, 24 Pac. 1018, holding statutory provision relating exclusively to return of premium does not authorize or apply to cancelation of policy at mere request of insured.

6 L. R. A. 90, *GARDNER v. STROEVER*, 81 Cal. 148, 22 Pac. 483.

Mandatory injunction.

Cited in *Hagen v. Beth*, 118 Cal. 331, 50 Pac. 425, holding mandatory injunction for removal of trade signs pending action to enjoin use of trade name, erroneous.

Cited in note (20 L. R. A. 162) as to power of equity to grant mandatory injunctions.

Distinguished in *Gardner v. Stroever*, 89 Cal. 30, 26 Pac. 618, granting mandatory injunction against maintaining building obstructing highway, as part of relief.

6 L. R. A. 92, *FIRST NAT. BANK v. HOLLINGSWORTH*, 78 Iowa, 575, 43 N. W. 536.

Homestead, what constitutes.

Cited in *Maguire v. Hanson*, 105 Iowa, 218, 74 N. W. 776, holding that mere intent to erect upon land a house, to be occupied as home at some indefinite time, not sufficient to create "homestead;" *Gill v. Gill*, 69 Ark. 598, 86 Am. St. Rep. 213, 55 L. R. A. 192, footnote p. 191, 65 S. W. 112, holding house subject to homestead exemption where owner repaired and cleaned and was moving household goods into it at death.

Cited in footnote to *Lyons v. Andry*, 55 L. R. A. 724, which holds homestead exemption not lost by nonresidence after house blown down.

Distinguished in *Mann v. Corrington*, 93 Iowa, 112, 57 Am. St. Rep. 256, 61 N. W. 409, holding homestead nature attaches to land secured for home from proceeds of homestead.

What constitutes security.

Cited in *National City Bank v. Torrent*, 130 Mich. 263, 89 service of garnishee process, "security" within meaning of for assignment of unsecured claim.

Application of payments.

Cited in *Pidcock v. Voorhies*, 84 Iowa, 710, 49 N. W. 1038, ment on one open account are to be applied to payment of der of their dates; *Schoonover v. Osborne Bros.* 108 Iowa, 4 holding payments by partnership's successor applicable in or open running account continued unchanged with partner v partner's interest; *Briggs v. Iowa Sav. Loan Asso.* 114 Iowa, holding that where, to secure loan, husband and wife mortga former pledges his stock, and also subsequently pledges such al loan, payments presumed first applicable to homestead debt ples Bldg. & L. Sav. Asso. 15 Tex. Civ. App. 419, 39 S. W. money paid without application being specified, upon debt s brance part void and part valid, first applicable upon latter.

6 L. R. A. 95, *ROBINSON v. CONTINENTAL INS. CO.* 76 W. 647.

Stipulation against liability.

Cited in *Dale v. Continental Ins. Co.* 95 Tenn. 44, 31 S. W recovery on policy defeated for loss during default on premium icy and note provide for lapse of policy upon such default.

Cited in footnote to *Stewart v. Union Mut. L. Ins. Co.* which holds provision against policy taking effect till first effectual, where premium note given, though unpaid.

Waiver.

Cited in footnote to *Kocher v. Supreme Council C. B. L.* which denies power of officers of benefit society to waive ju ments for death benefits.

6 L. R. A. 97, *DETROIT HOME & DAY SCHOOL v. DETRO* 43 N. W. 593.

Exemption from taxation.

Cited in *Academy of Sacred Heart v. Ire*, 51 Neb. 757, 71 N exemption of educational institution from taxation extends garden used to supply its tables directly, or in a few instance Pfeiffer v. Board of Education, 118 Mich. 573, 42 L. R. A. 54 (dissenting opinion), majority holding supplemental reading public schools, from which pupils are excused upon request, no tion for support of teacher of religion.

Cited in footnotes to *Harvard College v. Cambridge*, 48 L. holds exempt from taxation houses occupied by college presid sors, and dormitories and dining halls for students; *New Engl Corp. v. Boston*, 42 L. R. A. 281, which denies exemption from sophical corporation; *Ramsey County v. Macalaster College*, 11 which holds professors' residences on college grounds exempt, land in college tract; *Brown University v. Granger*, 36 L. R.

holds real estate constituting part of endowment of Brown University within exemption of "college estate."

6 L. R. A. 102, *EATON v. WALKER*, 76 Mich. 579, 43 N. W. 638.

Scope of title.

Cited in *Jenking v. Osmun*, 79 Mich. 306, 44 N. W. 787, holding subsequent act revising laws for incorporation of manufacturing and mercantile associations not void, as embracing more than one subject; *Soukup v. Van Dyke*, 109 Mich. 680, 67 N. W. 911, holding act entitled as relative to municipal justices courts, to reduce their number and fix compensation and provide clerk and offices, embraces provision for exclusive jurisdiction in justice's cases between residents.

Distinguished in *Wardle v. Cummings*, 86 Mich. 401, 49 N. W. 212, holding act, title of which provides for incorporation of mutual fire insurance companies, embraces organization of mutual companies to insure in cities and villages only.

Corporations or officers de facto.

Cited in *Lincoln Park Chapter No. 177*, R. A. M. v. Swatek, 105 Ill. App. 609, holding that a corporation regularly organized in conformity with statute, for lawful purpose, is a corporation *de facto*; *Georgia Southern & F. R. Co. v. Mercantile Trust & D. Co.* 94 Ga. 315, 32 L. R. A. 211, 47 Am. St. Rep. 153, 21 S. E. 701, holding corporations under special charters enacted after general statute, at least corporations *de facto*; *American Loan & T. Co. v. Minnesota & N. W. R. Co.* 157 Ill. 652, 42 N. E. 153, holding that, in absence of authorizing statute, company formed by consolidation of domestic with foreign corporation, not *de facto* corporation; *Cedar Rapids Water Co. v. Cedar Rapids*, 118 Iowa. 253, 91 N. W. 1081, holding acceptance of franchise which city was not authorized to grant does not create a color of right not questionable collaterally; *Bergeron v. Hobbs*, 96 Wis. 650, 65 Am. St. Rep. 85, 71 N. W. 1056 (dissenting opinion), majority holding that where filing of certificate is condition precedent to incorporation, organizers are individually liable for society's debts upon failure therein; *Auditor General v. Menominee County*, 89 Mich. 627, 51 N. W. 483 (dissenting opinion) majority holding acquiescence by state senate in acts, as one of its members, of one who had been illegally seated, makes him a *de facto* officer.

(Cited in note (9 L. R. A. 33) as to corporations.

Estoppel to question incorporation.

Cited in *Davis v. Stevens*, 104 Fed. 237, holding validity of corporate existence subject to collateral attack where there is no law under which corporation might exist; *Kalamazoo v. Kalamazoo Heat, Light & P. Co.* 124 Mich. 83, 82 N. W. 811, holding that city granting franchise, under which work has been done and expenditures made, cannot question corporate existence by reason of irregularities in execution and filing of papers; *Lehman v. Knapp*, 48 La. Ann. 1155, 20 So. 674, holding that seller of goods to corporation not authorized to deal as merchant is not estopped from enforcing stockholders' liability as partners.

Partnership liability of stockholders.

Cited in note (17 L. R. A. 550) as to partnership liability of stockholders in case of defective or illegal incorporation.

Distinguished in *Mandeville v. Courtwright*, 126 Fed. 1011, holding stockholders of corporation conducting unauthorized business not liable as partners for torts of its agents.

6 L. R. A. 107, *COLLIER v. COWGER*, 52 Ark. 322, 12 S. W. 702.

Constructive eviction.

Cited in footnotes to *Grove v. Youell*, 33 L. R. A. 297, which holds life tenant evicted from room when denied access by passage through house; *Oakford v. Nixon*, 34 L. R. A. 575, which holds destruction of wall for advertising purposes not eviction.

Damages for breach of warranty.

Cited in *Dillahunt v. Little Rock & Ft. S. R. Co.* 59 Ark. 636, 27 S. W. 1002, holding covenantee entitled, under warranty, to necessary expenditure to extinguish adverse title, but not exceeding amount paid covenantor, with interest; *Smith v. Corege*, 53 Ark. 299, 14 S. W. 93, holding assignor of note warranting collection liable for consideration and costs of assignee's unsuccessful suit thereon; *West Coast Mfg. & Invest. Co. v. West Coast Improv. Co.* 31 Wash. 614, 72 Pac. 455, holding measure of damages for breach of warranty by failure of title to part of land is proportional part of consideration, with interest.

6 L. R. A. 108, *Re DALPAY*, 41 Minn. 532, 16 Am. St. Rep. 729, 43 N. W. 564.

Assignment for creditors; property in another state.

Cited in *Re Harrison*, 46 Minn. 335, 48 N. W. 1132, holding illegal preference or concealment with respect to property in another state defeats insolvent's right to discharge; *Re Kahn*, 55 Minn. 512, 57 N. W. 154, holding agreement in state to give preference by shipping goods to creditor in another state illegal.

(Cited in notes (23 L. R. A. 35) on transfer of property out of state by bankruptcy or insolvency proceedings or assignment for creditors; (17 L. R. A. 84, 85) on supremacy of state or nation over devolution of property.

Insolvency defined.

Cited in *Stone v. Dodge*, 96 Mich. 524, 21 L. R. A. 287, 56 N. W. 75, defining insolvency as inability to meet maturing obligations, in ordinary course of business.

Cited in note (10 L. R. A. 707) on what constitutes insolvency.

6 L. R. A. 111, *KETTLE RIVER R. CO. v. EASTERN R. CO.* 41 Minn. 461, 43 N. W. 469.

Public use justifying taking by eminent domain.

Cited in *Chicago, B. & N. R. Co. v. Porter*, 43 Minn. 530, 46 N. W. 75, holding switch which public have right to use, public use justifying taking land by condemnation; *St. Louis, I. M. & S. R. Co. v. Petty*, 57 Ark. 368, 20 L. R. A. 440, 21 S. W. 884, holding side track for legitimate railroad purposes, though benefiting particular shipper, public use; *Butte, A. & P. R. Co. v. Montana Union R. Co.* 16 Mont. 523. 31 L. R. A. 304, 50 Am. St. Rep. 508, 41 Pac. 232, holding connection of mines with market public use justifying condemnation of lands for railroad; *Ulmer v. Lime Rock R. Co.* 98 Me. 588, 57 Atl. 1001, holding railroad

may condemn land for branch track to single quarry; *Re Split Rock Cable Co.* 58 Hun. 358, 12 N. Y. Supp. 116, holding tramway intended for use of private company, not accessible to public except by permission, not public use; *Board of Health v. Van Hoesen*, 87 Mich. 538, 14 L. R. A. 116, 49 N. W. 894, holding that cemetery corporation, with discretionary power to sell lots to individuals, cannot condemn lands.

Cited in footnotes to *Bridal Veil Lumbering Co. v. Johnson*, 34 L. R. A. 368, which sustains right of railroad built through timbered region for few miles to sawmill, to exercise of eminent domain; *Re Chicago & N. W. R. Co.* 56 L. R. A. 240, which sustains right to condemn land for spur track to reach large ice industry; *Kansas & T. Coal R. Co. v. Northwestern Coal & Min. Co.* 51 L. R. A. 936, which holds railroad company entitled to exercise of eminent domain, though railroad short and built chiefly to transport coal of particular company.

Cited in note (20 L. R. A. 435) on power to condemn right of way for railroad sidings to private establishments.

Covenants relating to land, enforceable against grantees with notice.

Cited in *Jellison v. Halloran*, 44 Minn. 203, 46 N. W. 332, holding one claiming ownership chargeable with notice of recorded mortgage and rights accruing thereunder; *Miller v. Fasler*, 42 Minn. 367, 44 N. W. 256, holding second mortgagee bound by owner's assumption of first mortgage by deed on record; *Lyman v. Suburban R. Co.* 190 Ill. 329, 52 L. R. A. 649, 60 N. E. 515, holding that covenant to maintain depot at certain place in consideration of right of way runs with land.

Cited in footnotes to *Doty v. Chattanooga Union R. Co.* 48 L. R. A. 160, which holds covenant for running certain trains binding on subsequent purchaser of railroad; *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land an agreement for party wall, expressly declared to run with land.

6 L. R. A. 119, *STATE v. VANDERSLUIS*, 42 Minn. 129, 43 N. W. 789.

Equal protection and privileges.

Cited in *State ex rel. Kellogg v. Currens*, 111 Wis. 437, 56 L. R. A. 256, 87 N. W. 561, sustaining act requiring examination of graduate of foreign medical college before licensing; *State v. Bair*, 112 Iowa, 468, 51 L. R. A. 778, 84 N. W. 532, sustaining act limiting practice of medicine to those having diploma, passing examination, or who have practised five years; *State v. Knowles*, 90 Md. 656, 49 L. R. A. 698, 45 Atl. 877, sustaining exemption of graduates of regular college of dentistry from examination for license; *State v. Creditor*, 44 Kan. 567, 21 Am. St. Rep. 306, 24 Pac. 346, sustaining exemption of dentists practising in state from requirement of license; *State v. Beck*, 21 R. I. 295, 45 L. R. A. 271, 43 Atl. 366, holding practitioners of medicine exempted from restrictions as to practice of dentistry.

Cited in footnotes to *Noel v. People*, 52 L. R. A. 287, which holds void, act giving exclusive privilege to sell patent medicines to registered pharmacists; *State v. Bair*, 51 L. R. A. 776, which sustains statute requiring examination before state board of examiners, five years' practice, or certificate from medical school, before practising medicine.

Cited in note (14 L. R. A. 582) on constitutional equality as to privileges, immunities, and protection.

Police power.

Cited in *Ex parte Lucas*, 160 Mo. 232, 61 S. W. 218, sustaining trade of barbers so as to prevent spread of contagious *rel.* *Burroughs v. Webster*, 150 Ind. 817, 41 L. R. A. 217, 50 *ing act* requiring all physicians to obtain new license; 80 Wis. 257, 27 Am. St. Rep. 34, 49 N. W. 818, upholding *macists* to register and pay registration fee.

Reasonableness of regulations.

Cited in *Com. v. Gibson*, 21 Pa. Co. Ct. 238, 7 Pa. Dist. 1 *lation* excepting practising dentists from act regulating *d* *Railroad Commission v. Houston & T. C. R. Co.* 16 Tex. Civ. 526, sustaining rules of railroad commissioners regulating *ton* as reasonable.

6 L. R. A. 121, *McKINNON v. VOLLMAR*, 75 Wis. 82, 17 N. W. 800.

Recovery of purchase price of land.

Cited in *Graham v. Merchant*, 43 Or. 305, 72 Pac. 1088 *money* had and received maintainable against vendor abandoned containing forfeiture clause, who accepted payment after

Effect of false representations.

Cited in *Hart v. Moulton*, 104 Wis. 359, 76 Am. St. Rep. holding purchaser's false statements as to financial ability *sion*, although he intends to pay; *Hoeck v. Bowman*, 42 2 *Rep.* 691, 60 N. W. 389, holding purchaser entitled to re *of sale* of lots the location of which was misrepresented; *Z* *Wis.* 421, 88 N. W. 605, holding rescission authorized where *title* to only part of land pointed out in good faith as his *Co. v. Mihills*, 80 Wis. 561, 50 N. W. 507, holding action for *for false* representation as to quality of lumber sold, though *lent intent* existed.

Cited in footnotes to *Bigham v. Madison*, 47 L. R. A. 24 *rescission* for mutual mistake as to location of boundary *1* *vendor*; *H. W. Williams Transp. Line v. Darius Cole Tran* 939, which denies right to rely on false representations as *boat*, if express warranty as to speed is inserted in contract *53 L. R. A.* 769, which denies deceit of land owner in making *tions* as to quantity, under belief in their truth.

Cited in note (37 L. R. A. 608) on right to rely on representation effect contract, as basis for charge of fraud.

Authority of agent.

Cited in *Gunther v. Ullrich*, 82 Wis. 228, 33 Am. St. Rep. holding owner of land liable for damage resulting from agent's *tions* as to its situation to one exchanging goods for same; *Thomas Clock Co. v. Cass County*, 53 Neb. 770, 74 N. W. *of agent* negotiating for sale of clock to appoint her husband *principal* in receiving payment; *Kampman v. Nicewaner*, 60 Neb. *raising question* as to power to delegate authority from mortgage *of mortgage* debt at foreclosure sale; *Porter v. Beattie*, 88 Wi

sustaining purchaser's right to rely on representations by agent as to quality and location of land, whose falsity is not obviously discoverable.

Cited in footnote to *Milton v. Johnson*, 47 L. R. A. 529, which denies power of subagent to apply proceeds of debt collected, to payment of claim due him from principal agent.

Distinguished in *Williams v. Moore*, 24 Tex. Civ. App. 406, 58 S. W. 953, denying real estate agent's power to employ broker so as to bind principal for commissions on selling to purchaser found by broker; *Hoyer v. Ludington*, 100 Wis. 445, 76 N. W. 348, holding principal not responsible for misrepresentations of agent as to incorporation of company to purchase land for sale of which only he is employed.

Sufficiency of complaint.

Cited in *Thomson v. Elton*, 109 Wis. 596, 85 N. W. 425, holding allegation that money was used for lawful town purposes sufficient in action for money had and received.

6 L. R. A. 125, *STATE v. SCHWEITZER*, 57 Conn. 532, 18 Atl. 787.

Defense to prosecution for nonsupport.

Cited in *People v. Bliskey*, 21 Misc. 434, 47 N. Y. Supp. 974, and *People v. Brady*, 13 Misc. 296, 34 N. Y. Supp. 1118, holding adultery of wife defense to prosecution for nonsupport; *Keller v. Foleron*, 36 Misc. 536, 73 N. Y. Supp. 951, holding adultery of wife no defense to surety on bond of husband to pay weekly toward her support.

Sufficiency of complaint for violation of ordinance.

Cited in *State v. Carpenter*, 60 Conn. 106, 22 Atl. 497, holding allegation that place was kept for playing policy, contrary to ordinance, sufficient.

Cited in footnote to *Haughn v. State*, 59 L. R. A. 789, which holds indictment for bunco steering which follows statutory language insufficient.

Preponderance of evidence.

Cited in *State v. Ballou*, 20 R. I. 613, 40 Atl. 861, holding accused seeking to excuse manslaughter on ground of attack must prove it by preponderance of evidence; *Tucker v. State*, 89 Md. 482, 46 L. R. A. 185, 43 Atl. 778, holding burden of showing justification for shooting one attacking third person is on defendant in action for wrongfully causing death.

6 L. R. A. 128, *PEOPLE v. ANDREWS*, 115 N. Y. 427, 22 N. E. 358.

Evasion of excise laws by clubs.

Followed in *People v. Sinell*, 34 N. Y. S. R. 899, 12 N. Y. Supp. 40, sustaining conviction for illegal sale of liquor, where club was mere pretense to evade excise law.

Explained in *People v. Adelphi Club*, 149 N. Y. 10, 31 L. R. A. 512, footnote p. 510, 52 Am. St. Rep. 700, 43 N. E. 410, holding furnishing of liquors to member of bona fide social club not a sale.

Cited in *People v. Lulhrs*, 7 Misc. 504, 28 N. Y. Supp. 498, holding it misdemeanor for steward of incorporated club without license, to serve liquors for pay to members; *Re Lyman*, 28 App. Div. 130, 50 N. Y. Supp. 977, holding that club, once bona fide, may be changed into establishment to evade law, and thereby forfeit license; *Barden v. Montana Club*, 10 Mont. 335, 11 L. R. A. 595, footnote

p. 593, 24 Am. St. Rep. 27, 25 Pac. 1042, holding bona fide se-
 quors to members and guests at fixed prices without prof-
 it; *People v. Bradley*, 33 N. Y. S. R. 564, 11 N. Y. Supp.
 viction of steward of fake club furnishing liquor to mem-
 State v. Boston Club, 45 La. Ann. 592, 20 L. R. A. 187, fol-
 895, holding incorporated social club must have license, wh-
 license for "sales, gifts, or other disposition;" *Krnavek v. S.*
 Rep. 49, 41 S. W. 612, upholding conviction where sale wa-
 of fake club to member; *Com. v. Tierney*, 1 Pa. Dist. R. 20
 holding sale of liquor above cost by steward of incorporated
 legal.

Cited in footnote to *State v. Easton Social, Literary, &*
 L. R. A. 64, which holds furnishing of liquor to members
 of fixed prices a sale.

Cited in notes (10 L. R. A. 82) on taxation of social clubs
 on sales of liquor by social club.

Distinguished in *State ex rel. Bell v. St. Louis Club*, 125
 A. 580, footnote p. 573, 28 S. W. 604, holding distribution of
 social club to members not a sale within dramshop act.

6 L. R. A. 132. *CLARK v. FOSDICK*, 118 N. Y. 7, 16 Am.
 E. 1111, 23 N. E. 136.

Validity of separation agreements.

Cited in *Buckel v. Suss*, 28 Abb. N. C. 24, 18 N. Y. Supp.
 wife having executed valid separation agreement cannot r-
 enticement; *Lawrence v. Lawrence*, 31 Misc. 649, 64 N. Y. St.
 in equity agreement between husband and wife, already sep-
 nance of children; *Grube v. Grube*, 65 App. Div. 241, 72 N.
 fusing to allow wife, under valid separation agreement, we-
 ing divorce action; *Chamberlain v. Cuming*, 37 Misc. 816, 7
 holding agreement after separation valid, although referri-
futuro; *Duryea v. Bliven*, 122 N. Y. 570, 25 N. E. 908, and
 38 Misc. 460, 77 N. Y. Supp. 1015, holding agreement after
 trustee, valid; *Stebbins v. Morris*, 19 Mont. 120, 47 Pac. 6
 tion must be necessary to validate separation agreement; *For-*
 N. H. 512, 54 L. R. A. 563, footnote p. 554, 48 Atl. 1088, hol-
 aration agreement between husband and wife void; *Carling*
 493, 86 N. Y. Supp. 46, holding agreement, after separation,
 tenance of wife, not contrary to public policy.

Cited in footnotes to *Henderson v. Henderson*, 48 L. R. A.
 unmodifiable, without wife's consent, decree in conformit-
 agreement for payment of stipulated monthly sum for wife's
v. Baum, 53 L. R. A. 650, which holds void, separation agree-
 tion that husband support wife and children, and assign p-
Palmer v. Palmer, 61 L. R. A. 641, which holds void, cor-
 band and wife to secure divorce.

Cited in note (9 L. R. A. 113) on articles of separation be-
 wife.

Distinguished in *Lawrence v. Lawrence*, 32 Misc. 505, 66
 holding agreement to support children, solely between husb-

separated, pending divorce, void; *Poillon v. Poillon*, 49 App. Div. 343, 63 N. Y. Supp. 301, Affirming 29 Misc. 668, 61 N. Y. Supp. 582, holding agreement between husband and wife to separate, void; *Eddie v. Horn*, 42 Misc. 30, 85 N. Y. Supp. 535, holding tripartite agreement for separate maintenance, confirming one made while living together, against public policy.

Effect of divorce on separation agreements.

Cited in *Galusha v. Galusha*, 116 N. Y. 645, 6 L. R. A. 487, 15 Am. St. Rep. 453, 22 N. E. 1114, holding valid separation agreement unaffected by decree of divorce; *Chamberlain v. Cuming*, 29 N. Y. S. R. 675, 8 N. Y. Supp. 851, holding valid separation agreement not rescinded by action for divorce and application for alimony and counsel fees; *Taylor v. Taylor*, 32 Misc. 314, 66 N. Y. Supp. 561, holding unlawful marriage of husband after valid separation agreement does not entitle wife to alimony; *Jones v. Jones*, 1 Colo. App. 31, 27 Pac. 85, holding valid separation agreement unaffected by divorce decree without alimony.

6 L. R. A. 136, *ROLLER v. BEAM*, 86 Va. 512, 10 S. E. 241.

Assignment of policy.

Cited in *Spooner v. Hilbish*, 92 Va. 339, 23 S. E. 751, upholding action by personal representative and creditor of deceased to set aside assignment of policy.

Cited in footnotes to *Steele v. Gatlin*, 59 L. R. A. 129, which holds complete gift not made by verbal assignment of life policy, accompanied with words indicating intent to give, and delivery of, policy; *Opitz v. Karel*, 62 L. R. A. 982, holding insured may make valid gift of proceeds by delivery of policy payable to personal representative; *McQuillan v. Mutual Reserve Fund Life Assn.* 56 L. R. A. 233, which sustains right to provide that assigned policy shall be void as to all above debt due assignee; *Steinback v. Diepenbrock*, 44 L. R. A. 417, which authorizes assignment of policy to one having no insurable interest; *Chamberlain v. Butler*, 54 L. R. A. 338, which sustains right to assign policy on own life to one without insurable interest; *Mutual Reserve Fund Life Assn. v. Hurst*, 20 L. R. A. 761, which holds assignee's insurable interest as creditor not condition of recovery on policy; *American Mut. L. Ins. Co. v. Bertram*, 64 L. R. A. 935, holding innocent assignee of policy taken by person without insurable interest in life of insured may recover premiums paid.

Disapproved in *Farmers & T. Bank v. Johnson*, 118 Iowa, 285, 91 N. W. 1074, holding life insurance policy may be assigned to person without insurable interest.

Insurable interest.

Cited in *Long v. Meriden Britannia Co.* 94 Va. 603, 27 S. E. 499, holding assignment of policy as security valid, though debtor thereafter be released from personal liability; *Crosswell v. Connecticut Indemnity Assn.* 51 S. C. 108, 28 S. E. 200, holding valid policy assigned in good faith to person without insurable interest by beneficiary and insured, with insurer's consent; *Tate v. Commercial Bldg. Assn.* 97 Va. 77, 45 L. R. A. 245, 75 Am. St. Rep. 770, 33 S. E. 382, holding building association has no insurable interest in member not indebted to it.

Cited in footnote to *Adams v. Reed*, 35 L. R. A. 692, which holds woman has insurable interest in life of son-in-law.

Amount recoverable by assignee of policy.

Cited in *New York L. Ins. Co. v. Davis*, 96 Va. 741, 44 L. R. A. 306, 32 S. E. 475, holding assignee of policy to secure debt limited to recovery of in-

debtedness; *Tate v. Commercial Bldg. Asso.* 97 Va. 78, 45 L. St. Rep. 770, 33 S. E. 382, holding association receiving pro policy can retain only amount of premiums paid by it and *Bank v. Loh*, 104 Ga. 452, 44 L. R. A. 381, 31 S. E. 459, and *v. Terry*, 99 Va. 196, 37 S. E. 843, holding creditor's insurance of life limited to amount of debt, premiums paid, and in *Kuhns*, 1 Ind. App. 518, 27 N. E. 980, holding holder of another's life cannot assign same to creditors without insurable *Lapeyre*, 48 La. Ann. 755, 35 L. R. A. 652, 19 So. 821, holding titled to proceeds of policy beyond advances, attorney's fees

6 L. R. A. 140, STOELKER v. THORNTON, 88 Ala. 241, Assignment of insurance policy.

Cited in *Culver v. Guyer*, 129 Ala. 607, 29 So. 779, holding insurance policy holds, as trustee, excess of proceeds over outlay *v. Stikes*, 112 Ala. 588, 20 So. 959, holding guardian cannot child's part" of proceeds of benefit certificate, as promised in consideration of payment of assessments; *Sands v. Ham*, 18 So. 489, holding creditor entitled to proceeds of insurance to secure bona fide debt; *Farmers & T. Bank v. Johnson*, 11 W. 1074, sustaining assignment of life insurance policy without insurable interest.

— Insurer's rules as to transfer of policy.

Cited in *Nye v. Grand Lodge, A. O. U. W.* 9 Ind. App. 154, holding beneficiary certificate assignable to one without interest not used as cloak for wager, and where not obnoxious to sale.

Cited in notes (7 L. R. A. 189) on transfer of mutual (15 L. R. A. 351) on changing designation in benefit certificate prescribed method.

6 L. R. A. 143, DEAN v. PENNSYLVANIA R. CO. 129 Pa. Rep. 733, 18 Atl. 718.

Imputed negligence.

Cited in *Bunting v. Hogsett*, 139 Pa. 375, 12 L. R. A. 27 192, 21 Atl. 31, holding that carrier's negligence cannot be greater so as to defeat recovery from third person for negligence *Fed.* 648, holding negligence of driver of private conveyance one riding with him with right to assume that driver is in care; *Downey v. Philadelphia Traction Co.* 14 Pa. Co. Ct. R. 82, holding that passenger upon street car, injured by street car company and railroad company, may have recovery *Mullen v. Owosso*, 100 Mich. 108, 23 L. R. A. 694, footnote *Rep.* 436, 58 N. W. 663 (dissenting opinion), majority holding driver of private carriage is imputable to woman of age of 14 riding with him; *Lohman v. McManus*, 23 Pa. Co. Ct. 502, holding negligence of driver to be imputed to guest knowing risk presented; *Duval v. Atlantic Coast Line R. Co.* 134 N. A. 727, 46 S. E. 750, holding negligence of driver not imputed to vehicle.

Cited in footnotes to *Union P. R. Co. v. Lapsley*, 16 L. R. A. 800, which holds negligence of carriage owner in driving team not imputable to passenger; *East Tennessee, V. & G. R. Co. v. Markens*, 14 L. R. A. 281, which holds hack driver's negligence in colliding with train not imputable to passenger.

Cited in notes (8 L. R. A. 844) as to imputation of negligence to child; (9 L. R. A. 157) as to imputation of driver's negligence to passenger.

Disapproved in *Matthews v. Delaware, L. & W. R. Co.* 56 N. J. L. 37, 22 L. R. A. 262, 27 Atl. 919, holding that where collision occurs through concurring negligence of street car and railroad companies, passenger may maintain joint action.

Contributory negligence.

Cited in *Snyder v. Penn Twp.* 14 Pa. Super. Ct. 154, holding one riding upon another's wagon, who joins him in testing dangers which she knows exist, guilty of contributory negligence; *Illinois C. R. Co. v. McLeod*, 78 Miss. 342, 52 L. R. A. 956, footnote, p. 954, 84 Am. St. Rep. 630, 29 So. 76, holding one riding with hired team, vehicle, and driver, guilty of contributory negligence in not checking or remonstrating with latter in case of apparent peril from crossing before approaching train; *Miller v. Louisville, N. A. & C. R. Co.* 128 Ind. 101, 25 Am. St. Rep. 416, 27 N. E. 339, holding wife riding with husband, guilty of contributory negligence in failing to exercise ordinary care at railroad crossing known to her to be dangerous.

Cited in footnotes to *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* 30 L. R. A. 684, which holds negligence of one riding with another when injured at railroad crossing a question for jury; *Western & A. R. Co. v. Ferguson*, 54 L. R. A. 802, which holds failure to look when within 30 feet of track does not prevent recovery.

Distinguished in *Carr v. Easton*, 142 Pa. 143, 21 Atl. 822, holding guest in sleigh overturned in turning aside to pass approaching team not guilty of contributory negligence, as matter of law, if danger not patent; *Cahill v. Cincinnati, N. O. & T. P. R. Co.* 92 Ky. 357, 18 S. W. 2, holding that driver's negligence cannot be imputed to guest; *O'Toole v. Pittsburgh & L. E. R. Co.* 158 Pa. 107, 22 L. R. A. 609, 38 Am. St. Rep. 830, 27 Atl. 737, holding crippled passenger on street car approaching railroad crossing, which stopped 75 feet away and again started, under no duty to ascertain safety of crossing and to jump if dangerous; *Baltimore & O. R. Co. v. State*, 79 Md. 344, 47 Am. St. Rep. 415, 29 Atl. 518, holding invited guest of able and competent driver of quiet horse not chargeable with driver's negligence, where himself without blame; *Howe v. Minneapolis, St. P. & S. Ste. M. R. Co.* 62 Minn. 81, 30 L. R. A. 688, 54 Am. St. Rep. 616, 64 N. W. 102, holding negligence of guest riding with driver over whom he had no control, for jury, where injury avoidable by exercise of due care by one in control.

6 L. R. A. 146, *DUBE v. BEAUDRY*, 150 Mass. 448, 15 Am. St. Rep. 228, 23 N. E. 222.

Minor's disaffirmance.

Cited in *Morse v. Ely*, 154 Mass. 459, 26 Am. St. Rep. 263, 28 N. E. 577, and *White v. New Bedford Cotton Waste Corp.* 178 Mass. 24, 59 N. E. 642, holding that minor's right to disaffirm does not depend upon putting the other party in *statu quo*; *Gillis v. Goodwin*, 180 Mass. 140, 91 Am. St. Rep. 265, 61 N. E. 813, holding that minor's contract to purchase bicycle may be disaffirmed without allowing for rent and use, or putting other party in *statu quo*.

Cited in notes (15 L. R. A. 213) as to infant's right to repudiate contract for

services and sue on *quantum meruit*; (26 L. R. A. 181) as to ing consideration in order to disaffirm infants' contracts.

6 L. R. A. 147, *WEEKS v. HOBSON*, 150 Mass. 377, 23 N. E. Cy pres doctrine.

Cited in *Atty. Gen. v. Briggs*, 164 Mass. 568, 42 N. E. 1. quest for support of school in specified district should, on a district, be applied to maintenance, as near as possible, of a story, though it accommodates children from other territory a Gen. 179 Mass. 105, 60 N. E. 391, holding that, upon failure for charitable purpose, they may be sold and income of devisee's general purposes, or, when possible, to fulfillment of plan; *Lackland v. Walker*, 151 Mo. 255, 52 S. W. 414, holding decree sale of lands devised for charitable purpose, when no traction of trust, although declared inalienable; *Tacoma v. T. Wash.* 246, 68 Pac. 723, holding that trustees may sell land although donor intended it to be used instead of sold; *Teele* 168 Mass. 343, 38 L. R. A. 630, 60 Am. St. Rep. 401, 47 N. E. of purpose of bequest for building chapel, as nonsupportable, version to repair neighboring parish church, or for parish or general benefit; *Boston v. Doyle*, 184 Mass. 382, 68 N. E. upon abolition of class of persons designated as managers equity will appoint other managers; *Old Ladies' Home v. Hoff* 89 N. W. 1066, holding orphan asylum, near but not within a titled to bequest to asylum in certain city, if any in existence.

Cited in footnotes to *Crerar v. Williams*, 21 L. R. A. 454 mode for taking effect of charity will be provided if mode fails; *Kelly v. Nichols*, 19 L. R. A. 413, which holds doctrine cable to bequest not made to definite charitable use.

6 L. R. A. 149, *BULLITT v. FARRAR*, 42 Minn. 8, 18 Am. N. W. 566.

Representations without knowledge.

Cited in *Carlton v. Hulett*, 49 Minn. 319, 51 N. W. 1053, false representations fraudulent; *Hamlin v. Abell*, 120 Mo. Snively v. Meixsell, 97 Ill. App. 372; *Knappen v. Freeman* N. W. 533,—holding unqualified affirmation amounts to personal knowledge; *Charles P. Kellogg Co. v. Hohn*, 82 Minn. holding it immaterial whether merchant knew statements as false and fraudulent; *Hadcock v. Osmer*, 153 N. Y. 610, 47 N. E. representations, without knowledge, actionable; *Gerner v. T.* 84 N. W. 596, holding assertion of fact as of personal knowledge, willful falsehood; *Martin v. Eagle Development* Pac. 216, holding representations which evidently did not mi basis for claim of fraud.

Cited in notes (11 L. R. A. 197) on action for deceit and frauds in case of breach of warranty; (35 L. R. A. 431) on express fraud.

Fraudulent intent.

Cited in *Martin v. Eagle Development Co.* 41 Or. 455, 69 Pac. 216, holding false representations to purchaser of property not actionable where he was not misled; *Watson v. Jones*, 41 Fla. 253, 25 So. 678, upholding declaration alleging actual knowledge and constructive knowledge of falsity of statements.

False statements innocently made.

Cited in *Browning v. National Capital Bank*, 13 App. D. C. 17, holding belief in truth of false representation no defense; *Adams v. Reed*, 11 Utah. 504, 40 Pac. 720, and *Vaughn v. Smith*, 34 Or. 57, 55 Pac. 99, rescinding conveyance because of false representations as to title, although innocently made.

6 L. R. A. 152, *O'SHIELDS v. GEORGIA P. R. CO.* 83 Ga. 621, 10 S. E. 268.

Statute of limitations.

Cited in *Brunswick Terminal Co. v. National Bank*, 48 L. R. A. 632, 40 C. C. A. 25, 99 Fed. 638, Reversing 88 Fed. 610, holding, in action in Maryland to enforce liability of stockholder in Georgia corporations, Georgia statute of limitations governs; *Theroux v. Northern P. R. Co.* 12 C. C. A. 53, 27 U. S. App. 508, 64 Fed. 85, holding limitation in statute of state giving right of action governs; *Williams v. St. Louis & S. F. R. Co.* 123 Mo. 583, 27 S. W. 387, and *Munos v. Southern P. Co.* 2 C. C. A. 165, 2 U. S. App. 222, 51 Fed. 190, holding that unless statute giving right of action for tort prescribes limitation, law of forum governs; *Poff v. New England Teleph. & Teleg. Co.* 72 N. H. 166, 55 Atl. 891, holding plaintiff in administrator's action for personal injuries to decedent must show action brought within time limited.

Cited in footnote to *Allen v. Allen*, 16 L. R. A. 647, which holds right to redeem land from mortgage or absolute deed given as security governed by rule in state where land is located, that right is barred if debt is barred.

Cited in note (48 L. R. A. 638) as to when statute of limitations will govern action in another state or country.

6 L. R. A. 155, *ADAMS COUNTY v. QUINCY*, 130 Ill. 566, 22 N. E. 624.

Exemption from taxation or local assessments.

Cited in *Board of Improvement v. School District*, 56 Ark. 360, 16 L. R. A. 421, 35 Am. St. Rep. 108, 19 S. W. 969, holding school property exempt from local assessment; *Chicago, use of Schools, v. Chicago*, 207 Ill. 43, 69 N. E. 580, holding school property outside of section 16 donated by Congress, liable to special assessment, whether occupied for school purposes, vacant, or used as source of revenue; *Franklin County v. Ottawa*, 49 Kan. 757, 33 Am. St. Rep. 396, 31 Pac. 783, holding county taxable for improvement of street in front of courthouse; *Edwards & W. Constr. Co. v. Jasper County*, 117 Iowa, 373, 94 Am. St. Rep. 301, 90 N. W. 1006, holding public square, occupied by courthouse, subject to assessment for paving bounding streets; *Washburn Memorial Orphan Asylum v. State*, 73 Minn. 346, 76 N. W. 204, holding charitable institutions not exempt from special local improvement assessments; *New Orleans v. Warner*, 175 U. S. 140, 44 L. ed. 106, 20 Sup. Ct. Rep. 44, holding local assessments against city of New Orleans for drainage valid; *Yates v. Milwaukee*, 92 Wis. 358, 66 N. W. 248, holding land exempted from taxation not exempted from local assessment; *Atlanta v. First Presby. Church*, 86 Ga. 742, 12 L. R. A. 855, 12 S. E. 252, holding church property not exempt from local assessment.

Cited in notes (12 L. R. A. 852) on exemption of church property from special assessment under exemption from taxes generally; (35 L. R. A. 38) on liability to local assessments for benefits to property exempt from general taxation.

Distinguished in *Re Mt. Vernon*, 147 Ill. 363, 23 L. R. A. 810, 35 N. E. 533, holding property of state exempt from special taxation.

Constitutionality of local assessments.

Cited in *Chicago & A. R. Co. v. Joliet*, 153 Ill. 654, 39 N. E. 1077, and *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 155, 46 N. E. 437, holding special taxation for local improvement, in proportion to frontage, constitutional.

Nature of local assessment.

Cited in *Springer v. Walters*, 139 Ill. 422, 28 N. E. 761, and *Chicago & A. R. Co. v. Joliet*, 153 Ill. 654, 39 N. E. 1077, holding special taxation for local improvements proper exercise of taxing power; *Seanor v. Whatcom County*, 13 Wash. 59, 42 Pac. 532, holding local assessment not a tax within Constitution forbidding legislature to tax municipal corporations for municipal purposes.

Cited in footnotes to *Denver v. Knowles*, 17 L. R. A. 135, which holds local assessments not a "tax;" *Pettebone v. Smith*, 17 L. R. A. 423, which holds sewer and street assessments not within covenant for payment of all taxes by lessee.

Cited in notes (8 L. R. A. 369) on constitutional restriction as to valuation, equality, and uniformity in taxation; (23 L. R. A. 808, 810) on municipal assessment of state property.

Definiteness of ordinance.

Cited in *Culver v. Chicago*, 171 Ill. 402, 49 N. E. 573, and *Hynes v. Chicago*, 175 Ill. 57, 51 N. E. 705, holding ordinance giving nature, character, and description of improvement with reasonable certainty, valid; *Woods v. Chicago*, 135 Ill. 585, 26 N. E. 608, holding ordinance directing paving of certain street except a 16-foot strip in middle sufficiently definite as to width; *Dickey v. Chicago*, 164 Ill. 39, 45 N. E. 537, holding width of street need not be stated, when street is of known and fixed width; *The People ex rel. Kochersperger v. Markley*, 166 Ill. 53, 46 N. E. 742, holding width need not be stated where ordinance provides for paving entire street; *Houston v. Chicago*, 191 Ill. 562, 61 N. E. 396, and *Givins v. Chicago*, 188 Ill. 353, 58 N. E. 912, holding ordinance from which width of paving easily ascertainable valid.

Scope of ordinance.

Cited in *Payne v. South Springfield*, 161 Ill. 290, 44 N. E. 105, holding ordinance providing for main sewer and branches valid; *Haley v. Alton*, 152 Ill. 117, 38 N. E. 750, sustaining ordinance for paving three streets of different widths; *Lewis v. Albertson*, 23 Ind. App. 155, 53 N. E. 1071, holding one resolution may provide for improvement of two streets.

Proper exercise of power to make local improvements.

Cited in *Carlyle v. Clinton County*, 140 Ill. 516, 30 N. E. 782, holding ordinance for levy of special tax for improvement, after completion, void; *Chicago & A. R. Co. v. Joliet*, 153 Ill. 654, 39 N. E. 1077, holding council's determination of benefits from local improvement conclusive.

Construction of words in statute.

Cited in *Langlois v. Cameron*, 201 Ill. 306, 66 N. E. 332, and *Bloomington v.*

Reeves, 177 Ill. 166, 52 N. E. 278, construing "contiguous" to mean "actual or close contact, touching, etc."

Amendment.

Cited in *Gilberts v. Rabe*, 49 Ill. App. 420, holding village board has power to amend record of proceedings to conform to facts.

6 L. R. A. 159, *NOWLIN v. WHIPPLE*, 120 Ind. 596, 22 N. E. 669.

Right by prescription.

Cited in *Dyer v. Eldridge*, 136 Ind. 658, 36 N. E. 522, holding boundary of lands fixed by line fence acquiesced in for twenty years; *Davis v. Cleveland*, C. C. & St. L. R. Co. 140 Ind. 470, 39 N. E. 495, holding easement not acquired by use without claim of right or acquiescence of owner of servient estate; *Cargar v. Feen*, 140 Ind. 578, 39 N. E. 93, holding instruction that right of way could be acquired in twenty years, by sufferance of owner, erroneous; *Pittsburgh. C. C. & St. L. R. Co. v. Crowh Point*, 150 Ind. 552, 50 N. E. 741, holding presumption of dedication after public use for thirty years not affected because landowner also used highway; *Baltimore & O. S. W. R. Co. v. Seymour*, 154 Ind. 22, 55 N. E. 953, holding right of way over railroad property not acquired by use which is neither exclusive nor adverse; *Mitchell v. Bain*, 142 Ind. 607, 42 N. E. 230, holding burden upon owner of land denying prescriptive right by twenty years' enjoyment, to prove that easement over it was under license, indulgence, or special contract; *Terre Haute & I. R. Co. v. Zehner*, 15 Ind. App. 282, 42 N. E. 756, holding easement cannot be acquired without active interference with dominant owner's legal rights.

Cited in footnote to *Flickinger v. Shaw*, 11 L. R. A. 134, which holds vested right of way for ditch acquired by its construction under oral agreement.

Cited in notes (8 L. R. A. 575) on easement and servitude in flowage of water; (8 L. R. A. 617) on what constitutes easement; (10 L. R. A. 484) on right by prescription to use of land of another.

Irrevocable license.

Cited in *Ferguson v. Spencer*, 127 Ind. 68, 25 N. E. 1035, holding action for damages maintainable for digging up drains constructed under license for valuable consideration; *Buck v. Foster*, 147 Ind. 532, 62 Am. St. Rep. 427, 46 N. E. 920, holding executed license cannot be revoked without at least placing licensee *in statu quo*; *Steinke v. Bentley*, 6 Ind. App. 667, 34 N. E. 97, holding that executed agreement to reconstruct ditch created easement appurtenant to land; *Joseph v. Wild*, 146 Ind. 253, 45 N. E. 467, holding executed license to build outside stairway irrevocable.

Cited in footnote to *Pierce v. Cleland*, 7 L. R. A. 752, which holds license to use property irrevocable after money expended.

Cited in notes (10 L. R. A. 487) on effect of executed license; (49 L. R. A. 521) on revocability of license to maintain burden on land after licensee has incurred expense in creating burden.

6 L. R. A. 161, *PEOPLE ex rel. BROKAW v. HIGHWAY COMRS.* 130 Ill. 482, 22 N. E. 596.

Additional remedy.

Cited in *People ex rel. Kocourek v. Chicago*, 193 Ill. 538, 62 N. E. 187, holding existence of another specific legal remedy not a bar to mandamus.

Duty to remove obstructions.

Cited in *Jennings v. Scott*, 87 Ill. App. 461, holding it clear duty of highway commissioners to remove obstructions.

Cited in footnote to *Costello v. State*, 35 L. R. A. 303, which holds permanent appropriation of part of sidewalk for fruit stand indictable nuisance.

Cited in note (39 L. R. A. 661) on municipal power over nuisances affecting highways and waters.

Distinguished in *People ex rel. Dyett v. McMurray*, 27 Colo. 280, 61 Pac. 226, holding abutting owner cannot by mandamus compel city council to remove railway tracks from street.

Construction of words "may" and "shall."

Cited in *Rothschild v. New York L. Ins. Co.* 97 Ill. App. 553, holding words "may" and "shall" should be construed to give expression to legislature's intention; *Doane v. Omaha*, 58 Neb. 817, 80 N. W. 54, construing "may," in ordinance directing service of notice, as "must;" *McLeod v. Scott*, 21 Or. 110, 26 Pac. 1061, construing "may," in statute for issuing liquor licenses, to mean "must."

Cited in notes (10 L. R. A. 499) on construction of "may" and "shall" in statute; (12 L. R. A. 355) on construction of words "may," "shall," and "must;" (21 L. R. A. 581) on discretion in granting liquor licenses implied from statutory construction.

Discretionary powers.

Cited in *People ex rel. Corey v. Highway Comrs.* 158 Ill. 208, 41 N. E. 1105, holding discretion of highway commissioners, if abused, controllable by mandamus; *Peotone & M. Union Drainage Dist. No. 1 v. Adams*, 163 Ill. 432, 45 N. E. 266, Affirming 61 Ill. App. 442, holding discretion of commissioners as to details of their work not a bar to mandamus; *People ex rel. Corey v. Highway Comrs.* 53 Ill. App. 448, affirming judgment refusing mandamus where duty of public officer was discretionary.

Right to mandamus.

Cited in *Buckley v. Eisendrath*, 58 Ill. App. 366; *Hunt v. Highway Comrs.* 43 Ill. App. 283; *North v. University of Illinois Trustees*, 137 Ill. 302, 27 N. E. 54, —holding mandamus writ should only be issued in clear case; *People ex rel. Akin v. Kipley*, 171 Ill. 91, 41 L. R. A. 791, 49 N. E. 229, holding mandamus will lie to enforce public duty without showing demand and refusal; *State ex rel. Schermerhorn v. McCann*, 107 Wis. 332, 83 N. W. 647, holding mandamus to remove obstructions will not lie, where question whether road is highway is doubtful.

Cited in footnotes to *State ex rel. Fleming v. Crawford*, 14 L. R. A. 253, which grants mandamus to compel Secretary of State to seal appointment of United States Senator; *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which authorizes mandamus to compel canvassing board to disregard illegal return.

Cited in note (11 L. R. A. 763) on mandamus to control executive discretion.

Rules of construction.

Cited in note (10 L. R. A. 841) on rules of construction.

6 L. R. A. 164, *SCHNEIDER v. TURNER*, 130 Ill. 28, 22 N. E. 407.

Acts on gambling in options.

Cited in *Booth v. Illinois*, 184 U. S. 427, 46 L. ed. 625, 22 Sup. Ct. Rep. 425,

sustaining act prohibiting future operations in grain stock commodities; *Booth v. People*, 186 Ill. 48, 50 L. R. A. 763, footnote p. 762, 78 Am. St. Rep. 229. 57 N. E. 798, upholding act against gambling in grain and commodities; *Kruse v. Kennett*, 69 Ill. App. 571, holding penal statute against gambling at cards cannot be extended to gambling options on grain; *Peterson v. Currier*, 62 Ill. App. 169, holding bonds a commodity within statute against gambling contracts.

What are gambling contracts.

Cited in *Richter v. Frank*, 41 Fed. 861, holding contract of sale of stocks with option to purchaser to resell not gambling contract; *Clews v. Jamieson*, 182 U. S. 494, 45 L. ed. 1198, 21 Sup. Ct. Rep. 845. Reversing 38 C. C. A. 481, 96 Fed. 654, upholding sale of stock not owned at time; *Champlin v. Smith*, 164 Pa. 488, 30 Atl. 447, sustaining purchases and sales of grain by broker, though none actually delivered because broker ordered to sell before time for delivery; *Ubben v. Binian*, 78 Ill. App. 334, holding void a contract of sale of stock with option to repurchase within specified time; *Schlee v. Guckenheimer*, 179 Ill. 596, 54 N. E. 302, Reversing 76 Ill. App. 686, upholding offer to sell, to be accepted within certain time; *Kerting v. Hilton*, 51 Ill. App. 439, holding privilege to buy plant, but no promise to buy it, void; *Wolsey v. Neeley*, 62 Ill. App. 149, holding contract giving purchaser option to resell stock at end of three years void; *Bensinger v. Kantzler*, 112 Ill. App. 297, and *Locke v. Towler*, 41 Ill. App. 70, holding mere option to sell stock at future time void; *Corcoran v. Lehigh & F. Coal Co.* 37 Ill. App. 580, holding agreement to deliver coal if required at future time void; *Minnesota Lumber Co. v. Whitebreast Coal Co.* 160 Ill. 98, 31 L. R. A. 534, 43 N. E. 774, Reversing 56 Ill. App. 257, holding privilege of ordering any quantity of coal not in excess of certain amount not illegal option; *Waite v. Frank*, 14 S. D. 631, 86 N. W. 645, holding purchases and sales of grain, without intention to receive or deliver same, void; *Jamieson v. Wallace*, 167 Ill. 396, 59 Am. St. Rep. 302, 47 N. E. 762, holding purchases of stock to be gambling contracts when amounts purchased far in excess of principal's capital; *Samuels v. Oliver*, 130 Ill. 85, 22 N. E. 499, holding that money used by broker to corner grain cannot be recovered; *Pope v. Hanke*, 155 Ill. 621, 28 L. R. A. 570, 40 N. E. 839, holding notes given for purchases of grain, without intending delivery, void; *Watte v. Costello*, 40 Ill. App. 310, holding contract for sale and purchase of grain, with option to deliver and receive or not, void; *Christie Grain & Stock Co. v. Chicago Bd. of Trade*, 61 C. C. A. 17, 125 Fed. 167, holding equity will not protect property right in stock quotations based on transactions not intending actual future delivery.

Distinguished in *Smith v. Preston*, 82 Ill. App. 293, holding agreement to furnish as much of patented article as other party wants, in consideration of exclusive right to manufacture and sell, not option; *Seymour v. Howard*, 51 Ill. App. 386, holding option became contract by not having been withdrawn before acceptance; *Wolf v. National Bank*, 178 Ill. 94, 52 N. E. 896, Reversing 77 Ill. App. 332, upholding sale of bonds under agreement by seller to repurchase at selling price, with interest, at specified time.

Construction of words.

Cited in note (17 L. R. A. 274) on parol evidence to vary, add to, or alter written contract.

Distinguished in *Bryden v. Northrup*, 58 Ill. App. 235, holding injunction will lie for use as dramshop of premises demised for "studio;" *Gibbs v. People's Nat.*

Bank, 198 Ill. 311, 64 N. E. 1060, construing word "net" as expressing its ordinary and usual meaning.

6 L. R. A. 167, CAMPBELL v. CAMPBELL, 130 Ill. 466, 22 N. E. 620.

Second appeal in 138 Ill. 613, 28 N. E. 1080.

Interest of person named as executor.

Cited in Bardell v. Brady, 172 Ill. 423, 50 N. E. 124, holding executor proper party to bill to contest will.

Presumption of competency of witness.

Cited in Boyd v. McConnell, 209 Ill. 398, 70 N. E. 649, holding burden is on contestant of will to show incompetency of attesting witnesses to testify.

Interest necessary to disqualify witness.

Cited in Christiansen v. Dunham Towing & Wrecking Co. 75 Ill. App. 274, holding witness should not be excluded where his interest is doubtful.

Distinguished in Smith v. Smith, 168 Ill. 495, 48 N. E. 96, holding executor, after resignation and withdrawal of answer, competent to testify.

Nature of estate disposed of.

Cited in Greene v. Greene, 145 Ill. 275, 33 N. E. 941, holding that man not able to dispose of large estate may be capable of disposing of small estate.

Sound mind and memory.

Cited in Wagh v. Moan, 200 Ill. 303, 65 N. E. 713, holding word "sane" synonymous with "sound mind and memory" in instruction with reference to testamentary capacity.

Tests of testamentary capacity.

Cited in Petefish v. Becker, 176 Ill. 454, 52 N. E. 71, holding unsoundness of mind to invalidate will must be such that testator did not know actual objects of his bounty; Graybeal v. Gardner, 146 Ill. 345, 34 N. E. 528, holding testator need not retain all his vigor of mind and memory to make valid will; Bevelot v. Lestrade, 153 Ill. 632, 38 N. E. 1056, holding testator has sufficient capacity if, when attention is aroused, his mind acts clearly and with discriminating judgment; McIntosh v. Moore, 22 Tex. Civ. App. 30, 53 S. W. 611, holding testator only required to know state of his property, scope, meaning, and effect of will; Wagh v. Moan, 200 Ill. 303, 65 N. E. 713, and Greene v. Greene, 145 Ill. 274, 33 N. E. 941, holding test to be whether testator understood business in which he was engaged and disposition made of his property; Craig v. Southard, 148 Ill. 45, 35 N. E. 361, holding real question for jury to be whether testator, when making will, understood that particular business; Whipple v. Eddy, 161 Ill. 122, 43 N. E. 789, holding person able to transact ordinary business affairs capable of making a will; Ring v. Lawless, 190 Ill. 529, 60 N. E. 881, holding mental power and vigor to transact ordinary business not necessarily required to make valid will; Entwistle v. Meikle, 180 Ill. 22, 54 N. E. 217, sustaining will where preponderance of evidence showed testator was able to, and did, transact ordinary business.

Capacity to make valid deed.

Cited in Francis v. Wilkinson, 147 Ill. 380, 35 N. E. 150, holding grantor, when making deed, must be able to understand the transaction.

6 L. R. A. 172, *ROLFE v. THE BOSKENNA BAY*, 40 Fed. 91.

Followed without discussion in *Saitta v. The Boskenna Bay*, 40 Fed. 96.

Ship's liability for discharged cargo.

Cited in *Smith v. Britain S. S. Co.* 123 Fed. 177, denying ship's liability for injury to cargo which owner leaves for several days on wharf, where bill of lading provides that liability shall cease on unloading.

Custom as affecting delivery of cargo.

Cited in *Pickering v. Weld*, 159 Mass. 524, 54 N. E. 1080, holding custom may regulate time, place, and manner of delivery of cargo, in absence of express contract.

6 L. R. A. 176, *DAWSON v. POGUE*, 18 Or. 94, 22 Pac. 637, 643.

Partnership, what constitutes.

Cited in *Willis v. Crawford*, 38 Or. 525, 53 L. R. A. 906, 63 Pac. 985, holding two lawyers agreeing to conduct certain litigation, dividing compensation, not special partners.

Error on trial not presumed.

Cited in *Wachsmuth v. Routledge*, 36 Or. 311, 59 Pac. 454, holding error not appearing in record not presumed.

Assignment of chose in action.

Cited in *Gregoire v. Rourke*, 28 Or. 277, 42 Pac. 996, holding consideration unnecessary to support assignment of chose in action.

6 L. R. A. 187, *DOOLITTLE v. DOOLITTLE*, 78 Iowa, 691, 43 N. W. 616.

Grounds for divorce.

Cited in *Day v. Day*, 84 Iowa, 225, 50 N. W. 979, holding failure to provide medical treatment, and permitting members of household to abuse and insult wife, justifies divorce; *Berry v. Berry*, 115 Iowa, 545, 88 N. W. 1075, holding use of violent and abusive language, making wife ill, justifies divorce; *Ryan v. Ryan*, 30 Or. 228, 47 Pac. 101, holding habitual intoxication, with vile and abusive language, ground for divorce; *Ennis v. Ennis*, 92 Iowa, 115, 60 N. W. 228, holding conduct attributable to weakness or disease of mind not inhuman treatment justifying divorce; *Williams v. Williams*, 1 Colo. App. 287, 28 Pac. 726, holding behavior not endangering life, limb, or health not ground for divorce.

Cited in footnotes to *Robinson v. Robinson*, 15 L. R. A. 121, which holds practice of Christian Science by wife ground for divorce by husband; *Barnes v. Barnes*, 16 L. R. A. 660, which holds mental suffering, without affecting bodily health, ground for divorce; *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty in failure to provide suitable dwelling house, clothing, and food; *Tirrell v. Tirrell*, 47 L. R. A. 750, which holds mere payment of allowance to abandoned wife under order of court not prevent divorce for desertion.

Allowance of counsel fees to wife on appeal.

Cited in *Simpson v. Simpson*, 91 Iowa, 242, 59 N. W. 22, holding woman in divorce action entitled, as appellee, to allowance of attorney's fees; *Halsted v. Halsted*, 11 Misc. 593, 32 N. Y. Supp. 1080, holding alimony and counsel fees allowable in court's discretion to wife pending her appeal.

Allowance of gross sum to divorced wife.

Cited in footnote to Hooper v. Hooper, 44 L. R. A. 725, which sustains allowance of gross sum from husband's estate in addition to monthly alimony.

6 L. R. A. 190, DARTMOUTH SPINNING CO. v. ACHARD, 84 Ga. 14, 10 S. E. 449.

Negligence; servant's assumption of risk.

Cited in footnote to Stager v. Troy Laundry Co. 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed as matter of law by servant operating mangle in laundry.

Cited in note (47 L. R. A. 173) on *volenti non fit injuria* as defense to actions by injured servants.

6 L. R. A. 191, WASSON v. LAMB, 120 Ind. 514, 16 Am. St. Rep. 342, 22 N. E. 729.

Nature of bank deposits.

Cited in Union Nat. Bank v. Citizens' Bank, 153 Ind. 52, 54 N. E. 97, holding bank remitting proceeds of note sent it for collection by draft not paid because of drawer's insolvency, mere debtor, and not trustee; Winfield Nat. Bank v. McWilliams, 9 Okla. 508, 60 Pac. 229, holding collecting bank entitled to proceeds of check taken for value from correspondent bank failing before collection.

Cited in note (24 L. R. A. 737) as to entries in bank book as contracts.

6 L. R. A. 193, LOUISVILLE, N. A. & C. R. CO. v. LUCAS, 119 Ind. 583, 21 N. E. 968.

Judgment in favor of Pennsylvania Company reversed, with instructions to render judgment on special verdict against both defendants, in Lucas v. Pennsylvania Co. 120 Ind. 205, 16 Am. St. Rep. 323, 21 N. E. 972.

Carrier's duty to provide suitable platform and approach.

Cited in Toledo, St. L. & K. C. R. Co. v. Wingate, 143 Ind. 131, 37 N. E. 274, holding railway liable to passenger injured in attempt to alight, where platform 26 inches below level of car steps; Indianapolis Street R. Co. v. Robinson, 157 Ind. 420, 61 N. E. 936, holding company liable for injury due to stepping on defective board in platform, where crowd prevented party from seeing it; Pennsylvania Co. v. Marion, 123 Ind. 418, 7 L. R. A. 690, 23 N. E. 973, 18 Am. St. Rep. 330, holding company liable for injury sustained by passenger on alighting from slowly moving train, where accident caused by defect in platform; Louisville, N. A. & C. R. Co. v. Treadway, 142 Ind. 482, 143 Ind. 697, 40 N. E. 807, holding railway liable for injury due to unprotected and unlighted platform, at 2 A. M. to passenger waiting for train; New York, C. & St. L. R. Co. v. Mushrush, 11 Ind. App. 195, 37 N. E. 954, holding railway liable for death of boy stumbling over concealed obstructions on platform and falling under train; Barker v. Ohio River R. Co. 51 W. Va. 428, 90 Am. St. Rep. 808, 41 S. E. 148, holding railway liable to party on platform, injured by stepping backwards into hole left by washed out plank; Illinois C. R. Co. v. Cheek, 152 Ind. 670, 53 N. E. 641, holding railway liable for injury resulting from attempt to board train, where no platform, and steps 3 feet from ground, on assurance of assistance by carrier's servants

Cited in footnotes to Herrman v. Great Northern R. Co. 57 L. R. A. 390, L. R. A. AN.—VOL. I.—48.

which holds railroad company liable for injury to passenger from unsafe condition of depot premises leased of union depot company or its receiver; *Jordan v. New York, N. H. & H. R. Co.* 32 L. R. A. 101, which holds carrier liable for dangerous hole in floor of unlighted toilet room in depot; *Redigan v. Boston & M. R. Co.* 14 L. R. A. 276, which denies recovery to licensee falling through open trap door in station platform; *Sargent v. St. Louis & S. F. R. Co.* 19 L. R. A. 460, which holds carrier not required to have gas or electric lights on station platform.

Cited in notes (7 L. R. A. 111) on duty of railroads to furnish safe stations and platforms for use of passengers; (16 L. R. A. 593) on duty of carrier to maintain safe approaches beyond its own premises; (7 L. R. A. 688) on means of approach and departure; (20 L. R. A. 527) as to whom railroads owe duty of keeping station platforms safe.

Distinguished in *Brooks v. Pittsburgh, C. C. & St. L. R. Co.* 158 Ind. 67, 62 N. E. 694, denying railroad's liability for injury to one alighting from another company's train in switching yard.

Degree of care required of carrier.

Cited in *Kentucky & I. Bridge Co. v. Quinkert*, 2 Ind. App. 248, 28 N. E. 338, holding carrier of passengers bound to carry safely "so far as human skill and foresight can go;" *Hammond, W. & E. C. Electric R. Co. v. Spyzchalski*, 17 Ind. App. 12, 46 N. E. 47, and *Prothero v. Citizens' Street R. Co.* 134 Ind. 439, 33 N. E. 765, holding carrier bound to use "highest degree of care, diligence, vigilance, and skill" in proportion to degree of peril of situation; *Citizens' Street R. Co. v. Merl*, 134 Ind. 611, 33 N. E. 1014, holding passenger entitled to damages for injury sustained while attempting to board transfer car, by reason of wilful collision therewith of approaching car; *Citizens' Street R. Co. v. Merl*, 26 Ind. App. 291, 59 N. E. 491, holding carrier liable where injury caused by collision with trolley poles beside track by reason of starting car before passenger found seat.

Cited in notes (20 L. R. A. 523) on measure of care which carrier must exercise to keep its platforms and approaches safe; (11 L. R. A. 720) on duty of railroad companies to care for safety of passengers.

Proximate cause.

Cited in *Chicago & E. I. R. Co. v. Grimm*, 25 Ind. App. 497, 57 N. E. 640, holding railway liable for injury to passenger in wreck caused by running over horse, where engine negligently placed at back of train and light caboose in front; *Coy v. Indianapolis Gas Co.* 146 Ind. 665, 36 L. R. A. 538, 46 N. E. 17, holding failure of gas company to supply gas during wintertime, according to contract, proximate cause of death of children from relapse in sickness by reason of cold; *Grimes v. Louisville, N. A. & C. R. Co.* 3 Ind. App. 579, 30 N. E. 200, holding railway liable for death of runaway horse killed when attempting to jump between cars unlawfully obstructing street; *Eureka Block Coal Co. v. Wells*, 29 Ind. App. 7, 94 Am. St. Rep. 259, 61 N. E. 236, holding negligence of mine boss in permitting blasting where wall was dangerously thin proximate cause of injury to employee on other side.

Cited in footnotes to *Vallo v. United States Exp. Co.* 14 L. R. A. 743, which holds throwing trunk from delivery wagon in highway proximate cause of traveler falling over another trunk; *Southwestern Teleg. & Teleph. Co. v. Robinson*, 16 L. R. A. 545, which holds telephone company liable for injury by electricity

generated by thunder storm in low-hanging telephone wire; *Schumaker v. St. Paul & D. R. Co.* 12 L. R. A. 257, which holds master's neglect to furnish transportation proximate cause of injury received in walking to find shelter; *McKenna v. Baessler*, 17 L. R. A. 310, which holds original fire proximate cause of destruction of property by back fire; *Chicago, St. P. M. & O. R. Co. v. Elliott*, 20 L. R. A. 582, as to proximate cause of injury to shipper while stepping from stock car to caboose; *Harrison v. Detroit, L. & N. R. Co.* 7 L. R. A. 623, which holds proximate cause of injury to servant question for jury; *Wood v. Pennsylvania R. Co.* 35 L. R. A. 199, which holds failure to give warning of approach of train not proximate cause of injury to one struck by body of other person hit by train; *Western R. Co. v. Mutch*, 21 L. R. A. 316, which holds excessive speed not proximate cause of death of boy attempting to catch on train; *McClain v. Garden Grove*, 12 L. R. A. 482, which holds narrowness of bridge and insufficiency of railings not proximate cause of injury from horse falling from disease or choking.

Cited in notes (13 L. R. A. 733) on proximate and remote cause of damage; (12 L. R. A. 282, 283) on concurrent or co-operating causes of injury; (8 L. R. A. 83) on loss or injury attributed to proximate cause; (13 L. R. A. 193) on responsibility for proximate or direct consequences of negligence; (17 L. R. A. 35) on effect of concurring negligence of third person on liability of one sued for negligently causing injury; (8 L. R. A. 84) on intervening agency breaking causal connection; (8 L. R. A. 82) on liability for injuries produced by negligence.

Distinguished in *Reid v. Evansville & T. H. R. Co.* 10 Ind. App. 396, 53 Am. St. Rep. 391, 35 N. E. 703, holding carrier not liable for loss of goods destroyed by fire not due to its negligence, merely by reason of delay in forwarding car; *Davis v. Williams*, 4 Ind. App. 491, 31 N. E. 204, holding owner of dead dog not liable for injuries caused in accident due to fright of horse at dog's carcass in road, where placed there by third party without owner's knowledge or consent.

Contributory negligence.

Cited in *McDermott v. Chicago & N. W. R. Co.* 82 Wis. 251, 52 N. W. 85, holding question of contributory negligence for jury, where plaintiff attempted to alight upon unstable, badly placed, slippery bench, from train, without assistance and aware of danger; *Illinois C. R. Co. v. Atwell*, 100 Ill. App. 519,—holding employee jumping upon track at order of foreman, to remove hand car from track in front of approaching train, not guilty of contributory negligence; *Ohio & M. R. Co. v. Stansbery*, 132 Ind. 536, 32 N. E. 218, holding passenger not guilty of contributory negligence in failing to avoid dangers of defective platform, where ignorant thereof and having no cause to suspect existence; *Knauss v. Lake Erie & W. R. Co.* 29 Ind. App. 219, 64 N. E. 95, holding complaint showing passenger was injured while putting head out of car window, demurrable.

Cited in footnotes to *Tuttle v. Atlantic City R. Co.* 54 L. R. A. 582, which authorizes recovery for fall while trying to escape from derailed car; *Gannon v. New York, N. H. & H. R. Co.* 43 L. R. A. 833, which holds carrier liable for injury to passenger while impulsively trying to escape from car in which oil lamp caught fire; *St. Louis & S. F. R. Co. v. Murray*, 16 L. R. A. 787, which requires passenger's prudence in attempting to escape to be judged by apparent circumstances.

Cited in notes (11 L. R. A. 131) on test of contributory negligence; (12 L. R. A. 280) on recovery defeated by contributory negligence; (13 L. R. A. 190) on assuming risk to save human life, as contributory negligence; (7 L. R. A. 843) on party placed in dilemma by another's fault.

Imputed negligence.

Cited in *Consolidated Gas Co. v. Getty*, 96 Md. 691, 94 Am. St. Rep. 603. 54 Atl. 660, holding policeman's negligence in searching for gas leak with candle not imputable to owner of house damaged by explosion.

Cited in note (8 L. R. A. 844) on imputing another's negligence to child.

Testimony as to probable results of injury.

Cited in *Pennsylvania Co. v. Frund*, 4 Ind. App. 473, 30 N. E. 1116, holding opinion of medical expert as to probable cause or probable results of injury competent.

Validity of special verdict.

Cited in *Helewig v. Beckner*, 149 Ind. 135, 46 N. E. 644, and *Bower v. Bower*, 146 Ind. 396, 45 N. E. 595, holding omission of statutory formal conclusion does not vitiate special verdict; *Evansville & T. H. R. Co. v. Taft*, 2 Ind. App. 242, 28 N. E. 443, holding verdict not invalidated because after making findings and calling for law applicable to plaintiff it makes further findings before calling for law applicable to defendant.

6 L. R. A. 198, *PERKINS v. DYER*, 71 Md. 421, 18 Atl. 889.

Taxes; new promise removing bar of statute of limitations.

Cited in *Duvall v. Perkins*, 77 Md. 591, 26 Atl. 1085, holding promise by life tenant to pay taxes payable by him removes bar of limitation of proceeding against land; *Georgetown College v. Perkins*, 74 Md. 76, 21 Atl. 551, holding taxpayer's promise to pay taxes removes bar as against judgment creditor claiming surplus proceeds of sale under senior judgment.

6 L. R. A. 200, *MEISWINKEL v. ST. PAUL F. & M. INS. CO.* 75 Wis. 147, 43 N. W. 669.

Reformation of written instruments.

Cited in *Kropp v. Kropp*, 97 Wis. 142, 72 N. W. 382, holding clear and convincing evidence of mistake in notes and mortgage justifies reformation; *Glocke v. Glocke*, 113 Wis. 308, 57 L. R. A. 460, 89 N. W. 118, holding clear and satisfactory proof of mutual mistake required to reform deed; *Fillingham v. Nichols*, 108 Wis. 56, 84 N. W. 15, holding clear and convincing evidence required to prove deed, absolute on face, given in trust; *Jasper v. Hazen*, 4 N. D. 10, 23 L. R. A. 64, 58 N. W. 454, holding clear, convincing, and satisfactory evidence required to prove absolute deed intended as mortgage.

Terms of policy binding on mortgagee.

Cited in *Carberry v. German Ins. Co.* 86 Wis. 326, 56 N. W. 920, holding mortgagee to whom "loss payable as interest may appear" bound by stipulations of policy.

6 L. R. A. 204, *JOHN SPRY LUMBER CO. v. SAULT SAV. BANK, LOAN & T. CO.* 77 Mich. 199, 18 Am. St. Rep. 396, 43 N. W. 778.

Mechanic's lien law; constitutionality of statutes giving subcontractor lien.

Cited in *Mellis v. Race*, 78 Mich. 81, 43 N. W. 1033; *Snell v. Race*, 78 Mich. 336, 44 N. W. 286; *Koepke v. Dyer*, 80 Mich. 312, 45 N. W. 143; *Preston v. Zekind*, 84 Mich. 645, 48 N. W. 180; *Kirkwood v. Hoxie*, 95 Mich. 64, 35 Am. St. Rep. 549, 54 N. W. 720,—holding mechanic's lien law 1887 unconstitutional; *McMasters v. West Chester State Normal School*, 2 Pa. Dist. R. 759, 10 Lanc. L. Rev. 407, 34 W. N. C. 460, and *Waters v. Wolf*, 162 Pa. 170, 34 W. N. C. 416, 42 Am. St. Rep. 815, 29 Atl. 646, holding statute providing that no contract with owner shall defeat right of subcontractor to lien unconstitutional; *Palmer v. Tingle*, 55 Ohio St. 445, 45 N. E. 313, holding statute giving subcontractor a lien, not based on contract with owner and without regard to amount due principal contractor, unconstitutional; *Selma Sash, Door & Blind Factory v. Stoddard*, 116 Ala. 254, 22 So. 555, holding statute giving subcontractors a lien, without regard to amount due under contract, if claim presented within thirty days, unconstitutional; *Mallory v. LaCrosse Abattoir Co.* 80 Wis. 185, 49 N. W. 1071 (dissenting opinion), majority holding statute making owner absolutely liable for claims of subcontractors, without regard to contract price, or owner's indebtedness to contractor, valid.

Cited in note (20 L. R. A. 565) on constitutionality of statutes giving laborers and material men right to lien.

Distinguished in *Jones v. Great Southern Fireproof Hotel Co.* 30 C. C. A. 115, 58 U. S. App. 397, 86 Fed. 377, Overruling 79 Fed. 481, holding Ohio statute giving subcontractor lien, without regard to amount due owner, but limited to contract price, in absence of fraud, not unconstitutional; *Smith v. Newbaur*, 144 Ind. 103, 33 L. R. A. 688, 42 N. E. 40, holding statute giving subcontractors and material men lien upon filing of notice of intention to claim lien within sixty days after labor or material furnished not unconstitutional; *Smalley v. Gearing*, 121 Mich. 196, 79 N. W. 1114, holding statute authorizing owner to withhold amounts due subcontractors, and making him liable in case of payment in disregard of sworn statement of contractor, not unconstitutional.

Rights of subcontractor measured by those of principal contractor.

Cited in *Cudworth v. Bostwick*, 69 N. H. 537, 45 Atl. 408, holding, under statute giving subcontractor "same lien" as provided for contractor, lien of subcontractor is limited by what principal contractor could enforce against property.

Limits of police power.

Cited in *Re Morgan*, 26 Colo. 426, 47 L. R. A. 57, 77 Am. St. Rep. 269, 58 Pac. 1071, holding statute restricting employment of working men in smelters for longer period than eight hours per day not within police power of state.

6 L. R. A. 205, *BRINSER v. ANDERSON*, 129 Pa. 376, 11 Atl. 809, 18 Atl. 520.

Possession as notice of title.

Cited in *Pace v. Yost*, 10 Kulp, 541, holding unquestioned open possession of land constructive notice of possessor's title; *Carnegie Natural Gas Co. v. Philadelphia Co.* 158 Pa. 329, 27 Atl. 951, holding lessor's possession constructive notice to lessee's assignee of forfeiture of lease.

Cited in footnote to *Rock Island & P. R. Co. v. Dimick*, 10 L. R. A. 105, which holds open and exclusive possession of passageway through railroad embankment notice of rights to purchaser of railroad.

Cited in note (8 L. R. A. 211) on constructive notice by possession of land.

Parol contract for sale of land.

Cited in *Schuey v. Schaeffer*, 130 Pa. 18, 18 Atl. 544, holding parol contract for sale of land followed by possession and improvement, enforceable.

6 L. R. A. 207, *TOMLINSON v. BOARD OF EQUALIZATION*, 88 Tenn. 1, 12 S. W. 414.

Certiorari; when issuable.

Cited in *Hayden v. Memphis*, 100 Tenn. 585, 47 S. W. 182, holding, in absence of statutory right to appeal, removal of officer by city council reviewable by certiorari.

Power to reassess.

Cited in *Iron Companies v. Pace*, 89 Tenn. 720, 15 S. W. 1077, holding power of court to make reassessment terminated absolutely at expiration of time allowed.

6 L. R. A. 212, *ALBANY v. McNAMARA*, 117 N. Y. 168, 22 N. E. 931.

Voluntary expenditures not recoverable from person benefited.

Cited in *Oneida County v. Bartholomew*, 82 Hun. 83, 31 N. Y. Supp. 106, and *Montgomery County v. Gupton*, 139 Mo. 308, 39 S. W. 447, holding money voluntarily paid for support of insane pauper not recoverable from estate; *Montgomery County v. Nyce*, 161 Pa. 83, 28 Atl. 999, Affirming 13 Pa. Co. Ct. 595, holding, in absence of statute, pauper's subsequently acquired estate not liable for past voluntary maintenance; *Newburgh Sav. Bank v. Woodbury*, 64 App. Div. 308, 72 N. Y. Supp. 222, holding money voluntarily paid to drafted men under unconstitutional statute not recoverable; *Koehler v. Hughes*, 4 Misc. 238, 24 N. Y. Supp. 760, holding taxes voluntarily paid on whole property by mortgagee of undivided share not recoverable; *Farrar v. Farmers' Loan & T. Co.* 85 App. Div. 482, 83 N. Y. Supp. 218, holding evidence of declaration of intention to accept devise, providing devisees should pay mortgage, relevant in action for one half of sum paid by one devisee.

Cited in footnotes to *McNairy County v. McCoin*, 41 L. R. A. 862, which authorizes action for reimbursement by county, supporting lunatic as pauper because of guardian's neglect; *Bon Homme County v. Berndt*, 50 L. R. A. 351, which sustains statute making estates of insane persons, without heirs in United States dependent thereon for support, chargeable with expense of maintenance in hospital; *McCook County v. Kammos*, 31 L. R. A. 461, which holds children liable under statute to county furnishing support to poor parents.

Cited in note (55 L. R. A. 570) on liability of alleged pauper or his estate to pay for support or gifts obtained on ground of poverty.

Indigent persons; who are.

Cited in *Bartlett v. Ackerman*, 49 N. Y. S. R. 297, 21 N. Y. Supp. 53, holding woman with four small children, unable to work, without means of support, and receiving public assistance, indigent.

Existence of jurisdictional fact not presumed.

Cited in *Hannah v. Chase*, 4 N. D. 355, 50 Am. St. Rep. 656, 61 N. W. 18, holding existence of jurisdictional fact not presumed, though founded on presumption of performance of official duty.

6 L. R. A. 214, *CARROLL v. EAST TENNESSEE, V. & G. R. CO.* 82 Ga. 452, 10 S. E. 163.

Motions in term continues until disposed of.

Cited in *Helmly v. Davis*, 111 Ga. 860, 36 S. E. 927, holding jurisdiction to proceed in term not lost by order to hear motion in chambers.

Narratives of past occurrences inadmissible.

Cited in *Wabash R. Co. v. Farrell*, 79 Ill. App. 511, holding written report of engineer of accident not witnessed, which it was his duty to report, inadmissible; *Travelers Ins. Co. v. Sheppard*, 85 Ga. 765, 12 S. E. 18, holding *ex parte* affidavits furnished to insurer as preliminary proof of insured's death, inadmissible to show bad faith in refusing payment.

Rule of railroad; when obligatory.

Cited in *Central R. & Bkg. Co. v. Ryles*, 84 Ga. 431, 11 S. E. 499, holding rules of railroad company not obligatory unless promulgated.

Cited in notes (12 L. R. A. 344) on rules to insure safety of employees; (43 L. R. A. 318, 358) on duties of master and servant as to rules promulgated for safe conduct of business.

6 L. R. A. 218, *WILLIAMS v. EVANS*, 87 Ala. 725, 6 So. 702.

Illegality of contracts involving issuance of fictitious stock or bonds.

Cited in *Williams v. Searcy*, 94 Ala. 363, 10 So. 632, holding agreement to issue to vendor stock double the consideration in land contract, illegal; *Alabama Nat. Bank v. Halsey*, 109 Ala. 208, 19 So. 522, holding note given for stock thereafter to be issued, \$2 for each \$1, void; *Smith v. Alabama Fruit Growing & Winery Asso.* 123 Ala. 541, 26 So. 232, holding contract by corporation to pay to subscriber dividends equal to amount paid for stock void; *Gay v. Brierfield Coal & I. Co.* 94 Ala. 326, 16 L. R. A. 574, 33 Am. St. Rep. 122, 11 So. 353, holding corporate bonds and mortgage, issued without consideration, fraudulent as to creditors; *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.* 89 Ala. 399, 7 So. 398, raising, without deciding, question of validity of stock issued on basis of overvaluation.

Distinguished in *Beitman v. Steiner Bros.* 98 Ala. 248, 13 So. 87, holding note given for stock already issued, with knowledge of its issuance upon fictitious value, valid.

Corporations; issue of fictitious stock.

Cited in *State ex rel. Sanche v. Webb*, 97 Ala. 119, 38 Am. St. Rep. 151, 12 So. 377, holding certificate of organization issued upon fraudulent affidavit of paid-up stock does not waive state's right to vacate charter.

— Liability of holders to creditors.

Cited in *Gilkie & A. Co. v. Dawson Town & Gas Co.* 46 Neb. 350, 64 N. W. 978, holding subscriber paying for stock in property liable for difference between real and fictitious valuation; *Leucke v. Tredway*, 45 Mo. App. 518, holding taker of

shares from corporation at less than par liable for difference in creditor's action; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.* 92 Ala. 415, 12 L. R. A. 310, 25 Am. St. Rep. 65, 9 So. 129, holding holders of stock issued for grossly over-valued property liable as for unpaid subscriptions; *Grant v. East & West R. Co.* 4 C. C. A. 518, 13 U. S. App. 1, 54 Fed. 576, holding subscribers paying for stock in property at bona fide valuation not liable.

Distinguished in *Davis Bros. v. Montgomery Furnace & Chemical Co.* 101 Ala. 129, 8 So. 496, holding subscriber to bonds receiving bonus stock issued for property not liable, on failure to pay subscription, as upon unpaid stock subscription.

6 L. R. A. 219, *NOUNNAN v. SUTTER COUNTY LAND CO.* 81 Cal. 1, 22 Pac. 515.

Statements of opinion.

Cited in *Choate v. Hyde*, 129 Cal. 584, 62 Pac. 118, holding expression of opinion as to sufficiency of title, based on facts equally accessible to both parties, not fraud; *Taylor v. Ford*, 131 Cal. 445, 63 Pac. 770, holding statements as to value of book accounts upon sale of interest by one partner to another not fraudulent; *American Nat. Bank v. Hammond*, 25 Colo. 372, 55 Pac. 1090, holding bank not liable for expression of opinion as to solvency of person.

Cited in notes (35 L. R. A. 439) on expression of opinion as fraud; (10 L. R. A. 606) on necessity of clear and strong proof of fraud.

Waiver of fraud.

Cited in *Schmidt v. Mesmer*, 116 Cal. 272, 48 Pac. 54, holding claim for damages for fraudulently misrepresenting income of hotel waived by lessee's continued occupancy without complaint; *Lee v. McClelland*, 120 Cal. 151, 52 Pac. 300, holding claim for damages from fraudulent representations prior to making land contract waived by substitution of more favorable contract after occupying land.

6 L. R. A. 222, *STATE ex rel. WINE v. KEOKUK & W. R. CO.* 99 Mo. 30, 12 S. W. 290.

Corporate exemptions.

Followed in *Keokuk & W. R. Co. v. County Court*, 41 Fed. 306, holding railroads consolidated after passage of tax exemption act not entitled to its benefit.

Cited in *Sublette v. St. Louis, I. M. & S. R. Co.* 96 Mo. App. 124, 69 S. W. 745, holding exemption of railroad from actions for killing stock not transferable.

Corporations; consolidation.

Cited in *Winn v. Wabash R. Co.* 118 Fed. 58, holding that consolidation works dissolution of old, and formation of new, corporation: *State ex rel. Houck v. Lacsueur*, 145 Mo. 328, 46 S. W. 1075, holding that consolidation forms new corporation, liable for incorporation fees; *Evans v. Interstate Rapid Transit R. Co.* 106 Mo. 601, 17 S. W. 489, holding question whether consolidation dissolves constituent corporations depends on statute; *State ex rel. Hobart v. Smith*, 173 Mo. 409, 73 S. W. 211, Affirming 98 Mo. App. 235, 68 S. W. 942, holding consolidated company may enforce bond running to constituent company for default occurring after consolidation.

Corporation bound by acceptance of charter.

Cited in *St. Louis R. Co. v. Southern R. Co.* 105 Mo. 586, 16 S. W. 960, holding

railroad company accepting provisions of city charter bound by provision permitting use of tracks by another company.

6 L. R. A. 226, *ARMSTRONG v. CHEMICAL NAT. BANK*, 41 Fed. 234.

Action to compel allowance of claim in *Chemical Nat. Bank v. Armstrong*, 50 Fed. 800.

Insolvent national banks; preferences.

Cited in *Stapylton v. Stockton*, 33 C. C. A. 546, 63 U. S. App. 412, 91 Fed. 330, holding security given by insolvent national bank good for present, but not antecedent, advances.

Cited in note (25 L. R. A. 548) on exceptions to prohibition of preferences by insolvent national banks.

Attachment of national bank stock.

Cited in footnote to *Doty v. First Nat. Bank*, 17 L. R. A. 259, which holds right of transferee of national bank stock under unrecorded transfer superior to subsequent attachment.

Banker's lien on deposits.

Cited in footnote to *Gardner v. First Nat. Bank*, 10 L. R. A. 45, which holds authority given to bank to apply deposits to notes before maturity terminates with death of depositor.

6 L. R. A. 230, *NELSON COUNTY v. NORTHCOTE*, 6 Dak. 378, 43 N. W. 897.

6 L. R. A. 234, *STATE v. ST. PAUL UNION DEPOT CO.* 42 Minn. 142, 43 N. W. 840.

Referred to in *St. Paul Union Depot Co. v. Minnesota & N. W. R. Co.* 47 Minn. 156, 13 L. R. A. 416, 49 N. W. 646; *Chicago G. W. R. Co. v. St. Paul Union Depot Co.* 68 Minn. 221, 71 N. W. 23, for statement of character and object of depot company; *Chicago, St. P. & K. C. R. Co. v. St. Paul Union Depot Co.* 54 Minn. 415, 56 N. W. 129, for terms upon which plaintiff shared privileges of depot of defendant.

Taxation of corporations.

Cited in notes (6 L. R. A. 222) on taxation of consolidated corporations; (58 L. R. A. 591) on double taxation of corporations.

Distinguished in *St. Louis & S. F. R. Co. v. Williams*, 53 Ark. 65, 13 S. W. 796, holding railway bridge assessable to bridge corporation owning same, rather than to railroad using bridge as lessee.

6 L. R. A. 236, *THOMPSON v. WINTER*, 42 Minn. 121, 43 N. W. 796.

Specific performance of real estate contracts.

Cited in *Abbott v. Moldestad*, 74 Minn. 300, 73 Am. St. Rep. 348, 77 N. W. 227, holding discretion of court in decreeing specific performance must not be arbitrary or capricious, but judicial.

Cited in footnote to *Atchison, T. & S. F. R. Co. v. Chicago & W. I. R. Co.* 35 L. R. A. 167, which refuses to require payment of interest not provided for as condition of specific performance of contract.

6 L. R. A. 238, *ANDRES v. CIRCUIT JUDGE*, 77 Mich. 85, 43 N. W. 857.

Mandamus to compel quo warranto.

Cited in *Lamoreaux v. Ellis*, 89 Mich. 149, 50 N. W. 812, denying defeated candidate's petition for mandamus in quo warranto to test sheriff-elect's right to office.

6 L. R. A. 241, *CINCINNATI I. ST. L. & C. R. CO. v. COOPER*, 120 Ind. 469, 16 Am. St. Rep. 334, 22 N. E. 340.

Liability for probable consequences of wrongful act.

Cited in *Louisville. N. A. & C. R. Co. v. Nitsche*, 126 Ind. 233, 9 L. R. A. 752, 22 Am. St. Rep. 582, 26 N. E. 51, holding railroad liable for damage from spread of fire set on right of way, when result probable under circumstances; *Ohio & M. R. Co. v. Trowbridge*, 126 Ind. 396, 26 N. E. 64, holding hand car left in highway, whereby plaintiff's horse took fright, and threw her, proximate cause of injury, which might have been anticipated.

Cited in footnote to *People v. Lewis*, 45 L. R. A. 783, which holds suicide of person mortally wounded does not relieve assailant from guilt of manslaughter.

Duty of railroad — To passenger.

Cited in *Wheeler v. Grand Trunk R. Co.* 70 N. H. 614, 54 L. R. A. 956, footnote p. 955, 50 Atl. 103, holding intoxication of passenger does not preclude recovery for injury from falling off train, if railroad employees, knowing his condition, could have prevented accident by exercise of due care; *Fisher v. West Virginia & P. R. Co.* 42 W. Va. 199, 33 L. R. A. 75, 24 S. E. 570 (dissenting opinion), majority holding contributory negligence of intoxicated passenger insisting on riding on platform of car, against protest of conductor, precludes recovery for injury from falling off car.

Cited in footnotes to *Reed v. Louisville & N. R. Co.* 44 L. R. A. 823, which requires railroad company to stop and rescue passenger fallen or thrown from train, only when possible without risk of collision; *Southern P. Co. v. Tarin*. 54 L. R. A. 240, which holds carrier liable for injury to unwarned passenger in car left standing till undermined by freshet; *Fisher v. West Virginia & P. R. Co.* 23 L. R. A. 758, which holds carrier not liable for injury to drunken passenger coming down car step without conductor's knowledge and falling off; *Bageard v. Consolidated Traction Co.* 49 L. R. A. 424, which denies carrier's liability for injury to sick passenger, supposed to be intoxicated, while going towards back of station, after being helped to front where way open to street; *Chesapeake & O. R. Co. v. Saulsberry*. 56 L. R. A. 580, which denies liability to drunken passenger ejected at station where ticket expires, for injuries in attempting to re-enter train; *Pullman Palace Car Co. v. Smith*, 13 L. R. A. 215, which holds sleeping-car company liable for servants causing passengers to get off at wrong place.

Cited in notes (8 L. R. A. 674) on duty of carrier to use care for safety of passenger; (19 L. R. A. 327) on exposure of drunken passenger to danger by ejection from car; (10 L. R. A. 140) on duty of carrier to inebriates; (40 L. R. A. 144) on intoxication as affecting negligence.

— To trespasser on track.

Cited in footnotes to *Clark v. Wilmington & W. R. Co.* 14 L. R. A. 749, which holds negligence in getting on railroad trestle does not relieve from liability in

running down; *Becker v. Louisville & N. R. Co.* 53 L. R. A. 268, which requires checking speed to enable trespasser, discovered on railroad bridge, to escape; *Raines v. Chesapeake & O. R. Co.* 24 L. R. A. 226, which holds railroad employees have right to presume, on giving signals, that person on track will step aside; *Cleveland, C. C. & St. L. R. Co. v. Tartt*, 49 L. R. A. 99, which denies duty towards trespassers on track before discovery; *Schreiner v. Great Northern R. Co.* 58 L. R. A. 75, which denies railroad's liability to trespasser on tracks, pushed in front of train by stray cow; *Patton v. East Tennessee, V. & G. R. Co.* 12 L. R. A. 184, which holds duty owed to trespassers to have lookouts on rear section of train broken in two, to give warning.

Cited in note (11 L. R. A. 385) on duty of railroad to trespassers.

Recklessness as showing wilful intent.

Cited in *Lake Erie & W. R. Co. v. Brafford*, 15 Ind. App. 662, 43 N. E. 882, holding wilful killing inferred from failure of engineer to reduce speed until within 40 feet of man on track with back to train.

Distinguished in *Cleveland, C. C. & St. L. R. Co. v. Miller*, 149 Ind. 500, 49 N. E. 445, holding failure of engineer to give warning at crossing, although vehicle seen approaching when train 1,200 feet away, not evidence of wilful injury.

6 L. R. A. 246, *HUNTER v. NEW YORK, O. & W. R. CO.* 116 N. Y. 615, 23 N. E. 9.

Judicial notice.

Cited in *Gurley v. Missouri P. R. Co.* 104 Mo. 233, 16 S. W. 11, judicially noticing that injury to leg 8 or 9 inches below thigh could not have been received while walking between two ordinary freight cars; *Campbell v. Wood*, 116 Mo. 202, 22 S. W. 796, taking judicial notice of meaning of surveyor's marks, made under surveyor general's orders on government plats; *Rogers v. Cady*, 104 Cal. 290, 43 Am. St. Rep. 100, 38 Pac. 81, holding county within which lands, described by section, township, and range, are located, matter of judicial notice; *Parks v. Jacob Dold Packing Co.* 6 Misc. 574, 27 N. Y. Supp. 289, taking judicial notice that geographical location of Kansas City and Wichita outside state of New York; *Hanson v. Heard*, 69 N. H. 191, 38 Atl. 788, taking judicial notice that cashier has prima facie authority to make collections and receive deposits; *Burke v. Territory*, 2 Okla. 512, 37 Pac. 829, holding that court may take judicial notice of its own proceedings in contempt proceeding for improper publication of same; *Montenes v. Metropolitan Street R. Co.* 77 App. Div. 495, 78 N. Y. Supp. 1059, and *Lendle v. Robinson*, 53 App. Div. 146, 65 N. Y. Supp. 894, taking judicial notice, with help of almanac to refresh memory, as to time of sunset on date of accident; *Cohn v. Kahn*, 14 Misc. 257, 35 N. Y. Supp. 829, taking judicial notice of particular day of week on which date given in evidence falls; *Walton v. Stafford*, 14 App. Div. 314, 43 N. Y. Supp. 1049, appellate court not bound judicially to notice that first day of month fell on Sunday, where fact not called to attention of trial court.

Distinguished in *North Hempstead v. Gregory*, 53 App. Div. 354, 65 N. Y. Supp. 867, refusing to take judicial notice of character of construction necessary in pier to withstand ice, or of extent of burden imposed upon soil by pier on piles as compared with that of solid pier, or of custom of vessels to lie aground at low water in exercise of right incident to navigation.

Proof of cause of accident.

Cited in *Deschenes v. Concord & M. R. Co.* 69 N. H. 290, 46 Atl. 467, rendering judgment for defendant where evidence failed to show, except inferentially, that brakeman was killed by bridge by reason of defective guard; *Fitzgerald v. New York C. & H. R. R. Co.* 154 N. Y. 266, 48 N. E. 514, denying right to recover where evidence showed brakeman's death after passing under bridge from 4½ to 6¼ feet above top of car, but no proof of contact with bridge; *Safford v. Green Island*, 74 Hun, 307, 26 N. Y. Supp. 669, denying right to recover for injury from fall on icy pavement in absence of evidence that accident would not have occurred in absence of ridges; *McCarty v. Lockport*, 13 App. Div. 500, 43 N. Y. Supp. 693, holding jury not justified in finding slope of sidewalk, and not slipperiness of snow, proximate cause of fall.

Distinguished in *Cash v. New York C. & H. R. R. Co.* 56 App. Div. 476, 67 N. Y. Supp. 823, holding proof of accident not rebutted by proof of physical impossibility of occurrence in manner stated by plaintiff's witness.

Duty toward employees.

Cited in footnote to *Sweet v. Ohio Coal Co.* 9 L. R. A. 861, which holds master may conduct business in his own way, though other method less hazardous.

Contributory negligence of employee.

Cited in *Mexican C. R. Co. v. Eckman*, 42 C. C. A. 350, 102 Fed. 279, holding contributory negligence of conductor sitting on roof of car going through tunnel sufficiently high at entrance, for jury.

Assumption of risk.

Cited in footnotes to *Williamson v. Newport News & M. Valley R. Co.* 12 L. R. A. 297, which holds brakeman assumes risk of bridge known to be too low; *Mensch v. Pennsylvania R. Co.* 17 L. R. A. 450, which holds danger from projection of bolt from end of car assumed by brakeman; *McKee v. Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, which holds risk from wing fence at cattle-guard assumed by brakeman; *Stager v. Troy Laundry Co.* 53 L. R. A. 459, which holds risk of hand passing under guard rails into rollers not assumed, as matter of law, by servant operating mangle in laundry.

Credibility of witness.

Cited in *Williams v. Delaware, L. & W. R. Co.* 155 N. Y. 162, 49 N. E. 672, holding jury sole judge thereof, under provisions of Code.

6 L. R. A. 249, *HOPEWELL MILLS v. TAUNTON SAV. BANK*, 150 Mass. 519, 15 Am. St. Rep. 235, 23 N. E. 327.

Effect on fixtures of conveyance of realty.

Cited in *Wentworth v. S. A. Woods Mach. Co.* 163 Mass. 33, 39 N. E. 414, holding that machines so affixed to freehold as to make them part of realty, pass to purchaser though title retained till paid for; *Ryder v. Faxon*, 171 Mass. 208, 68 Am. St. Rep. 417, 50 N. E. 631, holding finding of agreement that building put on leased property should be property of lessee, justified; *Cosgrove v. Troescher*, 62 App. Div. 126, 70 N. Y. Supp. 764, holding that character of gas logs, refrigerators, etc., as fixtures, depends upon intention of owner; *Cunningham v. Cureton*, 96 Ga. 494, 23 S. E. 426, holding mill fixtures passed with mortgage of mill notwithstanding agreement that title in them should not pass to purchaser until

note paid; *Gunderson v. Swarthout*, 104 Wis. 191, 76 Am. St. Rep. 860, 80 N. W. 465, holding dynamo and machinery connected with it, fixtures passing under foreclosure sale of realty; *National Bank v. North*, 160 Pa. 308, 28 Atl. 694, holding steam radiators and valves for heating not fixtures passing with mortgage of building; *Fisk v. People's Nat. Bank*, 14 Colo. App. 27, 59 Pac. 63, holding purchaser at foreclosure sale of trust property entitled to brickmaking machinery as fixtures, put on premises after execution of deed of trust; *Fifield v. Farmers Nat. Bank*, 47 Ill. App. 123, holding machinery attached to building by owner, under secret agreement with owner of machinery to retain title, passed under trust deed of land; *Baker v. McClurg*, 198 Ill. 34, 59 L. R. A. 134, 92 Am. St. Rep. 261, 64 N. E. 701, Affirming 96 Ill. App. 173, holding that removable trade fixtures may include ovens, engines, and other bakery fixtures; *Thomson v. Smith*, 111 Iowa, 723, 50 L. R. A. 782, 82 Am. St. Rep. 541, 83 N. W. 789, holding weighing scales to be fixtures, though extending a few inches on neighboring lot, passing under sheriff's deed; *Re Goldville Mfg. Co.* 118 Fed. 898, holding mill machinery to be fixtures passing under mortgage of mill; *Ice, Light & Water Co. v. Lone Star Engine & Boiler Works*, 15 Tex. Civ. App. 697, 41 S. W. 835, holding that steam boiler attached to realty as fixture passes to purchaser of realty free from lien of chattel mortgage; *Pfuger v. Carmichael*, 45 App. Div. 154, 66 N. Y. Supp. 417, holding stepping-stone on sidewalk and vases in garden, which have been often removed, not pass on foreclosure of realty as improvements; *William Firth Co. v. South Carolina Loan & T. Co.* 122 Fed. 579, holding mortgage of mill and machinery valid as to machinery though not recorded as chattel mortgage.

Cited in footnotes to *Anderson v. Creamery Package Mfg. Co.* 56 L. R. A. 554, which holds mortgage to seller of machinery purchased for use in permanent building superior to existing real estate mortgage; *Neufelder v. Third Street & Suburban R. Co.* 53 L. R. A. 601, which holds machinery steadied by bolts and screws fastening it to building not fixture as to mortgagee.

How fixtures determined.

Cited in *Morey v. Hoyt*, 62 Conn. 559, 19 L. R. A. 618, 26 Atl. 127, holding intention of tenant as to whether machinery intended to be fixture of great importance; *Baker v. McClurg*, 198 Ill. 36, 59 L. R. A. 134, 92 Am. St. Rep. 261, 64 N. E. 701, Affirming 96 Ill. App. 173, holding intention as evidenced by acts and circumstances controlling as to permanency of trade fixtures.

Cited in footnote to *Leonard v. Clough*, 16 L. R. A. 306, which holds barn placed by owner on own land, on stones resting on surface, a fixture.

Cited in note (10 L. R. A. 722, 723) on what are fixtures.

Removable fixtures.

Cited in *Sosman v. Conlon*, 57 Mo. App. 31, holding question whether mechanic's lien can be filed against theater for stage fittings and scenery dependent on whether furnished with intention of forming part of building; *Scannell v. Hub Brewing Co.* 178 Mass. 254, 59 N. E. 628, holding mechanic's lien for labor and materials can be established for making and fitting appliances for brewery; *Hillebrand v. Nelson*, 1 Herdman (Neb.) 788, 95 N. W. 1068, holding portable articles used in brick manufactory not fixtures; *Readfield Teleph. & Teleg. Co. v. Cyr*, 95 Me. 289, 49 Atl. 1047, holding that poles, wires, etc., retain character as chattels as between debtor and creditor.

Cited in note (9 L. R. A. 700) on tenant's right to remove fixtures.

Materiality of intent.

Cited in *Pioso v. Bitzer*, 20 *Lanc. L. Rev.* 157, holding evidence of signer's undisclosed intent in executing instrument inadmissible.

6 L. R. A. 252, *HARLAND v. UNITED LINES TELEG. CO.* 40 *Fed.* 308.

Federal jurisdiction by attachment.

Cited in *Central Trust Co. v. Chattanooga, R. & C. R. Co.* 68 *Fed.* 696, holding jurisdiction over nonresidents not served with process not conferred by U. S. Rev. Stat. § 915, U. S. Comp. Stat. 1901, p. 684, giving plaintiffs in Federal courts same remedy by attachment or other process against property as provided by state statute.

6 L. R. A. 254, *KIEL v. JACKSON*, 13 *Colo.* 378, 16 *Am. St. Rep.* 207, 22 *Pac.* 504.

Abutter's right to damages for improper use of street.

Cited in *Pueblo v. Strait*, 20 *Colo.* 18, 24 *L. R. A.* 394, 46 *Am. St. Rep.* 273, 36 *Pac.* 789, holding construction of viaduct over railroad unreasonable change in street entitling abutter to damages.

Distinguished in *Union P. R. Co. v. Foley*, 19 *Colo.* 282, 35 *Pac.* 542, and *Gilbert v. Greeley, S. L. & P. R. Co.* 13 *Colo.* 509, 22 *Pac.* 814, holding that owner of property abutting on street obstructed by railroad cannot recover for inconvenience common to public; *Fogg v. Nevada-California-Oregon R. Co.* 20 *Nev.* 438, 23 *Pac.* 840, holding that abutting owners suffering no inconvenience not common to public cannot enjoin operation of railroad in street.

Cited in notes (9 *L. R. A.* 100) on use of streets in municipalities; (18 *L. R. A.* 155) on liability of railroad company for obstructing highway crossing.

What constitutes nuisance.

Cited in footnote to *Chicago G. W. R. Co. v. First M. E. Church*, 50 *L. R. A.* 488, which holds water tank in street, and station at which bells constantly rung and whistles blown, within few rods of church, a nuisance.

Measure of damages for nuisance.

Cited in *Cleveland, C. C. & St. L. R. Co. v. King*, 23 *Ind. App.* 577, 55 *N. E.* 875, holding as measure of damages for abatable nuisance, depreciation in rental value; *Hollenbeck v. Marion*, 116 *Iowa*, 79, 89 *N. W.* 210, holding measure of damages for pollution of stream through pasture is depreciation in rental value.

6 L. R. A. 257, *ROSENBLATT v. PERKINS*, 18 *Or.* 156, 22 *Pac.* 598.

Leases; statute of frauds.

Cited in note (7 *L. R. A.* 671) on validity of leases under statute of frauds.

Tenancy from year to year.

Cited in *Phelan v. Anderson*, 118 *Cal.* 506, 50 *Pac.* 685, holding lease from year to year where rent for agricultural land paid annually and accepted as annual rent.

Cited in note (8 *L. R. A.* 221) on how tenancy from year to year created.

Effect of tenant holding over.

Cited in footnotes to *Byxbee v. Blake*, 57 *L. R. A.* 222, which holds tenant liable for another month's rent, by keeping keys and remaining in possession five days

to clean up rubbish; *Valentine v. Healey*, 43 L. R. A. 667, which holds lease not renewed by temporary retention under permit by tenant in common, who is member of lessee firm.

Termination of tenancy.

Distinguished in *Forsythe v. Pogue*, 25 Or. 483, 36 Pac. 571, holding tenancy at will terminable on twenty days' notice to quit, if rent payable in periods of less than twenty days.

6 L. R. A. 259, *CHURCH v. PORTLAND*, 18 Or. 73, 22 Pac. 528.

Dedication to public use.

Cited in *Conrad v. West End Hotel & Land Co.* 126 N. C. 780, 36 S. E. 282, holding that reference in deed to registered plat constitutes irrevocable dedication of streets and public grounds marked on plat.

Cited in footnotes to *Hogue v. Albina*, 10 L. R. A. 673, which holds dedication not presumed; *Campbell v. Kansas City*, 10 L. R. A. 593, which holds donor of land for graveyard entitled to same after abandonment by public; *Sturmer v. County Court*, 36 L. R. A. 300, which holds public square dedicated when used for more than eighty years as such; *Lake Erie & W. R. Co. v. Whitham*, 28 L. R. A. 612, which denies right of railroad to acquire right of way by common-law dedication.

Protection of parks from forbidden uses.

Cited in *McIntyre v. El Paso County*, 15 Colo. App. 84, 61 Pac. 237, holding land dedicated to city for public park held by it as trustee for purposes of dedication, and not to be used for erection of courthouse; *Rowzee v. Pierce*, 75 Miss. 858, 40 L. R. A. 403, 65 Am. St. Rep. 625, 23 So. 307, holding erection of schoolhouse on land dedicated for "public ornamental park" not consistent with purposes of dedication; *Douglass v. Montgomery*, 118 Ala. 616, 43 L. R. A. 382, 24 So. 745 (dissenting opinion), majority holding that adjacent proprietor may enjoin city from diverting park from purposes of dedication.

Cited in footnote to *Douglass v. Montgomery*, 43 L. R. A. 376, which denies city's power to grant right to lay railroad across public park and then abandon it and confirm reversioner's title.

Cited in note (13 L. R. A. 252) on dedication of lands for public parks.

Protection of easement.

Cited in *Collins v. Asheville Land Co.* 128 N. C. 569, 83 Am. St. Rep. 720, 39 S. E. 21 (dissenting opinion), majority holding purchaser of lot with reference to plat entitled to have kept open all streets represented.

Cited in footnote to *Ives v. Edison*, 50 L. R. A. 134, which sustains right of owner of easement to injunction to compel restoration of stairway.

6 L. R. A. 266, *TRUE v. DAVIS*, 133 Ill. 522, 22 N. E. 410.

Township organization.

Cited in *People ex rel. Deneen v. Martin*, 178 Ill. 622, 53 N. E. 309, holding power to legislate by local laws upon township division abrogated by Constitution; *Cicero v. Chicago*, 182 Ill. 309, 55 N. E. 351, holding that legislature may permit division of town by vote of majority of inhabitants; *Cicero Lumber Co. v. Cicero*, 176 Ill. 25, 42 L. R. A. 703, 68 Am. St. Rep. 155, 51 N. E. 758, holding act empowering cities to set aside streets for pleasure driveways valid.

Annexation of one town to another.

Cited in *East St. Louis v. Rhein*, 139 Ill. 118, 28 N. E. 1089, holding annexation of village to city not operate to annex portion of town in which it lay.

Cited in notes (27 L. R. A. 745) on power of legislature to annex territory to municipality; (11 L. R. A. 780) on power to extend city limits; (23 L. R. A. 404) on what constitutes "indebtedness" within meaning of constitutional and statutory restrictions of municipal indebtedness, when municipalities joined.

6 L. R. A. 268, *LAKE VIEW v. TATE*, 130 Ill. 247, 22 N. E. 791.

Ordinance limiting speed of trains.

Cited in footnote to *Chicago & A. R. Co. v. Carlinville*, 60 L. R. A. 391, which sustains ordinance limiting speed of interstate trains to 10 miles an hour within city limits.

Cited in notes (7 L. R. A. 318) on duty of railroad to slacken speed; (21 L. R. A. 796) on constitutionality of statutes restricting contracts and business.

Municipal ordinances; discrimination.

Cited in *Cairo v. Feuchter*, 159 Ill. 162, 42 N. E. 308, holding license ordinance discriminating between wholesale and retail liquor dealers void; *Hibbard v. Chicago*, 59 Ill. App. 473, holding ordinance applying to one place and person, permitting erection of awning in street, void; *People ex rel. Ferris Wheel Co. v. Swift*, 60 Ill. App. 398, holding ordinance prohibiting granting license in certain district, unless upon petition of majority of voters, void; *Peoria v. Gugenheim*, 61 Ill. App. 379, holding license ordinance discriminating between persons of same class invalid; *Ex parte Bohen*, 115 Cal. 378, 36 L. R. A. 622, 47 Pac. 55, holding ordinance prohibiting burials in cemetery except in lots already purchased for burial purposes, void.

Distinguished in *Chicago v. Brownell*, 146 Ill. 68, 34 N. E. 595, holding ordinance prohibiting pool-selling, excepting from operation certain localities, not void for discrimination.

— Unreasonableness.

Cited in *Frost v. Chicago*, 178 Ill. 253, 49 L. R. A. 658, 69 Am. St. Rep. 301, 52 N. E. 869, holding ordinance prohibiting dealers from covering fruit baskets with colored netting void for unreasonableness; *Wice v. Chicago & N. W. R. Co.* 193 Ill. 356, 56 L. R. A. 271, 61 N. E. 1084, holding ordinance forbidding passengers to board or leave moving train without authority void for unreasonableness.

— Reasonableness question for court.

Cited in *Hawes v. Chicago*, 158 Ill. 658, 30 L. R. A. 227, 42 N. E. 373, holding reasonableness of ordinance requiring substitution of cement for plank-walk question for court, in light of circumstances; *McFarlane v. Chicago*, 185 Ill. 252, 57 N. E. 12, holding reasonableness of ordinance requiring substitution of brick for cedar block pavement question for court; *Chicago & N. W. R. Co. v. Elmhurst*, 165 Ill. 152, 46 N. E. 437, holding reasonableness of special taxation ordinance question for court; *Evison v. Chicago, St. P. M. & O. R. Co.* 45 Minn. 375, 11 L. R. A. 437, 48 N. W. 6, holding reasonableness of ordinance regulating speed of trains question for court.

— Presumption of reasonableness.

Cited in *People ex rel. Morrison v. Cregier*, 138 Ill. 414, 28 N. E. 812, holding

ordinance prohibiting sale of liquor in certain districts presumed reasonable until otherwise shown.

Distinguished in *Myers v. Chicago*, 196 Ill. 593, 63 N. E. 1037, holding water-line extension ordinance not unreasonable in absence of proof that assessments exceed benefits.

Corporate by-laws must be reasonable.

Cited in *Vierling v. Mechanics' & T. Sav. Loan & Bldg. Asso.* 179 Ill. 527, 53 N. E. 979, holding that by-laws of loan association in pursuance of charter power to impose fines must be reasonable; *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 319, 60 L. R. A. 393, 93 Am. St. Rep. 190, 65 N. E. 730, Affirming, 103 Ill. App. 255, holding delegated power to pass ordinance limiting speed of trains must be reasonably exercised.

6 L. R. A. 270, *CULVER v. STREATOR*, 130 Ill. 238, 22 N. E. 810.

Liability of cities and villages for torts of officials.

Cited in *Blake v. Pontiac*, 49 Ill. App. 550, holding city not liable for illegal incarceration in calaboose; *Kansas City v. Lemen*, 6 C. C. A. 631, 12 U. S. App. 640, 57 Fed. 908, holding city not liable for the wrongful closing of exhibition by mayor and police; *Whitfield v. Paris*, 84 Tex. 433, 15 L. R. A. 784, 31 Am. St. Rep. 69, 19 S. W. 566, holding city not liable for accidental shooting by officer enforcing ordinance against unmuzzled dogs; *Givens v. Paris*, 5 Tex. Civ. App. 708, 24 S. W. 974, holding city not liable for injuries committed by cow being driven through street by policeman appointed to keep cattle out of streets; *Doty v. Port Jervis*, 23 Misc. 315, 52 N. Y. Supp. 57, holding village not liable for homicide by police officer appointed by president; *Stevens v. Muskegon*, 111 Mich. 79, 36 L. R. A. 780, 69 N. W. 227, holding city not liable for enforcing ordinances interfering with use of private sewer constructed by its consent in street; *Chicago v. Williams*, 182 Ill. 138, 55 N. E. 123, holding city not liable for wrongful arrest made by its police officers.

Cited in footnotes to *Snider v. St. Paul*, 18 L. R. A. 151, which holds city not liable for negligence of agents in providing and maintaining city hall; *Potter v. Jones*, 12 L. R. A. 160, which holds city not liable for negligence in blasting for schoolhouse; *Curran v. Boston*, 8 L. R. A. 243, which holds city not liable for negligence of workhouse officers.

Cited in notes (9 L. R. A. 208, 210) on liability of municipalities for acts or omissions of its officers or agents; (15 L. R. A. 783) on liability of municipality for acts of policemen; (44 L. R. A. 797) on liability of municipalities for false imprisonment and unlawful arrest.

Distinguished in *Chicago v. Selz. S. & Co.* 202 Ill. 550, 67 N. E. 386, holding city liable for negligence in repairing water system used as source of revenue as well as for fire protection.

Validity of ordinance.

Cited in *Chicago & A. R. Co. v. Carlinville*, 200 Ill. 322, 60 L. R. A. 394, 93 Am. St. Rep. 190, 65 N. E. 730, sustaining ordinance limiting speed of train through city to 10 miles an hour.

Distinguished in *Wice v. Chicago & N. W. R. Co.* 193 Ill. 353, 56 L. R. A. 269, 61 N. E. 1084, Reversing 93 Ill. App. 266, holding ordinance forbidding getting on or off moving cars not within police power delegated to city.

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6 L. R. A. 271, *ALSOP v. SOUTHERN EXP. CO.* 104 N. C. 278, 10 S. E. 297.

Refusal by carrier to accept shipment.

Cited in *State ex rel. Carter v. Wilmington & W. R. Co.* 126 N. C. 442, 36 S. E. 14, holding penalties for refusal to accept cattle for shipment recoverable by any one.

6 L. R. A. 278, *CAMPBELL v. ROTERING*, 42 Minn. 115, 43 N. W. 795.

Liability on bond.

Cited in *Walsh v. Featherstone*, 67 Minn. 105, 69 N. W. 811, holding indemnity bond not agreement for benefit of third party in whose favor liability incurred: *Wheeler v. Paterson*, 64 Minn. 233, 66 N. W. 964, holding replevin bond not void because name of one surety omitted from body, where it is apparent on its face that he is liable.

Distinguished in *Klein v. Funk*, 82 Minn. 8, 84 N. W. 460, holding rule that surety must pay debt before bringing action inapplicable in action by surety on third person's note given as collateral security.

6 L. R. A. 280, *COLLINS v. CHARTIERS VALLEY GAS CO.* 131 Pa. 143, 17 Am. St. Rep. 791, 18 Atl. 1012.

Judgment upon *venire de novo* affirmed in 139 Pa. 124, 27 W. N. C. 218, 21 Atl. 147.

Pollution of fresh water.

Cited in *Collins v. Chartiers Valley Gas Co.* 139 Pa. 124, 27 W. N. C. 219, 21 Atl. 147, holding one drilling for gas liable for injury to fresh water well by want of reasonable care to prevent mingling of salt water; *Pfeiffer v. Brown*, 165 Pa. 273, 35 W. N. C. 483, 44 Am. St. Rep. 660, 30 Atl. 844, holding one who pumps salt water so that it flows upon another's lands liable for changing fresh to salt water.

— As nuisance.

Cited in *Rarick v. Smith*, 17 Pa. Co. Ct. 631, 5 Pa. Dist. R. 532, holding pollution of stream by manufacture of dynamite from ingredients brought from abroad, nuisance as to lower owner.

Cited in note (8 L. R. A. 832) as to private right of action for nuisance.

Rights in subterranean waters or minerals.

Cited in *Stillwater Water Co. v. Farmer*, 89 Minn. 67, 60 L. R. A. 879, 99 Am. St. Rep. 541, 93 N. W. 907, denying land owner's right to waste percolating waters, injuring another's spring; *Tampa Waterworks Co. v. Cline*, 37 Fla. 601, 33 L. R. A. 382, 53 Am. St. Rep. 262, 20 So. 780, holding that land owner may open up channel of subsurface water if not diverted or polluted; *Barclay v. Abraham*, 121 Iowa, 622, 64 L. R. A. 256, 96 N. W. 1080, holding person asserting existence of subterranean stream must show its channel reasonably ascertainable; *Katz v. Walkinshaw*, 141 Cal. 124, 64 L. R. A. 249, 99 Am. St. Rep. 766, 74 Pac. 766, denying right to remove percolating water through artesian well for irrigation of distant lands, to injury of neighbors; *Williamson v. Jones*, 39 W. Va. 257, 25 L. R. A. 233, 19 S. E. 436, holding removal of petroleum in place is disherison of remainderman.

Cited in note (19 L. R. A. 96) on rights in subterranean waters.

Distinguished in *O'Neil v. Ben Avon*, 30 Pittsb. L. J. N. S. 249, 9 Pa. Dist. R. 131, holding injury to percolating spring by highway improvement not subject of damages; *Kelley v. Ohio Oil Co.* 57 Ohio St. 329, 39 L. R. A. 768, 63 Am. St. Rep. 721, 49 N. E. 399, holding that owner of land has right to oil taken from wells thereon.

Negligence in leaving torpedo on track.

Cited in *Cleveland Terminal Valley R. Co. v. Marsh*, 63 Ohio St. 249, 52 L. R. A. 147, 58 N. E. 821, denying company's liability to boy employed by station agent without its knowledge to attend lamps, and injured by explosion of torpedo on track.

Necessity of taking land for reservoir.

Cited in *Smithko v. Pittsburgh & W. R. Co.* 5 Pa. Dist. R. 544, 27 Pittsb. L. J. N. S. 18, finding taking of land for reservoir of surface water "necessary" to operation of railroad, where water in wells unfit.

6 L. R. A. 283, *HOLMES v. TURNERS FALLS LUMBER CO.* 150 Mass. 535, 23 N. E. 305.

Reference; when permissible.

Cited in *Graham v. Lord*, 170 Mass. 3, 48 N. E. 845, holding that mechanic's lien proceeding may be referred.

Appointment of auditor; practice in equity.

Cited in *Falmouth v. Falmouth Water Co.* 180 Mass. 328, 62 N. E. 255, holding auditor's report in equity suit regarded as master's report.

Evidence; declarations of corporate officer.

Cited in *Nash v. Minnesota Title Ins. & T. Co.* 159 Mass. 444, 34 N. E. 625, holding declarations of president as to title of land covered by trust mortgage to corporation binding upon corporation.

Possession adverse to mortgagee.

Cited in *Anthony v. Anthony*, 161 Mass. 351, 37 N. E. 386, holding occupancy by mortgagor's widow under lease from mortgagee not adverse; *Long v. Richards*, 170 Mass. 128, 64 Am. St. Rep. 281, 48 N. E. 1083, holding possession of first mortgage under mortgage not disseise second.

6 L. R. A. 290, *PORTLAND LUMBERING & MFG. CO. v. EAST PORTLAND*, 18 Or. 21, 22 Pac. 536.

Municipal corporations; power to make contracts.

Cited in *Townsend Gas & Electric Co. v. Port Townsend*, 19 Wash. 409, 53 Pac. 551, holding charter provision for annual tax for lighting streets does not restrict city's power to contract to annual periods; *Shipley v. Hachenev*, 34 Or. 308, 55 Pac. 971, holding city may contract to pay interest on overdue warrants for payment of debts.

Cited in notes (6 L. R. A. 318) on liability of municipal corporation on its contracts; (12 L. R. A. 168) on estoppel of corporation to deny liability on its contracts.

— Ultra vires.

Cited in *Portland v. Bituminous Paving & Improv. Co.* 33 Or. 321, 44 L. R. A.

553, 72 Am. St. Rep. 713, 52 Pac. 28, holding bond to secure performance of *ultra vires* contract not enforceable, though contract fully executed by city.

Cited in footnote to *Bath Gaslight Co. v. Claffy*, 36 L. R. A. 664, which denies right of lessee of corporation to escape payment of rent on ground that law *ultra vires*.

— **Liability where authority is irregularly exercised.**

Cited in *Soule v. Seattle*, 6 Wash. 317, 33 Pac. 384, holding city failing to levy special assessment liable for street improvements; *Portland v. Bituminous Paving & Improv. Co.* 33 Or. 317, 44 L. R. A. 531, 72 Am. St. Rep. 713, 62 Pac. 28, holding illegality of paving assessment does not invalidate contractor's bond to city.

Criticized in *German-American Sav. Bank v. Spokane*, 17 Wash. 325, 38 L. R. A. 262, 49 Pac. 542, holding delay in levying special tax for street improvements will not render city liable.

6 L. R. A. 301, *MOULTON v. STATE*, 88 Ala. 116, 6 So. 758.

Followed without discussion in *King v. State*, 89 Ala. 149, 7 So. 750.

Evidence; proof of character of party or witness.

Cited in *Evans v. State*, 109 Ala. 19, 19 So. 535; *Lowery v. State*, 98 Ala. 49, 13 So. 498; *Thompson v. State*, 100 Ala. 71, 14 So. 878,—holding character, whether good or bad, provable only by evidence of general reputation; *Morgan v. State*, 88 Ala. 224, 6 So. 761, holding particular acts of misconduct by defendant, on trial for assault with intent to kill, not admissible; *Walker v. State*, 91 Ala. 80, 9 So. 87, holding that good character of defendant on trial for murder cannot be shown by proof of particular acts; *Smith v. State*, 88 Ala. 77, 7 So. 52, holding inquiry as to character or reputation of witness must not extend to proof of particular acts within knowledge of impeaching witness.

Cross-examination respecting character.

Cited in *Smith v. State*, 103 Ala. 70, 15 So. 866, and *Goodwin v. State*, 102 Ala. 98, 15 So. 571, holding that state may cross-examine witnesses as to having heard of specific acts of violence, where defendant's character in issue; *Carson v. State*, 128 Ala. 60, 29 So. 608, holding, when character of defendant for peace and quiet in issue in murder case, state may cross-examine witnesses as to having heard of defendant getting drunk and carrying concealed weapons; *Hawes v. State*, 88 Ala. 71, 7 So. 302, holding evidence that witness had heard of difficulties between defendant and wife, for murder of whom he was on trial, admissible on cross-examination; *Jackson v. State*, 106 Ala. 17, 17 So. 333, holding evidence of bad reputation of state's witness cannot be rebutted by testimony as to opinion of his credibility, based upon personal dealings with him; *Garrett v. State*, 97 Ala. 25, 14 So. 327, holding state's witness in murder case cannot be cross-examined as to act of deceased in chasing man with hot horseshoe.

Cited in note (20 L. R. A. 615) on cross-examination of witnesses.

6 L. R. A. 303, *PEOPLE ex rel. PLATT v. WEMPLE*, 117 N. Y. 136, 2 Inters. Com. Rep. 735, 22 N. E. 1046.

Joint stock companies and partnership associations as corporations.

Cited in *People ex rel. Winchester v. Coleman*, 133 N. Y. 283, 16 L. R. A. 184, footnote p. 183, 31 N. E. 96, Affirming 37 N. Y. S. R. 120, 13 N. Y. Supp. 833,

holding joint stock company, having attributes of corporate body, not within statute making all "stock corporations" deriving income from capital subject to tax upon capital; *Andrews Bros. Co. v. Youngstown Coke Co.* 30 C. C. A. 302, 58 U. S. App. 444, 86 Fed. 594, holding "partnership association" organized under authority of statute, and possessing attributes of corporate body, corporation within jurisdictional requirements as to diversity of citizenship in Federal courts; *Raymond v. Colton*, 43 C. C. A. 508, 104 Fed. 226, and *Adams Exp. Co. v. State*, 55 Ohio St. 78, 44 N. E. 506, holding individual liability of members of joint stock company does not destroy character as corporation; *Snyder v. Lindsey*, 92 Hun, 433, 36 N. Y. Supp. 1037, holding, where contract under which association organized leaves members personally liable to creditors, it is not corporation requiring action for dissolution to be brought by attorney general; *Edgeworth v. Wood*, 58 N. J. L. 466, 33 Atl. 940, holding United States Express Company an incorporated company within statute permitting corporations to be sued in name of president or treasurer; *Lane v. Albertson*, 78 App. Div. 616, 79 N. Y. Supp. 947, holding transfer of stock in joint stock association to legatee not within clause in articles giving association first option to purchase stock sold or transferred; *Colton v. Raymond*, 41 Misc. 583, 85 N. Y. Supp. 210, holding rights of stockholder in joint stock association more like partnership than corporation stockholder's rights.

Cited in footnotes to *Rouse, H. & Co. v. Donovan*, 27 L. R. A. 577, which holds valid, provision for execution against limited partners for unpaid subscriptions after return of execution against partnership; *Edwards v. Warren Linoline & Gasoline Works*, 38 L. R. A. 791, which holds partnership association organized under laws of Pennsylvania regarded as partnership instead of corporation in Massachusetts; *State ex rel. Railroad & Warehouse Commission v. United States Exp. Co.* 50 L. R. A. 667, which sustains state's right to require information as to business within state, of unincorporated express company of another state; *State ex rel. Railroad & W. Commission v. Adams Exp. Co.* 38 L. R. A. 225, which holds service on nonresident joint stock association properly made on local agent.

Taxation of corporations and associations.

Cited in *Re Jones*, 172 N. Y. 584, 60 L. R. A. 479, footnote p. 476, 65 N. E. 570, which holds shares in joint stock company owning real estate only, personalty in applying transfer tax law; *Re Jones*, 60 App. Div. 246, 74 N. Y. Supp. 702 (dissenting opinion), majority holding beneficial interest or heir of deceased member of joint stock association, in company's real estate standing in name of president, is real estate not subject to transfer tax.

Cited in footnotes to *Vermont & C. R. Co. v. Vermont C. R. Co.* 10 L. R. A. 562, which holds railroad lessor liable for gross earnings tax; *San Francisco v. Western U. Teleg. Co.* 17 L. R. A. 301, which holds state tax on telegraph franchise void; *State Tide Water Pipe Co., Prosecutor, v. State Board*, 27 L. R. A. 684, which holds limited partnership a corporation for purpose of taxation.

Cited in notes (22 L. R. A. 478) on taxation of joint stock association; (58 L. R. A. 526) on taxation of capital stock of unincorporated associations; (57 L. R. A. 74, 80) on organizations subject to franchise taxes; (58 L. R. A. 548) on taxation of intangible property of corporations; (60 L. R. A. 674) on corporate taxation and the commerce clause.

Distinguished in *Hoey v. Coleman*, 46 Fed. 222, holding Adams Express Company, although quasi corporation as between its members, but not incorporated,

not within statute imposing tax on "all moneyed or stock corporations" deriving income from capital.

Effect of purchase by joint stock company of its own stock.

Cited in *Booth v. Dodge*, 60 App. Div. 27 note, 69 N. Y. Supp. 673, holding joint stock association may purchase its own stock, hold it unextinguished, and reissue it.

6 L. R. A. 308, *LAWRENCE v. INGERSOLL*, 88 Tenn. 52, 17 Am. St. Rep. 870, 12 S. W. 422.

Mandamus.

Cited in *Swindell v. State*, 143 Ind. 157, 35 L. R. A. 52, 42 N. E. 528, holding that validity of election or appointment may be inquired into by mandamus.

Cited in footnotes to *People ex rel. Daley v. Rice*, 14 L. R. A. 644, which authorizes mandamus to compel canvassing board to disregard illegal return; *Wampler v. State*, 38 L. R. A. 829, which authorizes mandamus to compel township trustee to meet with others in order to obtain quorum.

Cited in note (20 L. R. A. 167) on power of equity to grant mandatory injunction.

Parliamentary law.

Cited in footnote to *State ex rel. Childs v. Kiichli*, 19 L. R. A. 779, which holds president of city council removable at pleasure; *Board of Education v. Best*, 27 L. R. A. 77, which holds mandatory, provision for entry of ayes and noes on motion to employ teacher.

— Number of votes of body required for valid action.

Cited in *Anniston v. Davis*, 98 Ala. 634, 39 Am. St. Rep. 94, 13 So. 331, holding that majority of quorum cannot elect where charter requires vacancy filled by majority of remaining members of council.

Cited in footnotes to *State ex rel. Cope v. Foraker*, 6 L. R. A. 422, which requires majority of all votes cast for senators and representatives to pass amendment of Constitution; *Smith v. Proctor*, 14 L. R. A. 403, holding majority of those actually voting as to issue of school bonds sufficient; *State ex rel. Wiesen-thal v. Denny*, 16 L. R. A. 214, which holds majority of persons actually voting on amendment of city charter sufficient; *People ex rel. Hoffman v. Hecht*, 27 L. R. A. 203, which authorizes majority of board to organize and act, though minority disqualified; *State ex rel. Little v. Langlie*, 32 L. R. A. 723, which holds a two-thirds majority of votes polled on proposal to relocate county seat sufficient; *Belknap v. Louisville*, 34 L. R. A. 256, which requires two-thirds of all votes cast for any purpose necessary to authorize municipal indebtedness; *Zeiler v. Central R. Co.* 34 L. R. A. 469, which requires only two thirds of members voting to dispense with reading of proposed city ordinances; *Bryan v. Stephenson*, 35 L. R. A. 752, which requires majority of all votes cast at election to authorize issue of bonds; *Citizens & Taxpayers v. Williams*, 37 L. R. A. 761, which holds only majority of taxpayers actually voting at election necessary to authorize increase of taxes; *Montgomery County Fiscal Court v. Trimble*, 42 L. R. A. 734, which holds two thirds of those voting on question of creating county indebtedness sufficient; *State ex rel. McClurg v. Powell*, 48 L. R. A. 652, which requires majority of all electors voting at election for any purpose, to adopt constitutional amendment; *Re Denny*, 51 L. R. A. 722, which requires majority of all votes cast at election for any purpose to adopt constitutional amendment.

— Quorum.

Cited in *Re Schuylkill Haven Nominations*, 20 Pa. Co. Ct. 420, holding majority of body constitutes quorum unless law of the body directs otherwise.

Cited in footnotes to *Williams v. Benet*, 14 L. R. A. 825, which holds two associate justices constitute quorum of Florida supreme court though vacancy exists in office of chief justice; *State ex rel. Walden v. Vanosdal*, 15 L. R. A. 832, which holds quorum not lost by half of township trustees stepping into crowd of bystanders without leaving room; *State ex rel. Stanford v. Ellington*, 30 L. R. A. 532, which holds majority of members of legislative body a quorum.

Cited in note (21 L. R. A. 175) on what constitutes quorum for meeting of stockholders.

— Veto.

Cited in *Pollasky v. Schmid*, 128 Mich. 701, 55 L. R. A. 615, footnote, p. 614, 92 Am. St. Rep. 560, 87 N. W. 1030, holding two thirds of whole number of council required to override veto.

Cited in footnote to *Cate v. Martin*, 48 L. R. A. 613, which denies mayor's power to veto action by aldermen in passing on election for member of board, of which such board is made exclusive and final judge.

— Decision of the vote.

Cited in footnotes to *Wooster v. Mullins*, 25 L. R. A. 694, which authorizes casting vote by mayor where three newspapers each receive votes of four aldermen; *State ex rel. Young v. Yates*, 37 L. R. A. 205, which holds mayor's right to cast vote in case of tie not restricted by provision requiring majority vote of all members of council; *Brown v. Foster*, 31 L. R. A. 116, which authorizes mayor to vote only to break tie; *State ex rel. Morris v. McFarland*, 39 L. R. A. 282, which holds auditor's right to give casting vote on tie vote by township trustees not limited to vote by ballot; *Johnston v. State*, 12 L. R. A. 235, which holds statute for determining tie vote by lot valid; *State ex rel. Morris v. McFarland*, 39 L. R. A. 282, which holds auditor entitled to give casting vote for filling vacancy in office of county superintendent on *tira voce* vote.

Cited in note (47 L. R. A. 552, 554, 561, 562) on decision of tie vote at election.

6 L. R. A. 315, *RUSHVILLE GAS CO. v. RUSHVILLE*, 121 Ind. 206, 16 Am. St. Rep. 388, 23 N. E. 72.

Majority vote.

Cited in *Re Denny*, 156 Ind. 151, 51 L. R. A. 739, 59 N. E. 359, holding that majority vote means majority of those who choose to take part; *Re Doyle*, 1 Daulphin Co. Rep. 351, 7 Pa. Dist. R. 637, 24 Pa. Co. Ct. 30, holding, where there is quorum of deliberative body present, majority of those present can transact business; *Smith v. State*, 64 Kan. 732, 68 Pac. 641, and *Thurston v. Huston*, 123 Iowa, 160, 98 N. W. 637, sustaining resolution adopted by majority of quorum of city council; *State ex rel. Walden v. Vanosdal*, 131 Ind. 391, 15 L. R. A. 833, 31 N. E. 79, and *State ex rel. Drummond v. Dillon*, 125 Ind. 69, 25 N. E. 136, holding that candidate receiving majority of votes is elected when quorum of township trustees are present and voting; *Wheeler v. Com.* 98 Ky. 64, 32 S. W. 259, holding candidate receiving vote of six of twelve members of city council against five votes for another, and one vote for candidate previously dropped by resolution, elected; *Davis v. Brown*, 46 W. Va. 720, 34 S. E. 839, holding statute

requiring relocation of county seat to be carried by "three fifths of all votes cast upon question" not require three fifths of all votes cast at election; *State ex rel. Hocknell v. Roper*, 47 Neb. 425, 66 N. W. 539, holding city receiving three fifths of votes cast and counted at election for relocation entitled to county seat, although number of votes received is less than three fifths of vote, counting rejected ballots.

Cited in footnotes to *State ex rel. Young v. Yates*, 37 L. R. A. 205, which holds mayor's right to casting vote in case of tie not restricted by provision requiring majority vote of all members of council; *Pollasky v. Schmid*, 55 L. R. A. 614, which requires two thirds majority of all members elected to council to pass ordinance over veto, though some seats vacant.

Cited in notes (6 L. R. A. 308) on majority vote; (6 L. R. A. 311) on right of presiding officer as to casting vote; (47 L. R. A. 561) on decision of tie vote at election.

Effect of refusal to vote.

Cited in *United States v. Ballin*, 144 U. S. 8, 36 L. ed. 326, 12 Sup. Ct. Rep. 507, holding rule of House of Representatives permitting count of member-present, though not voting, to determine presence of quorum, constitutional; *Somers v. Bridgeport*, 60 Conn. 528, 22 Atl. 1015, holding person receiving majority vote of elective body properly constituted, elected, although majority abstain from voting; *State ex rel. Young v. Yates*, 19 Mont. 244, 37 L. R. A. 207, 47 Pac. 1004, holding half of city council present and not voting not create tie, requiring vote of mayor; *Landes v. State*, 160 Ind. 483, 67 N. E. 189, holding ordinance on which half the councilmen present refused to vote, unanimously adopted.

Municipal corporations; power to operate water and lighting plants.

Cited in *Rockebrandt v. Madison*, 9 Ind. App. 229, 53 Am. St. Rep. 348, 36 N. E. 444, and *Crawfordsville v. Braden*, 130 Ind. 152, 14 L. R. A. 270, 30 Am. St. Rep. 214, 28 N. E. 849, upholding city's power to own and operate electric plant for lighting streets and supplying private consumers; *Mitchell v. Negaunee*, 113 Mich. 367, 38 L. R. A. 160, 67 Am. St. Rep. 468, 71 N. W. 646, holding that legislature may authorize city to erect and operate electric plant for lighting streets, and furnishing light to inhabitants; *Ellinwood v. Reedsburg*, 91 Wis. 134, 64 N. W. 885, holding express delegation of power unnecessary to enable city to build and operate municipal water and lighting plants; *Wadsworth v. Concord*, 133 N. C. 593, 45 S. E. 948, by Clark, Ch. J., concurring, who holds that municipal board cannot bind town by contract for lighting streets beyond term of office.

Authority of city to issue bonds.

Cited in *Coffin v. Indianapolis*, 59 Fed. 227, holding that city organized under general law cannot issue and sell bonds to raise money by way of loan, unless expressly authorized.

Statute construed as part of system.

Cited in *Hyland v. Brazil Block Coal Co.* 128 Ind. 341, 26 N. E. 672, holding that statute must be considered as part of body of law, and not independently.

6 L. R. A. 318, SCHIPPER v. AURORA, 121 Ind. 154, 22 N. E. 878.

Sewers as incident to streets.

Cited in Greensburg v. Zoller, 28 Ind. App. 131, 60 N. E. 1007, holding tile drains properly part of street improvement.

Cited in note (61 L. R. A. 691) on duty and liability of municipality with respect to drainage.

Unauthorized municipal contract.

Cited in Boyd v. Mill Creek School Twp. 124 Ind. 195, 24 N. E. 661, holding that recovery must be on *quantum meruit*, not on contract when latter illegal; Smith v. Miami County, 6 Ind. App. 166, 33 N. E. 243, holding county liable for material and labor inuring to its benefit under *ultra vires* contract; Stone v. Morgan, 13 Ind. App. 54, 41 N. E. 79 (dissenting opinion), majority holding allegation of claim under contract unenforceable under statute of frauds insufficient on demurrer; London & N. Y. Land Co. v. Jellico, 103 Tenn. 323, 52 S. W. 995, holding city liable according to benefits from improvements under invalid contract; Moss v. Sugar Ridge Twp. 161 Ind. 425, 68 N. E. 896, denying township's liability for work done on highway under contract made in violation of statute; Valparaiso v. Valparaiso City Water Co. 30 Ind. App. 327, 65 N. E. 1063, holding *ultra vires* provisions in franchise no defense to water company's action for hydrant rental.

Cited in footnote to Barber Asphalt Paving Co. v. Harrisburg, 29 L. R. A. 401, which holds city liable under contract for cost of paving streets when assessment proves invalid.

Cited in notes (6 L. R. A. 290) as to doctrine of *ultra vires*; (19 L. R. A. 620) as to limitation of doctrine of *ultra vires* in respect to municipal corporations.

6 L. R. A. 320, LOUISVILLE, N. A. & C. R. CO. v. SMITH, 121 Ind. 353, 22 N. E. 775.

Liability for emergency aid.

Cited in Evansville & R. R. Co. v. Freeland, 4 Ind. App. 212, 30 N. E. 803, holding company liable to surgeon employed for necessary operation upon employee in emergency, when local surgeon employed on other injuries in wreck; Toledo, St. L. & K. C. R. Co. v. Mylott, 6 Ind. App. 442, 33 N. E. 135, holding that conductor may bind railroad for aid and shelter of brakeman seriously injured at place remote from company's general offices; Louisville & N. R. Co. v. Ginley, 100 Tenn. 478, 45 S. W. 348, holding that conductor has implied authority to employ brakemen in exigency requiring additional help for proper management or protection of train; Cincinnati, I. St. L. & C. R. Co. v. Davis, 126 Ind. 101, 9 L. R. A. 504, 25 N. E. 878, holding railroad liable to surgeon for services rendered to person injured by company's trains, at request of general superintendent; Bedford Belt R. Co. v. McDonald, 12 Ind. App. 622, 40 N. E. 821, holding physician's complaint for services rendered insufficient for not showing license to render such services, or their rendition to employee injured on duty, or for injuries by defendant's trains; Chicago & E. R. Co. v. Behrens, 9 Ind. App. 578, 37 N. E. 26, holding railroad company not liable for care and board furnished its injured employee at request of local surgeon taking case at conductor's direction.

Cited in note (20 L. R. A. 696) as to authority of agent or representative to employ medical services for employee or other third persons.

Distinguished and limited in *Holmes v. McAllister*, 123 Mich. 497, 48 L. R. A. 398, 82 N. W. 220, holding laundryman not liable for services of physician called in his absence by foreman to attend injured employee; *Godshaw v. J. N. Struck & Bro.* 109 Ky. 288, 51 L. R. A. 670, 58 S. W. 781, holding foreman of carpenter work without implied authority to engage medical attendance for injured workman, under him.

6 L. R. A. 321, *GENERAL ASSEMBLY OF PRES. CHURCH v. GUTHRIE*, 86 Va. 125, 10 S. E. 318.

Validity of devise.

Followed in *Guthrie v. Guthrie*. 1 Va. Dec. 717, 10 S. E. 327, holding devise to incorporated church agency not repugnant to constitution forbidding incorporation of church.

Cited in footnotes to *Kelly v. Nichols*, 19 L. R. A. 413, as to what constitutes charitable use or trust; *Crerar v. Williams*, 21 L. R. A. 454, which holds gift of free public library in great city charitable; *Thompson v. Brown*, 62 L. R. A. 398, which sustains devise of fund to be distributed by executor "to the poor."

Cited as *obiter* in *Fifield v. Van Wyck*, 94 Va. 568, 64 Am. St. Rep. 745, 27 S. E. 446, holding devise to two trustees, their survivors or appointees in case of their death, in trust for New Jerusalem Church (Swedenborgian), unenforceable for vagueness.

6 L. R. A. 332, *VAN BIBBER v. REESE*, 71 Md. 608, 18 Atl. 892.

Liability of estates for debts.

Cited in *McNiece v. Eliason*, 78 Md. 176, 27 Atl. 940, denying general creditor's right to redeem mortgage on decedent's lands and be subrogated to mortgagee's rights; *Constable v. Camp*, 87 Md. 181, 39 Atl. 807, denying creditor's right to maintain bill against legatees after delay of fifteen years and distribution of estate; *Seldner v. Katz*, 96 Md. 219, 53 Atl. 931, holding that court cannot order heirs to sell inherited land in another state to pay decedent's creditors.

Distinguished in *McGaw v. Gortner*, 96 Md. 493, 54 Atl. 133, holding that decedent's land cannot be subjected to claim for unliquidated damages arising from heir's refusal to perform decedent's option contract.

6 L. R. A. 330, *BARRETT v. MARKET STREET CABLE R. CO.* 81 Cal. 296, 15 Am. St. Rep. 61, 22 Pac. 859.

Reasonable tender.

Cited in note (35 L. R. A. 489) on what is a reasonable sum out of which a common carrier may be required to take a passenger's fare and return the change.

Distinguished in *Muldowney v. Pittsburgh & B. Traction Co.* 29 Pittsb. L. J. N. S. 159, 43 W. N. C. 53, 8 Pa. Super. Ct. 338, holding tender of \$5 bill for a 5 cent fare unreasonable in law.

6 L. R. A. 338, *WILDNER v. FERGUSON*, 42 Minn. 112, 18 Am. St. Rep. 495, 43 N. W. 794.

Construction of words in title of act.

Cited in *State ex rel. Olsen v. Board of Control*, 85 Minn. 172, 88 N. W. 533, holding title of act should be liberally construed to uphold constitutionality.

Construction of exemption statutes.

Cited in *Henderson v. Nott*, 30 Neb. 157, 38 Am. St. Rep. 720, 54 N. W. 87, construing term "laborer" to mean one hired to do manual or menial labor for another; *Boyle v. Vanderhoof*, 45 Minn. 32, 47 N. Y. 396, construing garnishment exemption act for "working men" applicable to telegraph operators; *Paddock v. Balgord*, 2 S. D. 105, 48 N. W. 840, holding allegation that judgment was for "labor" not equivalent to "for laborer's or mechanic's wages."

Cited in footnotes to *Equitable L. Assur. Soc. v. Goode*, 35 L. R. A. 690, which holds law library of attorney occupying part of time in legal business exempt; *Rustad v. Bishop*, 50 L. R. A. 168, which denies right to hold back successive exempt wages by successive garnishments and reach same by new garnishment after exemption period expires; *Siever v. Union P. R. Co.* 61 L. R. A. 319, which sustains right to injunction against prosecuting multiplicity of garnishment proceedings for exempt wages.

Cited in note (18 L. R. A. 310) as to who are laborers, whose earnings are exempt from attachment or garnishment.

6 L. R. A. 339, *STATE v. ROBINSON*, 42 Minn. 107, 43 N. W. 833.

Municipal licenses.

Cited in *Cheyenne v. O'Connell*, 6 Wyo. 499, 46 Pac. 1088, holding one act of hauling rubbish for pay not violation of ordinance prohibiting use of wagon without license; *Combs v. Lakewood*, 68 N. J. L. 583, 53 Atl. 697, sustaining township ordinance licensing and regulating vehicles carrying passengers for hire upon highways.

Cited in footnotes to *Child v. Bemus*, 12 L. R. A. 57, which holds discretionary power granted mayor to revoke licenses not unreasonable; *State v. Finch*, 46 L. R. A. 437, which sustains validity of license on express wagons greatly in excess of that imposed on hacks.

Cited in note (36 L. R. A. 413) on license fee for use of street by vehicles.

6 L. R. A. 340, *GARGAN v. LOUISVILLE, N. A. & C. R. CO.* 89 Ky. 212, 12 S. W. 259.

Rights of abutting owners in streets.

Cited in *Bannon v. Rohmeiser*, 90 Ky. 52, 29 Am. St. Rep. 355, 13 S. W. 444, holding legislature powerless to close alley without consent of abutting owners; *Martin v. Louisville*, 97 Ky. 33, 29 S. W. 864, holding city's power to close streets and alleys dependent upon legislative authority; *Bigelow v. Ballerino*, 111 Cal. 564, 44 Pac. 397, holding lot owner entitled to damages for taking of easement in street for public use; *Re Melon Street*, 182 Pa. 397, 38 L. R. A. 283, 38 Atl. 482 (adopting dissenting opinion in 1 Pa. Super. Ct. 92), holding owner of property abutting on part of street not vacated entitled to damages.

Cited in note (10 L. R. A. 276) on rights of abutting lot owners in streets.

6 L. R. A. 342, *WILEY v. ATHOL*, 150 Mass. 426, 23 N. E. 311.

Guaranty and warranty.

Cited in *Field v. Lamson & G. Mfg. Co.* 162 Mass. 392, 27 L. R. A. 147, 38 N. E. 1126, holding that guaranty by corporation of dividends upon preferred stock only devotes profits to such dividends in preference to those on common

stock; *Keene v. Demelman*, 172 Mass. 22, 51 N. E. 188, holding that equity will rescind executory contract of sale containing warranty as to quantity of land, based on mistake; *Alden v. Hart*, 161 Mass. 580, 37 N. E. 742, holding that vendee could reject unmerchandiseable cargo of coal as violation of implied warranty.

Substantial performance of contract.

Cited in *Palmer v. Meriden Britannia Co.* 188 Ill. 523, 59 N. E. 247, Affirming 88 Ill. App. 439, and *Sykes v. St. Cloud*, 60 Minn. 452, 62 N. W. 613, requiring party accepting part performance of contract to rely on claim for damages as to unperformed part; *Joplin Waterworks Co. v. Joplin*, 177 Mo. 528, 76 S. W. 960, and *Illinois Trust & Sav. Bank v. Arkansas City*, 34 L. R. A. 529, 22 C. C. A. 189, 40 U. S. App. 257, 76 Fed. 289, holding water company entitled to rental of hydrants, less damage for failure to perform contract; *Allen v. Mayers*, 184 Mass. 488, 69 N. E. 320, holding unrecorded assignment of unpaid balance on building contract, performed except as to trifling details, valid against trustee process; *Eastern Forge Co. v. Corbin*, 182 Mass. 592, 66 N. E. 419, holding vendor justified in refusing to perform contract where purchaser fails to make payments as stipulated.

Cited in note (9 L. R. A. 52) on substantial compliance with building contract.

Waiver of condition precedent.

Cited in *Ewing v. Janson*, 57 Ark. 242, 21 S. W. 430, holding waiver of performance of conditions precedent no bar to damages for breach; *New York v. New York Refrigerating Constr. Co.* 8 Misc. 69, 28 N. Y. Supp. 614, holding granting permit as condition precedent to construction of plant waived by acceptance of rent; *Griggs v. Moors*, 168 Mass. 364, 47 N. E. 128, holding that, unless unjust or unfair, court will not interfere with party's right to take advantage of condition precedent.

Measure of damages.

Cited in *Sykes v. St. Cloud*, 60 Minn. 454, 62 N. W. 613, holding measure of damages for failure to perform water contract, difference between actual and agreed supply.

Water companies.

Cited in note (61 L. R. A. 88) on rights and duties of water company.

6 L. R. A. 346. *MURRAY v. ROBERTS*. 150 Mass. 353, 23 N. E. 208.

Effect of insolvency discharge on foreign creditors.

Cited in *Rosenheim v. Morrow*, 37 Fla. 189, 20 So. 243, holding nonresident creditors proving claims and accepting dividend bound by insolvency proceeding; *Pattee v. Paige*, 163 Mass. 353, 28 L. R. A. 451, footnote, p. 451, 47 Am. St. Rep. 459, 40 N. E. 108, holding nonresident creditor accepting dividend in insolvency waives right of objection; *Swift v. Winchester*, 96 Me. 483, 90 Am. St. Rep. 414, 52 Atl. 1017, holding discharge in insolvency void against nonconsenting non-resident creditors.

Cited in footnote to *Lowenberg v. Levine*, 16 L. R. A. 159, which holds foreign judgment not released by discharge in insolvency proceedings.

Cited in notes (11 L. R. A. 328) on creditors entitled to dividends in insolvency; (17 L. R. A. 86) on priority of foreign attachment over subsequent domestic attachment.

6 L. R. A. 348, *SHAW v. SMITH*, 150 Mass. 166, 22 N. E. 887.

Description of payee or indorsee of note.

Cited in *Stern v. Eichberg*, 83 Ill. App. 444, holding notes payable to estate, valid; *Shepard v. Hanson*, 9 N. D. 251, 83 N. W. 20, holding indorsement "pay to guardian of W. and S." not direction to pay to wards or their estate.

Cited in footnote to *Gordon v. Anderson*, 12 L. R. A. 483, which holds note payable to certain person, "*et al.* or order," non-negotiable.

6 L. R. A. 349, *MATHEWSON v. HOFFMAN*, 77 Mich. 420, 43 N. W. 879.

Reciprocal riparian rights.

Cited in *Kray v. Muggli*, 84 Minn. 97, 54 L. R. A. 479, 87 Am. St. Rep. 332, 86 N. W. 882, and *Smith v. Youmans*, 96 Wis. 110, 37 L. R. A. 288, 65 Am. St. Rep. 32, 70 N. W. 1115, sustaining right of mill owner and owners of summer resorts to have artificial level of lake maintained; *Lakeside Paper Co. v. State*, 15 App. Div. 172, 44 N. Y. Supp. 281, holding state could not interfere with permanently changed channel of lake outlet for canal purposes; *Matheson v. Ward*, 24 Wash. 411, 85 Am. St. Rep. 955, 64 Pac. 520, holding that acquiescence for thirty years in diversion bars right to return stream to natural channel.

Cited in notes (41 L. R. A. 750) on correlative rights of upper and lower proprietors as to use and flow of water in stream; (50 L. R. A. 845) on rights acquired in artificial condition of body of water.

Disapproved in *Kray v. Muggli*, 77 Minn. 235, 45 L. P. A. 221, 79 N. W. 964, holding that riparian owners acquire no reciprocal prescriptive right to have dam maintained for their benefit.

6 L. R. A. 353, *KNOX'S APPEAL*, 131 Pa. 220, 17 Am. St. Rep. 798, 18 Atl. 1021.

What constitutes a will.

Cited in *Gaston's Estate*, 188 Pa. 378, 68 Am. St. Rep. 874, 41 Atl. 529, holding signed writing "it is my wish," followed by sufficiently definite directions, a will; *Tozer v. Jackson*, 164 Pa. 384, 35 W. N. C. 268, 30 Atl. 400, holding unsealed envelope with a signed paper inclosed, stating that writer gives certain property to person named on envelope, valid will; *Harrison's Estate*, 196 Pa. 578, 46 Atl. 888, holding signed indorsement on unsealed envelope directing sale of inclosed securities after indorser's death, for specified persons, valid codicil; *Scott's Estate*, 147 Pa. 100, 29 W. N. C. 180, 30 Am. St. Rep. 713, 23 Atl. 212, holding letter with directions for drawing will, executed by testator and witnesses, valid as will; *Funston's Estate*, 24 Pa. Co. Ct. 139, holding unsigned paper, making various bequests, headed "My will, S. — F. —," not valid will; *McGettigan v. Carr*, 13 Lanc. L. Rev. 77, holding paper in form of letter, disclosing writer's intention as to disposition of property, a valid will.

Cited in footnotes to *Orth v. Orth*, 32 L. R. A. 298, which holds no interest created by advice and expression of hope in letter to testator's wife as to what she will do with property devised to her; *Jewell v. Louisville Trust Co.* 53 L. R. A. 377, which denies creation of precatory trust by will of merchant expressing desire for retention, on liberal terms, of specified person in employ of firm of which testator a partner; *Morgan v. Halsey*, 36 L. R. A. 716, which holds power of appointment of property to testatrix's daughter in any manner she may deem proper limited by subsequent clauses of will; *Williams v. Baptist*

Church, 54 L. R. A. 427, which holds absolute gift, not trust, created by bequest to church and "suggesting" as to application.

Cited in notes (7 L. R. A. 520) as to effect of precatory words upon estate granted; (7 L. R. A. 394) as to precatory words in will; (13 L. R. A. 563) as to effect of precatory words in will.

Sufficiency of signature to instrument.

Cited in *Plate's Estate*, 148 Pa. 60, 29 W. N. C. 562, 33 Am. St. Rep. 805, 23 Atl. 1038, Reversing 8 Lanc. L. Rev. 212, 9 Pa. Co. Ct. 651, 28 W. N. C. 167, holding proof that testator commenced to sign codicil, made stroke, and said "I cannot sign now," conclusive of no signature; *Seventh Street Colored M. E. Church v. Campbell*, 48 La. Ann. 1546, 21 So. 184, holding statute that incorporators "shall prepare and sign" articles not require signature of names; *United States Fidelity & G. Co. v. Siegmann*, 87 Minn. 178, 91 N. W. 473, denying liability, as between parties, of person intending to sign bond as witness, placing name under obligors.

Cited in footnotes to *Re Conway*, 11 L. R. A. 796, which holds reference before signature on face of will to items on back insufficient; *Re Booth*, 12 L. R. A. 452, which holds holographic will containing maker's name at beginning only, insufficiently executed.

Cited in note (8 L. R. A. 823) as to subscription to will.

Distinguished in *Re Jacoby*, 190 Pa. 409, 44 W. N. C. 29, 42 Atl. 1026, holding box inscribed with owner's signed direction to deliver to attorney in case of death, and containing envelopes inscribed, without signature, "This to go to"—not a will.

6 L. R. A. 359, *STATE v. FIRE CREEK COAL & COKE CO.* 33 W. Va. 188, 25 Am. St. Rep. 891, 10 S. E. 288.

Freedom to contract and class legislation.

Cited in *State v. Loomis*, 115 Mo. 318, 21 L. R. A. 805, 22 S. W. 350, Reversing decision in department, 21 L. R. A. 792, holding act prohibiting payment of wages in scrip not redeemable at face value in cash at option of bidder, unconstitutional; *State v. Peel Splint Coal Co.* 35 W. Va. 857, 17 L. R. A. 403, 15 S. E. 1000 (dissenting opinion), majority holding act prohibiting employers paying employees in scrip not redeemable in money, constitutional; *People ex rel. Rodgers v. Coler*, 166 N. Y. 18, 52 L. R. A. 822, 82 Am. St. Rep. 605, 59 N. E. 716, holding unconstitutional statute requiring payment of prevailing rate of wages in city contract work; *Low v. Rees Printing Co.* 41 Neb. 141, 24 L. R. A. 708, 43 Am. St. Rep. 670, 59 N. W. 362, holding act declaring eight hours a day's labor, unconstitutional; *Republic Iron & Steel Co. v. State*, 160 Ind. 391, 62 L. R. A. 144, 66 N. E. 1005, holding statute requiring weekly payment of wages unconstitutional; *S. A. & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (Willson) p. 574, holding act imposing penalty on railroads for not paying employees within prescribed time unconstitutional; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 407, 23 L. R. A. 270, 41 Am. St. Rep. 109, 25 S. W. 75, holding statute requiring corporation to pay entire wages to date of discharge of employee, regardless of employer's damage, void.

Cited in *Dixon v. Poe*, 159 Ind. 497, 60 L. R. A. 310, 95 Am. St. Rep. 309, 65 N. E. 518, holding act requiring merchants issuing store tokens for wages assigned by coal miners, to redeem in money, invalid class legislation; *Johnson*

v. Goodyear Min. Co. 127 Cal. 14, 47 L. R. A. 342, 78 Am. St. Rep. 17, 59 Pac. 304, holding act giving employees lien on property of corporation failing to pay wages monthly, invalid; *Frorer v. People*, 141 Ill. 182, 16 L. R. A. 496, 31 N. E. 395, holding act prohibiting mine owners and manufacturers from keeping "truck stores" unconstitutional; *Com. v. Brown*, 43 W. N. C. 75, 8 Pa. Super. Ct. 355, declaring act requiring weighing of coal before screening, unconstitutional; *State v. Wilson*, 7 Kan. App. 446, 53 Pac. 371, holding act requiring weighing of coal before screening, constitutional.

Cited in footnotes to *Hancock v. Yaden*, 6 L. R. A. 576, which holds statute prohibiting employees of mining and manufacturing companies contracting to receive wages in other than money not unjust discrimination; *Braceville Coal Co. v. People*, 22 L. R. A. 340, which holds unconstitutional, statute requiring weekly payment of wages by specified corporations.

— **As to attorney's fees.**

Cited in *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 165, 41 L. ed. 672, 17 Sup. Ct. Rep. 255, holding act permitting successful claimants against railroads to recover attorney's fees invalid; *Hocking Valley Coal Co. v. Rosser*, 53 Ohio St. 25, 29 L. R. A. 390, 53 Am. St. Rep. 622, 41 N. E. 263, holding statute allowing plaintiff attorney's fees in suits for wages unconstitutional; *Vogel v. Pekoc*, 157 Ill. 349, 30 L. R. A. 495, 42 N. E. 386 (dissenting opinion), majority holding statute allowing plaintiff attorney's fees in suits for wages constitutional; *Davidson v. Jennings*, 27 Colo. 195, 48 L. R. A. 343, 83 Am. St. Rep. 49, 60 Pac. 354, holding portion of act permitting plaintiff in mechanic's lien foreclosure to tax attorney's fee unconstitutional; *Los Angeles Gold Mine Co. v. Campbell*, 13 Colo. App. 7, 56 Pac. 246, following as binding, authority of United States Supreme Court holding taxing of attorney's fee by plaintiff in mechanic's lien cases unconstitutional.

6 L. R. A. 360, *AIKEN v. FRANKLIN*, 42 Minn. 91, 43 N. W. 839.

Covenants running with land.

Cited in footnotes to *Mott v. Oppenheimer*, 17 L. R. A. 409, which construes as running with the land, agreement for party wall expressly declared to run with land; *Mygatt v. Coe*, 11 L. R. A. 646, which holds covenants of warranty and quiet enjoyment by owner of fee and her husband do not run with land as against husband; *Bald Eagle Valley R. Co. v. Nittany Valley R. Co.* 29 L. R. A. 423, which holds intention of parties controlling in determining whether covenant runs with land.

Breach of covenant of seisin.

Cited in footnotes to *Hodges v. Wilkinson*, 17 L. R. A. 545, which holds action for breach of implied warranty of title of personalty sold, after its taking by third person, not premature; *Wiggins v. Pender*, 61 L. R. A. 772, which holds assignee entitled to benefit of covenant of warranty not naming him, if assigns named in *habendum* clause of deed.

6 L. R. A. 362, *MARTIN v. PALMER*, 42 Minn. 176, 43 N. W. 966.

Log-lien law; construction.

Cited in *Breault v. Archambault*, 64 Minn. 423, 58 Am. St. Rep. 545, 67 N. W. 348, holding camp cook, assistant, and camp blacksmith entitled to benefits of

log-lien law; *Breault v. Archambault*, 64 Minn. 423, 58 Am. St. Rep. 545, 67 N. W. 348, holding party supplying teams and drivers under entire contract entitled to lien, though performing no manual labor herself; *Klondike Lumber Co. v. Williams*, 71 Ark. 338, 75 S. W. 854, holding that laborer's lien covers use of wagon and team; *Proux v. Stetson & P. Mill Co.* 6 Wash. 481, 33 Pac. 1167, holding lien for labor under entire contract enforceable against only part of logs.

Distinguished in *Mabie v. Sines*, 92 Mich. 547, 52 N. W. 1007, holding party selling team to be used in lumber yard, under contract providing for monthly rental in default of stipulated payments of purchase price, not entitled to lien.

6 L. R. A. 363, *JOHN W. LOVELL CO. v. HOUGHTON*, 116 N. Y. 520, 22 N. E. 1066.

Privileged communications.

Cited in *Sommers v. Christiano*, 21 Misc. 177, 47 N. Y. Supp. 115, holding affidavit in support of motion in legal proceeding prima facie privileged; *McCarty v. Lambley*, 20 App. Div. 268, 46 N. Y. Supp. 792, holding master's charge of employee with theft privileged, where informed by subordinates that such employee had not only stolen, but had admitted guilt; *Bowsky v. Cimiotti Unhairing Co.* 72 App. Div. 175, 76 N. Y. Supp. 465, holding publication warning traders against using or employing those who used machines infringing patents privileged; *Weber v. Lane*, 99 Mo. App. 82, 71 S. W. 1099, holding report of committee of board of aldermen investigating charges against dramshop keeper privileged.

Cited in footnotes to *Rothholz v. Dunkle*, 13 L. R. A. 655, which holds communication by bank cashier to stockholder as to solvency of surety on bond to bank privileged; *Hemmens v. Nelson*, 20 L. R. A. 441, which holds statement by principal of deaf mute institute, to executive committee, as to improper acts of department superintendent privileged; *Nissen v. Cramer*, 6 L. R. A. 780, which holds relevant words spoken by party to action during trial privileged; *Moore v. Manufacturers' Nat. Bank*, 11 L. R. A. 753, which holds reference, in statement to sureties of cashier, to items drawn by "collusion with teller," libelous as to teller; *Conroy v. Pittsburgh Times*, 11 L. R. A. 725, which holds privileged communication one properly made on proper occasion from proper motive on probable cause.

Cited in note (9 L. R. A. 621) on what constitutes libel and slander.

— Question for court.

Cited in *Hart v. Sun Printing & Pub. Asso.* 79 Hun. 361, 29 N. Y. Supp. 434, holding character of admitted facts, published under claim of privilege, question of law for court.

— Question for jury.

Cited in *Warner v. Press Pub. Co.* 132 N. Y. 183, 30 N. E. 393, holding existence of facts published under claim of privilege, for jury.

Inference of malice.

Cited in footnotes to *Pollasky v. Michener*, 9 L. R. A. 102, which authorizes inference of malice from sending false statement as to mortgage, advising caution, to patrons of commercial agency; *Street v. Johnson*, 14 L. R. A. 203, which holds seller of presumed to know that it contains libel.

Cited in note (13 L. R. A. 708) on slander of title.

6 L. R. A. 366, WILLIAMS v. GUILLE, 117 N. Y. 343, 22 N. E. 1071.

Gifts causa mortis.

Cited in *Ridden v. Thrall*, 125 N. Y. 579, 21 Am. St. Rep. 758, 11 L. R. A. 688, 26 N. E. 627, holding gift of box containing bank books in event donor did not survive pending surgical operation, valid gift *causa mortis*, though operation successful and donor died in hospital from another disease to which subject before operation; *Hogan v. Sullivan*, 114 Iowa, 460, 87 N. W. 447, holding delivery of memorandum on deathbed, to son-in-law, disposing of bank deposit, certificate for which taken in his name two years prior, valid gift *causa mortis* in favor of beneficiaries named in memorandum; *Caylor v. Caylor*, 22 Ind. App. 674, 72 Am. St. Rep. 331, 52 N. E. 465, holding deathbed gift by wife of all her property of which husband in possession, to absent nephew, valid; *Callanan v. Clement*, 18 Misc. 625, 42 N. Y. Supp. 514, holding delivery of bank book to donee on deathbed of donor, with subsequent directions to donee to let former custodian keep same until after donor's death, valid gift; *Re Crosby*, 46 N. Y. S. R. 444, 1 Power, 30, 20 N. Y. Supp. 63, holding delivery of promissory note to attending niece to hold for maker sufficient to validate gift; *Leyson v. Davis*, 17 Mont. 274, 31 L. R. A. 447, 42 Pac. 775, holding gift of bank stock accompanied by delivery, to donee four months prior to donor's death and on eve of journey to recuperate, valid, though donor returned before death, and during absence stock was voted according to his direction; *Larrabee v. Hascall*, 88 Me. 520, 51 Am. St. Rep. 440, 34 Atl. 408, holding that lapse of one month and a half between gift and death of testator does not invalidate same as gift *causa mortis*; *Kirk v. McCusker*, 3 Misc. 284, 22 N. Y. Supp. 780, in concurring opinion, in support of dissent from statement that gift of bank deposit was revoked by subsequent appropriation of portion of account to donor's personal use; *Telford v. Patton*, 144 Ill. 627, 33 N. E. 1119, holding sum deposited in name of third party eight months before death, without delivery of certificate to third party, not valid gift; *Hatcher v. Buford*, 60 Ark. 173, 27 L. R. A. 508, 29 S. W. 641, holding indorsement of donee's note to his mother while donor was in expectancy of death, but still able actively to tend to business, gift *inter vivos*; *Blazo v. Cochrane*, 71 N. H. 587, 53 Atl. 1026, and *Bean v. Bean*, 71 N. H. 542, 53 Atl. 907, holding gift *causa mortis* not absolute, though no condition be expressed; *Bray v. O'Rourke*, 89 App. Div. 402, 85 N. Y. Supp. 907, holding that gift *inter vivos* may be based on delivery to third person for donee's benefit; *Opitz v. Karel*, 118 Wis. 535, 62 L. R. A. 985, 99 Am. St. Rep. 1004, 95 N. W. 948, holding that insured may make valid gift by delivery of insurance policy; *Devol v. Dye*, 123 Ind. 328, 7 L. R. A. 442, 24 N. E. 246, holding delivery of key of private box to bank cashier, with instructions to set aside and mark certain sums with donees' names, valid.

Cited in footnotes to *Peck v. Rees*, 13 L. R. A. 714, which holds delivery of deed by donor to own agent insufficient; *Gammon Theological Seminary v. Robbins*, 12 L. R. A. 506, which holds instrument declaring that holder gives note, which he retains, insufficient as gift.

Cited in notes (7 L. R. A. 439; 11 L. R. A. 684) on gifts *causa mortis*; (18 L. R. A. 171) on sufficiency of constructive delivery to sustain gift *causa mortis*.

Criticized in *Zeller v. Jordan*, 105 Cal. 147, 38 Pac. 640, holding gift of check, unaccompanied by deposit book, by wife while well and on understanding that not to be used till death, not valid.

Disapproved in *Bieber v. Boeckmann*, 70 Mo. App. 508, holding delivery of money on deathbed to party, with directions to divide same between certain relatives in event of death, but to return it in case of recovery, not valid.

Time when gift takes effect.

Cited in *Callanan v. Clement*, 18 Misc. 625, 42 N. Y. Supp. 514, holding that gift of bank deposit relates back, on death of donor, to date of delivery of bank book to agent for donee.

Direction of verdict.

Cited in *Decker v. Sexton*, 19 Misc. 68, 43 N. Y. Supp. 167, holding verdict properly directed on question of waiver, where evidence of landlord and tenant conclusive against same; *Hopkins v. Nashville, C. & St. L. R. Co.* 96 Tenn. 435, 32 L. R. A. 362, 34 S. W. 1029, holding demurrer to evidence permissible in Tennessee without violating constitutional guaranty of trial by jury and provision against direction of verdict.

6 L. R. A. 369, *MANHATTAN CLOAK & SUIT CO. v. DODGE*, 120 Ind. 1, 16 Am. St. Rep. 298, 21 N. E. 344.

Breach of confidential relation.

Cited in *Hughes v. Willson*, 128 Ind. 494, 26 N. E. 50, holding attorney trustee of profits received on purchase and sale of land in fraud of client's estate; *Re Dwight*, 61 App. Div. 362, 70 N. Y. Supp. 563, holding attorney of assignee for benefit of creditors entitled to receive out of assigned estate only amount paid by him for claims against estate.

Cited in footnotes to *Harrison v. Mulvane*, 54 L. R. A. 405, which holds one charged with selling corporate stock to pay encumbrances, one of which he owns. not forbidden, as trustee, to buy prior liens to protect own interests; *Frazier v. Jeakins*, 57 L. R. A. 575, which holds guardian's sale to her husband void.

Cited in notes (9 L. R. A. 793) on purchase by trustee inuring to benefit of *cestui que trust*; (12 L. R. A. 396) on right of agent to become purchaser of subject of agency; (13 L. R. A. 490) on personal interest conflicting with fiduciary duty; (11 L. R. A. 328) on right of creditors of insolvent to dividends.

6 L. R. A. 371, *HART v. BURCH*, 130 Ill. 426, 22 N. E. 831.

Dower.

Cited in *Heisen v. Heisen*, 145 Ill. 664, 21 L. R. A. 437, 34 N. E. 597, holding husband's statutory dower barred *pro tanto* by taking lease for term of years from wife's executors; *Thompson v. Marsh*, 61 Ill. App. 271, holding that creditor may maintain suit to secure assignment of judgment debtor's right of dower and application to judgment; *Card v. Pudney*, 42 App. Div. 408, 59 N. Y. Supp. 278, holding widow of tenant in common not entitled to sale of cotenant's interest in property in suit to apportion dower in husband's interest; *Grubbs v. Leyendecker*, 153 Ind. 352, 53 N. E. 940, holding daughter barred after lapse of statutory period, to claim share of estate as against purchasers from sons conveying full title under transfer from mother of unassigned dower rights.

— Release of.

Cited in *Fletcher v. Shepherd*, 174 Ill. 271, 51 N. E. 212, holding that release of dower by widow to daughter in belief that latter owned fee operates as to actual interest of daughter, and does not bar claim to dower in remainder.

Judicial sale.

Cited in *Jennings v. Dunphy*, 174 Ill. 89, 50 N. E. 1045, holding conservator's sale subject to court's approval may be set aside, although price fair, where estate materially benefited by resale; *Davies v. Gibbs*, 174 Ill. 277, 51 N. E. 220, holding confirmation of irregular sale in vacation conclusive where no fraud or mistake shown which prevented filing of exceptions within statutory time.

6 L. R. A. 374, *MILLER v. MOORE*, 83 Ga. 684, 20 Am. St. Rep. 329, 10 S. E. 360.
Implied warranty.

Cited in *Snowden v. Waterman*, 105 Ga. 388, 31 S. E. 110, holding implied warranty of merchantableness not waived by personal examination of goods containing latent defect.

Cited in notes (6 L. R. A. 392) on implied warranty on sale by manufacturer; (15 L. R. A. 795) on effect of representing things sold to be "good."

Effect of acceptance.

Cited in footnote to *Ontario Deciduous Fruit Growers' Assn. v. Cutting Fruit Packing Co.* 53 L. R. A. 681, which requires buyer to pay for fruit received under contract, knowing full amount cannot be delivered.

Cited in note (12 L. R. A. 399) on effect of acceptance of goods under contract of sale.

6 L. R. A. 377, *GARRETSON v. FERRALL*, 78 Iowa, 166, 42 N. W. 637.

6 L. R. A. 379, *BINNEY v. GLOBE NAT. BANK*, 150 Mass. 574, 23 N. E. 380.
Statutory rights of feme covert.

Cited in *Colonial & U. S. Mortg. Co. v. Bradley*, 4 S. D. 162, 55 N. W. 1108, holding married woman liable on joint promissory note given in payment of husband's individual debt; *Foster v. Leach*, 160 Mass. 420, 36 N. E. 69, holding acceptance of note on wife's indorsement sufficient consideration to support her contract as indorser; *Harmon v. Old Colony R. Co.* 165 Mass. 106, 30 L. R. A. 660, 52 Am. St. Rep. 499, 42 N. E. 505, holding earning capacity of woman as laborer proper element of damages.

Cited in footnote to *Kitchen v. Chapin*, 57 L. R. A. 914, which holds married woman liable on her guaranty of note owned by her and payable to her order.

Cited in notes (7 L. R. A. 641) on wife's capacity to contract; (19 L. R. A. 226) on women included in term "persons."

Estoppel.

Cited in *Prescott Nat. Bank v. Butler*, 157 Mass. 550, 32 N. E. 909, holding invalidity of note made on Sunday not matter of defense in action by purchaser against indorser; *Wisdom v. Shanklin*, 74 Mo. App. 431, holding maker of negotiable note estopped to deny wife's capacity as payee to indorse same to purchaser for value.

Sufficiency of affidavit in insolvency proceedings.

Cited in *Clement v. Bullens*, 159 Mass. 106, 34 N. E. 173, holding affidavit on information and belief sufficient to support petition for examination of insolvent.

Review of proceedings of insolvency court.

Cited in *Jaquith v. Fuller*, 167 Mass. 128, 45 N. E. 54, denying writ of prohibition against insolvency court, where error correctable by appeal.

6 L. R. A. 383, *HYLAND v. HABICH*, 150 Mass. 112, 15 Am. St. Rep. 174, 22 N. E. 765.

Termination of suretyship.

Cited in *Valentine v. Donohoe-Kelly Bkg. Co.* 133 Cal. 106, 65 Pac. 381, holding estate of guarantor of bank account not liable for overdraft after notice to bank of guarantor's death; *Manitowoc County v. Truman*, 91 Wis. 14, 64 N. W. 307, holding sureties on bond given by bank to secure deposit of county moneys not discharged by renewal of deposit contract.

Cited in notes (23 L. R. A. 709) on effect on contract of guaranty of death of party thereto; (8 L. R. A. 381) on construction of contract of guaranty.

Distinguished in *Fewlass v. Keeshan*, 32 C. C. A. 9, 60 U. S. App. 133, 88 Fed. 574, holding surety on cost bond liable for costs accruing after his death.

Disapproved in *Gay v. Ward*, 67 Conn. 156, 32 L. R. A. 820, 34 Atl. 1025, holding death of guarantor not affect continuing guaranty without actual notice to guarantee.

6 L. R. A. 384, *TRUMBLE v. TERRITORY*, 3 Wyo. 280, 21 Pac. 1081.

Presumption of malice.

Cited in *State v. Vaughan*, 22 Nev. 301, 39 Pac. 733, holding malice not always presumed where intention to kill exists; *Territory v. Lucero*, 8 N. M. 555, 46 Pac. 18, holding no implication of malice from mere fact of killing; *State v. Gibson*, 43 Or. 189, 73 Pac. 333, holding conclusive presumption of intent to murder from use of deadly weapon not arise where evidence shows circumstances of justification.

6 L. R. A. 387, *STONER v. RICE*, 121 Ind. 51, 22 N. E. 968.

Riparian owner of fractional section of non-navigable lake.

Cited in *John Hilt Lake Ice Co. v. Zahrt*, 29 Ind. App. 478, 62 N. E. 509; *Kean v. Calumet Canal & Improv. Co.* 190 U. S. 459, 47 L. ed. 1137, 23 Sup. Ct. Rep. 651, *Brophy v. Richeson*, 137 Ind. 115, 36 N. E. 424,—holding government grant of fractional quarter, the remainder of which covered in part by inland non-navigable lake, includes whole quarter; *Tolleston Club v. State*, 141 Ind. 207, 38 N. E. 214, holding whole sections including both sides of meander lines within list of swamp lands describing same as "all of section," etc.; *Concord Mfg. Co. v. Robertson*, 66 N. H. 28, 18 L. R. A. 694, 25 Atl. 718, upholding classification of lakes and ponds by acreage; *Poynter v. Chipman*, 8 Utah, 450, 32 Pac. 600, holding that grant of land to shore of inland lake confers right to follow water in recession.

Cited in note (18 L. R. A. 696) as to ownership of bed of lakes and ponds.

Disapproved in *Hardin v. Jordan*, 140 U. S. 398, 35 L. ed. 439, 11 Sup. Ct. Rep. 808, and *Lamprey v. State*, 52 Minn. 195, 18 L. R. A. 677, 38 Am. St. Rep. 541, 53 N. W. 1139, holding grant of land bounded on inland non-navigable lake includes fee to center; *Lembek v. Nye*, 47 Ohio St. 349, 8 L. R. A. 581, 21 Am. St. Rep. 828, 24 N. E. 686, holding that grant of land adjoining non-navigable lake goes to center unless margin distinctly referred to; *Fuller v. Shedd*, 161 Ill. 486, 33 L. R. A. 159, 52 Am. St. Rep. 380, 44 N. E. 286, holding that grant of land bounded by meandered lake conveys only to water's edge.

Effect of officer's appearance in court.

Cited in note (11 L. R. A. 370) as to law authorizing suit against state.

6 L. R. A. 390, *ANDERSON v. JETT*, 89 Ky. 375, 12 S. W. 670.

Illegal combinations.

Cited in State *ex rel.* *Crow v. Firemen's Fund Ins. Co.* 152 Mo. 47, 45 L. R. A. 377, 52 S. W. 595, denying right of insurers to contract among themselves for maintenance of rates; *Huston v. Reutlinger*, 91 Ky. 343, 34 Am. St. Rep. 225, 15 S. W. 867, holding void by-laws of underwriters, limiting number and pay of solicitors, and time of employment, or employment of solicitor severing from another member within one year; *Gamewell Fire Alarm Teleg. Co. v. Crane*, 160 Mass. 57, 22 L. R. A. 677, 39 Am. St. Rep. 458, 35 N. E. 98, holding sale of letters patent and improvements, with vendor's stipulation to manufacture or sell machines for same purpose for ten years, against public policy; *Milwaukee Masons & Builders' Asso. v. Niezerowski*, 95 Wis. 136, 37 L. R. A. 130, 60 Am. St. Rep. 97, 70 N. W. 166, holding rule of builders' association requiring all bids to be submitted to committee's examination, and that 6 per cent be added to amount of lowest bid, void; *Brown v. Jacobs' Pharmacy Co.* 115 Ga. 435, 57 L. R. A. 551, 90 Am. St. Rep. 126, 41 S. E. 553, holding combination of druggists to compel another druggist to observe prices, or to prevent their wholesalers from selling to him, void; *Tuscaloosa Ice Mfg. Co. v. Williams*, 127 Ala. 123, 50 L. R. A. 180, 85 Am. St. Rep. 125, 28 So. 689, holding contract to discontinue use of ice machine in consideration of payment by owner of only other machine in town void; *Lovejoy v. Michels*, 88 Mich. 28, 13 L. R. A. 775, 49 N. W. 901, holding price fixed by combination of manufacturers with sole reference to personal interests, not determinative of price of goods ordered without agreement as to price; *Seasongood, S. K. Co. v. Tennessee & O. River Transp. Co.* 21 Ky. L. Rep. 1142, 49 L. R. A. 271, 54 S. W. 193, holding one of rival carriers not absolved from liability to shippers for refusals to accept freight under agreement only to accept freight destined for certain territory; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 133, 29 C. C. A. 155, 54 U. S. App. 723, 85 Fed. 286, holding void, combination of manufacturers in several states to regulate sales and prices in many states; *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 70, 71 S. W. 691, holding brewers' agreement to sell to no one indebted to parties thereto illegal; State *ex rel.* *Crow v. Armour Packing Co.* 173 Mo. 388, 61 L. R. A. 473, 96 Am. St. Rep. 515, 73 S. W. 645, holding combination of packing houses to control price of meat illegal; *Ætna Ins. Co. v. Com.* 106 Ky. 879, 45 L. R. A. 358, 51 S. W. 624, holding combination for maintenance of insurance rates not indictable at common law; *Queen Ins. Co. v. State*, 86 Tex. 266, 22 L. R. A. 492, 24 S. W. 397, sustaining combination to enforce uniform rates of insurance and of agents' commissions.

Cited in footnotes to *Pittsburgh Carbon Co. v. McMillin*, 7 L. R. A. 46, which holds party to illegal trust combination not entitled to proceeds as against receiver of trust assets; *Newell v. Meyendorff*, 8 L. R. A. 440, which holds valid, contract giving exclusive agency in certain territory for sale of particular brand of cigars.

Cited in notes (13 L. R. A. 770) as to effect of fixing price by illegal combination; (8 L. R. A. 497) as to effect of contracts against public policy; (8 L. R. A. 500) as to illegal nature of monopolies.

Distinguished in *United States v. Trans-Missouri Freight Asso.* 24 L. R. A.

83. 4 Inters. Com. Rep. 5, 7 C. C. A. 74, 19 U. S. App. 36, 58 Fed. 70; Affirming 53 Fed. 449, sustaining agreement by competing railways for maintenance of reasonable rates and equal facilities for interchange of traffic, without illegally limiting competition.

6 L. R. A. 392, GOULDS v. BROPHY, 42 Minn. 109, 43 N. W. 834.

Implied warranty of fitness.

Cited in Wisconsin Red Pressed-Brick Co. v. Hood, 54 Minn. 548, 56 N. W. 165, Same Case on Subsequent Appeal in 60 Minn. 404, 51 Am. St. Rep. 539, 62 N. W. 550, holding, on sale of "common bricks, no warranty of fitness for intended purpose; J. Thompson Mfg. Co. v. Gunderson, 106 Wis. 454, 49 L. R. A. 862, 82 N. W. 299, holding no implied warranty of fitness of machines manufactured according to model and specifications; J. I. Case Plow Works v. Niles & S. Co. 90 Wis. 603, 63 N. W. 1013, holding goods manufactured according to specifications not warranted fit for known purpose; Milwaukee Boiler Co. v. Duncan, 87 Wis. 125, 41 Am. St. Rep. 33, 58 N. W. 232, holding boiler manufactured according to specifications not warranted fit for known purpose; Fairbanks, M. & Co. v. Baskett, 98 Mo. App. 70, 71 S. W. 1113, holding vendor of engine of designated kind and character does not impliedly warrant fitness for intended uses; Kinkel v. Winne, 67 Kan. 104, 62 L. R. A. 598, 72 Pac. 548, holding seller of fire-insurance expiration register does not impliedly warrant exclusiveness of information contained.

Cited in notes (6 L. R. A. 375) on implied warranty on sale of goods; (22 L. R. A. 188) on implied warranty of fitness of property bought for special purpose; (6 L. R. A. 789) on distinction between sales and contracts to manufacture.

Distinguished in Haines, J. & C. Co. v. Young, 13 Pa. Super. Ct. 315, holding article manufactured for particular purpose impliedly warranted to be fit.

6 L. R. A. 394, STATE *ex rel.* BALTZELL v. STEWART, 74 Wis. 620, 43 N. W. 947.

Special legislation.

Cited in Carson v. St. Francis Levee Dist. 59 Ark. 535, 27 S. W. 590 (disapproved in dissenting opinion), sustaining act conferring corporate powers on public levee board; State *ex rel.* Turner v. Bell, 91 Wis. 274, 64 N. W. 846, holding act repealing special drainage act and authorizing levy of tax to pay expenses under same void.

Distinguished in State *ex rel.* Church Mut. Ins. Co. v. Cheek, 77 Wis. 287, 46 N. W. 163, holding act to enable Methodist church or annual conferences to form insurance corporation, which speaks throughout of but one corporation, void.

Police powers as to drainage.

Cited in Muskego v. Drainage Comrs. 78 Wis. 44, 47 N. W. 11, holding drainage act valid exercise of police power; Wilson v. Sanitary District, 133 Ill. 467, 27 N. E. 203, upholding validity of act creating drainage corporation including both city and county; Morrison v. Morey, 146 Mo. 561, 48 S. W. 629, holding levee district political subdivision of state which may be created under police power of state.

Cited in note (49 L. R. A. 786) as to drainage of private lands as public purpose for which power of eminent domain may be exercised.

Necessity of condemnation.

Cited in *Wisconsin Water Co. v. Winans*, 85 Wis. 39, 20 L. R. A. 666, 39 Am. St. Rep. 813, 54 N. W. 1003, holding question of necessity for taking land by eminent domain for legislature.

Notice and right of appeal.

Cited in *Roundenbush v. Mitchell*, 154 Ind. 620, 57 N. E. 510, upholding drainage act providing for notice and hearing before commissioner and upon appeal, and prohibiting assessment in absence of compensating benefits; *Towns v. Klamath County*, 33 Or. 234, 53 Pac. 604, holding notice of application for highway location not essential, if nonconsenting abutter has right of appeal.

Cited in footnotes to *Branson v. Gee*, 24 L. R. A. 355, which holds act authorizing taking of gravel from private lands without notice, for highway repairs, valid; *Brown v. Markham*, 30 L. R. A. 84, which holds valid, statute authorizing logger's lien without notice to owner, but giving subsequent opportunity to intervene.

Validity of drainage assessments.

Cited in *Morrison v. Morey*, 146 Mo. 564, 48 S. W. 629, holding levee assessments for benefits constitutional, not being a tax.

6 L. R. A. 399, *FILER v. FILER*, 77 Mich. 469, 43 N. W. 887.

Effect of decree in divorce suit.

Cited in note (6 L. R. A. 488) as to effect of divorce on articles of separation.

6 L. R. A. 400, *FARWELL v. BECKER*, 129 Ill. 261, 16 Am. St. Rep. 267, 21 N. E. 792.

Right of appeal.

Cited in *Stettauer v. Boldenweck*, 183 Ill. 189, 55 N. E. 709, and *Aultman & T. Co. v. Weir*, 134 Ill. 138, 24 N. E. 771, holding decision of appellate court final in creditor's action to set aside sale, where claims less than \$1,000; *Payne v. Chicago, R. I. & P. R. Co.* 170 Ill. 609, 48 N. E. 1053, holding that supreme court will dismiss appeal in garnishment against one of several garnishees whose individual liability less than \$1,000; *Hutmacher v. Anheuser-Busch Brewing Asso.* 198 Ill. 614, 64 N. E. 1092, holding that several amounts claimed in consolidated garnishment proceedings cannot be aggregated to confer jurisdiction on supreme court; *Davis v. Upham*, 191 Ill. 373, 61 N. E. 76, holding appellate court decision final where each of several mechanic's liens less than \$1,000; *Garden City Sand Co. v. American Refuse Crematory Co.* 205 Ill. 46, 68 N. E. 724, dismissing appeal to supreme court in proceeding to enforce stockholders' liability for unpaid balances, as to stockholders whose individual liability is less than \$1,000; *Spangler v. Green*, 21 Colo. 508, 52 Am. St. Rep. 259, 42 Pac. 674, holding several judgments in mechanic's lien proceeding cannot be aggregated to confer jurisdiction on appellate court.

Contribution between joint tort feensors.

Cited in *Vandiver v. Pollak*, 107 Ala. 555, 54 Am. St. Rep. 118, 19 So. 180, and *Selz v. Guthman*, 62 Ill. App. 635, holding creditors wrongfully procuring attachment liable to contribute to one paying judgment; *Grimes v. Taylor*, 93

Ill. App. 497, holding plaintiff in replevin assisting in seizure liable to indemnify officer.

Distinguished in *Frankenthal v. Lingo*, 16 Tex. Civ. App. 232, 40 S. W. 815, holding creditors wrongfully procuring attachment not liable to contribute to judgment recovered against first creditor.

6 L. R. A. 403, *BEAVER v. BEAVER*, 117 N. Y. 421, 15 Am. St. Rep. 531, 22 N. E. 940.

Second appeal in 137 N. Y. 59, 32 N. E. 998.

When trust is created.

Cited in *Beeman v. Beeman*, 88 Hun, 15, 34 N. Y. Supp. 484, holding trust not created by conveyances by father to children, with mortgages back, conditioned to pay sum for his life and then to daughter named; *Sullivan v. Sullivan*, 39 App. Div. 100, 56 N. Y. Supp. 693, holding trust for niece not created by certificate of deposit to order of depositor, and to niece in event of death, but retained by depositor; *Fellows v. Fellows*, 69 N. H. 345, 46 Atl. 474, holding mortgage conditional upon support of mortgagee for life, and then to pay same to persons named, not irrevocable trust from which mortgagee cannot release mortgagor; *Domestic Missions v. Mechanics' Sav. Bank*, 40 App. Div. 121, 54 N. Y. Supp. 28, holding trust created by addition to depositor's name of words "in trust for board of missions."

Cited in footnote to *Sayre v. Weil* 15 L. R. A. 544, which holds irrevocable, deposit to one's self as trustee for specified children.

Distinguished in *Domestic Missions v. Mechanics' Sav. Bank*, 24 Misc. 597, 54 N. Y. Supp. 28, holding declaration of trust evidenced by transfer of bank account to board of domestic missions at request of depositor.

Trust in deposit in name of another.

Cited in *Re Barefield*, 36 Misc. 748, 74 N. Y. Supp. 472, holding deposit by administratrix of her own money in trust for estate of decedent not of itself declare trust in estate; *Peoples Sav. Bank v. Webb*, 21 R. I. 221, 42 Atl. 874, holding deposit by one in name of his infant son not of itself declare a trust in latter's favor; *Peninsular Sav. Bank v. Wineman*, 123 Mich. 259, 81 N. W. 1091, holding gift to wife not created by mere transfer of deposit by husband to wife's name, with pass-book in her name but retained by him.

Distinguished in *Cunningham v. Davenport*, 147 N. Y. 46, 32 L. R. A. 376, 49 Am. St. Rep. 641, 41 N. E. 412, Reversing 74 Hun, 55, 26 N. Y. Supp. 322, holding that administrator of one in whose name deposit was made in savings bank, of which he never knew, cannot recover amount withdrawn by depositor; *Millard v. Clark*, 80 Hun, 146, 29 N. Y. Supp. 1012, holding deposit started by father with child's savings, in her name and acknowledged by him to be hers, held in trust for her though deposited subject to his control.

Deposit in alternative names.

Cited in *McElroy v. Albany Sav. Bank*, 8 App. Div. 48, 40 N. Y. Supp. 422, holding that deposit in savings bank in account with alternative names of husband and wife, or survivor, belongs to survivor; *Grafiug v. Irving Sav. Inst.* 37 Misc. 22, 74 N. Y. Supp. 741, holding savings bank protected in payment to executrix of one in whose name "or" another deposit had been made, on presentation of pass-book; *Norway Sav. Bank v. Merriam*, 88 Me. 150, 33 Atl. 840,

holding trusts not created by deposits in alternative names, when depositor retained pass-books which were found after her death among her belongings; *Denigan v. Hibernia Sav. & L. Soc.* 127 Cal. 141, 59 Pac. 389, holding gift to husband of deposit made by wife in her name "or" that of husband not evidenced by mere possession of pass-book; *Hannon v. Sheehan*, 46 N. Y. S. R. 566, 19 N. Y. Supp. 698, holding gift inferred from one sister to another of deposit in name of depositor "or" sister, with pass-book found where latter lived.

Deposit in trust for another.

Cited in *Lee v. Kennedy*, 25 Misc. 142, 54 N. Y. Supp. 155, holding mere deposit in one's name, "for niece" named, not declaration of trust; *Bishop v. Seaman's Bank for Savings*, 33 App. Div. 182, 53 N. Y. Supp. 488, holding deposit "in trust" for another raises presumption of trust and does not lapse by death of *cestui que trust*; *Devlin v. Hinman*, 34 App. Div. 109, 54 N. Y. Supp. 496, holding evidence disclosed no intention to make present gift of money deposited by father in own name as "trustee" for two children, and continually drawn on by himself; *Robertson v. McCarty*, 54 App. Div. 106, 66 N. Y. Supp. 327, holding deposit "in trust" for brother created irrevocable trust notwithstanding retention of bank book and that beneficiary was unaware of it until death of depositor; *Harrison v. Totten*, 29 Misc. 700, 62 N. Y. Supp. 754, holding deposit "for" another does not create irrevocable trust where depositor retains book and draws from account; *Jenkins v. Baker*, 77 App. Div. 513, 78 N. Y. Supp. 1074, Reversing 36 Misc. 56, 72 N. Y. Supp. 546, and *Re Totten*, 89 App. Div. 371, 85 N. Y. Supp. 928, Reversing 38 Misc. 351, 77 N. Y. Supp. 928, holding valid trust created by deposit in trust for another, subsequently withdrawn; *Farleigh v. Cadman*, 159 N. Y. 172, 53 N. E. 808, holding deposit made by one, acting as father, in his own name in trust for child and known to her, held in trust; *Graefing v. Heilman*, 1 App. Div. 263, 37 N. Y. Supp. 253, holding deposit in name of depositor in trust for another held in trust for beneficiary, although interest reserved to depositor and principal to go only on death of depositor; *Macy v. Williams*, 83 Hun, 249, 31 N. Y. Supp. 620, holding deposits made in name of depositor "in trust" for several persons named, not intended as gifts; *Decker v. Union Dime Sav. Inst.* 15 App. Div. 554, 44 N. Y. Supp. 521, holding circumstances justified finding that trust was created in deposit in name of depositor as "trustee" for another; *Re Mueller*, 15 App. Div. 69, 44 N. Y. Supp. 280, holding depositor does not divest himself of title to deposit in own name in trust for another, if there is no intention to give beneficial interest; *Martin v. Martin*, 46 App. Div. 448, 61 N. Y. Supp. 813, holding deposit in bank held in trust by one in name of another, coupled with statement that depositor "may draw," and declaration that money was to belong to donee; *Re Biggars*, 39 Misc. 430, 80 N. Y. Supp. 214, holding valid trust created by deposit "in trust for" daughter who was not informed thereof, though depositor made withdrawals; *Dickie v. Adams*, 40 Misc. 90, 81 N. Y. Supp. 336, holding evidence of deposit in name of one person in trust for another, subsequently withdrawn by individual check, insufficient to establish trust.

Distinguished in *Hyde v. Kitchen*, 69 Hun, 282, 23 N. Y. Supp. 573, holding irrevocable trust shown by deposit of money in bank in name of depositor in trust for brother named, though bank book retained by depositor; *Williams v. Brooklyn Sav. Bank*, 51 App. Div. 337, 64 N. Y. Supp. 1021, holding deposit

in name of depositor "in trust" for another showed *prima facie* intention to create trust, which was not defeated by retention of book and withdrawal of part of fund.

When acceptance of gift implied.

Cited in *Matson v. Abbey*, 70 Hun, 478, 24 N. Y. Supp. 284; *Langworthy v. Crissey*, 10 Misc. 453, 31 N. Y. Supp. 85; *Goelz v. People's Sav. Bank*, 31 Ind. App. 75, 67 N. E. 232; *O'Neil v. Greenwood*, 106 Mich. 582, 64 N. W. 511, — holding acceptance of gift beneficial to donee implied; *Porter v. Gardner*, 60 Hun, 575, 15 N. Y. Supp. 398, holding acceptance of colt given to nephew implied.

What constitutes gift.

Cited in *Schwind v. Ibert*, 60 App. Div. 380, 69 N. Y. Supp. 921, holding gift not shown by statement by depositor that she put money in bank for daughter, deposited in joint names of self and daughter; *Simpson v. Harris*, 21 Nev. 363. 31 Pac. 1009, holding gift not evidenced by declaration that one advancing money to another will never enforce debt; *Re Timerson*, 39 Misc. 678, 80 N. Y. Supp. 639, holding expressed intention to forgive debts, without delivery of notes to makers, does not constitute gift; *Re Munson*, 25 Misc. 589, 56 N. Y. Supp. 151, holding gift to son of personal property on farm not created where father remained in possession; *Re Taber*, 30 Misc. 181, 63 N. Y. Supp. 728, holding evidence that gifts complete and not made under undue influence necessary to support gifts from aged woman to nephew and adviser; *Re Swade*, 65 App. Div. 595, 72 N. Y. Supp. 1030, holding gift *causa mortis* by one sister to another evidenced by delivery of package which intestate declared in presence of others contained all her valuable papers, which she gave to donee; *Beaver v. Beaver*, 137 N. Y. 63, 32 N. Y. Supp. 998, Reversing 62 Hun, 205, 16 N. Y. Supp. 476, holding evidence failed to show completed gift; *Hamer v. Sidway*, 57 Hun, 234, 11 N. Y. Supp. 182, holding that promise to give nephew sum of money for abstaining from certain habits until specified age, but without delivery, not completed gift; *Van Slooten v. Wheeler*, 39 N. Y. S. R. 867, 15 N. Y. Supp. 591, holding expression of intention to make gift of ring, followed by delivery, valid transfer; *Krummel v. Thomas*, 5 Misc. 537, 25 N. Y. Supp. 833, holding deposit in bank with declaration of intent to give if donee survive donor not sufficient delivery; *Matson v. Abbey*, 70 Hun, 477, 24 N. Y. Supp. 284, holding valid gift created by delivery of sealed assignment of insurance money due assignors; *Picksley v. Starr*, 59 N. Y. S. R. 606, 27 N. Y. Supp. 616, holding donor's own check delivered and paid to donee amounted to gift, and not payment on account of salary; *Bump v. Pratt*, 84 Hun, 205, 32 N. Y. Supp. 538, holding delivery of bonds to one person for third constituted valid gift; *Gannon v. McGuire*, 160 N. Y. 482, 73 Am. St. Rep. 694, 55 N. E. 7, Reversing 22 App. Div. 48, 47 N. Y. Supp. 870, holding gift of bond and mortgage to mortgagor, completed by delivery to her, not defeated by depositing them with mortgagor for safe keeping; *Re Small*, 27 App. Div. 444, 50 N. Y. Supp. 341, holding gift intended to be made by brother to sister not consummated by giving her credit for sum on books of partnership of which he was member; *Re Anthony*, 40 Misc. 498, 82 N. Y. Supp. 789, holding husband's transfer to wife of money invested in his firm, with expressed intention to provide for her, valid gift; *Wetherow v. Lord*, 41 App. Div. 416, 58 N. Y. Supp. 778, holding delivery of check by husband for part of deposit in names of himself and wife, together

with pass book, constituted gift of his half; *Gilkinson v. Third Ave. R. Co.* 47 App. Div. 473, 63 N. Y. Supp. 792, holding delivery of key of box in trust company's vault containing certificates of stocks, with statement they were for donee, constituted gift; *Main's Appeal*, 73 Conn. 642, 48 Atl. 965, holding gift not created by deposit which depositor said she wished given to daughters after her death; *Telford v. Patton*, 144 Ill. 625, 33 N. E. 1119, holding gift not effected by taking certificate of deposit, retained by depositor, without declaration of trust, in another's name; *Kirk v. McCusker*, 3 Misc. 278, 22 N. Y. Supp. 780, holding gift *causa mortis* not evidenced by delivery of pass books, where donor subsequently withdrew part of account; *Liebe v. Battmann*, 33 Or. 245, 72 Am. St. Rep. 705, 54 Pac. 179, holding gift not disclosed by placing note in addressed envelope found on table in room where writer shot himself; *Richardson v. Emmett*, 61 App. Div. 213, 70 N. Y. Supp. 546, holding gift created by uncle's assignment of stock to niece and declaration that he had given it to her although he collected dividends; *Gilkinson v. Third Ave. R. Co.* 47 App. Div. 475, 63 N. Y. Supp. 792, holding gift created by placing certificates of stock in deposit box and giving donee key, donor also retaining one; *Crouse v. Judson*, 41 Misc. 342, 82 N. Y. Supp. 755, holding daughter entitled to certificate of stock issued in her name, kept in safe deposit box of father, who had stated he had given it to her; *Allen-West Commission Co. v. Grumbles*, 63 C. C. A. 404, 129 Fed. 290, holding delivery of assignment of stock, certificate being retained by donor, not valid gift.

Cited in footnotes to *Williamson v. Johnson*, 9 L. R. A. 277, which holds gift to enable fiancé to pay wedding expenses conditional on marriage; *Gammmon Theological Seminary v. Robbins*, 12 L. R. A. 506, which holds instrument declaring that holder gives note which he retains insufficient as gift; *Porter v. Woodhouse*, 13 L. R. A. 64, which holds warranty deeds not delivered by donor giving to third person.

Cited in notes (19 L. R. A. 700) on delivery of bank book to sustain gift of money in bank; (21 L. R. A. 693) on undelivered written transfer or assignment of property as a gift; (6 L. R. A. 515) on what constitutes gift *inter vivos*.

Declarations as affecting trust or gift.

Cited in *Washington v. Bank for Savings*, 171 N. Y. 172, 89 Am. St. Rep. 800, 63 N. E. 831, holding declaration of decedent that she never had children admissible as evidence to determine character of deposits made by her in names of children; *O'Neil v. Greenwood*, 106 Mich. 579, 64 N. W. 511, holding trust created by deposit by owner of evidences of indebtedness with bills of sale in envelopes, upon which names of donees indorsed; *Millard v. Clark*, 7 Misc. 369, 27 N. Y. Supp. 631, holding declaration of trust not evidenced by investment in securities, with statement attached showing they were to become gift only on death of depositor; *Re Gregg*, 11 Misc. 156, 32 N. Y. Supp. 1103, holding that declarations by owner that son owed nothing for rent, not amount to release in absence of receipt.

Intention as affecting trust.

Cited in *Wadd v. Hazelton*, 137 N. Y. 219, 21 L. R. A. 697, 33 Am. St. Rep. 707, 33 N. E. 143, Reversing 62 Hun, 608, 17 N. Y. Supp. 410, holding intended absolute gift failed for want of delivery, and could not be enforced as declaration of trust in absence of intent; *Hamer v. Sidway*, 57 Hun, 237, 11 N. Y. Supp. 182,

holding letter acknowledging prior promise by uncle to give money to nephew, not followed by deposit for him, not declaration of trust; *Skeen v. Marriott*, 22 Utah, 91, 61 Pac. 296, holding parol trust not disclosed by declarations of intention to provide for first wife's children at future time; *Hamilton v. Hall*, 111 Mich. 296, 69 N. W. 484, holding trust not created by declaration of intention to create one.

Liability of bank for paying deposit.

Cited in *Kopf v. Dry Dock Sav. Inst.* 32 Misc. 35, 65 N. Y. Supp. 364, holding by-law of savings bank in which wife had made deposits not protect bank in paying husband on her decease.

6 L. R. A. 409, *WHITEHEAD v. ST. LOUIS, I. M. & S. R. CO.* 99 Mo. 263, 11 S. W. 751.

Carrier and passenger, when relation exists.

Cited in *Simmons v. Oregon R. Co.* 41 Or. 158, 69 Pac. 440, and *Everett v. Oregon Short Line & U. N. R. Co.* 9 Utah, 347, 34 Pac. 289, holding person going in good faith on train not allowed to carry passengers, and permitted to remain, passenger; *Spence v. Chicago, R. I. & P. R. Co.* 117 Iowa, 9, 90 N. W. 346, and *Berry v. Missouri P. R. Co.* 124 Mo. 249, 25 S. W. 229, holding person riding on construction train, against company's rules of which he had no knowledge, with conductor's permission, passenger; *Fitzgibbon v. Chicago & N. W. R. Co.* 108 Iowa, 623, 79 N. W. 477 (dissenting opinion), majority holding one boarding special excursion train, without express or implied invitation, not presumed passenger.

Cited in footnotes to *Mendenhall v. Atchison, T. & S. F. R. Co.* 61 L. R. A. 120, which holds one riding on platform of baggage car at direction of brakeman, to whom money paid, not a passenger; *Chattanooga Rapid Transit Co. v. Venable*, 51 L. R. A. 886, which holds nightwatchman at depot getting on train to announce readiness to resume duty, a passenger; *Louisville & N. R. Co. v. Weaver*, 50 L. R. A. 381, which holds station agent riding on train without paying fare, several hours after work ended a passenger; *Atchison, T. & S. F. R. Co. v. Headland*, 20 L. R. A. 822, which holds presumption that person on train a passenger not applicable to caboose attached to freight train.

Distinguished in *Purple v. Union P. R. Co.* 57 L. R. A. 705, 51 C. C. A. 570, 114 Fed. 129, holding one riding free on freight train by permission of conductor, knowing passengers prohibited, not passenger.

Duty to persons riding on trains.

Cited in *Young v. Missouri P. R. Co.* 93 Mo. App. 273, holding carrier's duty toward free passenger, same as toward one paying; *Buck v. People's Street R. & Electric Light & P. Co.* 108 Mo. 185, 18 S. W. 1090, holding passenger riding free in street car with driver's consent entitled to same degree of care as other passengers; *Hays v. Wabash R. Co.* 51 Mo. App. 443; *Guffey v. Hannibal & St. J. R. Co.* 53 Mo. App. 468; *Fullerton v. St. Louis, I. M. & S. R. Co.* 84 Mo. App. 503; *Erwin v. Kansas City, Ft. S. & M. R. Co.* 94 Mo. App. 297, 68 S. W. 88; *Wait v. Omaha, K. C. & E. R. Co.* 165 Mo. 621, 65 S. W. 1028, — holding same degree of care required toward passenger on freight as on passenger train, except that passenger assumes risks necessarily incidental to running of such train; *McNeill v. Durham & C. R. Co.* 135 N. C. 721, 47 S. E. 765, holding railroad not

liable to one riding gratuitously, except for wilful and wanton injury; *Berry v. Missouri P. R. Co.* 124 Mo. 299, 25 S. W. 229 (dissenting opinion), majority holding railroad liable for want of ordinary care to persons wrongfully riding on train with knowledge of crew.

Distinguished in *Padgett v. Moll*, 159 Mo. 150, 52 L. R. A. 855, 81 Am. St. Rep. 347, 60 S. W. 121, holding newsboy jumping on and off street car entitled only to ordinary care; *Crawleigh v. Galveston, H. & S. A. R. Co.* 28 Tex. Civ. App. 265, 67 S. W. 140, holding railroad not liable for killing of person riding on freight train unknown to train crew, though resulting from gross negligence.

Right to prohibit passengers riding on freight trains.

Cited in *Burke v. Missouri P. R. Co.* 51 Mo. App. 498, holding railroad not bound to carry passengers on freight trains; *Farber v. Missouri P. R. Co.* 116 Mo. 92, 20 L. R. A. 353, 22 S. W. 631, holding that constitutional declaration that railroads are public highways does not authorize persons to ride without company's consent.

6 L. R. A. 412, *NICHOLS, S. & CO. v. CRANDALL*, 77 Mich. 401, 43 N. W. 875.

Parol agreement adding to or varying written instrument.

Followed in *Zimmerman Mfg. Co. v. Dolph*, 104 Mich. 285, 62 N. W. 339, holding evidence of verbal warranties of windmill sold under written contract with express warranties inadmissible.

Cited in *M. Rumely & Co. v. Emmons*, 85 Mich. 518, 48 N. W. 636, holding contemporaneous verbal warranty merged in written contract; *H. W. Williams Transp. Line v. Darius Cole Transp. Co.* 129 Mich. 212, 56 L. R. A. 942, 88 N. W. 473, holding verbal representations as to speed of steamer merged in written guaranty; *McCray Refrigerator & Cold Storage Co. v. Woods*, 99 Mich. 273, 41 Am. St. Rep. 599, 58 N. W. 320, holding verbal warranty cannot be imported into written contract silent on subject; *John Hutchison Mfg. Co. v. Pinch*, 107 Mich. 14, 64 N. W. 729, holding parol evidence enlarging requirement stated in written order inadmissible; *Quinn v. Moss*, 45 Neb. 617, 63 N. W. 931, and *Cohen v. Jackoboice*, 101 Mich. 417, 59 N. W. 665, holding parol evidence inadmissible to vary terms of written order containing all indicia of contract; *McCrath v. Myers*, 126 Mich. 213, 85 N. W. 712, raising, without deciding, question, whether agreement to forfeit purchase money mortgage on failure to procure good title provable by parol.

Distinguished in *Richey v. Daemicke*, 86 Mich. 648, 49 N. W. 516, holding guaranty attached to bill, not constituting agreement, does not render evidence of verbal agreement inadmissible; *Johnson v. Bratton*, 112 Mich. 323, 70 N. W. 1021, holding parol evidence admissible to show mortgage for specific sum intended to secure future advances by mortgagee's firm; *Gregory v. Lake Lindon*, 130 Mich. 374, 90 N. W. 29, holding evidence that village had other supply admissible to explain contract to purchase water.

6 L. R. A. 416, *ALLIN v. CONNECTICUT RIVER LUMBER CO.* 150 Mass. 560, 23 N. E. 581.

Jurisdiction.

Cited in *Ellenwood v. Marietta Chair Co.* 158 U. S. 107, 39 L. ed. 914, 15 Sup. Ct. Rep. 771, holding trespass *quare clausum* with count for conversion of timber cut maintainable only in state where land situated; *Du Breuil v. Pennsylvania Co.* 130 Ind. 139, 29 N. E. 909, holding trespass for injuries to land in another

state' by fire maintainable only at situs of land; *Little v. Chicago*, St. P. M. & O. R. Co. 65 Minn. 55, 33 L. R. A. 425, footnote, p. 423, 60 Am. St. Rep. 421, 67 N. W. 846 (dissenting opinion), majority holding trespass maintainable though land situated in another state; *Huntington v. Attrill*, 148 U. S. 670, 36 L. ed. 1128, 13 Sup. Ct. Rep. 224, holding statutory liability of officers for corporate debts enforceable in any jurisdiction.

Cited in footnotes to *Schmaltz v. York Mfg. Co.* 59 L. R. A. 907, which sustains jurisdiction in equity by resident, of suit to enjoin removal of alleged fixtures from land in another state on which plaintiff has mortgage.

Plea in abatement.

Cited in *Guild v. Bonnemort*, 156 Mass. 523, 31 N. E. 645, holding plea of wrong venue, merely in abatement, not to jurisdiction; *Davis v. Carpenter*, 172 Mass. 172, 51 N. E. 530, holding plea showing, not only present action not maintainable, but also no cause of action, plea in bar.

Review on appeal.

Cited in *Puritan Trust Co. v. Coffey*, 180 Mass. 512, 62 N. E. 970, holding decision of superior court on plea of nonjoinder not subject to review on appeal; *Brown v. Kellogg*, 182 Mass. 299, 65 N. E. 378, Reversing judgment of superior court dismissing for want of jurisdiction, on motion, for defects of form; *Kimball v. Sweet*, 168 Mass. 106, 46 N. E. 409, holding that appeal lies from decision on motion to dismiss for service of summons insufficient to give jurisdiction.

Distinguished in *Burrows v. Morton*, 170 Mass. 570, 49 N. E. 924, holding decision of municipal court on motion to dismiss for defect in complaint, final.

6 L. R. A. 418, *ILLINOIS C. R. CO. v. SLATER*, 129 Ill. 91, 16 Am. St. Rep. 242, 21 N. E. 575.

Action for death of other son killed in same accident in Illinois C. R. Co. v. Slater, 139 Ill. 190, 28 N. E. 830.

Speed of car or train as negligence.

Cited in *Chicago City R. Co. v. Fennimore*, 199 Ill. 15, 64 N. E. 985, holding it duty of street cars not to approach crossings at dangerous speed, independent of statute; *Landon v. Chicago & G. T. R. Co.* 92 Ill. App. 222, holding it duty of railroad not to cross highways at dangerous speed, independent of statutory regulation.

Negligence; failure to perform statutory duty.

Cited in *Platte & D. Canal & Mill. Co. v. Dowell*, 17 Colo. 386, 30 Pac. 68, holding failure to perform statutory duty to cover power canal negligence *per se*.

Cited in note (7 L. R. A. 316) on duty to signal approach to highway crossing.

Evidence of failure to give signals at crossings.

Cited in *Peirce v. Sparks*, 65 Ill. App. 354, holding, where evidence conflicting as to giving signals at railroad crossing, verdict will not be disturbed: *St. Louis, A. & T. H. R. Co. v. Odum*, 52 Ill. App. 523, holding testimony of witnesses with opportunity to see and know, that bell was not rung at crossing so far as they heard, not negative.

Duty of traveler at railroad crossing.

Cited in footnote to *Passman v. West Jersey & S. R. Co.* 61 L. R. A. 609, which

holds cutting of train on side track at highway crossing not invitation to cross without using ordinary precaution.

Contributory negligence of children.

Cited in *Wabash R. Co. v. Jones*, 53 Ill. App. 133; *Quincy Gas & Electric Co. v. Bauman*, 104 Ill. App. 610; *Baltimore & O. S. W. R. Co. v. Then*, 159 Ill. 538, 42 N. E. 97, Affirming 59 Ill. App. 565, — holding child required to exercise ordinary care according to age, capacity, and discretion; *Atchison, T. & S. F. R. Co. v. Roemer*, 59 Ill. App. 97; *Chicago v. McCrudden*, 92 Ill. App. 259; *Illinois Iron & Metal Co. v. Weber*, 196 Ill. 531, 63 N. E. 1008, — holding intelligence, capacity, and experience, as well as age of child, to be considered upon question of exercise of care; *Pittsburgh, Ft. W. & C. R. Co. v. Moore*, 110 Ill. App. 307, holding intelligence, as well as age and experience, should be considered in determining child's negligence.

Cited in footnote to *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team, to twelve year old boy using street as playground.

Cited in notes (8 L. R. A. 843) on care to be exercised towards children to avoid injuries; (6 L. R. A. 537) as to imputing contributory negligence to infant.

Damages for death of minor.

Cited in *Illinois C. R. Co. v. Reardon*, 157 Ill. 378, 41 N. E. 871, holding, in action for minor's death, loss of right to wages until majority not measure of damages; *Chicago & A. R. Co. v. Logue*, 58 Ill. App. 151, holding verdict of \$1,500 for death of child twenty-one months old not excessive; *United States Electric Lighting Co. v. Sullivan*, 22 App. D. C. 136, holding father may recover probable amount of son's contributions both during and after minority, in action for negligently causing son's death.

Cited in note (41 L. R. A. 809) on common-law right of action of parent for loss of service of child killed.

Imputed negligence.

Cited in note (9 L. R. A. 159) on imputing driver's negligence to passenger.

Sufficiency of allegations of negligence.

Cited in note (59 L. R. A. 226) on sufficiency of general allegations of negligence.

6 L. R. A. 422, *STATE ex rel. COPE v. FORAKER*, 46 Ohio St. 677, 23 N. E. 491.

Amendments to constitutions.

Cited in *Bear v. Heasley*, 98 Mich. 308, 24 L. R. A. 621, 57 N. W. 270, holding amendment to constitution of religious society, to be valid, must be adopted according to provisions of constitution; *State ex rel. McClurg v. Powell*, 77 Miss. 576, 48 L. R. A. 658, 27 So. 927, holding greater strictness of procedure required in adoption of constitutional amendments than in passage of acts of legislature.

What constitutes majority vote.

Cited in *Re Denny*, 156 Ind. 119, 51 L. R. A. 729, footnote, p. 722, 59 N. E. 359, holding that constitutional provision that amendments must be ratified by "majority of electors" requires majority of all persons voting at election for any purpose; *State ex rel. McClurg v. Powell*, 77 Miss. 576, 48 L. R. A. 660, 27 So. 927, holding constitutional provision that amendments must receive majority of

electors "voting" requires majority of all votes cast for any purpose; *Stebbins v. Superior Judge*, 108 Mich. 699, 66 N. W. 594, holding majority of all persons voting necessary under city charter authorizing issue of bonds when favored by majority of votes cast; *Bryan v. Lincoln*, 50 Neb. 628, 35 L. R. A. 755, 70 N. W. 252, holding that proposition must receive majority of all votes cast at election under statute permitting funding of city bonds when authorized by vote of people; *Belknap v. Louisville*, 99 Ky. 483, 34 L. R. A. 260, 59 Am. St. Rep. 478, 36 S. W. 1118, holding assent of two thirds of all persons voting, necessary, under constitutional provision requiring consent of two thirds of persons voting at election to authorize special municipal indebtedness.

Cited in note (6 L. R. A. 311) on majority vote.

Distinguished in *Davis v. Brown*, 46 W. Va. 720, 34 S. E. 839, holding that statute for relocation of county seat, providing three fifths of all votes cast favor it, requires three fifths of votes of those voting on proposition.

6 L. R. A. 424, *DRYSDALE v. STATE*, 83 Ga. 744, 20 Am. St. Rep. 340, 10 S. E. 358.

Justifiable homicide.

Cited in footnote to *State v. Yanz*, 54 L. R. A. 780, which holds killing person believed to be in act of adultery with killer's wife, manslaughter only.

Distinguished in *Wilkerson v. State*, 91 Ga. 732, 44 Am. St. Rep. 63, 17 S. E. 990, holding wife's seducer justified in defending himself against assault of husband knowing of wife's infidelity and lying in wait.

Homicide in self-defense.

Cited in footnotes to *State v. Bartlett*, 59 L. R. A. 756, which sustains right to use deadly weapon to defend from public whipping by physical superior; *People v. Hecker*, 30 L. R. A. 403, which upholds right of one attempting to withdraw from affray commenced by him, to kill in self-defense; *People v. Button*, 28 L. R. A. 591, which holds right of self-defense not cut off merely because one was original aggressor; *State v. Evenson*, 64 L. R. A. 77, which holds one whose disorderly conduct has caused attempt to compel him to leave town justified in using necessary force to repel attack.

Cited in note (45 L. R. A. 687, 696) on self-defense set up by accused who began conflict.

6 L. R. A. 426, *PHINIZY v. MURRAY*, 83 Ga. 747, 20 Am. St. Rep. 342, 10 S. E. 358.

To whom dividends on stock belong.

Cited in *Houser v. Richardson*, 90 Mo. App. 142, holding dividends go to holder of stock at time they are declared payable.

Cited in note (45 L. R. A. 397) on right to dividends on transfer of stock.

Distinguished in *Clark v. Campbell*, 23 Utah, 575, 54 L. R. A. 512, 90 Am. St. Rep. 716, 65 Pac. 496, holding dividends declared on mining stock, held in escrow, before price paid, do not belong to purchaser.

6 L. R. A. 427, *REGER v. O'NEAL*, 33 W. Va. 159, 10 S. E. 375.

Commissioner's report.

Cited in *Taylor v. Dorr*, 43 W. Va. 353, 27 S. E. 317; *Wallis v. Neale*, 43

W. Va. 539, 27 S. E. 227; Pendleton v. Bower, 49 W. Va. 149, 38 S. E. 487; Carter v. Gill, 47 W. Va. 507, 35 S. E. 828; Cann v. Cann, 45 W. Va. 564, 31 S. E. 923; Fry v. Feamster, 36 W. Va. 466, 15 S. E. 253; Bennett v. Harper, 36 W. Va. 551, 15 S. E. 143; Schuttler v. Brandfass, 41 W. Va. 211, 23 S. E. 808; Stewart v. Stewart, 40 W. Va. 84, 20 S. E. 862; Crothers v. Crothers, 40 W. Va. 174, 20 S. E. 927; Hartman v. Evans, 38 W. Va. 677, 18 S. E. 810; Burns v. Hays, 44 W. Va. 506, 30 S. E. 101; Dewing v. Hutton, 48 W. Va. 579, 37 S. E. 670; Dearing v. Selvey, 50 W. Va. 18, 40 S. E. 478, — sustaining commissioner's report when approved by lower court; Poling v. Parsons, 38 W. Va. 81, 18 S. E. 379, sustaining decision of chancellor on conflicting evidence, though appellate court might have come to different conclusion; Holt v. Taylor, 43 W. Va. 160, 27 S. E. 320, holding that evidence did not sustain commissioner's findings; Hulings v. Hulings Lumber Co. 38 W. Va. 370, 18 S. E. 620, holding that findings of commissioner in chancery have great weight, but conclusions as to absence of fraud not sustained; Haymond v. Camden, 48 W. Va. 465, 37 S. E. 642, holding finding of commissioner should not be arbitrarily changed by lower court.

What is usurious transaction.

Cited in Rushing v. Worsham, 102 Ga. 830, 30 S. E. 541, holding usurious transaction not disclosed by charging more than legal interest over cash price on sale of goods on time; Bang v. Phelps & B. Windmill Co. 96 Tenn. 365, 34 N. W. 516, holding that provision in note for more than legal rate after maturity renders it usurious; First Nat. Bank v. Mann, 94 Tenn. 24, 27 L. R. A. 568, 27 S. W. 1015, holding note for difference between cash and credit price of goods bought on credit, not usurious though put in form of interest and more than legal rate; Swayne v. Riddle, 37 W. Va. 295, 16 S. E. 512, holding agreement to pay money in excess of legal rate of interest, but as part of purchase price of land, not usurious; Crim v. Post, 41 W. Va. 403, 23 S. E. 613, holding subsequent agreement, in effect renewing former usurious transaction, not purge it of usury.

Computing interest.

Cited in Archer v. Baltimore Bldg. & L. Asso. 45 W. Va. 39, 30 S. E. 241, holding that interest payable monthly cannot be compounded by commissioner on failure of payment; Moore v. Johnson, 34 W. Va. 676, 12 S. E. 918, holding makers of note entitled to credit for interest paid in excess of legal rate.

6 L. R. A. 430, COOPER v. PEOPLE, 13 Colo. 337, 22 Pac. 790.

Review of judgment for contempt.

Cited in Wyatt v. People, 17 Colo. 256, 28 Pac. 961, holding judgment in contempt proceedings not to preclude inquiry into jurisdiction on appeal; Shore v. People, 26 Colo. 484, 58 Pac. 590, dismissing appeal from judgment imposing penalty for contempt; Aichele v. Johnson, 30 Colo. 465, 71 Pac. 367, holding writ of error appropriate remedy to review judgment in contempt proceeding; State v. Markuson, 5 N. D. 150, 64 N. W. 934, holding proceedings adjudging contempt for violating injunction reviewable on writ of error; Miskimmins v. Shaver, 8 Wyo. 415, 49 L. R. A. 839, 58 Pac. 411, holding jurisdiction of court in adjudging contempt reviewable on habeas corpus.

Power to punish for contempt.

Cited in Wyatt v. People, 17 Colo. 260, 28 Pac. 961, holding contempt proceedings not affected by constitutional provisions; People *ex rel.* Connor v. Staple-
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ton, 18 Colo. 581, 23 L. R. A. 791, 33 Pac. 167, holding power to punish for contempt inherent in superior courts, independent of statutory provisions; *People ex rel. Connor v. Stapleton*, 18 Colo. 584, 23 L. R. A. 792, 33 Pac. 167, holding that punishment for contempt extends only to fine and imprisonment; *State v. Sweetland*, 3 S. D. 506, 54 N. W. 415, holding power to punish for contempt limited to articles calculated to intimidate, influence, or obstruct courts in administration of justice; *Re Chadwick*, 109 Mich. 600, 87 N. W. 1071, holding power to punish for contempt inherent in court; *People ex rel. Connor v. Stapleton*, 18 Colo. 574, 23 L. R. A. 789, 33 Pac. 167, sustaining court's power to punish as contempt, newspaper's charge that boodlers have influence with court.

Cited in footnote to *State v. Bee Pub. Co.* 50 L. R. A. 195, which sustains punishment for contempt of newspaper publishing articles threatening judges with public odium if they decide pending cause in certain way.

What is contempt.

Cited in *Mullin v. People*, 15 Colo. 440, 9 L. R. A. 568, 22 Am. St. Rep. 414, 24 Pac. 880, holding contempt not shown by statement in motion papers for change of venue, that wife of judge made favorable remark concerning case: *Reeves v. People*, 2 Colo. App. 199, 29 Pac. 1033, holding party to replevin action, who, knowing judgment against him, removes goods from jurisdiction of courts, properly punished for contempt; *Bloom v. People*, 23 Colo. 418, 48 Pac. 519, holding publication relating to judge's decisions contemptuous; *Field v. Thornell*, 106 Iowa, 16, 68 Am. St. Rep. 281, 75 N. W. 685, holding editor in contempt for article he handed to jurors reflecting on character and sanity of witnesses and ability of jury; *Re Hughes*, 8 N. M. 242, 43 Pac. 692, holding publication commenting on pending disbarment proceedings punishable contempt, though publisher disclaimed intention to reflect on court; *State v. Tugwell*, 19 Wash. 255, 43 L. R. A. 723, 52 Pac. 1056, holding newspaper publication, reflecting on integrity of court pending appeal, punishable contempt.

Cited in footnote to *Telegram Newspaper Co. v. Com.* 44 L. R. A. 159, which holds corporation guilty of contempt in publishing article calculated to prejudice jury and prevent fair trial.

Distinguished in *State ex rel. Atty. Gen. v. Circuit Court*, 97 Wis. 9, 38 L. R. A. 558, 65 Am. St. Rep. 90, 72 N. W. 193, holding newspaper comment on cases decided before publication not criminal contempt.

Change of venue.

Cited in *Bloom v. People*, 23 Colo. 418, 48 Pac. 519, denying change of venue as of right in contempt proceedings.

6 L. R. A. 444, *PEOPLE ex rel. BARTON v. LONDONER*, 13 Colo. 303, 22 Pac. 764.

Second appeal in 15 Colo. 568, 26 Pac. 135.

Election contests.

Cited in *Pratt v. Breckinridge*, 112 Ky. 43, 65 S. W. 136 (dissenting opinion), majority holding act creating board to try election contests unconstitutional.

Cited in notes (12 L. R. A. 708) on remedy by proceedings in nature of quo warranto in election contests; (33 L. R. A. 387) on power of courts to re-

quire ballot boxes to be produced or opened in proceedings other than election contests.

Quo warranto as affected by statutes.

Cited in *Snowball v. People*, 147 Ill. 266, 35 N. E. 538, holding statutory right to contest elections as private citizens not impair quo warranto; *Parks v. State*, 100 Ala. 648, 13 So. 756, holding validity of election not contestable in quo warranto proceeding; *State ex rel. Harris v. Elliott*, 117 Ala. 154, 23 So. 124, holding validity of election of mayor under particular city charter contestable by quo warranto proceedings; *Haverstock v. Aylesworth*, 113 Iowa, 381, 85 N. W. 634, holding quo warranto and statutory contest cumulative remedies; *People ex rel. Union P. R. Co. v. Colorado Eastern R. Co.* 8 Colo. App. 302, 46 Pac. 219, holding no information in nature of quo warranto maintainable except in original proceedings in supreme court.

Interest necessary to maintain quo warranto.

Cited in *Davis v. Dawson*, 90 Ga. 825, 17 S. E. 110, holding that defeated candidate may proceed by quo warranto to have office declared vacant; *State ex rel. White v. Barker*, 116 Iowa, 100, 57 L. R. A. 248, 93 Am. St. Rep. 222, 89 N. W. 204, upholding quo warranto on relation of taxpayer to test validity of appointment of trustee of waterworks system.

Rights under municipal charters.

Cited in *Huer v. Central*, 14 Colo. 72, 23 Pac. 323, upholding special charter of city incorporated before adoption of Constitution; *Denver v. Barron*, 6 Colo. App. 76, 39 Pac. 989, upholding amendment to charter requiring notice to fix city's liability for tort; *Heinssen v. State*, 14 Colo. 250, 23 Pac. 995 (concurring opinion), as to authority of city under special charter to interfere with uniform jurisdiction of district courts in enforcement of general laws.

Special legislation.

Cited in footnotes to *Hamilton County v. Rasche Bros.* 19 L. R. A. 584, which holds statute as to taxes, not applying to all parts of state, unconstitutional; *Milwaukee County v. Isenring*, 53 L. R. A. 635, which holds act regulating sheriff's fees for particular county, local.

6 L. R. A. 449, *MOELLERING v. EVANS*, 121 Ind. 195, 22 N. E. 989.

Use of one's own property so as to avoid injury to another's.

Cited in footnote to *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L. R. A. 544, which denies to telephone company injunction against operation of electric railway.

Cited in notes (6 L. R. A. 573) on right to use of land, surface water, *damnum absque injuria*; (8 L. R. A. 809) on right to use one's own property.

Natural right to lateral support.

Cited in *Ulrick v. Dakota Loan & T. Co.* 2 S. D. 291, 49 N. W. 1054, upholding right to such support from adjoining land as incident to land in natural condition; *Bohrer v. Dienhart Harness Co.* 19 Ind. App. 499, 49 N. E. 296, holding that lot owner making excavations must use ordinary care to protect adjoining building; *Payne v. Moore*, 31 Ind. App. 363, 66 N. E. 483, holding complaint for injury to wall by excavation on adjoining lot, not alleging negligence, prescriptive right, or that it was a party wall, demurrable.

Measure of damages.

Cited in *Joliet v. Schroeder*, 92 Ill. App. 73, holding measure of damages to be difference in value of property before and after street improvement.

Cited in note (17 L. R. A. 428) on cost of restoration as measure of damages for injury to real property.

6 L. R. A. 451, *ADERHOLDT v. HENRY*, 87 Ala. 415, 6 So. 625.

Mortgage; order of sale of parcels subsequently sold.

Cited in *Farmers Sav. & Bldg. & L. Asso. v. Kent*, 117 Ala. 630, 23 N. E. 757, holding parcels sold without reference to mortgage liable to sale thereunder in inverse order of alienation; *Howser v. Cruikshank*, 122 Ala. 264, 82 Am. St. Rep. 76, 25 So. 206, holding second mortgagee of remainder, with notice, subject to right of grantee of portion to have land sold in inverse order of alienation; *Northwestern Land Asso. v. Harris*, 114 Ala. 474, 21 So. 999, holding portion of land purchased with knowledge of covenant in mortgage to apply purchase money on debt, primarily liable to extent of unpaid price.

6 L. R. A. 454, *ELLIS v. HILTON*, 78 Mich. 150, 18 Am. St. Rep. 438, 43 N. W. 1048.

Second appeal in 92 Mich. 439, 52 N. W. 754.

Expenses incurred in saving property.

Cited in *Coyle v. Baum*, 3 Okla. 717, 41 Pac. 389, holding cost of medical treatment for injured horse recoverable; *Hughes v. Austin*, 12 Tex. Civ. App. 187, 33 S. W. 607, holding expenses incurred in good faith in preserving property from wrongful destruction recoverable.

6 L. R. A. 455, *CHAFFEE v. TELEPHONE & TELEG. CONSTR. CO.* 77 Mich. 625, 18 Am. St. Rep. 424, 43 S. W. 1064.

6 L. R. A. 457, *RICHARDSON v. BUHL*, 77 Mich. 632, 43 N. W. 1102.

Illegality of contracts; subject of judicial notice.

Cited in *Burger v. Koelsch*, 77 Hun. 48, 28 N. Y. Supp. 460, holding that action to enforce illegal contract will be dismissed, although issue not raised by pleadings; *Reed v. Johnson*, 27 Wash. 56, 57 L. R. A. 409, 67 Pac. 381, holding specific performance of contract to convey land for securing location of railroad depot, proceeds of which to be shared with officers of railroad, will not be decreed, although illegality not pleaded; *Haddock v. Salt Lake City*, 23 Utah, 528, 65 Pac. 491, denying enforcement of contract with constable providing payment for services different from that prescribed by statute; *Baltimore High Grade Brick Co. v. Amos*, 95 Md. 602, 52 Atl. 582, holding that courts will set aside mortgage void under statute, irrespective of plaintiff's right to impeach it.

Unlawful combinations and contracts.

Cited in *United States v. E. C. Knight Co.* 156 U. S. 30, 39 L. ed. 335, 15 Sup. Ct. Rep. 249, holding anti-trust law 1890 not applicable to monopoly in manufacture of necessity of life; *State ex rel. Snyder v. Portland Natural Gas & Oil Co.* 153 Ind. 489, 53 L. R. A. 415, 74 Am. St. Rep. 319, 53 N. E. 1089, holding combinations between corporations, tending to restrict competition, against

public policy; *Lovejoy v. Michels*, 88 Mich. 28, 13 L. R. A. 775, 49 N. W. 901, denying power of monopolies to control prices; *Lovejoy v. Michels*, 88 Mich. 23, 13 L. R. A. 775, 49 N. W. 901, holding combination for purpose of controlling prices unlawful, although prices fixed are reasonable; *Stockton v. Central R. Co.* 50 N. J. Eq. 85, 17 L. R. A. 110, footnote p. 97, 24 Atl. 964, and *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 736, 39 Atl. 923, holding combination to create monopoly against public policy, although it has in fact reduced prices; *United States v. Addyston Pipe & Steel Co.* 46 L. R. A. 136, 29 C. C. A. 160, 54 U. S. App. 723, 85 Fed. 291, and *Wittenberg v. Mollyneaux*, 60 Neb. 585, 83 N. Y. 842, holding that when purchase of property is means to creation of monopoly, it is unlawful; *Distilling & Cattle Feeding Co. v. People*, 156 Ill. 488, 47 Am. St. Rep. 217, 41 N. E. 188, holding corporation organized to control manufacture and sale of distilling products illegal; *State v. Nebraska Distilling Co.* 29 Neb. 715, 46 N. W. 155, holding combination of distilleries to destroy competition by dismantling distilleries, and thus to control prices, unlawful; *Gibbs v. McNeeley*, 60 L. R. A. 155, 55 C. C. A. 73, 118 Fed. 123, holding association of manufacturers and dealers to control production and price of shingles unlawful combination; *Northern Securities Co. v. United States*, 193 U. S. 341, 48 L. ed. 702, 24 Sup. Ct. Rep. 436, holding corporation formed for purpose of holding stock of competing railroads, acquired in exchange for its own, an unlawful combination; *John D. Park & Sons Co. v. National Wholesale Druggist's Asso.* 175 N. Y. 36, 62 L. R. A. 647, footnote p. 632, 96 Am. St. Rep. 578, 67 N. E. 136 (dissenting opinion), majority holding plan adopted by druggists' association and manufacturers of proprietary medicines, providing for rebate to those maintaining selling price, legal.

Cited in footnotes to *Texas Standard Cotton Oil Co. v. Adoue*, 15 L. R. A. 598, which holds combination to fix prices of cotton seed and seed cotton void; *State v. Phipps*, 18 L. R. A. 658, which holds combination by foreign companies to increase rates of insurance unlawful; *Clark v. Needham*, 51 L. R. A. 785, which holds void lease of manufacturing machinery with agreement against lessor engaging in business for five years; *Chaplin v. Brown*, 12 L. R. A. 428, which holds grocer's agreement not to buy butter from makers for two years if firm opens butter store void; *More v. Bennett*, 15 L. R. A. 361, which holds association of stenographers to control prices for work illegal combination; *State ex rel. Watson v. Standard Oil Co.* 15 L. R. A. 145, which holds agreement for transfer of corporate stock to trustees to vote and receive dividends void; *Wassermann v. Sloss*, 38 L. R. A. 176, which holds that illegality of transfer of stock to president for corrupting government officials does not prevent recovery where taken by president for his own use instead; *Cummings v. Union Blue Stone Co.* 52 L. R. A. 262, which holds void, agreement by persons controlling 90 per cent of sale of blue stone, to sell through common agent and maintain agreed prices; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 12 L. R. A. 563, which holds agreement to prevent competition between corporations in manufacture of glue under patent valid; *Chateau v. Singla*, 33 L. R. A. 750, which denies relief to either party for settlement of partnership to carry on unlawful business.

Cited in notes (8 L. R. A. 500, 501) on combinations and monopolies in trade; (12 L. R. A. 754) on restraining monopolies as public nuisances; (13 L. R. A. 771) on nature of monopolies; (52 L. R. A. 381) on right of corporations to consolidate.

Distinguished in *Queen Ins. Co. v. State*, 86 Tex. 266, 22 L. R. A. 492, 24 S. W. 397, holding combination between insurance companies to fix rates, not within statute imposing penalties on persons or corporations composing "trust;" *O. & W. Thum Co. v. Tloczynski*, 114 Mich. 160, 38 L. R. A. 205, 68 Am. St. Rep. 469, 72 N. W. 140, upholding agreement of employee not to reveal secret process and methods of employer in manufacturing.

Agreements in aid of creation of monopoly.

Cited in *Trenton Potteries Co. v. Oliphant*, 56 N. J. Eq. 736, 39 Atl. 923, holding stipulation in sale of business of manufacturing firm not to engage in business anywhere in United States for fifty years void; *Gamewell Fire Alarm Teleg. Co. v. Crane*, 160 Mass. 57, 22 L. R. A. 677, 39 Am. St. Rep. 464, 35 N. E. 98, holding stipulation of vendor, in sale of business of manufacturing fire alarm and police telegraph machines, not to engage in same business for ten years, void; *National Harrow Co. v. Quick*, 67 Fed. 131, holding corporation organized to control harrow patents and prices of harrows sold by licensed manufacturers, illegal; *Harding v. American Glucose Co.* 182 Ill. 619, 64 L. R. A. 765, 74 Am. St. Rep. 215, 55 N. E. 577, holding agreement between corporations to transfer plants to new corporation to conduct business for benefit of parties to agreement, for purpose of suppressing competition, void; *State ex rel. Watson v. Standard Oil Co.* 49 Ohio St. 186, 15 L. R. A. 159, 34 Am. St. Rep. 553, 30 N. E. 279, holding agreement whereby stockholders transfer shares to trustees empowered to conduct business of several corporations for benefit of parties concerned, unlawful.

Unlawful dividends.

Cited in *American Steel & Wire Co. v. Eddy*, 130 Mich. 268, 89 N. W. 952, holding preferred stockholder liable to corporation creditor to extent of dividends impairing capital stock.

6 L. R. A. 469, *PALMER v. POOR*, 121 Ind. 135, 22 N. E. 984.

Alteration of written instrument.

Cited in *Richardson v. Fellner*, 9 Okla. 521, 60 Pac. 270, holding that material alteration vitiates written instrument though no fraud results; *Bucklen v. Johnson*, 19 Ind. App. 417, 49 N. E. 612, holding subscription note invalidated by alteration of contract precedent to delivery, without knowledge of maker, *Moore v. Hinshaw*, 23 Ind. App. 270, 77 Am. St. Rep. 434, 55 N. E. 236, holding surety released by insertion of rate of interest in blank by principal and payee; *Casto v. Evinger*, 17 Ind. App. 300, 46 N. E. 648, holding alteration after execution presumed to be made by party claiming under instrument; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 215, 54 N. E. 835, holding insertion of name of bank as place of payment, without authority, material alteration; *Young v. Baker*, 29 Ind. App. 135, 64 N. E. 54, holding unauthorized insertion of name of bank in blank provided for place of payment material alteration avoiding note in hands of bona fide holder.

Cited in footnotes to *Gleason v. Hamilton*, 21 L. R. A. 210, which holds mortgage not invalidated by alteration by attorney drawing same without mortgagee's knowledge; *Simmons v. Atkinson & L. Co.* 23 L. R. A. 599, which holds insertion of words "or bearer" and place of payment a material alteration; *Brown v. Johnson Bros.* 51 L. R. A. 403, which holds maker released by payee's addition

of name of other person as comaker; *Rochford v. McGee*, 61 L. R. A. 335, which holds removal of note written below perforated line on application for insurance material alteration rendering it void; *Foxworthy v. Colby*, 62 L. R. A. 393, which holds insertion of "gold" before "dollars" material alteration.

Cited in notes (7 L. R. A. 743) on effect of alteration of written instruments; (13 L. R. A. 314) on duty of party producing instrument to account for alterations.

Bona fide holder.

Cited in *Miller v. Stephenson*, 27 Ind. App. 287, 61 N. E. 22 (dissenting opinion), majority holding attorneys taking client's money order as fees, knowing that client had defrauded plaintiff, not bona fide holder; *Pope v. Branch County Sav. Bank*, 23 Ind. App. 213, 54 N. E. 835, holding, after alteration of note, burden upon plaintiff to show that he is bona fide holder.

Cited in notes (10 L. R. A. 678) on protection of bona fide holder of note fraudulently obtained; (36 L. R. A. 441) on fraud in obtaining execution of note as defense against bona fide holder.

Incomplete agreement.

Cited in *McCaslin v. Advance Mfg. Co.* 155 Ind. 305, 58 N. E. 67, holding mortgagor not bound to insure where amount left blank in mortgage stipulation requiring insurance.

Confession and denial in answer.

Cited in *People's Mut. Ben. Soc. v. Templeton*, 16 Ind. App. 129, 44 N. E. 809, holding that plaintiff cannot escape proof, although answer contains confession and denial.

6 L. R. A. 472, *Re TYSON*, 13 Colo. 482, 22 Pac. 810.

Second writ of habeas corpus denied in 21 Colo. 79, 39 Pac. 1093.

Ex post facto laws.

Cited in *McGinn v. State*, 46 Neb. 443, 30 L. R. A. 455, 50 Am. St. Rep. 617, 65 N. W. 46, holding imprisonment until execution not part of punishment so as to prevent setting aside irregular sentence and sentencing as prescribed by law.

Cited in footnotes to *State v. Kyle*, 56 L. R. A. 115, which sustains statute authorizing prosecution by information of crimes already committed; *People ex rel. Chandler v. McDonald*, 29 L. R. A. 834, which holds statute not *ex post facto* for abrogating provision for change of magistrate or of venue for prejudice; *People v. Hayes*, 23 L. R. A. 830, which holds change in statute authorizing slighter punishment not *ex post facto* law; *French v. Deane*, 24 L. R. A. 388, which holds void act giving right to punitive damages as to existing cause of action.

Cited in note (39 L. R. A. 456) as to decision against constitutional right as a nullity subject to collateral attack.

Overruled in effect in *Kelly v. People*, 17 Colo. 135, 29 Pac. 805, sustaining limitation of conviction to murder in second degree, where authorization of first degree *ex post facto*.

Computation of time.

Cited in *Mora v. People*, 19 Colo. 264, 35 Pac. 179, holding that from midnight Saturday until midnight following Saturday is week for execution of criminal;

Vailes v. Brown, 16 Colo. 466, 14 L. R. A. 123, 27 Pac. 945, requiring filing of statement of intention to contest election on Saturday if Sunday last day.

Distinguished in Evans v. Bowers, 13 Colo. 514, 22 Pac. 812, requiring exclusion of day of filing application in computing time between application for habeas corpus and sitting of district court.

6 L. R. A. 475, FAIRBANKS v. SARGENT, 117 N. Y. 320, 22 N. E. 1039.

Equitable assignments.

Cited in Niles v. Mathusa, 162 N. Y. 552, 57 N. E. 184, Affirming 20 App. Div. 486, 47 N. Y. Supp. 38, holding assignment of liquor tax certificate, valid without delivery to proper assignee making advancements to procure same, and without recording as to creditors; York v. Conde, 61 Hun, 29, 15 N. Y. Supp. 380, holding agreement to deliver avails of contract made in consideration of indorsement enabling performance, an equitable assignment; Harwood v. La Grange, 137 N. Y. 540, 32 N. E. 1000, holding that attorney has lien as equitable assignee, upon proceeds of action he conducted for compensation payable from recovery; Schubert v. Herzberg, 65 Mo. App. 585, holding rights under attorneys' agreement to prosecute for 40 per cent of judgment, superior to those of subsequent execution creditor; Randel v. Vanderbilt, 75 App. Div. 318, 78 N. Y. Supp. 124, holding assignment of portion of recovery of claims in litigation, with notice to defendant, not create equitable assignment; Collins & A. Co. v. United States Ins. Co. 7 Tex. Civ. App. 581, 27 S. W. 147, holding jury to determine whether equitable assignment created by intention to transfer part of insurance; Wooster v. Trowbridge, 115 Fed. 727, holding contract by trustee in insolvency giving power to prosecute, or settle doubtful claim for share of proceeds, equitable assignment.

Distinguished in Netling v. Netling, 60 App. Div. 412, 69 N. Y. Supp. 984, holding promise to pay portion of future income in lieu of alimony, not equitable assignment.

Compromise of claim pledged.

Cited in Field v. Sibley, 74 App. Div. 84, 77 N. Y. Supp. 252, holding that pledgee of bonds exercising power of collection must obtain cash, unless pledgeor consents to another course.

Priority of assignment.

Cited in Fortunato v. Patten, 147 N. Y. 283, 41 N. E. 572, Reversing 5 Misc. 238, 25 N. Y. Supp. 333, upholding assignment prior in point of time, although no notice given debtor or subsequent assignee.

Distinguished in Beran v. Tradesmen's Nat. Bank, 137 N. Y. 456, 33 N. E. 593, upholding debtor's payment to assignor when made to buy peace, notwithstanding assignee's notice of claim.

Rights of equitable assignee upon payment to assignor.

Cited in Freeman v. Rich, 64 Hun, 481, 19 N. Y. Supp. 498, holding pledgee of book accounts remaining in merchant's hands, entitled to proceeds to extent of claim as against administrators; Kerr v. Kennedy, 119 Iowa, 242, 93 N. W. 353, holding attorney claiming portion of collection by equitable assignment cannot reach it in third party's hands by garnishment.

Distinguished in Beran v. Tradesmen's Nat. Bank, 137 N. Y. 459, 33 N. E. 593, holding evidence admissible that payment to assignor by defendant was to

buy peace, and not in acknowledgment and settlement of claim, part of which was assigned.

6 L. R. A. 481, *DIERSTEIN v. SCHUBKAGEL*, 131 Pa. 46, 18 Atl. 1059.

What matters considered on appeal.

Cited in *Lowrey v. Robinson*, 141 Pa. 194, 28 W. N. C. 29, 21 Atl. 513, holding refusal to strike out evidence received without objection, or to enter compulsory nonsuit, not reviewable; *Com. v. Hanley*, 15 Pa. Super. Ct. 277, holding sufficiency of evidence not reviewable upon assignment of error for refusal to arrest judgment.

Privileged communications between attorney and client.

Cited in *Seip Estate*, 163 Pa. 432, 35 W. N. C. 402, 43 Am. St. Rep. 803, 30 Atl. 226, holding attorney in will contest competent to testify as to parties therein, in subsequent suit for proceeds; *McIntosh v. Moore*, 22 Tex. Civ. App. 25, 53 S. W. 611, holding question to attorney, in divorce proceedings against testator, as to effect of destruction of will, privileged, in proceeding to probate missing will.

Cited in footnotes to *Koeber v. Somers*, 52 L. R. A. 512, which holds conversation authorizing attorney to compromise action not privileged; *Bruley v. Garvin*, 48 L. R. A. 839, holding conversation with attorney with reference to contemplated suit in which opinion is sought and obtained without fee, although not between attorney and client, privileged.

6 L. R. A. 483, *COSKERY v. NAGLE*, 83 Ga. 696, 20 Am. St. Rep. 333, 10 S. E. 491.

Liability of innkeepers.

Cited in footnotes to *Fay v. Pacific Improv. Co.* 16 L. R. A. 188, which holds character of guest at hotel not lost by merely inquiring as to price of room and board; *Amey v. Winchester*, 39 L. R. A. 760, which denies hotel keeper's liability for loss of hats left on racks by persons attending club banquet at hotel; *Rains v. Maxwell House Co.* 64 L. R. A. 471, which denies hotel keeper's liability for watch not deposited in safe; *State v. Steele*, 8 L. R. A. 516, which authorizes expulsion from hotel of liveryman soliciting orders against rules.

Cited in notes (6 L. R. A. 620) as to bailments; (8 L. R. A. 98) as to liability of innkeeper as insurer; (12 L. R. A. 382) as to responsibility of innkeeper as bailee.

6 L. R. A. 487, *GALUSHA v. GALUSHA*, 116 N. Y. 635, 15 Am. St. Rep. 453, 22 N. E. 1114.

Report of second appeal in 138 N. Y. 280, 33 N. E. 1062.

Agreement for separation.

Cited in *Chamberlain v. Cuming*, 29 N. Y. S. R. 675, 8 N. Y. Supp. 851, holding agreement for separation not affected by wife's subsequent action for divorce; *Meyerl v. Meyerl*, 125 Mich. 610, 84 N. W. 1109, holding that wife can file bill for separate maintenance under statute, when husband refuses to perform separation agreement; *Bufe v. Bufo*, 88 Mo. App. 634, holding antenuptial agreement to release dower in consideration of sum paid after marriage, not affected by

divorce; *Chamberlain v. Cuming*, 37 Misc. 816, 76 N. Y. Supp. 896, holding separation agreement made after separation, valid; *Foote v. Nickerson*, 70 N. H. 512, 54 L. R. A. 563, footnote, p. 554, 48 Atl. 1088, holding agreement to dissolve marriage tie, void; *Bowers v. Hutchinson*, 67 Ark. 25, 53 S. W. 399, holding that separation agreement releases wife's right to share in husband's personal estate; *Jones v. Jones*, 1 Colo. App. 31, 27 Pac. 85, holding new agreement for support of wife as long as she is unmarried, made after divorce, releases husband from former agreement; *Lawrence v. Lawrence*, 32 Misc. 505, 66 N. Y. Supp. 393, holding separation agreement before separation, pending divorce, invalid; *Hughes v. Cuming*, 36 App. Div. 305, 55 N. Y. Supp. 256, holding agreement to continue to live apart, made after separation, valid; *Greenleaf v. Blakeman*, 40 App. Div. 376, 58 N. Y. Supp. 76, holding agreement that husband should furnish security in articles of separation binding and enforceable by trustee; *Atherton v. Atherton*, 82 Hun. 186, 31 N. Y. Supp. 977, holding separation agreement is binding and determines amount of compensation for support; *Duryea v. Bliven*, 122 N. Y. 570, 25 N. E. 908, holding that prohibition of father from seeing children, as provided in agreement, prevents wife's recovery of payments; *Buckel v. Suss*, 28 Abb. N. C. 24, 18 N. Y. Supp. 719, holding that wife cannot maintain action for alienating affection of husband after voluntary separation; *Carling v. Carling*, 42 Misc. 493, 86 N. Y. Supp. 46, holding contract between husband and wife, after separation, for her support, though not against public policy, not actionable; *People ex rel. Public Charities & Correction v. Cullen*, 153 N. Y. 636, 44 L. R. A. 423, 47 N. E. 804, holding wife not abandoned by husband when she has obtained decree of separation; *Clark v. Fosdick*, 118 N. Y. 18, 23 N. E. 136 (dissenting opinion), majority holding tripartite agreement for separation enforceable by trustee.

Cited in footnotes to *Baum v. Baum*, 53 L. R. A. 650, which holds void, separation agreement on consideration that husband support wife and children, and assign policies on his life; *Palmer v. Palmer*, 61 L. R. A. 641, which holds void, contract between husband and wife to secure divorce.

Cited in notes (9 L. R. A. 113) on articles of separation; (6 L. R. A. 132) as to when agreement of separation valid.

Alimony.

Cited in *Wells v. Wells*, 10 N. Y. S. R. 255, holding allowance of one half earning capacity of husband not excessive; *Johns v. Johns*, 44 App. Div. 536, 60 N. Y. Supp. 865, holding that right to alimony ceases with death of husband; *Grube v. Grube*, 65 App. Div. 241, 72 N. Y. Supp. 529, denying weekly allowance pending action for divorce when separation agreement in force; *Taylor v. Taylor*, 32 Misc. 314, 66 N. Y. Supp. 561, denying right to alimony in divorce action after wife has released husband from liability for support; *France v. France*, 38 Misc. 460, 77 N. Y. Supp. 1015, holding bond by husband to support wife, after separation, enforceable.

Cited in footnotes to *Filer v. Filer*, 6 L. R. A. 399, which holds jurisdiction to allow alimony not ousted by plea of dismissal of former suit for absolute divorce; *Henderson v. Henderson*, 48 L. R. A. 766, which holds that decree in conformity with separation agreement for payment of stipulated monthly sum for wife's maintenance cannot be modified without wife's consent.

6 L. R. A. 491, *ADAMS v. IRVING NAT. BANK*, 116 N. Y. 606, 15 Am. St. Rep. 447, 23 N. E. 7.

What matters considered on appeal.

Cited in *Martin v. Home Bank*, 160 N. Y. 199, 54 N. E. 717, holding that grounds for reversal will not be considered on appeal if questions not raised in trial court; *Dr. David Kennedy Corp. v. Kennedy*, 165 N. Y. 362, 59 N. E. 133, holding that defense not raised at trial cannot be presented first on appeal; *Reich v. Cochran*, 151 N. Y. 129, 37 L. R. A. 808, 56 Am. St. Rep. 607, 45 N. E. 367, holding that questions as to regularity of proceedings and validity of judgment cannot be raised first on appeal; *Sterrett v. Third Nat. Bank*, 122 N. Y. 662, 3 Silv. Ct. App. 140, 25 N. E. 913, holding that question as to remedy cannot be considered on appeal from ruling on motion for nonsuit on ground that case not made by plaintiff; *Lanahan v. Henry Zeltner Brewing Co.* 20 Misc. 554, 46 N. Y. Supp. 431, holding motion to dismiss at close of evidence, without indicating particular in which proof insufficient, not reviewable on appeal; *Brozek v. Steinway R. Co.* 161 N. Y. 65, 55 N. E. 395; *Wells v. Higgins*, 132 N. Y. 464, 30 N. E. 464, 861, refusing to sustain general exception when charge correct in part; *Friend v. Jetter*, 19 Misc. 105, 43 N. Y. Supp. 287, holding general exception to instruction insufficient, when charge not obviously bad.

Duress.

Cited in *Lazzarone v. Oishei*, 2 Misc. 203, 21 N. Y. Supp. 267; *Sawyer v. Gruner*, 44 N. Y. S. R. 204, 17 N. Y. Supp. 465, holding party enabled by circumstances to exercise controlling influence over conduct of another, not permitted to use position for purposes of extortion; *Tucker v. Roach*, 139 Ind. 288, 38 N. E. 822, holding mortgage procured through fraud, in settlement of invalid claim, unenforceable; *Sistare v. Heckscher*, 15 N. Y. Supp. 730, setting aside conveyance of wife to husband's creditor, induced by false representation of husband that same necessary to save him from financial ruin; *Silsbee v. Webber*, 171 Mass. 381, 50 N. E. 555, holding proof of transfer of property made to prevent threatened report to father of son's embezzlement, sufficient to go to jury on question of duress.

Cited in footnotes to *Flack v. National Bank of Commerce*, 17 L. R. A. 583, which holds threat by bank to institute proceedings to collect unmatured note not duress; *First Nat. Bank v. Sargent*, 59 L. R. A. 296, which holds payment of bonus exacted of debtor as condition to reconveyance of real estate held as security, may be recovered back; *Springfield F. & M. Ins. Co. v. Hull*, 25 L. R. A. 37, which upholds right to maintain suit for balance due on policy without tendering back less sum accepted under threats of groundless prosecution.

Cited in note (9 L. R. A. 633) on when payment involuntary.

Distinguished in *Jewelers' League v. De Forest*, 80 Hun, 379, 30 N. Y. Supp. 88, holding threat to dispose of son's remains contrary to mother's wish, not ground for avoiding assignment of insurance policy; *Foerster v. Squier*, 46 N. Y. S. R. 292, 19 N. Y. Supp. 387, holding indorsement of note under threat of payee to file mechanic's lien against buildings being erected for indorser, is for valuable consideration.

— Threatening persons' innocent of offense.

Cited in *Cribbs v. Sowle*, 87 Mich. 348, 24 Am. St. Rep. 166, 49 N. W. 587, holding money extorted on fictitious claim under threat of imprisonment on false

charge, recoverable; *Jaeger v. Koenig*, 30 Misc. 582, 62 N. Y. Supp. 803, holding recoverable, money paid by wife to husband's employer, on representation that husband would otherwise be prosecuted for larceny; *Heaton v. Norton County State Bank*, 59 Kan. 292, 52 Pac. 876, holding contract transferring wife's property to creditor of husband, under threat of criminal prosecution of latter, not binding; *Buckley v. New York*, 30 App. Div. 466, 52 N. Y. Supp. 452, holding payment for license to construct vault, induced by threat of city inspector to have workman arrested, and stop construction of building, not voluntary.

Cited in note (26 L. R. A. 58) on contracts procured by threats of prosecution of relative.

— Threatening to prosecute person amenable to criminal process.

Cited in *Hartford F. Ins. Co. v. Kirkpatrick*, 111 Ala. 467, 20 So. 651, holding settlement of claim procured by threat of arrest and imprisonment unlawful; *Thompson v. Niggley*, 53 Kan. 664, 26 L. R. A. 805, 35 Pac. 290, holding securities extorted by threats of person amenable to criminal prosecution, voidable; *Morse v. Woodworth*, 155 Mass. 252, 29 N. E. 525, holding contract procured by threats of imprisonment, not enforceable; *City Nat. Bank v. Kusworm*, 88 Wis. 199, 26 L. R. A. 62, 43 Am. St. Rep. 880, 59 N. W. 564, holding that wife may avoid note given under threat of criminal prosecution of sick husband; *Hargreaves v. Koriek*, 44 Neb. 670, 62 N. W. 1086, holding mortgage procured on homestead under threats of imprisonment of guilty husband, not enforceable; *Gorringe v. Reed*, 23 Utah, 137, 90 Am. St. Rep. 692, 63 Pac. 902, holding deed executed by wife to prevent threatened prosecution of guilty husband, voidable; *Hensinger v. Dyer*, 147 Mo. 229, 48 S. W. 912, holding wife's execution of contract induced by threats of criminal prosecution of husband, voidable; *Perkins v. Adams*, 17 Tex. Civ. App. 335, 43 S. W. 529, holding contract of infirm person induced by threat of prosecution of his sons for selling mortgaged property, voidable; *Strang v. Peterson*, 56 Hun, 421, 10 N. Y. Supp. 139 (dissenting opinion), majority holding mortgage for payment of son's obligation arising from forgery, and to prevent criminal prosecution, void.

Distinguished in *Gregor v. Hyde*, 10 C. C. A. 293, 27 U. S. App. 75, 62 Fed. 110, holding threat of lawful arrest of person amenable to criminal prosecution not ground for cancelation of deed by parent.

6 L. R. A. 495, *DARROW v. FAMILY FUND SOC.* 116 N. Y. 537, 15 Am. St. Rep. 430, 22 N. E. 1093.

Construction of conditions in policy.

Cited in *Berliner v. Travelers' Ins. Co.* 121 Cal. 461, 41 L. R. A. 469, 66 Am. St. Rep. 49, 53 Pac. 918, holding locomotive "conveyance for passengers" within provision of accident policy imposing double liability for death therein; *Moulton v. Aetna F. Ins. Co.* 25 App. Div. 281, 49 N. Y. Supp. 570, holding chattel mortgage of firm property by one partner to another to secure advances by latter to firm, not encumbrance within provision of fire policy; *Mead v. American F. Ins. Co.* 13 App. Div. 480, 43 N. Y. Supp. 334, holding double insurance resulting from operation of law, not violation of condition against additional insurance; *Caraher v. Royal Ins. Co.* 63 Hun. 93, 17 N. Y. Supp. 858, holding condition in fire policy against vacancy, not violated where insured church tenured by sexton and visited by rector, though no services held; *Sneck v. Travelers' Ins. Co.* 88 Hun, 97, 34 N. Y. Supp. 545, holding "entire hand" lost within provisions of accident policy,

where fingers amputated and use of entire hand lost; *Coles v. New York Casualty Co.* 87 App. Div. 46, 83 N. Y. Supp. 1063, holding exception in accident policy of injuries resulting from "fighting" does not cover injuries to bartender attacked by customer ordered to leave; *Sneck v. Travelers' Ins. Co.* 81 Hun, 335, 30 N. Y. Supp. 881 (dissenting opinion), majority holding amputation of fingers causing loss of use of entire hand, not loss of entire hand within provision of accident policy; *England v. Westchester F. Ins. Co.* 81 Wis. 589, 29 Am. St. Rep. 917, 51 N. W. 954, holding that condition against vacancy of premises operates from moment policy takes effect, though premises then vacant; *Phillips v. United States Grand Lodge, I. O. S. B.* 37 Misc. 870, 76 N. Y. Supp. 1000, burden of proof on insurer to show beneficiary's failure to serve notice of death as required by policy; *Spitz v. Mutual Ben. Life Assn.* 5 Misc. 251, 25 N. Y. Supp. 469, holding failure to state membership in benevolent association or to disclose existence of half-brothers in answer to inquiries as to other insurance and living brothers, not suppression of material facts avoiding insurance; *Cole v. Preferred Acci. Ins. Co.* 40 Misc. 262, 81 N. Y. Supp. 901, giving proviso limiting time for bringing action on policy construction most favorable to insured; *Behling v. Northwestern Nat. L. Ins. Co.* 117 Wis. 27, 93 N. W. 800, holding that court cannot, to prevent forfeiture, go further than fair construction of language permits.

Distinguished in *Baldwin v. Provident Sav. Life Assur. Soc.* 23 App. Div. 7, 48 N. Y. Supp. 463, holding policy voided by failure to pay mortuary premium within stipulated time limit; *Fitzgerald v. Supreme Council, Catholic Mut. Ben. Assn.* 39 App. Div. 256, 56 N. Y. Supp. 1005, holding statements in medical examination and application not warranties when not referred to in policy; *Sternman v. Metropolitan L. Ins. Co.* 49 App. Div. 476, 63 N. Y. Supp. 674, holding insured bound by application warranting correct record of medical examination, though incorrectly written by examiner; *Duran v. Standard Life & Acci. Ins. Co.* 63 Vt. 438, 13 L. R. A. 638, 25 Am. St. Rep. 773, 22 Atl. 530, holding hunting on Sunday "violation of law" within exemption from liability.

— Suicide.

Cited in *Campbell v. Supreme Conclave I. O. H.* 66 N. J. L. 282, 54 L. R. A. 579, 49 Atl. 550; *Morris v. State Mut. Life Assur. Co.* 183 Pa. 573, 41 W. N. C. 355, 39 Atl. 52, enforcing policy in favor of wife as beneficiary where no provision against liability in case of suicide; *Supreme Conclave, I. O. H. v. Miles*, 92 Md. 628, 84 Am. St. Rep. 528, 48 Atl. 845, holding suicide no defense where there is no provision against same and policy was obtained in good faith; *Meacham v. New York State Mut. Ben. Assn.* 120 N. Y. 242, 24 N. E. 283, holding suicide not violation of "laws of the land" within provision avoiding policy; *Royal Circle v. Achterrath*, 204 Ill. 566, 63 L. R. A. 458, 98 Am. St. Rep. 224, 68 N. E. 492, holding suicide not death "on account of violation of any criminal law," within provision avoiding mutual benefit certificate; *Seiler v. Economic Life Assn.* 105 Iowa, 95, 43 L. R. A. 540, 74 N. W. 941, holding beneficiary entitled to enforce policy after insured's suicide where no provision against liability in such event; *Patterson v. National Premium Mut. L. Ins. Co.* 100 Wis. 123, 42 L. R. A. 258, 69 Am. St. Rep. 899, 75 N. W. 980, holding suicide covered by "incontestable" clause of policy though technically a crime.

Cited in footnote to *Wells v. New England Mut. L. Ins. Co.* 53 L. R. A. 327, which denies right to recover on policy for death of one voluntarily submitting to abortion to get rid of illegitimate child.

Distinguished in *Hart v. Modern Woodmen*, 60 Kan. 681, 72 Am. St. Rep. 380, 57 Pac. 936, holding provision against liability for suicide "sane or insane" exempts company where insured conscious of physical, if not moral, consequences of act; *McCoy v. Northwestern Mut. Relief Asso.* 92 Wis. 582, 47 L. R. A. 684, 66 N. W. 697, holding provision of policy excluding liability for suicide binding though unauthorized by by-laws of association; *Cady v. Brooklyn Union Pub. Co.* 23 Misc. 410, 51 N. Y. Supp. 198, holding false publication of suicide libelous *per se* as injurious professionally though not charge of crime.

Overruled in *Shipman v. Protected Home Circle*, 174 N. Y. 410, 63 L. R. A. 352, 67 N. E. 83, holding suicide of insured while sane avoids mutual benefit certificate, under provision against death caused by own illegal act.

Action on assessment policy.

Cited in *Aiken v. Massachusetts Ben. Asso.* 34 N. Y. S. R. 697, 13 N. Y. Supp. 579, holding liability for face of policy complete where assessment returns full amount.

Cited in note (8 L. R. A. 116) on action on contract of mutual benefit association.

Distinguished in *Martin v. Equitable Acci. Asso.* 55 Hun, 576, 9 N. Y. Supp. 16, reversing judgment on verdict where no proof of amount which would have been realized on assessment.

Death fund.

Cited in *Re Equitable Reserve Fund Life Asso.* 61 Hun, 307, 16 N. Y. Supp. 80, holding death claims to be paid *pro rata* out of reserve fund of insolvent corporation, where death fund insufficient.

Distinguished in *Re Equitable Reserve Fund Life Asso.* 131 N. Y. 373, 30 N. E. 114, holding insured not entitled to resort to reserve fund on insufficiency of death fund of insolvent company, when former held for distinct purposes.

6 L. R. A. 498, *HESS v. CULVER*, 77 Mich. 598, 18 Am. St. Rep. 421, 43 N. W. 994.

Fraudulent representations.

Cited in *Kelley v. Chenango Valley Sav. Bank*, 21 Misc. 249, 45 N. Y. Supp. 651, holding savings bank liable to depositors for putting deposits in insolvent bank which former claimed was under its control; *Sanford v. Royal Ins. Co.* 11 Wash. 670, 40 Pac. 609, holding release of insurer procured by fraud after loss, invalid.

— Statute of frauds.

Cited in *Kemp v. National Bank*, 48 C. C. A. 219, 109 Fed. 53, holding statute of frauds not available to bank officer for false and fraudulent statement as to bank's condition; *Clark v. Hurd*, 79 Mich. 132, 44 N. W. 343, holding oral representation as to persons composing partnership, to induce sale of goods, not within statute.

— Bohemian oats.

Followed in *Pearl v. Walter*, 80 Mich. 318, 45 N. W. 181, facts being almost identical with those of cited case.

Cited in *Leland v. Goodfellow*, 84 Mich. 362, 47 N. W. 591, holding declaration in action for unauthorized transfer of note for Bohemian oats, insufficient, in not alleging defendant's connections with fraud.

Cited in footnote to Griffith v. Shipley, 14 L. R. A. 405, which holds purchaser of note known to have been given for "hulless oats" not a bona fide purchaser.

Cited in notes (6 L. R. A. 501) on Bohemian oats transactions; (8 L. R. A. 476) on relief from contract obtained by fraud.

Distinguished in Knight v. Linzey, 80 Mich. 396, 8 L. R. A. 477, 45 N. W. 337, holding that plaintiff knowing fraudulent character of Bohemian oat swindle cannot recover money paid in redeeming note given for oats.

Liability of transferer of tainted note.

Cited in note (27 L. R. A. 520, 521) on liability for transferring negotiable note to bona fide holder so as to cut off defenses.

In pari delicto.

Cited in Klein v. Pederson, 65 Neb. 455, 91 N. W. 281, holding money paid to prevent criminal prosecution recoverable from one obtaining it by fraudulent representations.

Cited in notes (12 L. R. A. 122) on remedies where party *in pari delicto*.

Nature of contract as determining validity.

Cited in footnote to Hunt v. Rumsey, 9 L. R. A. 674, which holds note in part payment of note void for fraud, also void.

6 L. R. A. 501, EVANS v. STUHRBERG, 78 Mich. 145, 18 Am. St. Rep. 435, 43 N. W. 1046.

Obligation on contract tainted with fraud.

Cited in footnotes to Hunt v. Rumsey, 9 L. R. A. 674, which holds note in part payment of note void for fraud, also void; Griffith v. Shipley, 14 L. R. A. 405, which holds purchaser of note known to have been given for "hulless oats" not a bona fide purchaser.

Cited in notes (6 L. R. A. 499) on nature of contract as determining its validity; (7 L. R. A. 705) on when promissory note invalid; (8 L. R. A. 476) on relief from contract obtained by fraud.

6 L. R. A. 503, McCREERY v. DAY, 119 N. Y. 1, 16 Am. St. Rep. 793, 23 N. E. 198.

Recovery under rescinded contract.

Cited in New York v. New York Refrigerating Constr. Co. 146 N. Y. 214, 40 N. E. 771, and Eames Vacuum Brake Co. v. Prosser, 157 N. Y. 295, 51 N. E. 986, Affirming 88 Hun, 345, 34 N. Y. Supp. 398, holding claim founded on rescinded contract in respect to performance unavailable unless reserved in rescission agreement; Browne v. Empire Type Setting Mach. Co. 44 App. Div. 602, 61 N. Y. Supp. 126, holding advances made under rescinded contract not recoverable unless repayment provided for in agreement of rescission; Doherty v. Shields, 86 Hun, 306, 33 N. Y. Supp. 497, sustaining recovery for materials brought on ground under special contract, and not included in rescission agreement; Hurst v. Trow Printing & Bookbinding Co. 2 Misc. 368, 22 N. Y. Supp. 371, holding rescission of contract in connection with which series of notes given, simply determined contract as to unexpired period; Benedict v. Sliter, 82 Hun, 197, 31 N. Y. Supp. 413, sustaining recovery for services rendered in expectation of payment, after abandonment of contract to take care of lunatic during life; Hayes v. Nashville, 26 C. C. A. 67, 47 U. S. App. 713, 80 Fed. 649, holding that

party rescinding contract may claim money due under it; *Hurst v. Trow Printing & Bookbinding Co.* 2 Misc. 371, 22 N. Y. Supp. 371, Pryor, J., dissenting, who holds that no right can be asserted under rescinded contract, but each party restored to original position.

Cited in note (9 L. R. A. 607) on effect of rescission of contract.

Consideration for rescission or new agreement.

Cited in *Crutchfield v. Dailey*, 98 Ga. 463, 25 S. E. 526, holding that executory contract may be discharged by agreement; *Oregon P. R. Co. v. Forrest*, 128 N. Y. 91, 28 N. E. 137, holding cancelation of agreement and mutual release of parties. consideration for surrender of certain bonds; *Lawrence v. Church*, 35 N. Y. S. R. 957, 12 N. Y. Supp. 420, holding mutual promises good consideration, where one indebted to estate agreed to make certain payments and was to have benefit of certain assets and action against him was to be discontinued; *Bryant v. Thesing*, 46 Neb. 247, 64 N. W. 967, holding that executory written contract to purchase goods may be rescinded by subsequent parol agreement; *Romaine v. Beacon Lithographic Co.* 13 Misc. 123, 34 N. Y. Supp. 124, holding that party may waive consideration for agreement to accept less sum, and if he carries out modified agreement he cannot revoke it.

Power to compromise.

Cited in *Ft. Edward v. Fish*, 156 N. Y. 372, 50 N. E. 973, holding water commissioners without power to compromise with vendee of water bonds under void sale in settlement of failure to deliver bonds.

Substituted agreement as satisfaction.

Cited in *Bicknell v. Speir*, 7 Misc. 112, 27 N. Y. Supp. 386, holding substituted parol agreement to accept notes in payment of agreed loan, good accord and satisfaction of contract to make the loan; *Davis v. Willis*, 57 Hun, 203, 10 N. Y. Supp. 883, to point new agreement, although not performed, if founded on good consideration, satisfaction if accepted as such.

Cited in note (11 L. R. A. 712) defining accord and satisfaction.

Change of contract under seal by parol agreement.

Followed in *Applebee v. Duke*, 37 N. Y. S. R. 454, 13 N. Y. Supp. 929, holding parol evidence of settlement of indebtedness between partners available, although partnership agreement under seal.

Cited in *McKenzie v. Harrison*, 120 N. Y. 264, 8 L. R. A. 258, 17 Am. St. Rep. 638, 24 N. E. 458, holding that contract under seal may be modified by executed parol agreement; *McIntosh v. Miner*, 37 App. Div. 490, 55 N. Y. Supp. 1074; *Miller v. Sullivan*, 33 Misc. 752, 67 N. Y. Supp. 168, holding that sealed instrument may be abrogated by subsequent parol agreement; *Platte Land Co. v. Hubbard*, 12 Colo. App. 470, 56 Pac. 64, holding that sealed instrument may be abrogated by parol agreement, as to time and condition of payment; *Thomson v. Poor*, 147 N. Y. 410, 42 N. E. 13, intimating that principle that sealed contract can only be changed by one of equal solemnity may no longer have any practical existence; *San Remo Hotel Co. v. Brennan*, 64 Hun, 611, 19 N. Y. Supp. 276, holding that after breach of lease under seal, parol agreement modifying its terms, based on sufficient consideration, and executed by one party and partly performed by other, cannot be repudiated; *Lenane v. Mayer*, 18 Misc. 456, 41 N. Y. Supp. 960, holding that lease and suretyship thereon might be abrogated by parties by new contract; *Bowman v. Wright*, 65 Neb. 663, 91 N.

W. 580, sustaining executed parol agreement to reduce rent under written lease; *Miller v. Sullivan*, 33 Misc. 752, 67 N. Y. Supp. 168, holding sealed contract annulled by executed parol agreement substituted; *Davis v. Bingham*, 39 Misc. 300, 79 N. Y. Supp. 469, sustaining executed parol modifications of written agreement.

Interest.

Cited in *Peck v. Granite State Provident Asso.* 21 Misc. 85, 46 N. Y. Supp. 1042, holding payment on account does not extinguish interest; *Graves v. Saline County*, 43 C. C. A. 416, 104 Fed. 63, holding acceptance of principal under protest, bar to recovery of interest not stipulated for.

Equitable defense to covenant.

Cited in *Jenkins v. Craig*, 22 Ind. App. 202, 53 N. E. 427, holding that equitable ground for restraining enforcement of covenant or decreeing its discharge constitutes equitable defense in action on the covenant.

6 L. R. A. 506, *McKENDRY v. McKENDRY*, 131 Pa. 24, 18 Atl. 1078.

Right of action between husband and wife.

Cited in *Bennett v. Bennett*, 37 W. Va. 398, 38 Am. St. Rep. 47, 16 S. E. 838, holding wife's judgment against husband by confession on valid debt due her separate estate, lien on his land, and valid against his creditors; *Haun v. Trainer*, 20 Pa. Co. Ct. 626, 7 Pa. Dist. R. 235, sustaining right of wife's indorsee to sue on husband's note.

Cited in footnotes to *Lyon v. Lyon*, 42 L. R. A. 195, which sustains injunction against husband's eating and sleeping in wife's house pending suit for divorce; *Bandfield v. Bandfield*, 40 L. R. A. 757, which holds tort committed by husband upon wife while they are living together not actionable.

Cited in note (18 L. R. A. 791) on what title or interest will support action of ejectment.

6 L. R. A. 509, *FAYETTEVILLE v. CARTER*, 52 Ark. 301, 12 S. W. 573.

Tax on business.

Cited in *Brewster v. Pine Bluff*, 70 Ark. 30, 65 S. W. 934, sustaining annual license tax of \$12 and \$20 for drays and wagons; *Wills v. Ft. Smith*, 70 Ark. 224, 66 S. W. 922, holding ordinance fixing fee for weighing coal not unreasonable; *Hot Springs v. Curry*, 64 Ark. 155, 41 S. W. 55, holding ordinance regulating drumming or soliciting passengers for hotels presumed reasonable; *Arkadelphia Lumber Co. v. Arkadelphia*, 56 Ark. 374, 19 S. W. 1053, holding fee of \$25 for ferry license, reasonable.

Cited in footnotes to *State ex rel. Beek v. Wagener*, 46 L. R. A. 442, which sustains statute regulating business of commission merchants handling agricultural products; *Littlefield v. State*, 28 L. R. A. 588, which limits power to license sales of milk to regulation, and not raising of revenue.

Cited in notes (9 L. R. A. 787) on taxes on occupations and business; (30 L. R. A. 427, 432, 433) on limit of amount of license fees.

6 L. R. A. 510, *EUREKA SPRINGS SCHOOL DIST. v. CROMER*, 52 Ark. 454, 12 S. W. 878.

Liability on school warrant.

Cited in *School Dist. No. 7 v. Reeve*, 56 Ark. 70, 19 S. W. 106, holding school district liable on unpaid school warrant.

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6 L. R. A. 511, *GEORGE v. BRADDOCK*, 45 N. J. Eq. 757, 14 Am. St. Rep. 754, 18 Atl. 881.

Charitable uses and trusts.

Cited in *Garrison v. Little*, 75 Ill. App. 416, upholding bequest for attainment of woman suffrage; *Jones v. Watford*, 62 N. J. Eq. 343, 50 Atl. 180, sustaining bequest in trust for purchase of books on spiritualism, to be accessible to seekers for truth; *Hyde v. Hyde*, 64 N. J. Eq. 9, 53 Atl. 593, holding bequests for educational purposes may be upheld as for valid charitable uses.

Cited in footnotes to *Kelly v. Nichols*, 19 L. R. A. 413, as to what constitutes charitable use or trust; *Crerar v. Williams*, 21 L. R. A. 454, which holds gift of free public library in great city charitable; *People ex rel. Ellert v. Cogswell*, 35 L. R. A. 269, which sustains trust for educating boys and girls not confined to poor ones; *Re John*, 36 L. R. A. 242, which sustains bequest for maintenance of free public schools; *New England Theosophical Corp. v. Boston*, 42 L. R. A. 281, which denies exemption from taxation of theosophical corporation.

Cited in note (12 L. R. A. 415) on charitable uses and trusts.

6 L. R. A. 515, *MILLER v. McMECHEN*, 33 W. Va. 197, 10 S. E. 378.

Publication of notice.

Cited in *Sandusky v. Faris*, 49 W. Va. 168, 38 S. E. 563, holding notice posted in fourth week though not twenty-eight days preceding sale, sufficient; *Benwood v. Wheeling R. Co.* 53 W. Va. 471, 44 S. E. 271, holding statute requiring notice to be published for 30 days complied with by publication in weekly newspaper.

Delivery of gift.

Cited in footnotes to *Williamson v. Johnson*, 9 L. R. A. 277, which holds gift to enable fiancée to pay wedding expenses, conditional on marriage; *Gammon Theological Seminary v. Robbins*, 12 L. R. A. 506, which holds instrument declaring that holder gives note which he retains, insufficient as gift; *Porter v. Woodhouse*, 13 L. R. A. 64, which holds warranty deeds not delivered by donor giving to third person.

6 L. R. A. 520, *KOHL v. LILIENTHAL*, 81 Cal. 378, 22 Pac. 689, 20 Pac. 401.

Transfer of corporate assets.

Cited in *Schaaake v. Eagle Automatic Can Co.* 135 Cal. 484, 63 Pac. 1025, holding transfer of property of one corporation to another for stock of latter, attempted distribution of assets; *Hunt v. Davis*, 135 Cal. 34, 66 Pac. 957, sustaining right of one party to agreement to form corporation, to prevent other party from disposing of assets; *Jameson v. Hartford F. Ins. Co.* 14 App. Div. 397, 44 N. Y. Supp. 15 (dissenting opinion), majority upholding reinsurance although effect was to suspend business of reinsuring company.

Interest of stockholders.

Cited in *Richter v. Henningsan*, 110 Cal. 534, 42 Pac. 1077, holding stockholders of corporation operating distillery jointly and severally liable for internal revenue taxes.

8 L. R. A. 524, *STATE INS. CO. v. SCHRECK*, 27 Neb. 527, 20 Am. St. Rep. 696, 43 N. W. 340.

Loss on divisible policy.

Cited in *German Ins. Co. v. York*, 48 Kan. 493, 30 Am. St. Rep. 313, 29 Pac. 586, holding chattel mortgage on personal property not invalidate part of policy covering dwelling; *German Ins. Co. v. Fairbank*, 32 Neb. 753, 29 Am. St. Rep. 459, 49 N. W. 711, holding execution of mortgage on land does not affect part of policy covering cow; *Johansen v. Home F. Ins. Co.* 54 Neb. 550, 74 N. W. 866, holding policy classifying property insured and limiting amount of insurance on each class, divisible; *German Ins. Co. v. Fairbank*, 32 Neb. 754, 29 Am. St. Rep. 459, 49 N. W. 711, holding execution of mortgage contrary to policy also covering personal property, no bar to recovery for death of cow; *Phenix Ins. Co. v. Grimes*, 33 Neb. 348, 50 N. W. 168, holding that conveyance of farm after insurance, does not work forfeiture of separable policy on colt; *Omaha F. Ins. Co. v. Dierks*, 43 Neb. 480, 61 N. W. 740, sustaining right to recovery for personal property encumbered subsequent to policy, but released prior to loss; *Home F. Ins. Co. v. Bernstein*, 55 Neb. 264, 75 N. W. 839, holding that chattel mortgage on articles in one class of property in divisible contract, affords defense to action on policy; *Georgia Home Ins. Co. v. McKinley*, 14 Tex. Civ. 11, 37 S. W. 606, holding policy on building and contents, divisible; *Trabue v. Dwelling House Ins. Co.* 121 Mo. 86, 23 L. R. A. 722, 42 Am. St. Rep. 523, 25 S. W. 848, holding word "entire" in divisible policy does not forfeit policy on class of property on which no breach of condition; *Southern F. Ins. Co. v. Knight*, 111 Ga. 634, 52 L. R. A. 74, 78 Am. St. Rep. 216, 36 S. E. 821, holding gross premium policy on classified risks voided by breach of single condition relating to but one class; *McQueeney v. Phenix Ins. Co.* 52 Ark. 261, 5 L. R. A. 746, 20 Am. St. Rep. 179, 12 S. W. 498, holding policy on two houses, one of which became vacant contrary to its provisions, voided policy.

Cited in footnote to *Coleman v. New Orleans Ins. Co.* 16 L. R. A. 174, which holds policy for separate amounts on storehouse and goods severably.

Cited in notes (8 L. R. A. 834) on entire and severable contracts of fire insurance; (19 L. R. A. 216) on severability of insurance in same policy.

Forfeiture for breach of condition.

Cited in *Connecticut F. Ins. Co. v. Jeary*, 60 Neb. 346, 51 L. R. A. 708, 83 N. W. 78, holding that forfeiture will not be declared for breach of "iron safe clause" unless all conditions broken; *Liverpool & L. & G. Ins. Co. v. Tillis*, 110 Ala. 210, 17 So. 672, refusing under pleadings to consider breach of "iron safe clause;" *Ohio Farmers' Ins. Co. v. Burget*, 65 Ohio St. 123, 55 L. R. A. 827, 87 Am. St. Rep. 596, 61 N. E. 712, holding consent of company to removal of property to place of loss; election to accept hazards; *German Mut. F. Ins. Co. v. Fox* (Neb.) 63 L. R. A. 336, 96 N. W. 652, permitting recovery of insurance on property conveyed in violation of policy, but reconveyed before loss; *Home F. Ins. Co. v. Johansen*, 59 Neb. 352, 80 N. W. 1047, holding burden of showing discharge of lien upon insured.

Cited in note (11 L. R. A. 293) on conditions in policy against transfer and alienation of interest.

Effect of variance — In policy.

Cited in *Phenix Ins. Co. v. Gebhart*, 32 Neb. 146, 49 N. W. 333, holding variance in description of land on which insured property situated, immaterial;

Omaha F. Ins. Co. v. Dufek, 44 Neb. 243, 62 N. W. 465, holding misdescription of township in which personal property stored, not fatal variance; **Kansas Farmers' F. Ins. Co. v. Saindon**, 52 Kan. 493, 39 Am. St. Rep. 356, 35 Pac. 15, holding misdescription of land on which insured dwelling stands, not affect risk; **German Ins. Co. v. Miller**, 39 Ill. App. 637, holding reformation of misdescription of land in policy not necessary when agent knew facts at time of issuance; **Sauerbier v. Union Cent. L. Ins. Co.** 39 Ill. App. 629, holding that beneficiary, if identified need not be named in policy.

— **In other cases.**

Cited in **Rainsford v. Massengale**, 5 Wyo. 9, 35 Pac. 774, holding name of firm pleaded as Adams, Choate, & Co., and proof of representations by one acting for Rainsford, Adams, Choate, & Co., immaterial.

Form of policy.

Cited in **Sproul v. Western Assur. Co.** 33 Or. 106, 54 Pac. 180, holding parties in negotiation for policy, presumed to have in contemplation ordinary form of policy for kind of property insured.

Sufficiency of notice of loss.

Cited in **Home F. Ins. Co. v. Hammang**, 44 Neb. 574, 62 N. W. 883, holding insurance company waived sufficiency of proofs of loss by sending adjuster who took steps to ascertain loss; **Phenix Ins. Co. v. Rad Bila Hora Lodge**, 41 Neb. 28, 59 N. W. 752, holding notice given by authority of insured, in response to which adjuster appeared, sufficient; **Omaha F. Ins. Co. v. Dierks**, 43 Neb. 482, 61 N. W. 740, holding that insured need not notify company of loss of which it had knowledge through its agents.

6 L. R. A. 529, **REESE v. PENNSYLVANIA R. CO.** 131 Pa. 422, 17 Am. St. Rep. 818, 19 Atl. 72.

Reasonable regulations.

Cited in **Zagelmeyer v. Cincinnati, S. & M. R. Co.** 102 Mich. 216, 47 Am. St. Rep. 514, 60 N. W. 436, holding penalty of additional charge over legal rate, when fare collected on train, unreasonable; **Kennedy v. Birmingham R. Light & P. Co.** 138 Ala. 230, 35 So. 108, holding regulation requiring passenger without ticket to pay excess fare unreasonable as to passengers entering car 1,000 feet from ticket-office; **Robb v. Pittsburg, C. C. & St. L. R. Co.** 14 Pa. Super. Ct. 290, sustaining regulation requiring holder of mileage book to exchange coupons for ticket; **Weber v. Southern R. Co.** 65 S. C. 374, 43 S. E. 888 (dissenting opinion), majority holding regulation requiring passenger without ticket to pay excess fare, for which rebate check is issued, unlawful.

Cited in footnote to **United Railways & Electric Co. v. Hardesty**, 57 L. R. A. 276, which denies carrier's duty to accept coupon detached from commutation book.

Cited in note (20 L. R. A. 483, 484) on validity of extra charge for passenger fare when paid on train.

6 L. R. A. 531, **HOME FOR AGED PROTESTANT WOMEN v. WILKINSBURG**, 131 Pa. 109, 18 Atl. 937.

Assessment for local improvements.

Cited in **Mt. Pleasant v. Baltimore & O. R. Co.** 138 Pa. 372, 11 L. R. A. 521,

27 W. N. C. 179, 20 Atl. 1052, holding railroad passenger or freight depot or ground used for lumber yard, subject to municipal lien for paving foot walk; Philadelphia v. Pennsylvania Hospital, 143 Pa. 374, 28 W. N. C. 434, 22 Atl. 744, holding hospital liable to assessment for curbing street; Philadelphia v. Pennsylvania Hospital, 143 Pa. 372, 22 Atl. 744, to point out distinction between right of local taxation and authority vested in municipal corporations to require property owners to curb, pave, and keep sidewalks in repair in front of their premises; Philadelphia v. Girard, 16 Montg. Co. L. Rep. 136, 23 Pa. Co. Ct. 672, 9 Pa. Dist. R. 273, holding real estate held in trust for charities liable for paving assessment; Harrisburg City v. St. Paul's Episcopal Church, 2 Lack. Legal News, 330, 18 Pa. Co. Ct. 113, 5 Pa. Dist. R. 351, holding church property liable for municipal sewer assessment; Philadelphia v. Weaver, 14 Pa. Super. Ct. 298, holding sidewalk assessments not within rule limiting special assessment to special benefit; Greensburg v. Laird, 8 Pa. Co. Ct. 610, holding paving assessment not within charter provision prohibiting taxation in excess of certain rate unless voted by electors; Pittsburg v. Biggert, 23 Pa. Super. Ct. 544; and Pittsburg use of Flanagan v. Daly, 5 Pa. Super. Ct. 532, 28 Pittsb. L. J. N. S. 116, 41 W. N. C. 238, holding city may maintain assumpsit for cost against lot owner failing to build sidewalk required by ordinance; Mt. Joy v. Harrisburg, P. Mt. J. & L. R. Co. 8 Northampton Co. Rep. 249, 19 Lanc. L. Rev. 218, holding assumpsit maintainable against railroad for cost of pavement in front of its lands; Chester v. First Nat. Bank, 7 Del. Co. Rep. 360, 9 Pa. Super. Ct. 520, 44 W. N. C. 181, holding property owner liable to municipality for damages recovered for defect in sidewalk; Ladies' United Aid Soc. v. Philadelphia, 14 Pa. Co. Ct. 216, 3 Pa. Dist. R. 141, 34 W. N. C. 260, holding land cut off by street from main lot of charitable institution not taxable for general purposes.

Cited in note (35 L. R. A. 36) that exemption from taxation does not exempt from assessment for local improvement.

6 L. R. A. 533, FARLEY v. GEISECKER, 78 Iowa, 453, 43 N. W. 279.

Statutes applicable to pending actions.

Cited in State v. Dorland, 106 Iowa, 42, 75 N. W. 654, holding act allowing cost of printing to successful defendant on appeal in criminal case, applicable to pending appeals.

Appellate court jurisdiction.

Cited in Geyer v. Douglass, 85 Iowa, 96, 52 N. W. 111, jurisdiction of appellate court presumed unless otherwise affirmatively appearing; Farmers' Loan & T. Co. v. Newton, 97 Iowa, 505, 66 N. W. 784, allowing appeal from cancelation of assessment under ruling giving jurisdiction over all judgments and decisions of courts of record.

Cited in footnote to Cassard v. Tracy, 49 L. R. A. 272, which holds pending appeals within provision in new constitution giving supreme court power to determine questions of fact as well as of law.

6 L. R. A. 534, HOLMAN v. SCHOOL DIST. NO. 5, 77 Mich. 605, 43 N. W. 996.

Mandamus.

Cited in Pfeiffer v. Board of Education, 118 Mich. 581, 42 L. R. A. 543, 77 N. W. 250, Moore, J., dissenting, who holds mandamus appropriate remedy

to redress invasion of civil rights by reading extracts from Bible in public schools.

Regulation of conduct of pupils.

Cited in *Board of Education v. Purse*, 101 Ga. 443, 41 L. R. A. 608, 65 Am. St. Rep. 327, 28 S. E. 896, holding that child may be suspended for misconduct of parent in entering school room and using offensive language to teacher.

Cited in note (41 L. R. A. 603) on suspension for failure to pay for injury to school property.

6 L. R. A. 536, *WINTER v. KANSAS CITY CABLE R. CO.* 99 Mo. 509, 17 Am. St. Rep. 591, 12 S. W. 652.

Duty of motorman.

Cited in *La Pontney v. Shedden Cartage Co.* 116 Mich. 515, 77 N. W. 712, holding that motorman should have car under such control, as to avoid collision with vehicles discernible ahead; *San Antonio Street R. Co. v. Mechler*, 87 Tex. 633, 30 S. W. 899, holding persons operating street cars must use ordinary care to see that track is clear and to avoid collision; *Southern Electric R. Co. v. Hageman*, 57 C. C. A. 356, 121 Fed. 270, holding that motorman must use same care to avoid collisions as others using street; *Degel v. St. Louis Transit Co.* 101 Mo. App. 60, 74 S. W. 156, holding that street railroad must exercise reasonable care to avoid colliding with vehicles; *City R. Co. v. Thompson*, 20 Tex. Civ. App. 18, 47 S. W. 1038, holding that it is duty of motorman to look ahead on track and on each side; *Burnstein v. Cass Ave. & Fair Grounds R. Co.* 56 Mo. App. 53, approving instruction that it is duty of driver to stop car on first appearance of danger and in time to prevent injury; *Schmidt v. St. Louis R. Co.* 163 Mo. 654, 63 S. W. 834, holding that it is duty of gripman to keep vigilant watch; *West Chicago Street R. Co. v. Schwartz*, 93 Ill. App. 400 (dissenting opinion), majority holding that motorman may assume one approaching track will wait for car to pass.

Cited in notes (7 L. R. A. 819) on duty of gripman to see that track is clear; (25 L. R. A. 663) on duty of street railroad employee to be watchful.

Imputed negligence.

Cited in *Chicago G. W. R. Co. v. Kowalski*, 34 C. C. A. 4, 92 Fed. 312; *St. Louis I. M. & S. R. Co. v. Rexroad*, 59 Ark. 186, 26 S. W. 1037; *Jeffersonville v. McHenry*, 22 Ind. App. 15, 53 N. E. 183; *Brill v. Eddy*, 115 Mo. 606, 22 S. W. 488; *Profit v. Chicago & G. W. R. Co.* 91 Mo. App. 376; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 713, 25 L. R. A. 793, 41 Am. St. Rep. 799, 19 S. E. 730, — holding negligence of parent not imputable to child in action by or on behalf of latter; *Warren v. Manchester Street R. Co.* 70 N. H. 361, 47 Atl. 735, holding negligence of parent not imputable to child in action by administrator; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 379, 26 L. R. A. 557, 44 Am. St. Rep. 145, 20 S. E. 550, holding that mother may recover for death of child due to negligence of custodian not her representative or agent; *Berry v. Lake Erie & W. R. Co.* 70 Fed. 683, holding negligence of parent not imputed to child incapable of exercising care for its own safety; *Czezewska v. Benton-Bellefontaine R. Co.* 121 Mo. 214, 25 S. W. 911, holding that negligence of parent will not prevent recovery if driver might have avoided inflicting injury by exercise or ordinary care.

Cited in notes (8 L. R. A. 495; 6 L. R. A. 546) that negligence of parent not imputable to child; (21 L. R. A. 77, 81) contributory negligence of parent as bar to action by child.

Pedestrian's right to use street.

Cited in *Cambeis v. Third Ave. R. Co.* 1 Misc. 160, 20 N. Y. Supp. 633, holding that pedestrians have equal use of highway with street cars which only have preference in the use of track; *Henry v. Grand Ave. R. Co.* 113 Mo. 536, 21 S. W. 214, holding that pedestrians may cross street at any point if they exercise due care and caution; *Frank v. St. Louis Transit Co.* 99 Mo. App. 334, 73 S. W. 239, sustaining instructions to effect that person crossing street car track must use care proportioned to danger of surroundings.

Contributory negligence of child.

Cited in footnotes to *Worthington v. Mencer*, 17 L. R. A. 407, which holds contributory negligence not chargeable to one unable to apprehend danger; *Graney v. St. Louis, I. M. & S. R. Co.* 38 L. R. A. 633, which denies negligence *per se* of twelve year old boy in standing so near passing train as to be drawn under by current of air; *Gleason v. Smith*, 55 L. R. A. 622, which denies liability for injury by collision with team to twelve year old boy using street as playground.

Cited in notes (8 L. R. A. 844; 17 L. R. A. 78) infant not chargeable with contributory negligence; (10 L. R. A. 655; 12 L. R. A. 217) contributory negligence of child.

Objection first made on appeal.

Cited in *Pope v. Kansas City Cable R. Co.* 99 Mo. 405, 12 S. W. 891, holding that every reasonable inference will be made in favor of sufficiency of evidence first objected to on appeal.

6 L. R. A. 541, *PEARCE v. DENVER*, 13 Colo. 383, 22 Pac. 774.

Boundary on stream.

Cited in *Hanlon v. Hobson*, 24 Colo. 288, 42 L. R. A. 512, 51 Pac. 433, holding that grant bounded by non-navigable stream extends to thread of stream.

Cited in note (42 L. R. A. 508) on boundary on river where rights in river are in third person.

Separating riparian rights from upland.

Cited in note (40 L. R. A. 394) on method of separating riparian rights from upland.

Computation of time.

Cited in footnotes to *East Tennessee, V. & G. R. Co. v. Atlanta & F. R. Co.* 15 L. R. A. 109, which authorizes taking fractions of day into consideration in determining priority of appointment of receivers; *People use of Chaddock v. Barry*, 18 L. R. A. 337, which requires exclusion of day of service and return day in computing time for appearance; *McGinn v. State*, 30 L. R. A. 450, which defines calendar month as period terminating with day of succeeding month corresponding to day of beginning less one.

Cited in notes (11 L. R. A. 724) computation of time; (11 L. R. A. 701) day upon which an act done excluded.

6 L. R. A. 545, *WYMORE v. MAHASKA COUNTY*, 78 Iowa, 396, 16 Am. St. Rep. 449, 43 N. W. 264.

Imputed negligence.

Cited in *Ives v. Welden*, 114 Iowa, 478, 54 L. R. A. 855, 86 Am. St. Rep. 379, 87 N. W. 408, holding parent's knowledge that jug without label contains gaso line from explosion of which child burned, not defeat recovery by her; *Fink v. Des Moines*, 115 Iowa, 642, 89 N. W. 28, holding that negligence of parents cannot be imputed to child of tender years injured while playing on coal chute; *Warren v. Manchester Street R. Co.* 70 N. H. 361, 47 Atl. 735, holding that administrator may recover for child's death notwithstanding negligence of father contributed; *Evansville v. Senhenn*, 151 Ind. 57, 41 L. R. A. 733, 68 Am. St. Rep. 218, 47 N. E. 634; *Jeffersonville v. McHenry*, 22 Ind. App. 15, 53 N. E. 183; *Bottoms v. Seaboard & R. R. Co.* 114 N. C. 713, 25 L. R. A. 792, 41 Am. St. Rep. 799, 19 S. E. 730—holding negligence of parent not imputable to child to defeat his recovery for injury; *Norfolk & W. R. Co. v. Groseclose*, 88 Va. 270, 29 Am. St. Rep. 718, 13 S. E. 454, holding negligence of parent cannot be imputed to child of tender age; *St. Louis, I. M. & S. R. Co. v. Rexford*, 59 Ark. 186, 26 S. W. 1037, holding that negligence of parent cannot be attributed to child in her action to recover for injuries; *Kowalski v. Chicago G. W. R. Co.* 84 Fed. 587, holding that negligence of parent cannot be imputed to child of tender years permitted to travel street unattended; *Berry v. Lake Erie & W. R. Co.* 70 Fed. 683, and *Chicago G. W. R. Co. v. Kowalski*, 34 C. C. A. 4, 92 Fed. 312, holding that parent's negligence cannot be imputed to child in its action for injuries; *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 28, 28 L. R. A. 490, 49 Am. St. Rep. 909, 31 S. W. 163, holding that negligence of father cannot be imputed to child; *Atlanta & C. Air-Line R. Co. v. Gravitt*, 93 Ga. 379, 26 L. R. A. 557, 44 Am. St. Rep. 145, 20 S. E. 553, holding negligence of father not imputable to mother suing for child's death under statute.

Cited in footnote to *Casey v. Smith*, 9 L. R. A. 259, which holds negligence of custodian imputable to young child.

Cited in notes (8 L. R. A. 844) on imputing another's negligence to child; (21 L. R. A. 80) on contributory negligence of parent or custodian as bar of action by child for negligent injuries; (8 L. R. A. 495) on doctrine of imputed negligence.

Contributory negligence affecting recovery.

Cited in *Bradshaw v. Frazier*, 113 Iowa, 583, 55 L. R. A. 261, 86 Am. St. Rep. 394, 85 N. W. 752, holding contributory negligence of parents in caring for intestate, whose death resulted from exposure after improper eviction while ill, no defense; *Lewin v. Lehigh Valley R. Co.* 52 App. Div. 77, 65 N. Y. Supp. 49, holding that father can recover for death of infant child contributed to by his own negligence though he is sole beneficiary; *Ploof v. Burlington Traction Co.* 70 Vt. 517, 43 L. R. A. 112, 41 Atl. 1017, holding negligence of parents in permitting boy to go on street no bar to action against street car company for negligent injury; *Gunn v. Ohio River R. Co.* 42 W. Va. 686, 36 L. R. A. 580, 26 S. E. 546, holding facts as to imputed negligence of father not sufficient to bar recovery for death of children; *Bamberger v. Citizens' Street R. Co.* 95 Tenn. 31, 28 L. R. A. 491, 49 Am. St. Rep. 909, 31 S. W. 163, holding that father as sole beneficiary cannot bring action as administrator for injury to child to which his negligence contributed.

Cited in footnote to *Tucker v. Draper*, 54 L. R. A. 321, which holds father's

contributory negligence prevents action by him, as administrator, for child's death.

Cited in notes (6 L. R. A. 538) as to when infant chargeable with negligence; (12 L. R. A. 217) on contributory negligence of infant of tender years; (17 L. R. A. 78) on contributory negligence of child as bar to recovery.

Distinguished in *Christe v. Chicago*, R. I. & P. R. Co. 104 Iowa, 712, 74 N. W. 697, holding that settlement and release by parents of deceased, precludes action by administrator; *Wolf v. Lake Erie & W. R. Co.* 55 Ohio St. 532, 36 L. R. A. 815, 45 N. E. 708, holding defense of contributory negligence of beneficiary available as to him, but not as to other beneficiaries not negligent.

6 L. R. A. 548, *YOUNGS v. YOUNGS*, 130 Ill. 230, 17 Am. St. Rep. 313, 22 N. E. 806.

Divorce — For "habitual intoxication."

Cited in *Ring v. Ring*, 112 Ga. 858, 38 S. E. 330, holding excessive and habitual use of opiates not habitual intoxication.

Cited in notes (34 L. R. A. 450) on what constitutes drunkenness; (39 L. R. A. 264) on morphine habit as ground for divorce.

— For cruelty.

Cited in footnote to *Maddox v. Maddox*, 52 L. R. A. 628, which denies right to divorce for cruelty from failure to provide suitable dwelling house, clothing, and food.

Cited in note (34 L. R. A. 165) on insanity as affecting cruelty.

Condonation.

Cited in *Nullmeyer v. Nullmeyer*, 49 Ill. App. 577, holding that acts of cruelty may be condoned; *Abbott v. Abbott*, 192 Ill. 442, 61 N. E. 350, holding cruelty condoned where wife continued to live with the husband for three years after last act of violence.

6 L. R. A. 551, *HATHAWAY v. LYNN*, 75 Wis. 186, 43 N. W. 956.

Abandonment of contract; consideration.

Cited in *Dyer v. Middle Kittitas Irrig. Dist.* 25 Wash. 94, 64 Pac. 1009, holding that agreement for abandonment of contract requires no independent consideration for its support.

Cited in note (13 L. R. A. 633) on parol evidence to show waiver.

Penalty or liquidated damages.

Cited in footnotes to *Chicago-House Wrecking Co. v. United States*, 53 L. R. A. 122, which holds stipulation for certain sum as damages for failure to remove building by certain time, penalty, when actual damages easily assessable; *Meyer v. Estes*, 32 L. R. A. 283, which holds penalty provided for by contract that purchaser wrongfully using electrotype plates shall pay fine of ten times their price; *Krutz v. Robbins*, 28 L. R. A. 676, which holds agreement for greater rate of interest on default in paying principal, interest, etc., a penalty; *State v. Larson*, 54 L. R. A. 487, which holds amount of liquor license bond, a penalty; *Kilbourne v. Burt & B. Lumber Co.* 55 L. R. A. 275, which holds provision for retaining 15 cents per hundred feet for logs not delivered by specified date, one for liquidated damages; *Salem v. Anson*, 56 L. R. A. 169, which holds stipulated amount to be paid to city for failure to complete electric light plant within specified time,

liquidated damages; *Pierce v. Whittlesey*, 7 L. R. A. 286, which holds agreed forfeiture of two weeks wages on leaving without notice, defense without showing special damage.

Cited in notes (10 L. R. A. 829) on when forfeiture construed as liquidated damages; (11 L. R. A. 681) on damages for breach of contract; (18 L. R. A. 386) on measure of damages for breach of implied warranty.

6 L. R. A. 553, *BENNETT v. BENNETT*, 116 N. Y. 584, 23 N. E. 17.

Alienation of affections — Wife's right to maintain action.

Cited in *Deitzman v. Mullin*, 108 Ky. 614, 50 L. R. A. 810, footnote p. 808, 94 Am. St. Rep. 390, 57 S. W. 247; *Humphrey v. Pope*, 122 Cal. 258, 54 Pac. 847; *Haynes v. Nowlin*, 129 Ind. 583, 14 L. R. A. 790, 28 Am. St. Rep. 213, 29 N. E. 389; *Price v. Price*, 91 Iowa. 698, 29 L. R. A. 151, 51 Am. St. Rep. 360, 60 N. W. 202; *Wolf v. Frank*, 92 Md. 140, 52 L. R. A. 104, footnote p. 102, 48 Atl. 132; *Warren v. Warren*, 89 Mich. 125, 14 L. R. A. 547, footnote p. 545, 50 N. W. 842; *Lockwood v. Lockwood*, 67 Minn. 482, 70 N. W. 784; *Clow v. Chapman*, 125 Mo. 104, 26 L. R. A. 413, footnote p. 412, 46 Am. St. Rep. 468, 28 So. 328; *Manwarran v. Mason*, 79 Hun. 593, 29 N. Y. Supp. 915; *Van Olinda v. Hall*, 88 Hun. 453, 34 N. Y. Supp. 777; *Romaine v. Decker*, 11 App. Div. 22, 43 N. Y. Supp. 79; *Kuhn v. Hemmann*, 43 App. Div. 110, 59 N. Y. Supp. 341; *Beach v. Brown*, 20 Wash. 269, 43 L. R. A. 116, 72 Am. St. Rep. 98, 55 Pac. 46; *Gernerd v. Gernero*, 185 Pa. 236, 40 L. R. A. 550, 64 Am. St. Rep. 646, 42 W. N. C. 51, 39 Atl. 884; *Holmes v. Holmes*, 133 Ind. 388, 32 N. E. 932,—holding wife entitled to maintain action in own name for enticing away husband, alienating affections, and depriving her of his society; *Williams v. Williams*, 20 Colo. 55, 37 Pac. 614; *Hodgkinson v. Hodgkinson*, 43 Neb. 271, 27 L. R. A. 121, footnote p. 120, 47 Am. St. Rep. 759, 61 N. W. 577; *Gernerd v. Gernerd*, 185 Pa. 236, 40 L. R. A. 550, 64 Am. St. Rep. 646, 39 Atl. 884,—holding that wife may maintain action against one wrongfully procuring husband to abandon her, or send her away; *Postlewaite v. Postlewaite*, 1 Ind. App. 478, 28 N. E. 99, holding that divorced woman may maintain action for alienation of affections of former husband; *Weston v. Weston*, 86 App. Div. 162, 83 N. Y. Supp. 528, construing complaint alleging acquisition of improper influence over and intercourse with plaintiff's wife as stating cause of action for alienating affections; *Servis v. Servis*, 172 N. Y. 444, 65 N. E. 270, by Bartlett, J., dissenting, as to wife's right to maintain action for alienation of husband's affections.

Cited in footnotes to *Foot v. Card*, 6 L. R. A. 829, and *Betser v. Betser*, 52 L. R. A. 630, which sustain wife's right of action for alienating husband's affections; *Houghton v. Rice*, 47 L. R. A. 310, which denies right of action against another woman for alienating husband's affections unaccompanied by adultery; *Sanborn v. Gale*, 28 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery to deny facts known to husband; *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; *Doe v. Roe*, 8 L. R. A. 833, which holds action for alienating husband's affections by debauching and carnally knowing him, not maintainable.

Cited in notes (8 L. R. A. 420) on action for alienation of husband's affections; (10 L. R. A. 468) on liability for interrupting marital relations; (11 L. R. A. 549) on inducements to violate obligations not actionable.

Disapproved in effect in *Duffies v. Duffies*, 76 Wis. 380, 8 L. R. A. 423, 20 Am. St. Rep. 79, 45 N. W. 522, holding that wife cannot maintain action against one enticing away husband or depriving her of his society, support, and maintenance; *Lonstorf v. Lonstorf*, 118 Wis. 161, 95 N. W. 961, denying wife's right of action for alienation of husband's affections; *Smith v. Smith*, 98 Tenn. 106, 60 Am. St. Rep. 838, 38 S. W. 439, holding under statute giving deserted wife authority to prosecute any action which husband might have prosecuted, deserted wife cannot maintain action for alienation of husband's affections causing desertion.

— **Gift of action.**

Cited in *Van Olinda v. Hall*, 88 Hun, 456, 34 N. Y. Supp. 777; *Buchanan v. Foster*, 23 App. Div. 544, 48 N. Y. Supp. 732; *Billings v. Albright*, 66 App. Div. 242, 73 N. Y. Supp. 22; *Hollister v. Valentine*, 69 App. Div. 584, 75 N. Y. Supp. 115; *Daley v. Gates*, 65 Vt. 593, 27 Atl. 193,—holding that basis of action for alienating affections of husband or wife is loss of consortium, or right of plaintiff to conjugal society of alienated husband or wife; *Whitman v. Egbert*, 27 App. Div. 375, 50 N. Y. Supp. 3; *Eldredge v. Eldredge*, 79 Hun, 513, 29 N. Y. Supp. 941, holding that plaintiff must show defendants wrongfully enticed husband, and deprived her of his society, to support action for alienating affections.

What is property.

Cited in *Wilson v. Æolian Co.* 64 App. Div. 341, 72 N. Y. Supp. 150, holding chose in action is property; *Barry v. Port Jervis*, 64 App. Div. 283, 72 N. Y. Supp. 104, holding that right of action for personal injury to property cannot be taken away by unreasonable statute of limitation.

Articles to action.

Cited in *Weld v. New York, L. E. & W. R. Co.* 68 Hun, 251, 22 N. Y. Supp. 974, and *Campbell v. Perry*, 29 N. Y. S. R. 670, 9 N. Y. Supp. 330, holding husband not proper party plaintiff in action by wife for injuries to person; *Bradley v. Shafer*, 64 Hun, 432, 19 N. Y. Supp. 640, holding husband necessary party defendant to action against wife for plaintiff's loss of services of daughter seduced by defendant's son.

Damages for personal injuries.

Cited in *Kujek v. Goldman*, 150 N. Y. 180, 34 L. R. A. 158, 55 Am. St. Rep. 670, 44 N. E. 773, Affirming 9 Misc. 38, 29 N. Y. Supp. 294, holding loss of conjugal fellowship and society of wife, through misconduct of third person, actionable injury without proof of pecuniary loss; *Haden v. Clarke*, 32 N. Y. S. R. 479, 10 N. Y. Supp. 291, holding that married woman may recover for pain and suffering caused by personal injury; *Kelley v. New York, N. H. & H. R. Co.* 168 Mass. 310, 38 L. R. A. 632, 60 Am. St. Rep. 397, 46 N. E. 1063, holding that recovery by husband in action for personal injury to wife may include damages for loss of wife's consortium; *Williams v. Williams*, 20 Colo. 67, 37 Pac. 614, holding enticing husband to abandon wife, personal injury within statute permitting exemplary damages for injuries to person.

Novelty as objection to action.

Cited in *Weber v. Rogers*, 41 Misc. 664, 85 N. Y. Supp. 232, holding novelty not insuperable objection to action temporarily to restrain summary proceedings during tenant's dangerous illness.

6 L. R. A. 559, *HENDRICKS v. ISAACS*, 117 N. Y. 411, 15 Am. St. Rep. 524, 22 N. E. 1029.

Validity of contract between husband and wife.

Cited in *Harlem River Bank v. Meyer*, 42 N. Y. S. R. 465, 16 N. Y. Supp. 872, holding wife not liable upon indorsement of husband's demand note, to one receiving same for husband's antecedent debt; *Lowenstein v. Salinger*, 42 N. Y. S. R. 414, 17 N. Y. Supp. 70, holding wife not liable on contract made in conduct of unauthorized copartnership with husband; *Lawrence v. Lawrence*, 32 Misc. 505, 66 N. Y. Supp. 393, Reversing 31 Misc. 649, 64 N. Y. Supp. 1113, holding agreement in 1888 between husband and wife living together, but while divorce action pending, to make payments for support, void; *Re Callister*, 153 N. Y. 302, 60 Am. St. Rep. 620, 47 N. E. 268, Modifying 88 Hun, 90, 34 N. Y. Supp. 628, holding that not till after 1888 could husband make enforceable agreement with wife for her personal services, rendered apart from separate business; *Suau v. Caffé*, 122 N. Y. 318, 9 L. R. A. 596, 25 N. E. 488 (dissenting opinion), majority holding wife liable on copartnership agreement with husband, notwithstanding coverture where authorized to trade on separate account; *Board of Trade v. Hayden*, 4 Wash. 272, 16 L. R. A. 534, 31 Am. St. Rep. 919, 30 Pac. 87; *Fuller & F. Co. v. McHenry*, 83 Wis. 581, 18 L. R. A. 515, 53 N. W. 896, holding wife's partnership with husband not within statute authorizing her to contract as to separate estate.

Cited in footnote to *Dempster Mill Mfg. Co. v. Bundy*, 56 L. R. A. 739, which holds void, contract that product of joint labor of husband and wife shall belong to wife.

Cited as changed by statute, in *France v. France*, 38 Misc. 461, 77 N. Y. Supp. 1015, holding bond for support given by husband and wife upon discontinuance of divorce proceedings, not within inhibition of court's acts to alter marriage or relieve from liability to support.

Enforcement of equitable agreement.

Cited in *Hulse v. Bacon*, 40 App. Div. 92, 57 N. Y. Supp. 537, holding that deed to wife of property purchased with husband's means, supports reconveyance; *Hulse v. Bacon*, 26 Misc. 457, 57 N. Y. Supp. 537, sustaining validity of reconveyance in 1858 of home and shipyard previously given by husband to wife; *Hungerford v. Hungerford*, 161 N. Y. 553, 56 N. Y. Supp. 117, permitting wife to rescind separation agreement providing inadequate support, executed inadvisedly while suffering from ill treatment; *Cheney v. Thornton*, 43 N. Y. S. R. 511, 17 N. Y. Supp. 545, holding husband without interest in mortgage given him without consideration by wife purchasing at foreclosure of his previous mortgage; *Bohannon v. Travis*, 94 Ky. 63, 21 S. W. 354, holding deed from wife to husband not enforceable in equity, in view of laches; *Livingston v. Hall*, 73 Md. 396, 21 Atl. 49, refusing to sustain deed to husband by wife having children by former marriage, made in consideration of natural affection and \$1, in absence of allegations of possession, or title questioned, or proof of circumstances of making.

Distinguished in *Blaechinska v. Howard Mission & Home for Little Wanderers*, 130 N. Y. 500, 15 L. R. A. 217, 29 N. E. 755, holding contract by husband to pay wife for services in his business, not enforceable; *Shaffer v. Kugler*, 107 Mo. 63, 17 S. W. 698, holding wife's conveyance upon sufficient consideration of land to husband, not enforceable in equity.

Duty to support.

Cited in *Nostrand v. Ditmis*, 127 N. Y. 360, 28 N. E. 27, holding mere fact of

use by wife of her separate funds for necessities, not prove liability by husband to repay; *Re Hamilton*, 70 App. Div. 76, 75 N. Y. Supp. 66, Reversing 34 Misc. 609, 70 N. Y. Supp. 426, holding that marriage relation precludes presumption of promise to pay for board and lodging supplied by wife; *Maxwell v. Lowther*, 35 N. Y. S. R. 768, 13 N. Y. Supp. 169, holding wife not liable to husband's creditors for services which he voluntarily rendered her separate estate; *Cliff v. Moses*, 75 Hun, 522, 27 N. Y. Supp. 728, holding transfer to wife in settlement of wife's expenditure for their living expenses, fraudulent; *Brundage v. Munger*, 54 App. Div. 552, 66 N. Y. Supp. 1014, holding that husband's voluntary payment for interest, taxes and repairs when wife's property imposes no lien in favor of his creditors.

Costs.

Cited in *Walker v. Gardener*, 8 Misc. 469, 29 N. Y. Supp. 669, holding reference of claim against estate "special proceeding" as to costs.

6 L. R. A. 562, *BAILEY v. BUCHANAN COUNTY*, 115 N. Y. 297, 26 N. Y. S. R. 128, 22 N. E. 155.

Condition of payment.

Cited in *Halpin v. Phenix Ins. Co.* 118 N. Y. 176, 23 N. E. 482, holding that mortgagor who tenders amount due, may attach condition that mortgagee execute discharge; *Ballou v. Manhattan Real Estate & Loan Co.* 19 Misc. 701, 45 N. Y. Supp. 10, holding that withdrawing member of loan association must surrender certificate as condition of payment; *Osterman v. Goldstein*, 31 Misc. 503, 64 N. Y. Supp. 555, holding that debtor liable on written instrument, may demand surrender as condition of payment; *Zander v. New York Security & T. Co.* 178 N. Y. 212, 70 N. E. 449, holding that person suing upon lost certificate of deposit, payment of which is conditioned on surrender, need not indemnify trust company; *Engelbach v. Simpson*, 12 Tex. Civ. App. 196, 33 S. W. 596, holding tender made upon condition that release of vendor's lien be delivered on final payment of purchase money, valid.

Sufficiency of tender.

Cited in *Osterman v. Goldstein*, 32 Misc. 678, 66 N. Y. Supp. 506, holding tender by indorsers of amount due on condition that note be surrendered should be kept good by payment into court or averment of continued readiness to pay.

Cited in footnote to *Moore v. Norman*, 18 L. R. A. 359, which holds tender coupled with demand of surrender of notes ineffectual to discharge chattel mortgage.

Detached coupons.

Cited in *Beattys v. Solon*, 64 Hun, 128, 19 N. Y. Supp. 37, holding that detached coupons are, for many purposes, separate instruments.

Cited in footnote to *Internal Improv. Fund. v. Lewis*, 26 L. R. A. 743, which holds cancelation or payment of bond before maturity not affect rights of bona fide holder of coupon.

Coupons as specialties.

Cited in *Kelly v. Forty-second Street, M. & St. N. Ave. R. Co.* 37 App. Div. 508, 55 N. Y. Supp. 1096; *Smith v. Greenwich*, 80 Hun, 120, 30 N. Y. Supp. 56, holding interest coupons specialties like the bonds and governed by same statute of limitations.

Guaranty not good as to coupon holder.

Cited in *Clokey v. Evansville & T. H. R. Co.* 16 App. Div. 306, 44 N. Y. Supp. 631, holding guaranty to bondholder of punctual payment of principal and interest not inure to benefit of holder of negotiated coupon.

Recovery of interest upon coupons.

Cited in *Smith v. Greenwich*, 80 Hun, 121, 30 N. Y. Supp. 56, holding that owners of detached coupons may sue to recover accrued interest thereon; *Williamsburgh Sav. Bank v. Solon*, 136 N. Y. 481, 32 N. E. 1058, holding coupons of town bonds mere incidents thereto while in possession of a bondholder and that interest is not recoverable thereon; *Columbus, S. & H. R. Co.'s Appeal*, 48 C. C. A. 291, 109 Fed. 193, holding interest not recoverable upon coupons in the hands of the holders of the bonds, where principal and interest on the bonds are payable in New York; *Beattys v. Solon*, 64 Hun, 126, 19 N. Y. Supp. 37 (dissenting opinion), majority holding interest recoverable on overdue coupons of a railroad coupon bond; *Lake County v. Linn*, 29 Colo. 467, 68 Pac. 839 (dissenting opinion), majority holding interest recoverable on overdue coupons on county bonds.

6 L. R. A. 565, *SPIES v. CHICAGO & E. I. R. CO.* 40 Fed. 34.

Accounting.

Cited in *Cook County Brick Co. v. Kaehler*, 83 Ill. App. 454, holding shareholder entitled to accounting after declaration of dividend.

Effect of mortgage on income of corporation.

Cited in footnote to *New York Security & T. Co. v. Saratoga Gas & Electric Light Co.* 45 L. R. A. 132, which holds general creditors preferred to mortgage bondholders in corporate earnings before property taken by trustee or receiver.

Cited in note (9 L. R. A. 143) on mortgage on future acquired property.

6 L. R. A. 569, *PATTON v. LEFTWICH*, 86 Va. 421, 19 Am. St. Rep. 902, 10 S. E. 686.

Rights and liabilities of partners.

Cited in *Burchinell v. Koon*, 8 Colo. App. 465, 46 Pac. 932, holding that valid mortgage of partnership property to secure firm debts may be executed; *Riley v. Carter*, 76 Md. 593, 19 L. R. A. 494, 35 Am. St. Rep. 443, 25 Atl. 667, holding deed of trust for benefit of creditors, by insane surviving partner of insolvent firm, valid, until impeached by creditors; *Millhisser v. McKinley*, 98 Va. 209, 35 S. E. 446, holding preferences in assignment by partners made prior to bankruptcy law, valid.

Cited in footnotes to *Hundley v. Farris*, 12 L. R. A. 254, which holds individual creditors primarily entitled to payment out of deceased partner's estate; *Re Baldwin*, 58 L. R. A. 122, which sustains individual liability of member of banking firm, signing name to certificate of deposit, enforceable against estate in preference to claims against firm; *Kincaid v. National Wall Paper Co.* 54 L. R. A. 412, which sustains right of partners to appropriate with other partners' consent interest in firm to pay individual in preference to firm debts.

Distinguished in *State ex rel. Richardson v. Withrow*, 141 Mo. 77, 41 S. W. 980, holding assignment by surviving partner, operating to take firm property out of probate court, void by statute; *Rogers v. Flournoy*, 21 Tex. Civ. App.

558, 54 S. W. 386, holding that surviving partner cannot make valid assignment of individual interest for benefit of creditors.

6 L. R. A. 573, *JORDAN v. ST. PAUL, M. & M. R. CO.* 42 Minn. 172, 43 N. W. 849.

Surface water.

Cited in *Brown v. Winona & S. W. R. Co.* 53 Minn. 263, 39 Am. St. Rep. 603, 55 N. W. 123, holding that owner may improve his lands in such a way as to cast surface water in streams on adjoining premises; *Johnson v. Chicago, St. P. M. & O. R. Co.* 80 Wis. 646, 14 L. R. A. 497, footnote, p. 495, 27 Am. St. Rep. 76, 50 N. W. 771, holding surface water including that received from higher levels by embankments or ditches may be diverted to lands of another whose remedy is to pass it on; *Clauson v. Chicago & N. W. R. Co.* 106 Wis. 315, 82 N. W. 146, holding that property owner cannot recover for damage to lands from water bearing sand and gravel cast thereon, incidental to improvement of railroad property by changing grade; *Missouri P. R. Co. v. Renfro*, 52 Kan. 242, 39 Am. St. Rep. 344, 34 Pac. 802, holding railroad company not liable to adjoining owner for injuries from surface water due to properly constructed embankment; *Beach v. Gaylord*, 43 Minn. 477, 45 N. W. 1095, holding that property owner cannot collect water in gutter pipes in great volume and discharge it upon his own land at point where it will flow upon neighboring premises in increased and injurious quantity.

Cited in footnote to *Champion v. Crandon*, 19 L. R. A. 856, which holds diversion of surface water by changing grade of highway not actionable.

Cited in notes (6 L. R. A. 450) right to use and improve one's property; (8 L. R. A. 202) upper owner cannot vary flow to injury of lower owner; (8 L. R. A. 277) prescriptive right to flow of water; (13 L. R. A. 395) embankment must not occasion injury to others; (21 L. R. A. 602, 603) casting down surface water.

Distinguished in *Missouri P. R. Co. v. Renfro*, 52 Kan. 244, 39 Am. St. Rep. 344, 34 Pac. 802, from cases where railroad companies constructed ditches for drainage purposes only.

Criticized in *Sheehan v. Flynn*, 59 Minn. 443, 26 L. R. A. 634, 61 N. W. 462, stating distinction between cases where improvement is made for drainage, and where drainage is incidental, not well founded.

6 L. R. A. 576, *HANCOCK v. YADEN*, 121 Ind. 366, 16 Am. St. Rep. 396, 23 N. E. 253.

Restriction of freedom of contract.

Cited in *Opinion of the Justices*, 163 Mass. 591, 28 L. R. A. 345, 40 N. E. 713, holding statute requiring manufacturers to pay wages weekly, constitutional; *Harbison v. Knoxville Iron Co.* 103 Tenn. 446, 56 L. R. A. 321, 76 Am. St. Rep. 682, 53 S. W. 955, holding act requiring redemption in cash at face value of evidences of indebtedness issued for wages, constitutional; *State v. Peel Splint Coal Co.* 36 W. Va. 825, 17 L. R. A. 392, 15 S. E. 1000, holding act requiring payment of miners according to weight of coal before screening, constitutional; *Com. v. Brown*, 8 Pa. Super. Ct. 355, 43 W. N. C. 75, holding act requiring weighing of bituminous coal before screening, unconstitutional; *International Text-Book Co. v. Weissinger*, 160 Ind. 354, 65 L. R. A. 601, 98 Am. St. Rep. 334,

65 N. E. 521, sustaining statute prohibiting assignment of future wages; *State ex rel. Zillmer v. Kreutzberg*, 114 Wis. 543, 58 L. R. A. 754, 91 Am. St. Rep. 934, 90 N. W. 1098, holding statute forbidding discharge of employee because member of labor union, unconstitutional; *Wortman v. Montana C. R. Co.* 22 Mont. 279, 56 Pac. 316, holding contract provision waiving right of appeal to courts, void; *State v. Haun*, 61 Kan. 167, 47 L. R. A. 376, 59 Pac. 340 (dissenting opinion), majority holding statute prohibiting contracts to pay wages in other than money, unconstitutional; *Com. v. Perry*, 155 Mass. 125, 14 L. R. A. 328, 31 Am. St. Rep. 533, 28 N. E. 1126 (dissenting opinion), majority holding statute prohibiting withholding any part of wages for imperfections in weaving, unconstitutional.

Cited in notes (14 L. R. A. 326) on statutory restrictions on contracts between master and servant; (28 L. R. A. 344) on validity and effect of statutes regulating time of payment of wages; (28 L. R. A. 274) on validity and effect of statutes requiring wages to be paid in lawful money.

Distinguished in *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 426, 23 L. R. A. 271, 41 Am. St. Rep. 109, 25 S. W. 75, holding statute abridging right to contract to labor with period of credit for payment, unconstitutional.

Class legislation.

Cited in *State v. Indiana & I. S. R. Co.* 133 Ind. 78, 18 L. R. A. 506, 32 N. E. 817, holding act requiring train bulletin posted at passenger depots having telegraph office, constitutional; *Duckwall v. Jones*, 156 Ind. 686, 58 N. E. 1056, holding statute authorizing allowance of attorney's fees on foreclosure of mechanic's lien, constitutional; *Branson v. Studabaker*, 133 Ind. 151, 33 N. E. 98, holding act providing for transfer of cases from Supreme to appellate court docket, making general classification, valid; *State v. Peel Splint Coal Co.* 33 W. Va. 854, 17 L. R. A. 402, 15 S. E. 1000 (dissenting opinion), majority holding act forbidding payment of wages by persons engaged in trade or business in scrip not redeemable in money, constitutional; *Morris v. Powell*, 125 Ind. 306, 9 L. R. A. 336, 25 N. E. 221 (dissenting opinion), majority holding act requiring registration of voters absenting themselves from state, or not residing in any one county for six months before election, unconstitutional.

Cited in footnotes to *Braceville Coal Co. v. People*, 22 L. R. A. 340, which holds unconstitutional, statute requiring weekly payment of wages by specified corporations; *Frorer v. People*, 16 L. R. A. 492, which holds prohibition against employers in certain kinds of business selling goods to employees unconstitutional.

Cited in notes (6 L. R. A. 622) on validity of class legislation; (14 L. R. A. 582) on constitutional equality of privileges and immunities.

Distinguished in *Dixon v. Poe*, 159 Ind. 499, 60 L. R. A. 311, 95 Am. St. Rep. 309, 65 N. E. 518, holding act requiring redemption in money of tokens issued by merchants to employees in coal mine assigning wages, invalid class legislation.

Disapproved in *Johnson v. Goodyear Min. Co.* 127 Cal. 18, 47 L. R. A. 344, 78 Am. St. Rep. 17, 59 Pac. 304, holding act giving employees lien on property of corporations failing to pay wages monthly, unconstitutional; *State v. Loomis*, 115 Mo. 320, 21 L. R. A. 795, 22 S. W. 350, holding statute prohibiting employers engaged in manufacturing or mining from paying wages in orders not redeemable in cash, unconstitutional.

Scope of legislative powers.

Cited in *State ex rel. Geake v. Fox*, 158 Ind. 129, 56 L. R. A. 895, 63 N. E. 19, holding legislative power restricted only by state and Federal Constitutions, and laws and treaties pursuant thereto.

Discretionary exercise not reviewable by courts.

Cited in *State ex rel. Clark v. Haworth*, 122 Ind. 467, 7 L. R. A. 242, 23 N. E. 946, holding courts cannot control discretion of legislature in prescribing course of study and books used in public schools; *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 442, 14 L. R. A. 570, 29 N. E. 595, holding legislature sole judge of necessity for special law; *State ex rel. Harrison v. Menaugh*, 151 Ind. 266, 43 L. R. A. 411, 51 N. E. 117, holding act changing time of electing township trustees valid.

Legislative power not exercisable by courts.

Cited in *Forsyth v. Hammond*, 18 C. C. A. 179, 34 U. S. App. 552, 71 Fed. 446, holding order of commissioners enlarging municipal boundaries not reviewable by court.

Contracts deemed made with reference to law.

Cited in *Farmers' Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 253, 11 L. R. A. 746, 26 N. E. 784, holding law deemed part of every contract; *Bell v. Hiner*, 16 Ind. App. 188, 44 N. E. 576, holding laws preferring labor liens deemed to enter into mortgage.

Right of creditor to cash payment.

Cited in *Born v. First Nat. Bank*, 123 Ind. 81, 7 L. R. A. 444, 18 Am. St. Rep. 312, 24 N. E. 173, holding in absence of express agreement acceptance of certified check not payment; *Combs v. Bays*, 19 Ind. App. 265, 49 N. E. 358, holding promissory note, in absence of agreement, not payment of debt; *Vansickle v. Furgeson*, 122 Ind. 451, 23 N. E. 858, holding money payment of wages required where agreement to contrary void for indefiniteness; *Farmers Loan & T. Co. v. Canada & St. L. R. Co.* 127 Ind. 258, 11 L. R. A. 744, 26 N. E. 784, holding money demandable where bonds agreed to be taken in payment not tendered.

Accord and satisfaction, what is.

Cited in *Henes v. Henes*, 5 Ind. App. 106, 31 N. E. 832, holding payment of part no consideration for agreement to release whole debt; *Jennings v. Durringer*, 23 Ind. App. 678, 55 N. E. 979, holding acceptance of check "in full" for less than sum due not accord and satisfaction.

6 L. R. A. 579, *STATE ex rel. CORWIN v. INDIANA & O. OIL, GAS & MIN. CO.* 120 Ind. 575, 2 Inters. Com. Rep. 758, 22 N. E. 778.

Regulation of interstate commerce.

Followed without discussion in *Avery v. Indiana & O. Oil, Gas & Min. Co.* 120 Ind. 600, 22 N. E. 781, and *Benedict v. Columbus Constr. Co.* 49 N. J. Eq. 28, 23 Atl. 485.

Cited in *Manufacturers Gas & Oil Co. v. Indiana Natural Gas & Oil Co.* 155 Ind. 546, 53 L. R. A. 135, footnote, p. 134, 58 N. E. 706, holding statute prohibiting transportation of natural gas out of state, unconstitutional; *Miller v. Goodman*, 91 Tex. 43, 40 S. W. 718, holding statute forbidding foreign corpo-

ration to maintain suit on claim except where papers filed at time of origin of claim, unconstitutional.

Cited in footnotes to *Jamieson v. Indiana Natural Gas & Oil Co.* 12 L. R. A. 652, which holds state regulation of pressure of natural gas in pipes within state not unlawful regulation of commerce; *Stockton v. Powell*, 15 L. R. A. 42, which holds state improvement of navigable water entirely within state not interference with commerce; *Bagg v. Wilmington, C. & A. R. Co.* 14 L. R. A. 596, which holds act compelling shipment of freight within specified time not interference with commerce; *Lafarier v. Grand Trunk R. Co.* 17 L. R. A. 111, which holds state statute giving ticket holder stopover rights not applicable outside of state.

Cited in note (13 L. R. A. 687) on constitutionality of state laws imposing taxes or penalties on immigration.

Distinguished in *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 576, 12 L. R. A. 655, 3 Inters. Com. Rep. 616, 28 N. E. 76, holding regulation of gas pressure in transportation pipes valid police measure; *State v. Geer*, 61 Conn. 152, 13 L. R. A. 806, 3 Inters. Com. Rep. 734, 22 Atl. 1012, holding statute prohibiting killing of game birds for purpose of conveying same out of state, valid.

Property in gas.

Cited in *People's Gas Co. v. Tyner*, 131 Ind. 280, 16 L. R. A. 444, 31 Am. St. Rep. 433, 31 N. E. 59, holding party entitled to all gas flowing from well though coming in part from neighbor's land; *Townsend v. State*, 147 Ind. 628, 37 L. R. A. 298, 62 Am. St. Rep. 477, 47 N. E. 19, holding statute prohibiting waste of natural gas valid police regulation, though limiting property right; *Ohio Oil Co. v. Indiana*, 177 U. S. 205, 44 L. ed. 738, 20 Sup. Ct. Rep. 576, holding statute requiring confinement of oil or gas within two days after struck, constitutional; *Richmond Natural Gas Co. v. Enterprise Natural Gas Co.* 31 Ind. App. 231, 66 N. E. 782, denying injunction against use of pumps not increasing natural flow of gas from well; *Federal Oil Co. v. Western Oil Co.* 57 C. C. A. 429, 121 Fed. 675, holding that oil and gas lease vests inchoate title only.

Cited in note (16 L. R. A. 444) on natural gas.

Public occupation.

Cited in *Kincaid v. Indianapolis Natural Gas. Co.* 124 Ind. 581, 8 L. R. A. 603, 19 Am. St. Rep. 113, 24 N. E. 1066, holding supplying citizens with gas, public use, authorizing exercise of power of eminent domain.

Judicial notice.

Cited in *Jamieson v. Indiana Natural Gas & Oil Co.* 128 Ind. 564, 12 L. R. A. 655, 3 Inters. Com. Rep. 616, 28 N. E. 76, taking judicial notice of inflammable and explosive nature of gas.

Construction of statute.

Cited in *Logan v. Stogsdale*, 123 Ind. 375, 8 L. R. A. 60, 24 N. E. 135, holding that statute must be taken in entirety where provisions inseparable.

6 L. R. A. 584, *TAYLOR v. EVANSVILLE & T. H. R. CO.* 121 Ind. 124, 16 Am. St. Rep. 372, 22 N. E. 876.

Who are fellow servants.

Cited in *Kerlin v. Chicago, P. & St. L. R. Co.* 50 Fed. 186, holding in Indiana baggage master coservant with conductor of another train; *Cole Bros. v. Wood*,

11 Ind. App. 54, 36 N. E. 1074, holding foreman in fixing place for himself and another employee to work causing plaintiff's injury, not a coservant.

Distinguished in *Peirce v. Oliver*, 18 Ind. App. 95, 47 N. E. 485, holding falling of jackscrew by failure of foreman to watch it, negligence of fellow servant; *Justice v. Pennsylvania Co.* 130 Ind. 324, 30 N. E. 303, holding railroad section foreman fellow servant in control of his men after their employment; *McBride v. Indianapolis Frog & Switch Co.* 5 Ind. App. 484, 32 N. E. 579, holding traveling salesman while working in shops, fellow servant of mechanic whom he directs to assist him.

— Agents of superior rank in capacity of coemployee.

Cited in *Hodges v. Standard Wheel Co.* 152 Ind. 687, 52 N. E. 393, holding master's agent personally assisting in removing lumber, fellow servant of employee; *Gann v. Nashville, C. & St. L. R. Co.* 101 Tenn. 384, 79 Am. St. Rep. 687, 47 S. W. 493; *Louisville, N. A. & C. R. Co. v. Isom*, 10 Ind. App. 695, 38 N. E. 423, holding superior while performing servant's duty, fellow servant; *Illinois C. R. Co. v. Bolton*, 99 Tenn. 277, 41 S. W. 442, holding carrier not liable to servant for negligence of section foreman while working as laborer; *Stockmeyer v. Reed*, 55 Fed. 262, holding servant cannot recover from master for foreman's negligence in pounding upon rock in stone quarry; *Galvin v. Pierce*, 72 N. H. 89, 54 Atl. 1014 (dissenting opinion), majority holding foreman directing operations and laborer attaching derrick chains, fellow servants.

Cited in notes (18 L. R. A. 825) on negligent superiors; (51 L. R. A. 581, 595, 597, 609, 610) on vice principalship considered with reference to superior rank of negligent servant.

— Employee as master's representative.

Cited in *Nall v. Louisville, N. A. & C. R. Co.* 129 Ind. 267, 28 N. E. 184, holding agent with absolute authority and control, not fellow servant of employees under his command; *Bloyd v. St. Louis & S. F. R. Co.* 58 Ark. 77, 41 Am. St. Rep. 85, 22 S. W. 1089, holding master liable to servant for negligence, in giving orders, of foreman in charge of building and repairing bridges; *Indiana, I. & I. R. Co. v. Snyder*, 140 Ind. 653, 39 N. E. 912, holding employee entrusted with duty of providing safe appliances, vice principal; *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 308, 50 N. E. 988, holding master liable for death of trainman through train despatcher's negligence.

Cited in note (7 L. R. A. 501) on master's liability for negligent acts of vice principal.

— Employee in charge of a branch or department of work.

Cited in *Clarke v. Pennsylvania Co.* 132 Ind. 201, 17 L. R. A. 812, 31 N. E. 808, holding negligence of employee in charge of separate department, negligence of master; *Hoosier Stone Co. v. McCain*, 133 Ind. 237, 31 N. E. 956, holding master liable for negligence of its superintendent of stone quarry causing personal injury; *Louisville, N. A. & C. R. Co. v. Heck*, 151 Ind. 306, 50 N. E. 988, holding general superintendent of railroad division, vice principal.

Cited in note (7 L. R. A. 503) on master's liability for acts of agent or representative.

Master's duty as to safety of servants.

Cited in *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 428, 8 L. R. A. 637, 24 N. E. 1046, and *Evansville & T. H. R. Co. v. Duel*, 134 Ind. 158, 33 N. E.

355, holding that master must use reasonable care to provide safe place and tools and competent servants; *Neutz v. Jackson Hill Coal & Coke Co.* 139 Ind. 415, 38 N. E. 324, holding master not liable for servant's failure to inspect, set brakes, or block wheels of defective cars; *Chicago & E. R. Co. v. Lee*, 17 Ind. App. 219, 46 N. E. 543, holding master only required to provide reasonably safe place for servants to work; *Matchett v. Cincinnati, W. & M. R. Co.* 132 Ind. 342, 31 N. E. 792, holding that carrier must use reasonable care to provide safe brakes; *Steube v. Christopher & S. Architectural Iron & Foundry Co.* 85 Mo. App. 647, holding that master's duty to superintend work cannot be delegated so as to avoid liability; *Baltimore & O. S. W. R. Co. v. Spaulding*, 21 Ind. App. 328, 52 N. E. 410, holding master liable for allowing iron, negligently placed, to remain in scrap bin; *Evansville & T. H. R. Co. v. Holcomb*, 9 Ind. App. 205, 36 N. E. 39, holding master liable for employee's failure to give notice of danger to car repairer; *Louisville, N. A. & C. R. Co. v. Corps*, 124 Ind. 423, 8 L. R. A. 637, 24 N. E. 1046, holding that employee must use reasonable care to select competent and skilful persons for service; *Rogers v. Leyden*, 127 Ind. 51. 26 N. E. 210, Affirming judgment for personal injury to servant from fall of overhanging mine roof; *McLaine v. Head & D. Co.* 71 N. H. 301, 58 L. R. A. 469, 93 Am. St. Rep. 522, 52 Atl. 545 (dissenting opinion), majority holding master not liable for negligence of foreman in failing to notify trench laborer of dumping of load of earth.

Cited in note (54 L. R. A. 101) on duty to warn as to dangers of transitory class occasionally supervening during progress of work as nondelegable duty.

Employee under specific order to do special work.

Cited in *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 591, 23 N. E. 675, holding employee protected to reasonable extent by order directing him to do special duty; *Brazil Block Coal Co. v. Hoodlet*, 129 Ind. 337, 27 N. E. 741, holding that servant may assume master will provide safe place, tools and appliances; *Louisville, E. & St. L. Consol. R. Co. v. Hanning*, 131 Ind. 534, 31 Am. St. Rep. 443, 31 N. E. 187, holding that servant may assume master will use special care to render unusual employment safe; *Ft. Wayne v. Patterson*, 25 Ind. App. 558, 58 N. E. 747, holding that servant directed to dig bell holes may assume master has not made place unsafe; *Norton Bros. v. Nadebok*, 190 Ill. 602, 54 L. R. A. 845, 60 N. E. 843, holding master liable to servant under vice principal's orders, for vice principal's negligent act causing injury.

Cited in note (17 L. R. A. 607) on reliance upon orders as affecting contributory negligence of employee.

Risks of employment.

Cited in *Griffin v. Ohio & M. R. Co.* 124 Ind. 327, 24 N. E. 888, holding that servant digging in gravel pit assumes risk of falling of super stratum of clay; *Stuart v. New Albany Mfg. Co.* 15 Ind. App. 196, 43 N. E. 961, holding that servant assumes open and obvious risks of his regular employment.

Cited in footnotes to *Williamson v. Newport News & M. Valley Co.* 12 L. R. A. 297, which holds brakeman assumes risk of bridge known to be too low; *McKee v. Chicago, R. I. & P. R. Co.* 13 L. R. A. 817, which holds risk from wing fences at cattle guards assumed by brakemen.

Cited in note (12 L. R. A. 342) on assumption of ordinary risks of employment by employee.

6 L. R. A. 588, *KELLOGG v. HOWES*, 81 Cal. 170, 22 Pac. 509.

Action on supersedeas bond, in *Kellogg v. Howes*, 93 Cal. 586, 29 Pac. 230.

Building contracts; mechanic's lien.

Followed in *Davies Henderson Lumber Co. v. Gottschalk*, 81 Cal. 644, 22 Pac. 860, holding contract for building for over \$1,000 not in writing nor recorded, void, and material men may claim lien without notifying owner to stop payments on contract.

Cited in *Gibbs v. Tally*, 133 Cal. 377, 60 L. R. A. 817, 65 Pac. 970, holding statutory requirement of bond to one-quarter amount of building contract, unconstitutional; *McClain v. Hutton*, 131 Cal. 136, 63 Pac. 182, holding declaration by material man on contract as if made with owner instead of contractor, proper; *McDonald v. Hayes*, 132 Cal. 495, 64 Pac. 850, holding extent of lien governed by Code Civ. Proc. § 1200, where owner completes after abandonment by contractor; *Giant Powder Co. v. San Diego Flume Co.* 97 Cal. 266, 32 Pac. 172, sustaining material man's lien for value of materials furnished before filing of contract, filed within 30 days after acceptance of structure.

Cited in note (20 L. R. A. 562, 565) on payment to contractors or subcontractors as affecting lien of subordinate claimants.

— Necessity of recording contract.

Cited in *McClain v. Hutton*, 131 Cal. 144, 63 Pac. 182, holding personal judgment against owner on unrecorded contractor's contract, not proper; *Laidlaw v. Marye*, 133 Cal. 173, 65 Pac. 391, holding terms of building contract, void for failure to record, control recovery of contractor in assumpsit; *Barker v. Doherty*, 97 Cal. 12, 31 Pac. 1117, holding building contract, void because unrecorded, admissible in evidence to determine whether lien was filed before building's completion; *Butterworth v. Levy*, 104 Cal. 510, 38 Pac. 897, holding record of insufficient memorandum of building contract does not affect lienor's right to proceed as though it were unrecorded.

Distinguished in *Maher v. Shull*, 11 Colo. App. 327, 52 Pac. 1115, holding failure to record contract to convey interest in mining claim upon completion of certain development work, not give employees of promisee's contractor lien on property.

Class legislation.

Cited in *State v. Gregory*, 170 Mo. 604, 71 S. W. 170, holding statute imposing penalty on contractor or subcontractor falsely representing where material purchased on credit is to be used, constitutional.

6 L. R. A. 591, *DONOVAN v. JUDSON*, 81 Cal. 334, 22 Pac. 682.

Performance of condition precedent.

Cited in *Southern P. R. Co. v. Allen*, 112 Cal. 461, 44 Pac. 796, holding that vendor agreeing to convey upon receiving government patent may sue for purchase money becoming due on fixed date without tendering conveyance.

Cited in note (12 L. R. A. 245) on rights and remedies of vendor.

6 L. R. A. 594, *Re JESSUP*, 81 Cal. 408, 22 Pac. 742, 1028, 21 Pac. 976.

Jurisdiction to determine contested heirship.

Cited in *Morton v. Morton*, 62 Neb. 423, 87 N. W. 182, holding that appeal lies from order denying petition for distribution of personalty.

When rehearing may be granted.

Cited in *Merchant's Nat. Bank v. Grunthal*, 39 Fla. 394, 22 So. 685, holding that appellate court cannot grant rehearing after filing of its mandate in court below.

Evidence of parentage.

Cited in *Watson v. Richardson*, 110 Iowa, 691, 80 N. W. 407, holding rumors and current reports as to paternity of claimant, incompetent.

Cited in footnote to *Re Rohrer*, 50 L. R. A. 350, which holds acknowledgment of illegitimate child by father's allegation in sworn pleading sufficient, though not expressly made, to admit child to heirship.

Cited in notes (52 L. R. A. 501, 504) resemblance as evidence of relationship; (35 L. R. A. 802, 805) on use of photographs as evidence; (28 L. R. A. 702) on right to compel accused to exhibit himself for identification.

Construction of legitimacy statutes.

Cited in *Morton v. Morton*, 62 Neb. 426, 87 N. W. 182, holding that "adopted into family" refers to public acknowledgment and recognition of child, and not to statutory adoption proceedings; *Re Gorkow*, 20 Wash. 573, 56 Pac. 385, holding illegitimate entitled to support during minority where paternity established by written acknowledgment; *Thomas v. Thomas*, 64 Neb. 589, 90 N. W. 630, holding that statutes for relief of illegitimate children should have fair construction.

Overruled in part in *Re De Lareaga*, 142 Cal. 169, 75 Pac. 790, holding acknowledged illegitimate child, not received into father's home, or among his kindred, not legitimated by adoption.

Heirship of adopted child.

Distinguished in *Bray v. Miles*, 23 Ind. App. 443, 54 N. E. 446, holding adopted child entitled to take under will of grandparent in favor of children's children.

6 L. R. A. 601, *CHIPPEWA VALLEY & S. R. CO. v. CHICAGO, ST. P. M. & O. R. CO.* 75 Wis. 224, 44 N. W. 17, 25.

Contract against public policy.

Cited in *Deering v. Cunningham*, 63 Kan. 180, 54 L. R. A. 412, 65 Pac. 263, holding contract for pecuniary consideration, to withdraw opposition to pardon and to use influence in its favor, invalid; *Richardson v. Scott's Bluff County*, 59 Neb. 410, 48 L. R. A. 298, 80 Am. St. Rep. 682, 81 N. W. 309, holding contract to draft appropriation bill, secure introduction and hearing, and do all things needful to secure passage, for "liberal" contingent compensation, void; *Young v. Thompson*, 14 Colo. App. 315, 59 Pac. 1030, holding contract to suppress evidence, void; *Owens v. Wilkinson*, 20 App. D. C. 71, holding agreement involving personal solicitation of congressmen, not enforceable; *Herman v. Oconto*, 100 Wis. 399, 76 N. W. 364, holding evidence of fraud, bribery, and corruption used to attain municipal contract, admissible under general allegation.

Cited in footnotes to *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 12 L. R. A. 563, which holds agreement to prevent competition between corporations in manufacture of glue under patent, valid; *Brooks v. Cooper*, 21 L. R. A. 617, which holds void, contract between newspapers for alternate selection and division of profits of public printing.

Cited in notes (12 L. R. A. 121) as to contracts not binding on makers; (30 L. R. A. 738) as to validity of contract for services to procure legislation; (8 L. R. A. 497, 6 L. R. A. 615) as to validity of contracts against public policy.

Distinguished in *Gilmore v. Roberts*, 79 Wis. 453, 48 N. W. 522, holding chattel mortgage to payee "or bearer," not void because taken by "bearer" who furnished the loan, to evade taxes; *Houlton v. Nichol*, 93 Wis. 400, 33 L. R. A. 168, 57 Am. St. Rep. 928, 67 N. W. 715, holding contract for securing public lands to be opened to settlement as matter of right, valid; *Chesebrough v. Conover*, 140 N. Y. 387, 35 N. E. 633, upholding recovery on contract to draw legislative bills, explain them, and secure their introduction; *Dunham v. Hastings Pavement Co.* 56 App. Div. 249, 67 N. Y. Supp. 632, holding contract to call upon and secure inspection of pavement by municipal officers, not invalid *per se*.

Corporation as person.

Cited in *Segnitz v. Garden City Bkg. & T. Co.* 107 Wis. 178, 50 L. R. A. 330, 81 Am. St. Rep. 830, 83 N. W. 329, and *State ex rel. Atty. Gen. v. Portage City Water Co.* 107 Wis. 451, 83 N. W. 697, holding that word "person" in legislative enactments includes corporations.

6 L. R. A. 610, *GIFFORD v. CORRIGAN*, 117 N. Y. 257, 15 Am. St. Rep. 508, 22 N. E. 756.

Enforcement of lien or claim.

Cited in *New York L. Ins. Co. v. Aitkins*, 125 N. Y. 670, 26 N. E. 732, holding mortgagee entitled to enforce claim against grantee of mortgagor assuming payment, in spite of subsequent release by grantor; *Clark v. Howard*, 150 N. Y. 238, 44 N. E. 695, holding creditor entitled to enforce claim against another creditor taking conveyance of debtor's property under guaranty of payment of debts; *Parraga v. Ribon*, 44 App. Div. 96, 61 N. Y. Supp. 1024, holding creditor entitled to enforce claim against party assuming same in consideration of mortgage by debtor; *Magill v. Brown Bros.* 20 Tex. Civ. App. 676, 50 S. W. 143, holding mortgagee entitled to security given by mortgagor to second mortgagee as collateral to mortgagor's promise to pay off first mortgage; *Binghamton Sav. Bank v. Binghamton Trust Co.* 85 Hun, 80, 32 N. Y. Supp. 657, holding mortgagee entitled to enforce debt personally against grantee of separate interest where deed expressly assumes payment of mortgage; *Cook v. Berrott*, 50 N. Y. S. R. 164, 21 N. Y. Supp. 358, holding creditors entitled to enforce covenant of third party to debtor, where remedies against debtor omitted in reliance thereon; *Williams v. Fisher*, 8 Misc. 316, 28 N. Y. Supp. 739, holding plaintiff's attorney entitled to enforce promise of defendant to pay counsel fees, contained in release obtained from plaintiff without attorney's knowledge; *Glens Falls Gaslight Co. v. Van Vranken*, 11 App. Div. 424, 42 N. Y. Supp. 339, holding gas company entitled to sue on contract between city and sewer contractor, providing for payment of damages for injury to gas pipes; *Wilson v. Whitmore*, 92 Hun, 469, 36 N. Y. Supp. 550, holding sureties on statutory bond of contractor to municipality liable to material man; *American Nat. Bank v. Klock*, 58 Mo. App. 345, holding party taking as collateral notes secured by mortgages assumed by grantees, entitled to enforce same against grantees.

Cited in notes (7 L. R. A. 35) on personal liability of vendee assuming encumbrance; (8 L. R. A. 317) on mortgagor conveying premises subject to mortgage debt.

Distinguished in *Coleman v. Hiler*, 85 Hun, 551, 33 N. Y. Supp. 357; *Buffalo Cement Co. v. McNaughton*, 90 Hun, 79, 35 N. Y. Supp. 453; *Street v. Goodale*, 77 Mo. App. 321; *Townsend v. Rackham*, 143 N. Y. 522, 38 N. E. 731,—holding that beneficiary of promise cannot enforce same where promisee under no liabil-

ity to beneficiary; *Barnes v. Hekla F. Ins. Co.* 56 Minn. 42, 45 Am. St. Rep. 438. 57 N. W. 314, holding insured entitled to sue reinsurer only where contract of latter expressly names insured; *Watkins v. Reynolds*, 123 N. Y. 218, 25 N. E. 322. holding that equitable mortgagee cannot enforce claim against purchaser without notice from debtor, assuming other debts, though notified before payment, where purchaser not released by subrogated creditors; *Blass v. Terry*, 156 N. Y. 129. 50 N. E. 953, holding presumption that grantee in recorded deed containing covenant to pay mortgage, assumed debt, rebutted by proof that grantee is married woman acting through husband and in fact ignorant of covenant; *Albere v. Kingsland*, 37 N. Y. S. R. 409, 13 N. Y. Supp. 794, holding defect of parties for want of holder of mortgage, in action by mortgagor against mortgagee for failure of latter to pay same in pursuance of promise, available only on demurrer.

Agency.

Cited in *Cowen v. Winters*, 37 C. C. A. 630, 96 Fed. 931, holding railroad authorizing another line to issue tickets good over either, bound by latter's contract.

Delivery of deed.

Cited in *Townsend v. Rackham*, 143 N. Y. 523, 38 N. E. 731, holding record of deed not conclusive evidence of delivery.

6 L. R. A. 615, *ADAMS COUNTY v. HUNTER*, 78 Iowa, 328, 43 N. W. 208.

Compensation of public officer in excess of statutory allowance.

Cited in *Ryce v. Osage*, 88 Iowa, 564, 55 N. W. 532, holding promise to pay city attorney extra fee for official services, void; *Council Bluffs v. Waterman*, 86 Iowa, 693, 53 N. W. 289, holding aldermen required to act as board of equalization not entitled to extra compensation; *Tracy v. Jackson County*, 115 Iowa, 256. 88 N. W. 362, holding county treasurer not entitled to extra compensation for extraordinary duties performed in official capacity; *State ex rel. Axen v. Meserve*, 58 Neb. 453, 78 N. W. 721, holding county treasurer entitled only to compensation fixed by law for performance of official duties; *Dorsett v. Garrard*, 85 Ga. 737. 11 S. E. 768, holding purchaser's agreement to pay commission on sale by county commissioner in performance of duty, illegal; *Kollock v. Dodge*, 105 Wis. 207, 80 N. W. 608 (dissenting opinion), majority holding council may agree to pay city engineer additional compensation for extra official services.

Cited in footnote to *Buck v. Eureka*, 30 L. R. A. 409, which holds void, contract to pay city attorney other compensation than salary for conducting litigation for city.

Contracts against public policy.

Cited in footnotes to *Brooks v. Cooper*, 21 L. R. A. 617, which holds void contract between newspapers for alternate selection and division of profits of public printing; *Gloucester Isinglass & Glue Co. v. Russia Cement Co.* 12 L. R. A. 563. which holds agreement to prevent competition between corporations in manufacture of glue under patent, valid.

Cited in notes (12 L. R. A. 121) on contracts not binding on makers; (6 L. R. A. 602) on contracts void as against public policy.

6 L. R. A. 617, *CARLISLE v. KILLEBREW*, 89 Ala. 329, 6 So. 756.

Ownership of crops.

Cited in note (23 L. R. A. 477) on sale or mortgage of future crops.

Judgments; how far conclusive.

Cited in *Kohn v. Haas*, 95 Ala. 479, 12 So. 577; *Wiggins v. Steiner*, 103 Ala. 657, 16 So. 8, holding that judgment cannot be altered after term save to correct mere clerical errors, unless void on its face; *Carlisle v. Killebrew*, 91 Ala. 353, 24 Am. St. Rep. 915, 8 So. 355, holding judgment in ejectment following description of land in declaration, not void on its face, because of uncertainty.

Admissibility of judgment.

Cited in footnote to *State v. Bradneck*, 43 L. R. A. 620, which holds judgment of dismissal in divorce suit for adultery inadmissible in criminal prosecution for nonsupport of wife.

Appeal; consideration of objections to evidence.

Cited in *Waxelbaum v. Bell*, 91 Ala. 333, 8 So. 571, holding general objection to admission of evidence, without stating grounds, not available on appeal; *White v. Craft*, 91 Ala. 142, 8 So. 420, holding objection to admissibility of evidence disregarded on appeal, if grounds do not appear on face of record.

6 L. R. A. 619, *STAUB v. KENDRICK*, 121 Ind. 226, 23 N. E. 79.

Articles included in baggage.

Cited in *Runyan v. Central R. Co.* 61 N. J. L. 542, 43 L. R. A. 287, 68 Am. St. Rep. 711, 41 Atl. 367, holding that passenger's baggage includes rubbers, gloves, and catalogues and memoranda carried for business purposes of journey, but not package of nails and letter file.

Carrier's liability for loss of baggage.

Cited in notes (6 L. R. A. 910) on duty of carriers as bailees; (11 L. R. A. 760) on liability of common carrier for loss of baggage (34 L. R. A. 138, 139) on liability of baggage transfer companies; (12 L. R. A. 397) on bailment.

Who are common carriers.

Cited in footnote to *Wade v. Lutchter & M. Cypress Lumber Co.* 33 L. R. A. 255, which holds provision making all railroads carriers inapplicable to business corporation operating railroad on own property.

6 L. R. A. 621, *STATE v. GOODWILL*, 33 W. Va. 179, 25 Am. St. Rep. 863, 10 S. E. 285.

Class legislation; freedom to contract.

Cited in *Dugger v. Mechanics' & T. Ins. Co.* 95 Tenn. 259, 28 L. R. A. 800, 32 S. W. 5, holding act regulating payment of loss under policies, excepting cotton in bales, valid; *State v. Wilson*, 7 Kan. App. 446, 53 Pac. 371, holding act regulating weighing of coal at mines, valid; *Com. v. Brown*, 8 Pa. Super. Ct. 355, 43 W. N. C. 75, Affirming 6 Pa. Dist. R. 775, 20 Pa. Co. Ct. 255, 28 Pittsb. L. J. N. S. 181, holding act requiring mining operator to weigh coal before screening, invalid; *Re House Bill No. 203*, 21 Colo. 28, 39 Pac. 431, holding act regulating the weighing of coal at mines, void; *State v. Foster*, 22 R. I. 175, 50 L. R. A. 344, 46 Atl. 833, holding act applying to all itinerant peddlers, valid; *State v. Garbroski*, 111 Iowa, 499, 56 L. R. A. 572, 82 Am. St. Rep. 524, 82 N. W. 959, holding act requiring peddler to procure license, but exempting veterans, void; *Haigh v. Bell*, 41 W. Va. 24, 31 L. R. A. 132, 23 S. E. 666, holding act valid, making applicable to all counties, provision applying to one; *Ruhrstrat v. People*, 185 Ill.

140, 49 L. R. A. 183, 76 Am. St. Rep. 30, 57 N. E. 41, holding that trade-mark on label with national flag, may be used for advertising; *People ex rel. Rodgers v. Coler*, 166 N. Y. 18, 52 L. R. A. 822, 82 Am. St. Rep. 605, 59 N. E. 716, denying power of legislature to fix compensation which cities must pay for labor; *West Virginia Transp. Co. v. Standard Oil Co.* 50 W. Va. 616, 56 L. R. A. 808, 88 Am. St. Rep. 895, 40 S. E. 591, holding that oil company may enlarge its business by buying every competitor in sight; *Leep v. St. Louis, I. M. & S. R. Co.* 58 Ark. 421, 23 L. R. A. 270, 41 Am. St. Rep. 109, 25 S. W. 75, holding act regulating payment of wages of employees of railroads and railway contractors, void; *S. A. & A. P. R. Co. v. Wilson*, 4 Tex. App. Civ. Cas. (White & W.) 574, 10 S. E. 287, holding statute imposing penalty on railroads for failure to pay employee within prescribed time, unconstitutional; *Low v. Rees Printing Co.* 41 Neb. 140, 24 L. R. A. 708, 43 Am. St. Rep. 670, 59 N. W. 362, holding eight hours law which excepted farm and domestic labor, invalid; *Cleveland v. Clements Bros. Constr. Co.* 67 Ohio St. 222, 59 L. R. A. 782, 93 Am. St. Rep. 670, 65 N. E. 885, holding statute limiting day's work of laborers on public works to eight hours, unconstitutional; *Braceville Coal Co. v. People*, 147 Ill. 71, 22 L. R. A. 342, 37 Am. St. Rep. 206, 35 N. E. 62, holding act that companies engaged in certain classes of work should pay weekly wages invalid; *Union Cent. L. Ins. Co. v. Chowning*, 86 Tex. 659, 24 L. R. A. 506, 26 S. W. 982, holding act compelling insurance companies to pay penalty with attorney's fees for delay in settling losses, valid; *State v. Haun*, 61 Kan. 157, 47 L. R. A. 373, 59 Pac. 340, holding act to secure payment of wages to laborers and others, invalid; *Luman v. Hitchens Bros. Co.* 90 Md. 27, 46 L. R. A. 396, 44 Atl. 1051, holding act regulating sale of goods by railroads and mining companies to employees in single county, void; *Com. v. Perry*, 155 Mass. 122, 14 L. R. A. 328, 31 Am. St. Rep. 533, 28 N. E. 1126, holding act forbidding imposition of fine on weavers for poor work, invalid; *Re Morgan*, 26 Colo. 448, 47 L. R. A. 65, 77 Am. St. Rep. 269, 58 Pac. 1071, holding act regulating hours in mines, smelting and ore reduction works, void; *Johnson v. Goodyear Min. Co.* 127 Cal. 13, 47 L. R. A. 342, 78 Am. St. Rep. 17, 59 Pac. 304, holding act regulating wages of employes of corporations void; *Ritchie v. People*, 155 Ill. 104, 29 L. R. A. 82, 46 Am. St. Rep. 315, 40 N. E. 454, holding act forbidding employment of females in any factory or workshop, invalid; *Frorer v. People*, 141 Ill. 182, 16 L. R. A. 496, 31 N. E. 395, holding act forbidding truck system by certain classes of employers, invalid; *State v. Loomis*, 115 Mo. 318, 21 L. R. A. 792, 22 S. W. 350, holding act prohibiting those engaged in mining and manufacturing from issuing anything but lawful money or negotiable paper in payment of labor, invalid; *State v. Julow*, 129 Mo. 173, 29 L. R. A. 258, 50 Am. St. Rep. 443, 31 S. W. 781, holding act prohibiting discharge of labor unionists, invalid; *Low v. Rees Printing Co.* 41 Neb. 146, 24 L. R. A. 708, 43 Am. St. Rep. 670, 59 N. W. 362, holding laborer has right to contract for the price at which he will work; *Palmer v. Tingle*, 55 Ohio St. 445, 45 N. E. 313, holding act giving lien to laborers or material men under contract with agent of owner or subcontractor, void; *State v. Fire Creek Coal & Coke Co.* 33 W. Va. 189, 6 L. R. A. 359, 25 Am. St. Rep. 891, 10 S. E. 288, holding act prohibiting miners and manufacturers from selling goods to employee at higher rates than to others, invalid; *Whitwell v. Continental Tobacco Co.* 64 L. R. A. 695, 60 C. C. A. 297, 125 Fed. 458, holding manufacturer refusing to sell to dealers not giving exclusive trade except at prohibitive prices, does not violate anti-trust act; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S.

120, 43 L. ed. 918, 19 Sup. Ct. Rep. 609 (dissenting opinion), majority holding that act providing for attorney's fee in actions against railroads for damages by fire, valid; *Gulf, C. & S. F. R. Co. v. Ellis*, 165 U. S. 165, 41 L. ed. 671, 17 Sup. Ct. Rep. 255, holding act providing for payment of attorney's fees in actions against railroads for killing stock, void; *Virginia Development Co. v. Crozer Iron Co.* 90 Va. 130, 44 Am. St. Rep. 893, 17 S. E. 806, holding liens for supplies to manufacturing companies superior to deeds of trust, valid; *Dixon v. Poe*, 159 Ind. 497, 60 L. R. A. 310, 95 Am. St. Rep. 309, 65 N. E. 518, holding act requiring redemption in money of token issued by merchants to coal miners assigning wages, invalid class legislation; *State v. Smiley*, 65 Kan. 285, 69 Pac. 199 (dissenting opinion), majority sustaining statute prohibiting anti-competitive, price-controlling trade agreements.

Cited in footnotes to *Anderton v. Milwaukee*, 15 L. R. A. 830, which holds discrimination between lot owners as to compensation for change of street grade void; *State v. Snow*, 11 L. R. A. 355, which holds regulation for marking packages of lard and substitutes, not violation of due process of law; *Hancock v. Yaden*, 6 L. R. A. 576, which holds statute prohibiting employees of mining and manufacturing companies contracting to receive wages in other than money, not unjust discrimination; *Braceville Coal Co. v. People*, 22 L. R. A. 340, which holds unconstitutional, statute requiring weekly payment of wages by specified corporations.

Distinguished in *Dennis v. Moses*, 18 Wash. 592, 40 L. R. A. 314, 52 Pac. 333 (dissenting opinion), majority denying right to waive in mortgage, statute relating to appraisal before foreclosure; *State v. Nelson*, 52 Ohio St. 103, 26 L. R. A. 320, 39 N. E. 22, holding act requiring street car operators to provide for well-being of employees, valid; *State v. Peel Splint Coal Co.* 36 W. Va. 822, 17 L. R. A. 401, 15 S. E. 1000, holding act regulating weighing coal without screening valid.

6 L. R. A. 625. **ARMSTRONG v. POMEROY NAT. BANK**, 46 Ohio St. 512, 15 Am. St. Rep. 655, 22 N. E. 866.

Fictitious payee.

Followed in *Chism v. First Nat. Bank*, 96 Tenn. 649, 32 L. R. A. 781, footnote, p. 778, 54 Am. St. Rep. 863, 36 S. W. 387, holding bank liable for payment of check on forged indorsement of fictitious payee supposed by maker to be genuine.

Cited in *Building & Savings Co. v. Bank*, 3 Ohio S. & C. P. Dec. 690, holding indorsement by third person of name of fictitious payee, supposed to be genuine by maker, forgery; *Tolman v. American Nat. Bank*, 22 R. I. 466, 52 L. R. A. 879, 84 Am. St. Rep. 850, 48 Atl. 480, holding bank paying on forged name of payee liable, although drawer intended proceeds for person receiving same who represented himself to be person whose name he forged; *Shipman v. Bank of State*, 126 N. Y. 331, 12 L. R. A. 797, 22 Am. St. Rep. 821, 27 N. E. 371, holding that only paper knowingly made payable to fictitious persons is payable to bearer.

Cited in notes (26 L. R. A. 570) on negotiability of check; (39 L. R. A. 426, 429) on use of fictitious name as affecting validity of instrument.

Distinguished in *Crippen v. American Nat. Bank*, 51 Mo. App. 518, and *Meridian Nat. Bank v. First Nat. Bank*, 7 Ind. App. 329, 52 Am. St. Rep. 450, 33 N. E. 247, holding paper good in hands of bona fide holder when maker

supposed person to whom it was delivered was payee, although fictitious name given.

Payment of forged paper.

Cited in *State ex rel. Boston Woven Hose Co. v. Lewis*, 4 Ohio N. P. 177, holding county treasurer liable for payment of warrant on agent's unauthorized indorsement; *J. N. Houston Grocer Co. v. Farmers' Bank*, 71 Mo. App. 139, holding as against drawer, payments made by drawee upon forged indorsements are at latter's peril.

Cited in footnote to *First Nat. Bank v. Northwestern Nat. Bank*, 26 L. R. A. 289, which holds genuineness of indorsement not admitted by drawee accepting or paying check.

Cited in note (50 L. R. A. 80, 81, 83) as to who must bear loss on check or bill issued or indorsed to impostor.

Distinguished in *Burnet Woods Bldg. & Sav. Co. v. German Nat. Bank*, 3 Ohio N. P. 99, 4 Ohio Dec. 303, holding that depositor in business requiring drawing of checks owes banker duty of ordinary care.

6 L. R. A. 629, *BOSTON v. SIMMONS*, 150 Mass. 461, 15 Am. St. Rep. 230, 23 N. E. 210.

Civil action in nature of conspiracy.

Cited in *Root v. Rose*, 6 N. D. 580, 72 N. W. 1022, holding that conspiracy will not of itself transmute nonactionable into actionable torts; *More v. Finger*, 128 Cal. 319, 60 Pac. 933, holding that conspiracy, not being gist of action for wrong, need not be proved; *Porter v. Mack*, 50 W. Va. 584, 40 S. E. 459, holding that action on nature of conspiracy has been substituted for common-law actions of conspiracy.

Duty of person acting in position of trust.

Cited in *Alvord v. Cook*, 174 Mass. 127, 54 N. E. 499, upholding actions to recover commissions where brokers for seller and buyer agreed to divide commissions; *Land, Log & Lumber Co. v. McIntyre*, 100 Wis. 261, 69 Am. St. Rep. 925, 75 N. W. 969, holding county supervisors personally liable for audit of claims they have no right to audit; *Emmons v. Alvord*, 177 Mass. 470, 59 N. E. 126, holding that confidential relations make tort of acts that would otherwise not be so.

Recovery from wrongdoers.

Cited in *Emmons v. Alvord*, 177 Mass. 470, 59 N. E. 126, holding those who assist in agent's tort jointly liable; *Illinois C. R. Co. v. Foulks*, 191 Ill. 69, 60 N. E. 890, holding that injured person can take judgment against which of tortfeasors he chooses; *Emmons v. Alvord*, 177 Mass. 470, 59 N. E. 126, holding measure of damages for tort in sale, difference between what owner received and what he ought to have received.

Cited in footnote to *Bonte v. Postell*, 51 L. R. A. 187, which denies joint liability of different lot owners for injury by discharge of surface water.

6 L. R. A. 632, *LEONARD v. LEONARD*, 151 Mass. 151, 21 Am. St. Rep. 437, 23 N. E. 732.

Imprisonment as affecting marital relation.

Cited in note (31 L. R. A. 519) on effect of conviction and sentence of either husband or wife upon marriage relation.

Construction of term "prison."

Cited in *Sturtevant v. Com.* 158 Mass. 600, 33 N. E. 648, holding in statute imposing heavier punishment upon person twice before "committed to prison in this or any other state," word "prison" not limited to state prison.

6 L. R. A. 633, *COM. USE OF ALLEGHENY COUNTY v. MILLER*, 131 Pa. 118, 18 Atl. 938.

Exercise of police power.

Cited in footnote to *Com. v. Roberts*, 16 L. R. A. 401, which holds requiring water closets in human habitation within police power.

— Regulation of sale of articles of food.

Cited in *Com. v. Hendley*, 7 Pa. Super. Ct. 359, 28 Pittsb. L. J. N. S. 401, holding restaurant keeper furnishing oleomargarine as part of meal, liable for penalty.

Cited in footnotes to *State v. Hanson*, 54 L. R. A. 468, which holds sale of unlabeled cottolene forbidden by statute against selling unlabeled imitation of lard; *State ex rel. Monnett v. Capital City Dairy Co.* 57 L. R. A. 181, which sustains statute forbidding sale of unmarked oleomargarine; *State v. Myers*, 35 L. R. A. 844, which sustains statute requiring oleomargarine and artificial butter to be colored pink; *Frost v. Chicago*, 49 L. R. A. 657, which holds void, ordinance prohibiting colored netting over package of fruit, etc.; *State v. Layton*, 62 L. R. A. 164, which sustains statute prohibiting manufacture or sale of baking powder containing alum.

Cited in note (11 L. R. A. 533) on regulation and prohibition of manufacture and sale of oleomargarine.

6 L. R. A. 636, *FRIEND v. PITTSBURGH*, 131 Pa. 305, 17 Am. St. Rep. 811, 18 Atl. 1060.

Place of payment.

Cited in *Skinker v. Butler County*, 112 Mo. 337, 20 S. W. 613, holding county may, as part of instrument, designate place of payment outside county; *Re Boyle's Lunacy*, 20 Pa. Super. Ct. 6, holding municipality not required to seek creditors for purpose of making payment.

Interest.

Cited in *Vider v. Chicago*, 164 Ill. 357, 45 N. E. 720, holding municipal corporation not liable for interest except in express contract.

6 L. R. A. 637, *WILLIAMS v. WILLIAMS*, 89 Ky. 381, 12 S. W. 760.

Widow's right of dower.

Cited in note (18 L. R. A. 79) on power of husband or his creditors to defeat wife's right of dower.

Statute of limitations.

Cited in *Davis v. Brown*, 98 Ky. 489, 36 S. W. 534, holding action for continuous breach of parol contract barred after lapse of five years from date of contract.

6 L. R. A. 639, *WRIGHT v. GRIFFITH*, 121 Ind. 478, 23 N. E. 281.

Unaccepted offer.

Cited in *Pennsylvania Co. v. Plotz*, 125 Ind. 31, 24 N. E. 343, holding mere proposition or offer not acted on or accepted, not a contract.

Guaranty.

Cited in *Conduitt v. Ryan*, 3 Ind. App. 5, 29 N. E. 160, holding words "I hereby guarantee payment when due, etc.," an absolute, continuing guaranty; *Shearer v. R. S. Peale & Co.* 9 Ind. App. 288, 36 N. E. 455, construing words "hereby guarantees payment of amount," as original undertaking; *Lane v. Mayer*, 15 Ind. App. 384, 44 N. E. 73, holding guaranty, "I hereby agree to hold myself responsible for, and agree to pay for," original undertaking; *Bryant v. Stout*, 16 Ind. App. 393, 44 N. E. 68, holding bond conditioned upon faithful performance of contract of service absolute, continuing undertaking; *Woody v. Haworth*, 24 Ind. App. 637, 57 N. E. 272, holding words "I guarantee payment of written note when due," direct and absolute engagement; *Nading v. McGregor*, 121 Ind. 470, 6 L. R. A. 687, 23 N. E. 283, holding promise to do what another is bound to do, in case of latter's failure, original undertaking; *Metzger v. Hubbard*, 153 Ind. 192, 54 N. E. 761, holding words "I guarantee payment of," direct and absolute undertaking; *Walter A. Wood Mowing & Reaping Co. v. Farnham*, 1 Okla. 377, 33 Pac. 867, holding guarantor of promissory note liable on maturity without notice of default.

— Notice to guarantor.

Cited in *Jenkins v. Phillips*, 18 Ind. App. 567, 48 N. E. 651, holding notice of advances after notice of acceptance of guaranty bond unnecessary; *Neagle v. Sprague*, 63 Ill. App. 27, holding where guarantor would know that guaranty would be accepted, notice unnecessary; *Sullivan v. Cluggage*, 21 Ind. App. 673, 52 N. E. 110, holding notice of default of principal unnecessary in collateral guaranty; *Closson v. Billman*, 161 Ind. 616, 69 N. E. 449, holding notice of acceptance of guaranty executed contemporaneously with bond guaranteed, unnecessary.

Disapproved in *German Sav. Bank v. Drake Roofing Co.* 112 Iowa, 188, 51 L. R. A. 761, footnote p. 758, 84 Am. St. Rep. 335, 83 N. W. 960, holding notice of acceptance necessary to bind guarantors of payment, to bank, of notes, etc., to third person.

— Continuing guaranty.

Cited in *Presbyterian Bd. of Publication & S. S. Work v. Gilliford*, 139 Ind. 529, 38 N. E. 404, holding guaranty limited in amount but not in time, continuing guaranty; *S. Hamill Co. v. Woods*, 94 Iowa, 250, 62 N. W. 735, holding parol evidence admissible to show whether guaranty "to see that same is paid as if it was my debt" is or is not continuing guaranty.

Construction of instruments.

Cited in *Closson v. Billman*, 161 Ind. 614, 69 N. E. 449, holding bond construable with contract therein referred to.

6 L. R. A. 641, *HERR v. DENVER MILL & MERCANTILE CO.* 13 Colo. 406, 22 Pac. 770.

Sales — Necessity of continued change of possession.

Cited in *Baur v. Beall*, 14 Colo. 386, 23 Pac. 345, holding delivery of personal

property by vendor reassuming possession as agent passes no title; *Springer v. Kreeger*, 3 Colo. App. 491, 34 Pac. 269, holding sale without actual or constructive change of possession void as to vendor's creditors; *Anders v. Barton*, 3 Colo. App. 327, 33 Pac. 142, holding bill of sale without giving possession of chattels passes no title; *Allen v. Steiger*, 17 Colo. 557, 31 Pac. 226, holding sale unaccompanied by delivery and change of possession conclusively presumed fraudulent.

6 L. R. A. 646, *ATCHISON, T. & S. F. R. CO. v. LINDLEY*, 42 Kan. 714, 16 Am. St. Rep. 515, 22 Pac. 703.

Second appeal in 47 Kan. 432, 28 Pac. 201.

Contributory negligence; voluntarily assuming position of danger.

Cited in *Ft. Scott, W. & W. R. Co. v. Sparks*, 55 Kan. 295, 39 Pac. 1032, holding that stock shipper injured while standing on top of car when in motion, cannot recover for injuries; *Walker v. Green*, 60 Kan. 294, 56 Pac. 477, holding that shipper riding in freight car cannot recover for injuries from negligent handling of car; *Kimball v. Palmer*, 25 C. C. A. 396, 42 U. S. App. 399, 80 Fed. 241, holding shipper injured in attempting to climb to top of box car, guilty of contributory negligence; *Gross v. South Chicago City R. Co.* 73 Ill. App. 222, holding trespasser riding on top of freight car and injured through contact with trolley wire of electric railway, guilty of contributory negligence; *Church v. Chicago, M. & St. P. R. Co.* 50 Minn. 220, 16 L. R. A. 863, 52 N. W. 647, holding bystander assisting in switching cars at request of "head switchman," not employee, and assumes risk of position.

Cited in note (22 L. R. A. 664) on assumption by volunteer of risks of service.

Duty not to wantonly injure another.

Cited in *Hendryx v. Kansas City, Ft. S. & G. R. Co.* 45 Kan. 379, 25 Pac. 893, holding that only duty railroad owes trespasser on train is not wantonly to injure him.

Cited in note (22 L. R. A. 796) on rights of person riding on pass or contract for free passage.

6 L. R. A. 653, *CORT v. LASSARD*, 18 Or. 221, 17 Am. St. Rep. 726, 22 Pac. 1054.

Contracts for personal services.

Cited in notes (11 L. R. A. 550) on special services for professional labor; (12 L. R. A. 497) on assignability of contracts for personal services requiring special skill and knowledge.

Injunction against breach of contract.

Cited in footnotes to *Metropolitan Exhibition Co. v. Ewing*, 7 L. R. A. 381, which holds contract may be practically enforced by enjoining breach of negative promise; *Philadelphia Ball Club v. Lajoie*, 58 L. R. A. 227, which authorizes injunction against baseball player violating contract to play for certain organization, for specified time, and meanwhile not play for other club.

Cited in notes (7 L. R. A. 779; 11 L. R. A. 116) on agreements not specifically enforceable; (8 L. R. A. 626) on right to specific performance when remedy at law adequate.

Distinguished in *E. Jaccard Jewelry Co. v. O'Brien*, 70 Mo. App. 436, holding that equity will not enjoin breach of contract for services of salesman of average ability; *Chain Belt Co. v. Von Spreckelsen*, 117 Wis. 122, 94 N. W. 78, dissolving preliminary injunction against violation of contract for services, where defendant's answer alleges others in plaintiff's employ have same knowledge and skill.

Implied covenants.

Cited in *Southwest Missouri Light Co. v. Joplin*, 101 Fed. 28, holding grant of twenty year electric light franchise implies covenant not to compete within that time.

6 L. R. A. 656, *MOAKLER v. PORTLAND & W. VALLEY R. CO.* 18 Or. 189, 17 Am. St. Rep. 717, 22 Pac. 948.

Contributory negligence.

Cited in *Benedict v. Minneapolis & St. L. R. Co.* 86 Minn. 228, 57 L. R. A. 641, 91 Am. St. Rep. 345, 90 N. W. 360, holding protrusion of passenger's head beyond side of car, from curiosity, contributory negligence; *Emison v. Owyhee Ditch Co.* 37 Or. 581, 62 Pac. 13, holding in action for overflowing lands, plaintiff's method of irrigation causing accumulation of water on low land, not contributory negligence; *Carrico v. West Virginia C. & P. R. Co.* 39 W. Va. 99, 19 S. E. 571, holding protrusion of passenger's arm from window not enhancing danger of injury, does not affect railroad's liability; *Zumault v. Kansas City Suburban Belt R. Co.* 175 Mo. 311, 74 S. W. 1015, holding intending passenger sitting on station platform where passing train could strike him, facing in direction opposite from whence train was expected, guilty of contributory negligence.

Cited in note (16 L. R. A. 93) on passenger's negligent exposure of person at car window.

— When question for jury.

Cited in *Gradert v. Chicago & N. W. R. Co.* 109 Iowa, 551, 80 N. W. 559, holding contributory negligence of passenger leaving car to avoid collision, question for jury.

6 L. R. A. 661, *LEATHERS v. JANNEY*, 41 La. Ann. 1120, 6 So. 884.

Corporation's right to sell entire property.

Cited in *Holmes & G. Mfg. Co. v. Holmes & W. Metal Co.* 127 N. Y. 259, 21 Am. St. Rep. 448, 27 N. E. 831, holding that corporation may, with stockholders' consent, sell all its property, taking stock in payment; *Phillips v. Providence Steam Engine Co.* 21 R. I. 305, 45 L. R. A. 562, 43 S. E. 598, holding that corporation may dispose of property by majority vote, in absence of fraud.

Dealings between corporations having same person as director.

Cited in *Colorado Fuel & Iron Co. v. Western Hardware Co.* 16 Utah, 11, 50 Pac. 628, holding assignment preferring another corporation not invalidated by vote of director common to both, not affecting result.

Cited in note (33 L. R. A. 789) on contracts between corporations having common directors or officers.

Pledges of stock bound by stockholders' action.

Cited in *Spokane v. Amsterdamsch Trustees Kantoor*, 22 Wash. 178, 60 Pac.

141, holding pledgees of stock bound by action of shareholders authorizing conveyance of property; *Elyea v. Lehigh Salt Min. Co.* 45 App. Div. 236, 60 N. Y. Supp. 1050, holding that pledgee of stock cannot have transfer of corporate property with assent of record stockholders set aside.

¶ L. R. A. 663, *LEMON v. GRAHAM*, 131 Pa. 447, 19 Atl. 48.

Intention of parties.

Cited in *Interstate Bldg. & L. Asso. v. Agricola*, 124 Ala. 478, 27 So. 247, holding that intention to convey may be deduced from deed referred to in writing under construction.

Informal instrument transferring title.

Cited in *Wisdom v. Reeves*, 110 Ala. 431, 18 So. 13, holding that assignment of "within title" written on deed passes legal title.

Distinguished in *Peirce v. Hubbard*, 48 Phila Leg. Int. 264, 10 Pa. Co. Ct. 65, 28 W. N. C. 196, holding devise to daughter "and in case of her death without issue . . . then to testator's heirs," passes life estate.

¶ L. R. A. 665, *PERRY COUNTY v. CONWAY COUNTY*, 52 Ark. 430, 12 S. W. 877.

Legislative power to impose debt on municipality.

Followed in *Garland County v. Hot Springs County*, 68 Ark. 92, 56 S. W. 636, holding subsequent act making detached territory liable for portion of county debt, valid.

Cited in *Re Fremont & B. H. Counties*, 8 Wyo. 22, 54 Pac. 1073, holding that provision for apportionment of indebtedness upon division of county may be made by general law passed before division is made; *Johnson v. San Diego*, 109 Cal. 478, 30 L. R. A. 181, 42 Pac. 249, holding that legislature may readjust burden of municipal indebtedness after division of city as equities may suggest; *Board of Education v. State*, 64 Kan. 11, 67 Pac. 559, sustaining retroactive law requiring city to assume school bonds issued by annexed district.

— To release claim in favor of municipality.

Cited in *Pearson v. State*, 56 Ark. 154, 35 Am. St. Rep. 91, 19 S. W. 499, holding act releasing treasurer from liability for county funds stolen from safe furnished by county, valid.

¶ L. R. A. 667, *TAYLOR v. MILLARD*, 118 N. Y. 244, 23 N. E. 376.

Parol partition.

Cited in footnote to *Sontag v. Bigelow*, 16 L. R. A. 326, which holds plaintiff in ejectment cannot establish title upon parol partition.

Disapproved in effect in *Berry v. Seawall*, 65 Fed. 752, holding parol partition not vest legal title in severalty to allotted shares.

Easement created by estoppel.

Cited in *Mattes v. Frankel*, 157 N. Y. 611, 68 Am. St. Rep. 804, 52 N. E. 585 (dissenting opinion), majority holding vendor of land estopped by representations to deny right of way over his adjoining lot.

Protection of recording act.

Distinguished in *Hey v. Collman*, 78 App. Div. 587, 79 N. Y. Supp. 778, holding L. R. A. Au.—Vol. I.—54.

ing purchaser of land not protected by recording act from assertion of right of way physically defined.

6 L. R. A. 669, *BLATZ v. ROHRBACH*, 116 N. Y. 450, 22 N. E. 1049.

Report of later appeal in 60 Hun, 189, 14 N. Y. Supp. 458.

Beer as intoxicating liquor.

Followed in *State v. Sioux Falls Brewing Co.* 5 S. D. 44, 26 L. R. A. 139, 58 N. W. 1, holding beer, in absence of evidence as to quality, not intoxicating liquor.

Cited in *Re Hunter*, 34 Misc. 389, 69 N. Y. Supp. 908, holding proof of sale of beer no ground for enjoining trafficking in liquors.

Cited in note (20 L. R. A. 648) on what liquors are within statutory restriction as to sale of "spirituous, vinous, fermented," and other intoxicating liquors.

Action for civil damages for sale of intoxicants.

Cited in *McCarty v. Wells*, 51 Hun, 174, 4 N. Y. Supp. 672, holding that plaintiff in action for damages for sale of intoxicants need not prove intoxication was immediate and proximate cause of death.

Burden of proof in civil action charging crime.

Cited in *Cook v. Dowling*, 6 Misc. 273, 26 N. Y. Supp. 764, holding person charged with unlawful conversion presumed innocent; *Re Hunter*, 34 Misc. 390, 69 N. Y. Supp. 908, holding person sought to be enjoined from unlicensed sale of liquor presumed innocent; *Buffalo v. Smith*, 8 Misc. 349, 28 N. Y. Supp. 690, holding burden of proof on city in action to recover penalty for violation of ordinance.

Necessity of proof of knowledge of intent to violate statute.

Distinguished in *Bulena v. Newman*, 10 Misc. 462, 31 N. Y. Supp. 449, holding that knowledge or intent to use imitation union label, not made ingredient of offense by statute, need not be proved.

6 L. R. A. 672, *WEIR v. MARLEY*, 99 Mo. 484, 12 S. W. 798.

Custody of child.

Cited in *Hussey v. Whiting*, 145 Ind. 583, 57 Am. St. Rep. 220, 44 N. E. 639, holding oral agreement with grandparent at wife's death not preclude father from claiming custody; *Re Blackburn*, 41 Mo. App. 631, holding that mother obtaining custody of child on divorce cannot transmit custody to third party on death; *De Jarnett v. Harper*, 45 Mo. App. 420, holding mother entitled to custody on death of father irrespective of father's contract with third party; *Edwards v. Edwards*, 84 Mo. App. 554, granting mother custody as against paternal grandfather, where evidence insufficient to show unfitness; *Hibbette v. Baines*, 78 Miss. 710, 51 L. R. A. 843, footnote p. 839, 29 So. 80, holding father entitled to custody of children after death of party to whom entrusted by wife on deathbed; *Markwell v. Peresles*, 95 Wis. 422, 69 N. W. 798, holding father entitled to child left with wife's relatives at their request at her death, where rights not surrendered; *Legate v. Legate*, 87 Tex. 253, 28 S. W. 281; *State ex rel. Wood v. Deaton*, 93 Tex. 247, 54 S. W. 901, holding that relinquishment of child by parents to another for adoption does not preclude them from regaining custody.

Cited in footnotes to *Stapleton v. Poynter*, 53 L. R. A. 784, which holds that

custody of child will be taken against its will from wealthy grandparent and given to parent of moral habits; *Re Reiss*, 25 L. R. A. 798, which denies power of court to compel father to send children to visit their grandmother; *Re Young*, 36 L. R. A. 224, which upholds grandparents' right to custody of children to exclusion of father's sister appointed guardian by his will; *Fletcher v. Hickman*, 55 L. R. A. 896, which holds father bound by agreement entrusting custody of infant child to another; *Anderson v. Young*, 44 L. R. A. 277, which sustains court's power to uphold, in interest of child, custody acquired under void agreement with parent; *Kelsey v. Green*, 38 L. R. A. 471, which denies absolute right of guardian appointed on father's application as against guardian appointed in other state where child actually resides; *State ex rel. Lasserre v. Michel*, 54 L. R. A. 927, which holds habeas corpus by husband against wife for custody of child not a "suit" within statutory prohibition; *People v. Ewer*, 25 L. R. A. 794, which holds valid act prohibiting employment of girls under fourteen as dancers or in theatrical exhibitions.

Cited in note (27 L. R. A. 56) on validity of contract for transfer of parental responsibility or authority.

Res judicata.

Cited in *Re Clyne*, 52 Kan. 450, 35 Pac. 23, holding discharge in habeas corpus for insufficient evidence to support charges, no bar to subsequent prosecution on new evidence; *Re Hamilton*, 66 Kan. 756, 71 Pac. 817, holding judgment on habeas corpus to determine custody of child conclusive of all matters in issue arising upon the same state of facts; *Re King*, 66 Kan. 698, 97 Am. St. Rep. 399, 72 Pac. 263, holding judgment on habeas corpus as to custody of child not conclusive where child's welfare requires different order; *Ex parte Reaves*, 121 Fed. 859, holding judgment in habeas corpus proceedings awarding enlisted minor to father's custody conclusive on government.

Cited in note (7 L. R. A. 578) on doctrine of *res judicata*.

6 L. R. A. 676, *FIRST NAT. BANK v. GUSTIN-MINERVA CONSOL. MIN. CO.*
42 Minn. 327, 18 Am. St. Rep. 510, 44 N. W. 198.

Liability of "bonus stock" holders.

Cited in *Mandel v. Swan Land & Cattle Co.* 51 Ill. App. 209, holding stockholder liable to pay calls due at time of forfeiture where charter provides therefor at time of subscription; *Kulp v. Fleming*, 65 Ohio St. 337, 87 Am. St. Rep. 611, 62 N. E. 334, and *Hanson v. Davison*, 73 Minn. 461, 76 N. W. 254, holding stockholder's liability contractual in nature; *Hospes v. Northwestern Mfg. & Car Co.* 48 Minn. 196, 15 L. R. A. 474, 31 Am. St. Rep. 637, 50 N. W. 1117, holding liability of bonus stockholders to creditors based on fraud, not on "trust fund" theory.

Issue of stock.

Cited in *Union R. Co. v. Sneed*, 99 Tenn. 8, 41 S. W. 364, holding subscriber not estopped to deny legality of issue of stock in suit by corporation to collect balance of subscription thereto; *Berry v. Rood*, 168 Mo. 334, 67 S. W. 644, and *Hastings Malting Co. v. Iron Range Brewing Co.* 65 Minn. 32, 67 N. W. 652, holding stockholder paying subscription in overvalued property liable to subsequent creditors for difference between its actual value and face of stock; *Hooper v. Central Trust Co.* 81 Md. 581, 29 L. R. A. 268, 32 Atl. 505, holding promoters

owning bonus stock cannot enforce corporate mortgage bonds without first paying for stock; *Handley v. Stutz*, 139 U. S. 436, 35 L. ed. 237, 11 Sup. Ct. Rep. 530, holding creditor prior to issue of additional stock not entitled to enforce liability; *Rickerson Roller-Mill Co. v. Farrell Foundry & Mach. Co.* 23 C. C. A. 308, 43 U. S. App. 452, 75 Fed. 561, holding creditor becoming such with knowledge of issue of "bonus stock" cannot enforce liability in Federal court; *Cunningham v. Holley, M. M. & Co.* 58 C. C. A. 141, 121 Fed. 721, holding part owner of property receiving full-paid stock therefor cannot, on becoming a creditor, assert invalidity of transaction; *State Trust Co. v. Turner*, 111 Iowa. 674, 53 L. R. A. 140, 82 N. W. 1029, holding that assignee after maturity of note given by corporation to creditor aware of bonus stock issue, cannot enforce liability; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 618, 48 Pac. 415, holding stockholder paying subscription in overvalued property not liable to party aware thereof at time of becoming creditor; *Andrews v. National Foundry & Pipe Works*, 36 L. R. A. 152, 22 C. C. A. 130, 46 U. S. App. 281, 76 Fed. 175, holding parties taking stock as collateral security for debt not liable except to creditors misled to regard them as shareholders; *Bruner v. Brown*, 139 Ind. 608, 38 N. E. 318, holding that receiver cannot enforce liability against promoter taking paid-up stock for property, in absence of fraud; *Bent v. Underdown*, 156 Ind. 518, 60 N. E. 307, holding no liability to creditors where charter provides for issue of stock at less than par; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.* 92 Ala. 426, 12 L. R. A. 314, footnote p. 307, 25 Am. St. Rep. 65, 9 So. 129, holding subscribers liable to creditors where stock paid for by conveyance of land worth only amount assumed by corporation.

Cited in notes (9 L. R. A. 632) on issue of new stock by corporation; (38 L. R. A. 492, 494) on bonus stock of corporations; (42 L. R. A. 598, 619) on how far payment for stock by corporation by transfer of property will protect shareholders against corporate creditors.

Distinguished in *Shields v. Clifton Hill Land Co.* 94 Tenn. 156, 26 L. R. A. 520, 45 Am. St. Rep. 700, 28 S. W. 668, and *Jones v. Whitworth*, 94 Tenn. 609, 30 S. W. 736, holding statutory liability available to creditors becoming such either before or after issue of bonus stock; *Carter v. Union Printing Co.* 54 Ark. 581, 16 S. W. 579, holding that creditor prior to issue of stock may enforce subscription thereto in spite of release by corporation after insolvency.

Conflict of laws.

Cited in *Western Nat. Bank v. Lawrence*, 117 Mich. 673, 76 N. W. 105, holding that creditors may enforce anywhere, double liability imposed by foreign statute on stockholders in corporations there organized; *Childs v. Cleaves*, 95 Me. 508, 50 Atl. 714, holding that receiver of foreign corporation may maintain actions in other jurisdictions to enforce liability; *Leucke v. Tredway*, 45 Mo. App. 513, holding special remedies against bonus stockholders, at corporation's domicile, not available in foreign jurisdiction; *Giesen v. London & N. W. American Mortg. Co.* 42 C. C. A. 519, 102 Fed. 587, holding liability under foreign statute enforceable in Federal courts; *McVickar v. Jones*, 70 Fed. 756, holding statutory liability of stockholder in foreign corporation enforceable in Federal court sitting in another state.

Cited in notes (12 L. R. A. 366) on law of comity as to foreign corporations; (34 L. R. A. 741) on right to enforce stockholder's liability outside of state of incorporation.

Limited in *Rule v. Omega Stove & Grate Co.* 64 Minn. 329, 67 N. W. 60, holding creditor of insolvent foreign corporation not entitled to statutory proceedings against "bonus-stock" holders in domestic corporation.

6 L. R. A. 680, *SILLARS v. COLLIER*, 151 Mass. 50, 23 N. E. 723.

Actionable libel or slander.

Cited in *Fanning v. Chace*, 17 R. I. 390, 13 L. R. A. 136, 33 Am. St. Rep. 878, 22 Atl. 275, holding charge that person intends to start house of ill fame, not actionable; *Doyle v. Kirby*, 184 Mass. 411, 68 N. E. 843, holding oral charge of having sold vote not actionable without averment and proof of special damages.

Cited in footnote to *Nissen v. Cramer*, 6 L. R. A. 780, which holds relevant words spoken by party to action during trial privileged.

Cited in note (9 L. R. A. 621) on libel and slander in general.

— Criticism of public men.

Cited in *Kilgour v. Evening Star Newspaper Co.* 96 Md. 24, 53 Atl. 716, holding publication charging state's attorney with statement that he would not recommend payment of coroner's fees if proposed autopsy were held, not libelous *per se*.

Cited in footnotes to *State v. Hoskins*, 47 L. R. A. 223, which denies privilege, to publication of charges against county judge, outside of judicial district; *Upton v. Hume*, 21 L. R. A. 493, which holds false imputation of crime to candidate not privileged; *Coffin v. Brown*, 55 L. R. A. 732, which denies right to falsely attack character of appointee of governor to prevent latter's re-election; *Eikhoff v. Gilbert*, 51 L. R. A. 451, which denies privilege to circular to voters announcing that candidate for re-election has championed legislation opposed to moral interests of community; *Wofford v. Meeks*, 55 L. R. A. 214, which holds libelous, publication imputing to county officials prostitution of county finances by awarding contracts to persons of same political faith; *Augusta Evening News v. Radford*, 20 L. R. A. 533, which holds newspaper article charging constable with soliciting business for magistrates' courts libelous.

Cited in notes (8 L. R. A. 193) on words tending to injure person in office; (13 L. R. A. 98) on fair criticism of public men.

6 L. R. A. 682, *RAMSEY v. RAMSEY*, 121 Ind. 215, 23 N. E. 69.

Right to custody and service of child.

Cited in footnotes to *Keller v. St. Louis*, 47 L. R. A. 391, which denies mother's right of action for injury to child given her by divorce decree without provision as to its support; *Hibbette v. Bains*, 51 L. R. A. 839, which sustains father's right to custody of child notwithstanding assent to wife's deathbed contract to give custody to her relatives.

Effect of divorce upon responsibility of parent for support of child.

Cited in *McKay v. McKay*, 125 Cal. 71, 57 Pac. 677, and *Gussman v. Gussman*, 140 Ind. 435, 39 N. E. 918, holding that decree of divorce giving custody of child to mother, relieves father of responsibility for support and education.

Distinguished in *Zilley v. Dunwiddie*, 98 Wis. 434, 40 L. R. A. 581, 67 Am. St. Rep. 820, 74 N. W. 126, holding mother refusing to surrender child to father,

after he has become entitled to custody under decree of divorce, may recover on implied promise of father to pay for maintenance; *Leibold v. Leibold*, 158 Ind. 61, 62 N. E. 627, holding father liable to support child for custody of which he is unfit; *Tobin v. Tobin*, 29 Ind. App. 384, 64 N. E. 624, modifying divorce decree awarding child to mother by requiring father to support it upon showing that mother cannot do so.

Disapproved in effect in *McCloskey v. McCloskey*, 93 Mo. App. 400, 67 S. W. 669, holding that father remains liable to mother for necessary disbursements for children made after divorce.

Right of volunteer to recover for services or disbursements.

Cited in *Turner v. Flagg*, 6 Ind. App. 572, 33 N. E. 1104, holding person furnishing necessities to infant not necessarily deemed volunteer, when parent neglects or refuses support; *Montgomery County v. Ristine*, 124 Ind. 247, 8 L. R. A. 463, 24 N. E. 990, holding that county cannot recover on contract with guardian providing for payment for care of insane person in asylum for poor; *Miles v. De Wolf*, 8 Ind. App. 175, 34 N. E. 114, holding that examination of witnesses by firm of attorneys, holding trust relation to estate, in presence of trustee under will, raises no presumption of employment by trustee.

6 L. R. A. 686, *NADING v. MCGREGOR*, 121 Ind. 465, 23 N. E. 283.

Guaranty, construction of.

Distinguished in *Colborn v. Fry*, 23 Ind. App. 489, 55 N. E. 621, holding letter authorizing "bearer to purchase such lumber as he may select for me" neither guaranty nor original undertaking.

Original undertakings.

Cited in *Hernley v. Brannum*, 23 Ind. App. 393, 55 N. E. 512; *Walter A. Wood Mowing & Reaping Co. v. Farnham*, 1 Okla. 376, 33 Pac. 867; *Woody v. Haworth*, 24 Ind. App. 637, 57 N. E. 272,—holding guaranty of payment of note, original undertaking; *Metzger v. Hubbard*, 153 Ind. 192, 54 N. E. 761, holding guarantor of payment of note primarily liable; *Cole Mfg. Co. v. Morton*, 24 Mont. 63, 60 Pac. 587; *Bryant v. Stout*, 16 Ind. App. 392, 44 N. E. 68; *Durand & K. Co. v. Rockwell*, 23 Ind. App. 13, 54 N. E. 771,—holding bond conditional on faithful accounting by employee, original undertaking; *Wittmer Lumber Co. v. Rice*, 23 Ind. App. 588, 55 N. E. 868, holding one signing as surety on bond to secure performance of contract originally liable; *Wheeler v. Rohrer*, 21 Ind. App. 481, 52 N. E. 780, holding bond to indemnify vendor against loss original undertaking; *Lane v. Mayer*, 15 Ind. App. 384, 44 N. E. 73; *Newcomb Bros. Wall Paper Co. v. Emerson*, 17 Ind. App. 485, 46 N. E. 1018; *Herman v. Williams*, 36 Fla. 142, 18 So. 351; *Conduitt v. Ryan*, 3 Ind. App. 5, 29 N. E. 160,—holding guaranty of payment for goods sold and to be sold, original undertaking; *Shearer v. R. S. Peale & Co.* 9 Ind. App. 286, 36 N. E. 455, holding guaranty of payment for goods ordered original undertaking.

Collateral undertakings.

Cited in *Sullivan v. Cluggage*, 21 Ind. App. 672, 52 N. E. 110, holding surety's bond to pay damages occasioned by principal's failure to perform contract, collateral guaranty.

Necessity of notice of acceptance of guaranty.

Cited in *Bechtold v. Lyon*, 130 Ind. 202, 29 N. E. 912, holding notice of

acceptance of guaranty contemporaneous with or subsequent to principal contract unnecessary.

Cited in footnote to *German Sav. Bank v. Drake Roofing Co.* 51 L. R. A. 758, which holds notice of acceptance necessary to bind guarantor.

Cited in note (20 L. R. A. 259) on necessity of notice of default to bind guarantor.

6 L. R. A. 688, *POPE v. VAJEN*, 121 Ind. 317, 22 N. E. 308.

Novation.

Cited in *Price v. Barnes*, 7 Ind. App. 5, 31 N. E. 809, holding acceptance of individual note in extinguishment of liability as guardian, novation; *Horn v. McKinney*, 5 Ind. App. 349, 32 N. E. 334, holding that answer to suit on note pleading novation must show new agreement by all parties.

Cited in note (10 L. R. A. 369; 13 L. R. A. 390) on what constitutes novation.

Consideration for release from note.

Cited in *Ditmar v. West*, 7 Ind. App. 639, 35 N. E. 47, holding surrender of right of action against maker of note constitutes sufficient consideration to sustain release; *Morrison v. Kendall*, 6 Ind. App. 217, 33 N. E. 370, holding that release of party to note requires a consideration.

6 L. R. A. 691, *GRAY v. HERMAN*, 75 Wis. 453, 44 N. W. 248.

Effect of payment of debt by stranger.

Cited in *Crumlish v. Central Improv. Co.* 38 W. Va. 396, 23 L. R. A. 128, 45 Am. St. Rep. 872, 18 S. E. 456, holding that payment by stranger discharges debt.

Cited in note (23 L. R. A. 120) on effect of payment of debt by volunteer or stranger to original undertaking.

Statute of frauds — Promise to pay another's debt.

Cited in *Dupuis v. Interior Constr. & Improv. Co.* 88 Mich. 107, 50 N. W. 103, holding parol promise to retain enough of contractor's money to pay subcontractor, void; *Lowe v. Turpie*, 147 Ind. 683, 37 L. R. A. 243, 44 N. E. 25, holding parol promise to pay another's note to third person, upon assignment of collateral by surety, void.

6 L. R. A. 693, *CARTER v. NOLAND*, 86 Va. 568, 10 S. W. 605.

6 L. R. A. 695, *MOLLOY v. WALKER*, TWP. 77 Mich. 448, 43 N. W. 1012.

Negligence — Proximate cause.

Cited in footnotes to *Missouri P. R. Co. v. Columbia*, 58 L. R. A. 399, which holds placing on platform heavy doors blown on track by severe gale not proximate cause of derailment of engine; *Bell v. Wayne*, 48 L. R. A. 644, which holds want of barriers to approach to bridge not proximate cause of injuries by team going off bank while unmanageable.

Distinguished in *Beall v. Athens Twp.* 81 Mich. 541, 45 N. W. 1014, holding town not liable where failure to erect barriers not proximate cause of injury.

Liability for defects in highway.

Cited in *Bigelow v. Kalamazoo*, 97 Mich. 127, 56 N. W. 339 (dissenting opin-

ion), majority holding city not liable to one slipping on beveled edge of walk, rendered necessary by local requirements.

Cited in footnote to *Teagar v. Flemingsburg*, 53 L. R. A. 792, which holds mere building of step in sidewalk not negligence rendering city liable for injury to pedestrians.

Cited in notes (19 L. R. A. 454) on distinction between public and private functions of municipalities as to liability for negligence; (13 L. R. A. 439) on custom and usage as law.

Distinguished in *Weisse v. Detroit*, 105 Mich. 486, 63 N. W. 423, holding city not liable for injury caused by slight elevation of loose plank in walk.

Safety of highway question for jury.

Cited in *Ross v. Ionia Twp.* 104 Mich. 324, 62 N. W. 401, holding where horse frightened by falling water backed off approach to bridge, negligence in not erecting railing question for jury; *Schrader v. Port Huron*, 106 Mich. 175, 63 N. W. 964, holding city's liability for open gutter between curb and crosswalk question for jury; *Comiskie v. Ypsilanti*, 116 Mich. 322, 74 N. W. 487, holding city's liability for ditch at point where beaten path crossed street, question for jury; *Shaw v. Saline Twp.* 113 Mich. 345, 71 N. W. 642, and *Gage v. Pontiac, O. & N. R. Co.* 105 Mich. 341, 63 N. W. 318, holding necessity of railing on bridge approach question for jury; *Schillinger v. Verona*, 88 Wis. 323, 60 N. W. 272, holding question of sufficiency of unrailed approach to bridge, for jury; *Lauder v. St. Clair Twp.* 125 Mich. 485, 85 N. W. 4, holding negligence in failing to maintain bridge railing question for jury.

Notice to officers of defect in highway.

Cited in *Aben v. Ecorse Twp.* 113 Mich. 11, 71 N. W. 329, holding notice of defective bridge shown by evidence of notorious weakness and examination by town officers.

Contributory negligence.

Cited in *Nosler v. Coos Bay R. Co.* 39 Or. 337, 64 Pac. 644, holding failure to act in best way in face of sudden danger not contributory negligence.

— Question for jury.

Cited in *Roux v. Blodgett & D. Lumber Co.* 85 Mich. 530, 13 L. R. A. 732, 24 Am. St. Rep. 102, 48 N. W. 1092, holding contributory negligence of servant continuing to work in dangerous place, question for jury.

6 L. R. A. 702, *HARRIS v. SMITH*, 79 Mich. 54, 44 N. W. 169.

Right of relative to compensation for services.

Cited in *Kirchgassner v. Rodick*, 170 Mass. 546, 49 N. E. 1015, holding that stepchild cannot recover for services where the relation with stepfather is that of parent and child.

Cited in footnote to *Ulrich v. Ulrich*, 18 L. R. A. 37, which holds that no presumption exists against parent's agreement to pay for services where evidence tends to show agreement.

6 L. R. A. 703, *SUTTON v. HIRAM LODGE NO. 51*, 83 Ga. 770, 10 S. E. 585.

6 L. R. A. 705, *RAMSAY v. THOMPSON*, 71 Md. 315, 18 Atl. 592.

6 L. R. A. 706, *BALTIMORE & O. R. CO. v. STATE*, 72 Md. 36, 20 Am. St. Rep. 454, 18 Atl. 1107.

Who are passengers.

Cited in *Boston Ins. Co. v. Chicago*, R. I. & P. R. Co. 118 Iowa, 434, 59 L. R. A. 801, 92 N. W. 88; *Libby v. Maine*, C. R. Co. 85 Me. 39, 20 L. R. A. 814, 26 Atl. 943,—holding carrier owes same degree of care to postal clerk as to passengers; *Cleveland, C. C. & S. L. R. Co. v. Ketcham*, 133 Ind. 354, 19 L. R. A. 342, 36 Am. St. Rep. 550, 33 N. E. 116, holding postal clerk with photographic commission, and entitled to free transportation, a passenger; *Voight v. Baltimore & O. S. W. R. Co.* 79 Fed. 562, holding express messenger passenger for hire, although traveling in special car provided by carrier.

Cited in note (19 L. R. A. 340) on liability of railroad companies for injuries received by postal clerks on their trains.

Contributory negligence.

Cited in *Florida Southern R. Co. v. Hirst*, 30 Fla. 26, 16 L. R. A. 636, 32 Am. St. Rep. 17, 11 So. 506, holding that carrier's rule forbidding passengers to ride in express cars may be waived or abandoned; *Winkelmann & B. Drug Co. v. Colladay*, 88 Md. 92, 40 Atl. 1078, holding it not to be negligence *per se* for employee to put head in shaft while dumb waiter not in motion; *Conowingo Bridge Co. v. Hedrick*, 95 Md. 681, 53 Atl. 430, holding it not to be negligence *per se* to enter unlighted covered toll bridge at night.

Cited in footnote to *Florida C. & P. R. Co. v. Sullivan*, 61 L. R. A. 410, which denies negligence of white passenger in riding in car set apart for negroes.

Cited in note (16 L. R. A. 631) on passengers riding in baggage or express car as contributory negligence.

6 L. R. A. 708, *FALLON v. WORTHINGTON*, 13 Colo. 559, 16 Am. St. Rep. 231, 22 Pac. 960.

Vendor's lien not interest in property.

Cited in *Griffin v. Seymour*, 15 Colo. App. 491, 63 Pac. 809, holding grantor's lien not interest in land supporting mechanic's lien.

Distinguished in *Green v. Daniels*, 53 C. C. A. 381, 115 Fed. 451, holding interest in land of vendor retaining title vendible under execution.

6 L. R. A. 713, *Ex parte HARRIS*, 26 Fla. 77, 23 Am. St. Rep. 548, 7 So. 1.

When judge disqualified.

Cited in *State ex rel. Perez v. Wall*, 41 Fla. 465, 49 L. R. A. 549, footnote p. 548, 79 Am. St. Rep. 195, 26 So. 1020, holding judge cannot sit where wife's niece's husband interested; *Bryan v. State*, 41 Fla. 657, 26 So. 1022, holding bias or prejudice against accused does not disqualify judge.

Cited in footnotes to *Meyer v. San Diego*, 41 L. R. A. 762, which holds judge owning land in city disqualified to sit in suit contesting validity of contract to issue city bonds; *First Nat. Bank v. McGuire*, 47 L. R. A. 413, which holds judge disqualified to try case in which plaintiff is corporation of which his wife is a shareholder.

6 L. R. A. 714, *FORD v. JUDSONIA MERCANTILE CO.* 52 Ark. 426, 20 Am. St. Rep. 192, 12 S. W. 876.

Report of decision as to right of secured creditor to retain security in *Taylor v. Judsonia Mercantile Co.* 56 Ark. 462, 19 S. W. 1065.

Conflict of jurisdiction; effect of prior possession.

Cited in *Walker v. George Taylor Commission Co.* 56 Ark. 2, 18 S. W. 1056, holding property in receiver's hands not subject to attachment; *Gilkerson-Sloss Commission Co. v. Carnes*, 56 Ark. 417, 19 S. W. 1061, holding that equity will not, to avoid multiplicity of suits, enjoin execution of attachments.

6 L. R. A. 715, *GARNER v. WRIGHT*, 52 Ark. 385, 12 S. W. 785.

Rule as to prevailing law in absence of proof.

Cited in *Brown v. Wright*, 58 Ark. 26, 21 L. R. A. 473, 22 S. W. 1022, holding in absence of proof as to law of Texas, rules of common law will not be presumed to exist there; *Johnson v. State*, 60 Ark. 312, 30 S. W. 31, holding common law not be presumed to exist in Indian territory; *Pyeatt v. Powell*, 2 C. C. A. 371, 10 U. S. App. 200, 51 Fed. 555, holding that in Federal Courts in Indian territory, rule of decision in absence of statute or proof is common law; *Gatton v. Chicago, R. I. & P. R. Co.* 95 Iowa, 136, 28 L. R. A. 564, 63 N. W. 589, holding that no Federal common law exists as distinguished from common law of the several states; *Kennebrew v. Southern Automatic Electric Shock Mach. Co.* 106 Ala. 379, 17 So. 545, holding that in absence of proof of laws of other state or judicial knowledge of its origin, law of forum prevails.

Cited in notes (21 L. R. A. 473) on presumption as to law of other states; (64 L. R. A. 360) on conflict of laws as to chattel mortgages.

Validity of chattel mortgage.

Cited in *Forrester v. Kearney Nat. Bank*, 49 Neb. 661, 68 N. W. 1059, holding that chattel mortgage becomes valid as to creditors as of date of filing or taking possession by mortgagee.

6 L. R. A. 716, *AYER v. WEEKS*, 65 N. H. 248, 23 Am. St. Rep. 37, 18 Atl. 1108.

Consent not sufficient to confer jurisdiction.

Cited in *Smith v. Hammond*, 68 N. H. 364, 44 Atl. 519, holding that partners cannot assign individual property of nonresident consenting partner so as to confer jurisdiction not theretofore existing.

Domicil or residence.

Cited in *Smith v. Stanley*, 67 N. H. 328, 36 Atl. 254, holding temporary residence not sufficient to confer jurisdiction in insolvency; *Schmidt v. Ellis*, 69 N. H. 98, 38 Atl. 382, holding that insolvency court has no jurisdiction of nonresident debtors; *Wood v. Roeder*, 45 Neb. 315, 63 N. W. 853, holding residing at different place not *per se* constitute change of domicil.

Inadmissible declaration.

Cited in *Fulham v. Howe*, 62 Vt. 396, 20 Atl. 101, upholding refusal to admit declaration as to domicil not made before controversy arose.

6 L. R. A. 717, *GRIMM'S APPEAL*, 131 Pa. 199, 17 Am. St. Rep. 796, 18 Atl. 1061.

Proof of marriage.

Cited in *Com. v. Haylow*, 17 Pa. Super. Ct. 546, holding cohabitation under agreement for future marriage, not marriage; *Wertzel v. Central Lodge*. No. 19, A. O. U. W. 11 Pa. Co. Ct. 270, 1 Pa. Dist. R. 145, 9 Lanc. L. Rev. 245, holding

continued cohabitation and reputation as husband and wife raises no presumption of marriage where one party was already married at its origin; *Strauss's Estate*, 14 Pa. Co. Ct. 596, 3 Pa. Dist. R. 427, 34 W. N. C. 479, as to presumption that cohabitation illicit in origin continues so.

Cited in footnote to *Nims v. Thompson*, 17 L. R. A. 847, which holds marriage shown by evidence.

Cited in note (14 L. R. A. 364) on cohabitation as proof of marriage where it begins unlawfully.

6 L. R. A. 718, *BAKER v. BRASLIN*, 16 R. I. 635, 18 Atl. 1039.

Survivability of actions.

Cited in *Brown v. Kellogg*, 182 Mass. 298, 65 N. E. 378, holding libel action against partners not abated by death of one.

Cited in footnote to *Perkins v. Stein*, 20 L. R. A. 861, which holds that action for negligently driving over person will survive.

Torts of wife.

Cited in footnote to *Henley v. Wilson*, 58 L. R. A. 941, which sustains husband's common-law liability for wife's torts.

Cited in note (30 L. R. A. 521) on liability of husband and wife for wife's libel and slander.

6 L. R. A. 719, *O'REILLY v. NEW YORK & N. E. R. CO.* 16 R. I. 395, 19 Atl. 244.

Pendency of other suit.

Cited in footnote to *Sulz v. Mutual Reserve Fund Life Asso.* 28 L. R. A. 379, which holds pending action on policy by administrator in state where insured died bar to action by widow in state of home office.

Conflict of laws.

Cited in *Hancock Nat. Bank v. Farnum*, 20 R. I. 471, 40 Atl. 341, holding action to enforce stockholder's liability not maintainable in other state.

Cited in notes (15 L. R. A. 584) on rights of action for causing death accruing under foreign statute; (56 L. R. A. 204, 210, 222) on conflict of laws as to action for death or bodily injury.

When statutory cause of action is penal.

Cited in *Matheson v. Kansas City, Ft. S. & M. R. Co.* 61 Kan. 670, 60 Pac. 747, holding statute providing for forfeiture of fixed sum for negligently causing death, penal.

Distinguished in *Gardner v. New York & N. E. R. Co.* 17 R. I. 792, 24 Atl. 831, holding statute giving action for, and limiting recovery to, loss sustained by negligence, not penal; *Aylsworth v. Curtis*, 19 R. I. 523, 33 L. R. A. 112, 61 Am. St. Rep. 785, 34 Atl. 1109, holding action for twice value of stolen article not restored, not penal.

6 L. R. A. 721, *DICKINSON v. EICHORN*, 78 Iowa, 710, 43 N. W. 620.

Res judicata.

Cited in *State ex rel. Vidal v. Lamoureux*, 3 Wyo. 733, 30 Pac. 243, holding legality of incorporation adjudicated in mandamus not reviewable in quo war

ranto action, though parties nominally different; *McConkie v. Remley*, 119 Iowa. 517, 93 N. W. 505, holding adjudication deciding question whether liquor license law was in force in certain place, conclusive on all liquor sellers.

— **Actions to enjoin sale of liquor.**

Cited in *Steyer v. McCauley*, 102 Iowa, 107, 71 N. W. 194, holding liquor injunction and contempt proceeding pending thereunder bar to another citizen's action for injunction for similar offense; *Carter v. Bartel*, 110 Iowa, 213, 81 N. W. 462, holding permanent injunction restraining firm from liquor selling effective against members after change in firm name; *Cameron v. Tucker*, 104 Iowa, 214, 73 N. W. 601, holding injunction collusively obtained no bar to subsequent injunction against liquor nuisance.

Distinguished in *Carter v. Steyer*, 93 Iowa, 535, 61 N. W. 956, holding injunction no bar to injunction against liquor nuisance on different premises owned by codefendant not previously enjoined.

Injunction of liquor nuisance.

Cited in *Bartel v. Hobson*, 107 Iowa, 647, 78 N. W. 689, holding violation of decree for injunction against liquor nuisance, rendered in defendant's presence, contempt, though no order issued.

Cited in footnotes to *Laugel v. Bushnell*, 58 L. R. A. 266, which sustains ordinance declaring places where hop ale, hop and malt meal and cider sold, nuisances; *De Blane v. New Iberia*, 56 L. R. A. 285, which denies city's power to arbitrarily declare particular licensed saloon a nuisance.

Cited in note (7 L. R. A. 299) on abatement of liquor nuisance.

Plaintiff represents public.

Cited in *Geyer v. Douglass*, 85 Iowa, 101, 52 N. W. 111, holding that state or citizen may be substituted for plaintiff in action to enjoin liquor nuisance dying pending appeal; *Cameron v. Kapinos*, 89 Iowa, 564, 56 N. W. 677, holding that plaintiff in action to enjoin liquor nuisance may maintain action to make fine lien on premises.

6 L. R. A. 724, *PEOPLE'S BANK v. FRANKLIN BANK*, 88 Tenn. 299, 17 Am. St. Rep. 884, 12 S. W. 716.

Recovery of money paid on forged check.

Cited in *Indiana Nat. Bank v. First Nat. Bank*, 9 Ind. App. 188, 36 N. E. 382, holding that ground for making indorsing bank liable was that its indorsement in part brought about failure to discover forgery; *Canadian Bank of Commerce v. Bingham*, 30 Wash. 495, 60 L. R. A. 959, 71 Pac. 43, holding that drawee bank may recover amount of forged check paid to bank cashing it without inquiry or requiring identification; *Germania Bank v. Boutell*, 60 Minn. 192, 27 L. R. A. 641, 51 Am. St. Rep. 519, 62 N. W. 327, holding bank paying forged check of depositor cannot recover from bona fide holder to whom paid; *First Nat. Bank v. First Nat. Bank*, 58 Ohio St. 215, 41 L. R. A. 586, 65 Am. St. Rep. 748, 50 N. E. 723, holding genuineness of names of indorsers but not of drawer guaranteed by indorsing note "for collection;" *Deposit Bank v. Fayette Nat. Bank*, 90 Ky. 19, 7 L. R. A. 851, 13 S. W. 339, holding where parties are equally innocent, drawee paying amount of forged check must suffer.

Cited in note (27 L. R. A. 637) on drawee's duty to know signature of bank.

6 L. R. A. 727, *HANNA v. CHATTANOOGA & N. R. CO.* 88 Tenn. 310, 12 S. W. 718.

Liability of lessor of railroad for negligence of lessee.

Cited in *Arrowsmith v. Nashville & D. R. Co.* 57 Fed. 172, holding lessor under valid lease not liable for injury to lessee's passenger due to lessee's negligence; *Hukill v. Mayville & B. S. R. Co.* 72 Fed. 755, holding that servant of lessee under void lease cannot recover from lessor for injury due to lessee's negligence.

Cited in note (44 L. R. A. 753) on liability of lessor of railroad for injuries caused by negligence of another company using road under lease, license, or other contract.

Liability of carrier furnishing cars to shipper.

Cited in *Roddy v. Missouri P. R. Co.* 104 Mo. 249, 12 L. R. A. 750, 24 Am. St. Rep. 333, 15 S. W. 1112, holding that carrier under contract to furnish cars to quarryman must use ordinary care to provide such as are reasonably safe.

Negligence of fellow servants.

Cited in note (46 L. R. A. 38, 67) on right of servant to recover damages from persons other than his master for injuries received in performance of his duties.

6 L. R. A. 728, *LACY v. GETMAN*, 119 N. Y. 109, 16 Am. St. Rep. 806, 23 N. E. 452.

Contracts for personal service for specified term.

Distinguished in effect in *Walton v. Rafel*, 7 Misc. 667, 28 N. Y. Supp. 10, holding contract in terms binding on legal representatives assignable.

— Termination by death of party.

Cited in *Arming v. Steinway*, 35 Misc. 222, 71 N. Y. Supp. 810, holding contract to teach pupils selected by employer terminated by his death; *Blakely v. Sousa*, 197 Pa. 321, 80 Am. St. Rep. 821, 47 Atl. 286, holding contract between manager and leader of band terminated by manager's death; *Mason v. Secor*, 76 Hun. 180, 27 N. Y. Supp. 570, and *Greenburg v. Early*, 4 Misc. 100, 23 N. Y. Supp. 1009, holding that contract of employment for fixed term ends on dissolution of employing copartnership by member's death; *Skinner v. Busse*, 38 Misc. 266, 77 N. Y. Supp. 560, holding relation of attorney and client terminated by client's death.

Distinguished in effect in *Russell v. Buckhout*, 87 Hun. 47, 34 N. Y. Supp. 271, holding contract for erection of building on decedent's land not dissolved by his death.

— What excuses nonperformance.

Cited in *McClellan v. Harris*, 7 S. D. 451, 64 N. W. 522, holding that unavoidable illness excuses nonperformance of contract to labor for specified term; *Jerome v. Queen City Cycle Co.* 163 N. Y. 356, 57 N. E. 485, holding that servant's absence contrary to master's reasonable commands justifies discharge; *Edgecomb v. Buckhout*, 146 N. Y. 339, 28 L. R. A. 818, 40 N. E. 991, holding marriage of housekeeper, not preventing performance of services, no ground for discharge.

Distinguished in effect in *Hart v. Myers*, 25 Abb. N. C. 480, 12 N. Y. Supp. 140,

holding illness of one contracting to render services as stockbroker not excuse nonperformance.

6 L. R. A. 731, *WRIGHT v. MUTUAL BEN. LIFE ASSO.* 118 N. Y. 237, 16 Am. St. Rep. 749, 28 N. Y. S. R. 817, 23 N. E. 186.

Limitation by contract.

Cited in *Matthews v. American Cent. Ins. Co.* 9 App. Div. 341, 41 N. Y. Supp. 304, holding that parties to insurance contract may limit time within which rights thereunder are to be asserted.

Defense of fraud.

Cited in *Massachusetts Ben. Life Asso. v. Robinson*, 104 Ga. 275, 42 L. R. A. 270, 30 S. E. 918, holding that insurer cannot set up fraudulent representation after three years, contrary to incontestable clause in policy; *Patterson v. Natural Premium Mut. L. Ins. Co.* 100 Wis. 127, 42 L. R. A. 260, 69 Am. St. Rep. 899, 75 N. W. 980, holding fraudulent intent or concealment by insured as to health covered by incontestable clause; *Bates v. United Life Ins. Asso.* 68 Hun, 146, 22 N. Y. Supp. 626, holding that defense that material statements in application were false, cannot be set up after two years contrary to provision in policy that it shall be indisputable after that period; *Murray v. State Mut. Life Assur. Co.* 22 R. I. 525, 53 L. R. A. 743, 48 Atl. 800, holding that clause making policy incontestable for fraud in application after two years merely provides short statute of limitations; *Clement v. New York L. Ins. Co.* 101 Tenn. 30, 42 L. R. A. 249, 70 Am. St. Rep. 650, 46 S. W. 561, holding that stipulation that policy shall be incontestable after one year limits time in which insurer may set up fraud to one year.

Cited in note (42 L. R. A. 247, 249) incontestable clause as preventing defense of fraud.

Distinguished in *Holland v. Supreme Council*, O. C. F. 54 N. J. L. 496, 25 Atl. 367, holding fraudulent representations good defense where certificate provides fraud and death of member during suspension shall forfeit beneficiary's rights.

Incontestable clause applies to reinstatement.

Cited in *Teeter v. United Life Ins. Asso.* 159 N. Y. 417, 54 N. E. 72, Affirming 11 App. Div. 263, 42 N. Y. Supp. 119, holding that provision in original contract that policy shall be indisputable after two years applies to reinstatement.

Insurable interest.

Cited in *Steinback v. Diepenbrock*, 158 N. Y. 29, 44 L. R. A. 419, 70 Am. St. Rep. 424, 52 N. E. 662, holding that one having no insurable interest in life of another may take assignment of policy and recover thereon; *Smith v. People's Mut. Ben. Soc.* 64 Hun, 536, 19 N. Y. Supp. 432, holding that assignee of policy issued to son-in-law of insured may recover where relationship and assignment were known by company and policy contained incontestable clause, time limit in which had expired; *Clement v. New York L. Ins. Co.* 101 Tenn. 38, 42 L. R. A. 252, 70 Am. St. Rep. 650, 46 S. W. 561, holding incontestable clause not protect policy assigned to one without insurable interest in pursuance of conspiracy to evade rule against wagering contracts; *Exchange Bank v. Loh*, 104 Ga. 468, 44 L. R. A. 381, 31 S. E. 459, holding creditor may insure life of debtor as a protection against loss; *McQuillan v. Mutual Reserve Fund Life Asso.* 112 Wis. 675,

holding incontestable clause not prevent forfeiture by creditor to whom policy assigned, of sum in excess of amount due him.

Effect of incontestable clause on anti-suicide clause.

Cited in *Royal Circle v. Achterrath*, 204 Ill. 560, 63 L. R. A. 456, 98 Am. St. Rep. 224, 68 N. E. 492, holding that "incontestable clause" in mutual benefit certificate, not excepting death by suicide, precludes society from taking advantage of clause relieving it from liability in such case.

6 L. R. A. 733, *CIRIACK v. MERCHANTS WOOLEN CO.* 151 Mass. 152, 21 Am. St. Rep. 438, 23 N. E. 829.

Master's duty to warn or instruct.

Cited in *Pratt v. Prouty*, 153 Mass. 334, 26 N. E. 1002, holding master not negligent unless he failed to give information of danger which servant could not be presumed to know; *Rood v. Lawrence Mfg. Co.* 155 Mass. 593, 30 N. E. 174, holding that master need not instruct servant set to working elevator, as to obvious danger; *Patnode v. Warren Cotton Mills*, 157 Mass. 289, 34 Am. St. Rep. 275, 32 N. E. 161, to point failure to instruct young, inexperienced, or dull servant, negligence; *Richstain v. Washington Mills Co.* 157 Mass. 541, 32 N. E. 908, holding failure to instruct not negligence when considering servant's age, intelligence, and experience; *Rooney v. Sewall & D. Cordage Co.* 161 Mass. 160, 36 N. E. 789, holding that master need not warn experienced servant of middle age, of danger of coming in contact with set-screw projecting from revolving shaft; *Ruchinsky v. French*, 168 Mass. 70, 46 N. E. 417, holding that master need not warn adult employee of ordinary intelligence that if she put her hand between revolving cog-wheels she would be hurt; *O'Connor v. Whittall*, 169 Mass. 569, 48 N. E. 844, holding that servant assumes obvious risk of having hand cut in roller; *Lemoine v. Aldrich*, 177 Mass. 91, 58 N. E. 178, holding that master need not warn servant of danger of getting cut while passing under revolving shaft; *Silvia v. Sagamore Mfg. Co.* 177 Mass. 479, 59 N. E. 73, holding that master not negligent in failing to warn boy of ordinary intelligence and fourteen years of age, of danger of getting fingers caught in gearing; *Gaudet v. Stansfield*, 182 Mass. 454, 65 N. E. 850, holding that master need not instruct servant of average intelligence, nineteen years of age, of danger of catching fingers in revolving roller of steam mangle; *Day v. Achron*, 23 R. I. 630, 50 Atl. 654 (dissenting opinion), majority holding girl of sixteen accustomed to operate mangle in laundry assumed incidental risks.

Cited in footnote to *Davis v. St. Louis, I. M. & S. R. Co.* 7 L. R. A. 283, which holds unappreciated risk not assumed by youthful employee.

Cited in notes (44 L. R. A. 36) duty of master to warn servant of danger; (44 L. R. A. 68) whether knowledge of danger is to be imputed to minor.

Evidence as to servant's capacity.

Cited in *Leistritz v. American Zylonite Co.* 154 Mass. 384, 28 N. E. 275, holding testimony whether plaintiff was above or below average intelligence, inadmissible as not showing he was manifestly incapable of understanding risk without instruction.

Question for jury.

Cited in *Patnode v. Warren Cotton Mills*, 157 Mass. 284, 34 Am. St. Rep. 275,

32 N. E. 161, holding weight of evidence that plaintiff was not very smart, but was rather dull, for jury.

6 L. R. A. 736, *BENNETT v. MCINTIRE*, 121 Ind. 231, 23 N. E. 78.

Trespass.

Cited in *Keaton v. Snider*, 14 Ind. App. 67, 42 N. E. 372, holding wrongful entry by cattle upon land and destruction of growing corn, trespass; *Spades v. Murray*, 2 Ind. App. 406, 28 N. E. 709, holding abuse of owner's authority to enter upon land not constitute trespass; *Reed v. Maley*, 25 Ky. L. Rep. 211, 62 L. R. A. 902, footnote p. 900, 74 S. W. 1079, holding soliciting woman to sexual intercourse, not actionable.

Local actions.

Cited in *Du Breuil v. Pennsylvania Co.* 130 Ind. 138, 29 N. E. 909, holding that action for trespass must be brought in county where land is situated.

Incidental damages.

Cited in *Hamilton v. Toner*, 17 Ind. App. 395, 46 N. E. 921, holding that where principal cannot be collected in action for tort, interest and damages for failure to pay cannot be collected in tort.

Pleading fraud.

Cited in *Guy v. Blue*, 146 Ind. 632, 45 N. E. 1052, holding facts constituting fraud must be distinctly averred; *Bullock v. Wooldridge*, 42 Mo. App. 362; *Balue v. Taylor*, 136 Ind. 374, 36 N. E. 269; *Hartman v. International Bldg. & L. Asso.* 28 Ind. App. 67, 62 N. E. 64; *Smith v. Parker*, 148 Ind. 133, 45 N. E. 770,—holding that allegations must show representations of existing facts, and not promises.

6 L. R. A. 737, *McCLAIN v. NEW CASTLE*, 130 Pa. 546, 25 W. N. C. 246, 18 Atl. 1066.

Abatement of nuisance.

Cited in *Mowday v. Moore*, 133 Pa. 612, 19 Atl. 626, and *Mirkil v. Morgan*, 134 Pa. 155, 19 Atl. 628, holding that final injunction will not be granted against maintenance of nuisance unless right has been first established at law or is conceded; *Evans v. Reading Chemical Fertilizing Co.* 160 Pa. 216, 28 Atl. 702, holding that injunction will not issue in doubtful case until right has been established at law; *Wood v. McGrath*, 150 Pa. 458, 16 L. R. A. 718, 24 Atl. 682, holding injunction to restrain maintenance of private drain will not be granted unless right of removal has been first established at law; *Easton, S. E. & W. E. Pass. R. Co. v. Easton*, 133 Pa. 520, 19 Am. St. Rep. 658, 19 Atl. 486, holding that injunction will be granted without regard to merits of controversy restraining city authorities from summarily removing railway track as nuisance.

Distinguished in *Com. ex rel. Tyrone v. Stevens*, 178 Pa. 562, 36 Atl. 166, enjoining erection of wall in stream without requiring determination of right in common-law action.

Municipal power over nuisances.

Cited in notes (40 L. R. A. 469) on injunctions by municipalities against nuisances affecting water courses; (38 L. R. A. 645) municipal power over nuisances; (39 L. R. A. 650) municipal power over nuisances affecting highways.

Prescriptive right to maintain nuisance.

Cited in notes (53 L. R. A. 896) on prescriptive right to pollute stream; (53 L. R. A. 895) on prescriptive right to carry on offensive trade.

Obstructing stream.

Cited in note (59 L. R. A. 850) on liability for damming back water of stream.

6 L. R. A. 740, *DARBY v. GILLIGAN*, 33 W. Va. 246, 10 S. E. 400.

Proceeding to settle accounts of trustee in 37 W. Va. 59, 16 S. E. 507.

Proceeding to establish rights of respective creditors in 43 W. Va. 755, 28 S. E. 737.

Equitable liens on partnership property — Of partners.

Cited in *Grobe v. Roup*, 44 W. Va. 199, 28 S. E. 699, holding that appropriation of partnership funds by insolvent member, may be enjoined pending accounting.

Cited in footnote to *Kincaid v. National Wall Paper Co.* 54 L. R. A. 412, which sustains right of partners to appropriate with other partners' consent interest in firm to pay individual in preference to firm debts.

— Of creditors of insolvent firm.

Cited in *Dewing v. Hutton*, 40 W. Va. 538, 21 S. E. 780, holding creditors of quasi-partnership preferred to partner's creditor; *Kurner v. O'Neil*, 39 W. Va. 520, 20 S. E. 589, holding transfer of property by member of insolvent firm to secure individual debt, void as to partnership creditors; *Jackson Bank v. Durfey*, 72 Miss. 971, 31 L. R. A. 471, 48 Am. St. Rep. 596, 18 So. 456, holding that insolvent members of insolvent firm cannot use partnership property to pay individual debts; *Reyburn v. Mitchell*, 106 Mo. 376, 27 Am. St. Rep. 350, 16 S. W. 592, holding transfer of partnership property to pay individual debt to one knowing of firm's insolvency, fraud on firm creditors.

Followed in *Baer's Sons v. Wilkinson*, 35 W. Va. 426, 14 S. E. 1; *Millhiser v. McKinley*, 98 Va. 211, 35 S. E. 446, holding sale of interest by one member of insolvent to other member in consideration of latter's assumption of all firm debts followed by his sale to trustee to pay his individual debts void as to firm creditors; *Franklin Sugar Ref. Co. v. Henderson*, 86 Md. 459, 63 Am. St. Rep. 524, 38 Atl. 991, holding transfer of interest in insolvent firm by retiring partner to copartners continuing business, fraudulent as to creditors; *Thayer v. Humphrey*, 91 Wis. 290, 30 L. R. A. 554, 51 Am. St. Rep. 887, 64 N. W. 1007, holding partner's sale of interest in insolvent firm for purpose of paying firm debts preserves rights of firm creditors; *Foley v. Ruley*, 50 W. Va. 165, 55 L. R. A. 919, 40 S. E. 382, holding transfer of property of insolvent firm with intent to defraud creditors, void.

Distinguished in *Hall v. Hyer*, 48 W. Va. 358, 37 S. E. 594, holding improvements on wife's property by partner retiring from solvent firm, out of individual funds, not liable for firm debts.

Rights and duties of surviving partner.

Criticized in *McDonald v. Cash*, 57 Mo. App. 549, holding sale by one of insolvent firm to another in consideration of assumption of debts, without actual fraud, valid.

Cited in notes (7 L. R. A. 481) on rights of surviving partner; (7 L. R. A. 791) on duties of surviving partner.

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Relative rights of individual and firm creditors.

Cited in footnotes to *Clark v. Stanwood*, 34 L. R. A. 378, which authorizes proof of debts of solvent firm against single insolvent partner; *Thayer v. Humphrey*, 30 L. R. A. 549, as to relative rights of individual and firm creditors; *Hundley v. Farris*, 12 L. R. A. 254, which holds individual creditors primarily entitled to payment out of deceased partner's estate; *Re Baldwin*, 58 L. R. A. 122, which sustains individual liability of member of banking firm, signing name to certificate of deposit, enforceable against estate in preference to claims against firm.

6 L. R. A. 742, *UNITED STATES v. BAYLE*, 40 Fed. 664.

Unmailable matter.

Cited in *United States v. Elliott*, 51 Fed. 808, holding postal card demanding payment of past due rent not violation of Federal statute; *Griffin v. Pembroke*, 64 Mo. App. 269, holding whether mailing a particular postal card in violation of Federal statute, question of law.

6 L. R. A. 743, *STATE v. BARNES*, 32 S. C. 14, 17 Am. St. Rep. 832, 10 S. E. 611.

Pardons on condition.

Cited in *Fuller v. State*, 122 Ala. 37, 45 L. R. A. 502, 82 Am. St. Rep. 17. 26 So. 146, holding that pardoning power under Constitution includes pardons on condition precedent or subsequent, and breach of condition annuls pardon.

Forfeiture of parole for breach of condition.

Cited in *Fuller v. State*, 122 Ala. 39, 45 L. R. A. 503, 82 Am. St. Rep. 17. 26 So. 146, holding statute providing for conditional parole, and for taking prisoner again into custody upon breach of condition, constitutional.

6 L. R. A. 745, *DE HAVEN v. SHERMAN*, 131 Ill. 115, 22 N. E. 711, 714.

When annuity charge upon corpus of estate.

Cited in *Einbecker v. Einbecker*, 162 Ill. 273, 44 N. E. 426, holding that principal cannot be used to make up deficiency where testator intended annuity to be paid out of income of fund; *Hopkins v. Remy*, 64 N. J. Eq. 14, 53 Atl. 676, holding that no resort may be had to land to pay annuity devised out of rents and profits; *Merriam v. Merriam*, 80 Minn. 272, 83 N. W. 162 (dissenting opinion), majority holding that income should be made up from corpus of estate where securities selected by executors to pay designated income to widow proved insufficient.

6 L. R. A. 749, *GORDON v. STATE*, 46 Ohio St. 607, 23 N. E. 63.

Constitutionality of statutes.

Followed in *State v. Rouch*, 47 Ohio St. 482, 25 N. E. 59, holding Dow law not unconstitutional for want of uniform operation; *Ex parte Handler*, 176 Mo. 389. 75 S. W. 920, holding local option liquor law, prescribing different penalties for unlawful traffic in counties adopting it than imposed in others, constitutional.

Cited in *Mathis v. Jones*, 84 Ga. 807, 11 S. E. 1018, holding local option law as to fences a general law of uniform operation; *Adams v. Beloit*, 105 Wis. 374. 47 L. R. A. 446, 81 N. W. 869, holding option to adopt provisions of general

statute not in conflict with constitutional requirement as to uniformity of operation.

— Delegation of power.

Followed in *State v. Rouch*, 47 Ohio St. 482, 25 N. E. 59, on the point that Dow law not unconstitutional as delegation of legislative power to people.

Cited in *State ex rel. Witter v. Forkner*, 94 Iowa, 11, 28 L. R. A. 210, 62 N. W. 772, holding it not unconstitutional delegation of legislative power to allow people to determine by vote limits of operation of prohibitory liquor law; *State v. Messenger*, 63 Ohio St. 402, 59 N. E. 105, holding authority granted commissioners to determine increased weight that may be drawn in vehicles having tires less than 3 inches in width not unconstitutional as delegation of legislative power.

Distinguished in *State ex rel. Allison v. Garver*, 66 Ohio St. 565, 64 N. E. 573, holding act to limit compensation of county officers unconstitutional where it is to take effect when and if approved by popular vote.

— Impossibility of execution.

Followed in *State v. Rouch*, 47 Ohio St. 482, 25 N. E. 59, on point that Dow law not unconstitutional because impossible of execution.

— Prohibitory law.

Cited in *Stevens v. State*, 61 Ohio St. 606, 56 N. E. 478, holding that the prohibition of the sale of intoxicating liquors need not be absolute to be a police regulation within the Wilson act.

Cited in note (10 L. R. A. 82) on right of state to prohibit manufacture and sale of intoxicating liquors.

Duplicity.

Cited in *Nickel v. State*, 6 Ohio C. C. 603, holding count charging sale of liquors to diverse persons unknown, not bad for duplicity; *State v. Batson*, 108 La. 481, 32 So. 478, holding that single criminal act consummated at one time may be charged as one offense, although it may operate upon more than one person.

6 L. R. A. 756, *SPRING VALLEY WATERWORKS v. SAN FRANCISCO*, 82 Cal. 286, 16 Am. St. Rep. 116, 22 Pac. 910-1046.

Public corporations; authority to fix rates..

Cited in *Jacobs v. San Francisco*, 100 Cal. 137, 34 Pac. 630, holding under statute making it official duty of board of supervisors of city annually to fix rates for water, power to fix rates rests with board of supervisors alone; *San Diego Water Co. v. San Diego*, 118 Cal. 566, 38 L. R. A. 462, 62 Am. St. Rep. 261, 50 Pac. 633, holding constitutional provision for fixing water rates without notice not deprivation of property without due process of law; *Spring Valley Waterworks v. San Francisco*, 124 Fed. 587, holding ordinance fixing water rates so low that company's net earnings would be much less than earnings from similar investments, unconstitutional; *San Diego Land & Town Co. v. Jasper*, 189 U. S. 440, 47 L. ed. 894, 23 Sup. Ct. Rep. 571, holding default of original petitioners for establishment of water rates, made parties to bill to have them declared void; not entitle plaintiff to relief sought; *San Diego Water Co. v. San Diego Flume Co.* 108 Cal. 560, 29 L. R. A. 843, 41 Pac. 495, holding contract making water company sole distributing agent for flume company not against public policy.

Cited in notes (33 L. R. A. 182) on legislative power to fix tolls, rates, or prices; (61 L. R. A. 101, 104, 105) on control of rates of municipal water supply.

Arbitrary fixing of rates.

Cited in *San Diego Land & Town Co. v. National City*, 174 U. S. 749, 43 L. ed. 1158, 19 Sup. Ct. Rep. 804, holding when statute making it duty of town supervisors annually to fix water rates, construed by state court as not authorizing arbitrary fixing of rates, construction binding on Federal courts, although notice to water company not expressly provided.

Power of courts to review reasonableness of rates.

Cited in *Jacobs v. San Francisco*, 100 Cal. 130, 34 Pac. 630, holding that fixing of water rates by board of supervisors is judicial act, and judgment cannot be controlled by mandamus; *Union Transp. Co. v. Bassett*, 118 Cal. 610, 50 Pac. 754, holding that equity cannot interfere with discretionary action of board of harbor commissioners in changing place of landing of vessel.

Disapproved in part in *Matthews v. North Carolina*, 106 Fed. 10, holding state commission order fixing amount of fertilizers constituting car load at ten tons, not subject to judicial interference, unless clearly unreasonable.

Requiring furnishing of water meters.

Cited in note (61 L. R. A. 112, 114) on rights and duties of consumer of water.

Distinguished in *State ex rel. Hallauer v. Gosnell*, 116 Wis. 615, 61 L. R. A. 45, 93 N. W. 542, sustaining provision in ordinance regulating water rates requiring consumers in certain cases to furnish meters.

Pleading; party must allege facts essential to recovery.

Cited in *Allen v. Home Ins. Co.* 133 Cal. 30, 65 Pac. 138, holding that in action upon policy insuring building "while occupied as dwelling house", plaintiff must allege that building was so occupied; *Miles v. Woodward*, 115 Cal. 314, 46 Pac. 1076, holding complaint in action to recover penalty of directors of mining corporation for failure to post weekly reports of superintendent, need not allege neglect wilful and intentional, since directors prima facie liable for mere neglect.

6 L. R. A. 763, *PINE CITY v. MUNCH*, 42 Minn. 342, 44 N. W. 107.

Abatement of nuisance.

Cited in *Re Debs*, 158 U. S. 587, 39 L. ed. 1103, 15 Sup. Ct. Rep. 900, holding obstruction of public highway subject to abatement in equity at instance of government; *Hutchinson Twp. v. Filk*, 44 Minn. 537, 47 N. W. 255, holding that city may maintain civil action to abate nuisance constituting obstruction to public highway; *Huron v. Bank of Volga*, 8 S. D. 451, 59 Am. St. Rep. 769, 66 N. W. 815, and *Red Wing v. Guptil*, 72 Minn. 261, 41 L. R. A. 324, 71 Am. St. Rep. 485, 75 N. W. 234, holding that municipal corporation authorized by charter to abate or to compel abatement of public nuisances, may maintain action in equity for that purpose; *Buffalo v. Harling*, 50 Minn. 556, 52 N. W. 931, holding that city may maintain action to enjoin erection of building for private use on public ground; *Llano v. Llano County*, 5 Tex. Civ. App. 136, 23 S. W. 1008, holding action to abate county jail and cesspool as nuisances maintainable by city; *Philadelphia v. Lyster*, 3 Pa. Super. Ct. 480, holding ordinance prohibiting collection of garbage without permit not enforceable by injunction, unless act *per se* nuisance.

Cited in footnote to *Pfingst v. Senn*, 21 L. R. A. 569, which denies right to enjoin as nuisance prospective use of premises as beer garden.

Cited in notes (51 L. R. A. 660, 661) on right of municipality to maintain suit to enjoin public nuisance; (42 L. R. A. 823) on injunctions by municipalities against nuisances upon highways and streets; (41 L. R. A. 323) on injunctions by municipal corporations against nuisances affecting public morals, peace and good order, and health and safety; (9 L. R. A. 716) on abatement of nuisance by action; (8 L. R. A. 831) on abatement of public nuisances; (20 L. R. A. 165) on power of equity to grant mandatory injunctions as to nuisances; (38 L. R. A. 327) on municipal power over nuisances affecting safety, health, and personal comfort; (36 L. R. A. 593, 597, 599, 607) on power of municipal corporations to define, prevent, and abate nuisances; (59 L. R. A. 850) on right to dam back water of stream as against public.

Justification of nuisance.

Cited in *Rand Lumber Co. v. Burlington*, 122 Iowa, 209, 97 N. W. 1096, holding that legislative authority to construct sewer will not justify nuisance; *Georgia R. & Bkg. Co. v. Maddox*, 116 Ga. 82, 42 S. E. 315, holding unnecessary switching in railroad terminal yard on Sunday, a nuisance.

Cited in note (9 L. R. A. 714) on justification of nuisance under legislative authority.

6 L. R. A. 765, *ALBERTI v. NEW YORK, L. E. & W. R. CO.* 118 N. Y. 77, 23 N. E. 35.

Duty to use ordinary care.

Cited in *Caven v. Troy*, 15 App. Div. 167, 44 N. Y. Supp. 244, holding injured person must use ordinary care to effect cure but that mistake of his physician in treatment will not shield wrongdoer.

Waiver of statutory privilege.

Cited in *Pence v. Waugh*, 135 Ind. 154, 34 N. E. 860; *Kern v. Kern*, 154 Ind. 35, 55 N. E. 1004; *McMaster v. Scriven*, 85 Wis. 168, 39 Am. St. Rep. 828, 55 N. W. 149,—holding that testator who requests his attorney to witness his will thereby waives privilege of statute; *Re Downing*, 118 Wis. 591, 95 N. W. 876, holding that attorney drafting will, may, at its probate, testify as to directions given by testator; *Re Mullin*, 110 Cal. 254, 42 Pac. 645, holding that testator waives statutory privilege by requesting his physician to witness will, and latter may testify as to testator's mental capacity; *Morris v. New York, O. & W. R. Co.* 148 N. Y. 92, 51 Am. St. Rep. 675, 42 N. E. 410, holding that patient waives statutory privilege as to information gained by two physicians at same examination by calling one of them as a witness; *Foley v. Royal Arcanum*, 151 N. Y. 204, 56 Am. St. Rep. 621, 45 N. E. 456. Affirming 78 Hun, 225, 28 N. Y. Supp. 352, holding that insured may waive statutory privilege as to testimony of physician by stipulation in insurance contract; *Corey v. Bolton*, 31 Misc. 141, 63 N. Y. Supp. 915, holding that natural guardian of infant may waive protection of statute which forbids physician from disclosing information acquired in professional capacity.

Opinion of physician.

Cited in *Reynolds v. Niagara Falls*, 81 Hun, 356, 30 N. Y. Supp. 954, holding that physician may express opinion about continuance of known present condition

of plaintiff's limb; *Penny v. Rochester R. Co.* 7 App. Div. 603, 40 N. Y. Supp. 172, holding that physician may testify that wound which had broken out after apparently healing may do so again; *Saltzman v. Brooklyn City R. Co.* 73 Hun. 568, 26 N. Y. Supp. 311, holding that physician may testify that in his opinion injury is liable to grow worse; *Barr v. Kansas City*, 121 Mo. 31, 25 S. W. 562, holding medical testimony that plaintiff's injuries would probably shorten his life, admissible; *Quinn v. O'Keeffe*, 75 N. Y. S. R. 578, 41 N. Y. Supp. 116, holding testimony that injury is capable of producing certain conditions indicated by plaintiff's symptoms, admissible; *Wolf v. Third Ave. R. Co.* 67 App. Div. 613, 74 N. Y. Supp. 336, holding medical evidence as to propriety of operation necessary for plaintiff's relief, competent in negligence action.

Distinguished in *Clegg v. Metropolitan Street R. Co.* 1 App. Div. 211, 37 N. Y. Supp. 130, holding that medical witness may testify as to probable effects of present condition of injured person.

Photographs as evidence.

Cited in *Lake Erie & W. R. Co. v. Wilson*, 189 Ill. 96, 59 N. E. 573, holding accurate photographs of scene of accident taken about time of injury, admissible; *Warner v. Randolph*, 18 App. Div. 464, 79 N. Y. S. R. 1116, 45 N. Y. Supp. 1112, and *Dederichs v. Salt Lake City R. Co.* 14 Utah, 141, 35 L. R. A. 807, 46 Pac. 656, holding accurate photograph of place of accident admissible in action for personal injuries; *Cooper v. St. Paul City R. Co.* 54 Minn. 384, 56 N. W. 42, holding photograph accurately representing portions of plaintiff's body, admissible; *Baxter v. Chicago & N. W. R. Co.* 104 Wis. 325, 80 N. W. 644, holding photographs of plaintiff's injured leg admissible in action for personal injuries; *Howard v. Illinois Trust & Sav. Bank*, 189 Ill. 577, 59 N. E. 1106, holding enlarged photographs of original deed in evidence admissible where alteration is claimed; *People v. Webster*, 139 N. Y. 83, 34 N. E. 730, holding photograph of deceased admissible on murder trial to show his physical characteristics where self-defense is set up; *Nies v. Broadhead*, 75 Hun, 256, 27 N. Y. Supp. 52, holding verification of picture by photographer not essential to its admissibility; *Cunningham v. Fair Haven & W. R. Co.* 72 Conn. 249, 43 Atl. 1047, holding that accuracy of photograph of physical object must be proved before it can be received.

Cited in notes (35 L. R. A. 803) proof of correctness of photograph offered as evidence; (35 L. R. A. 808) photograph of part of body as evidence.

Exhibition of injured limb.

Cited in *Arkansas River Packet Co. v. Hobbs*, 105 Tenn. 40, 58 S. W. 278, holding that plaintiff may voluntarily exhibit injured limb to jury.

6 L. R. A. 770, *FRANKLIN v. BROWN*, 118 N. Y. 110, 27 N. Y. S. R. 955, 16 Am. St. Rep. 744, 23 N. E. 126.

Landlord and tenant; implied covenants.

Cited in *Daly v. Wise*, 132 N. Y. 310, 16 L. R. A. 238, 30 N. E. 837, holding covenant against inherent defects not implied in lease of unfurnished dwelling for definite term; *Edwards v. McLean*, 122 N. Y. 307, 25 N. E. 483, Affirming 23 Jones & S. 131, holding infectious disease upon premises after execution of lease, but before commencement of term, not relieve tenant from liability for rent; *Rotter v. Goerlitz*, 16 Daly, 485, 12 N. Y. Supp. 210, raising question as to doc-

trine that lease of furnished house or apartment implies fitness for occupancy; *Davis v. George*, 67 N. H. 397, 39 Atl. 979, holding covenant that furnished dwelling is fit for occupancy, not implied in lease for term of years; *Ingalls v. Hobbs*, 156 Mass. 351, 16 L. R. A. 52, footnote p. 51, 32 Am. St. Rep. 460, 31 N. E. 286, holding lease of furnished dwelling for limited term implies fitness for immediate occupation; *Meserole v. Hoyt*, 161 N. Y. 62, 55 N. E. 274, Affirming 34 App. Div. 33, 55 N. Y. Supp. 1072, holding statute relieving lessee from liability for rent upon premises becoming unfit for occupancy without his fault, not applicable when defect existed at time lease made, in absence of misrepresentation of lessor; *Schwalbach v. Shinkle, W. & K. Co.* 97 Fed. 485, holding lessor not liable for personal injury by reason of unsafe condition of premises for purpose for which leased if defect unknown, and not apparent on reasonable inspection; *Prahar v. Tousey*, 93 App. Div. 509, 87 N. Y. Supp. 845, holding that landlord does not impliedly warrant fitness of leased premises for proposed use; *Castagnette v. Nicchia*, 76 App. Div. 372, 78 N. Y. Supp. 498, holding landlord's covenant to repair not implied from striking out of lease clause requiring tenant to do so; *Smith v. Donnelly*, 93 App. Div. 573, 87 N. Y. Supp. 893, denying landlord's absolute duty to disclose to tenant that upper window sash would fall out if pulled entirely down; *Tallman v. Murphy*, 120 N. Y. 354, 24 N. E. 716 (dissenting opinion) majority holding that smoke and odors of coal gas from flues of adjoining tenants, and explosions, rendering premises untenable, constitutes eviction.

Cited in footnotes to *Angevine v. Knox-Goodrich*, 18 L. R. A. 264, which denies implied warranty that house leased for dwelling habitable.

Cited in note (33 L. R. A. 456) on implied covenant in lease as to fitness of property for purpose intended.

Doctrine of caveat emptor applicable to leaseholds.

Cited in *Meserole v. Sinn*, 34 App. Div. 35, 53 N. Y. Supp. 1072; *Watson v. Almirall*, 61 App. Div. 430, 70 N. Y. Supp. 662; *Rotter v. Goerlitz*, 16 Daly, 485, 12 N. Y. Supp. 210,—holding that maxim *caveat emptor* applies to leasehold of dwelling; *Zerega v. Will*, 34 App. Div. 490, 54 N. Y. Supp. 361, holding that where tenant has opportunity to examine premises he assumes risk of their condition; *Sherman v. Ludin*, 79 App. Div. 38, 79 N. Y. Supp. 1066, holding that tenant assumes risk of condition of premises, in absence of lessor's express agreement; *Stein v. Rice*, 23 Misc. 351, 51 N. Y. Supp. 320, holding that lessee of dwelling at seashore resort assumes risk of sufficiency of water supply in absence of express covenant by lessor; *Barrett v. Lake Ontario Beach Improv. Co.* 68 App. Div. 618, 74 N. Y. Supp. 301, holding that person using toboggan slide assumes risk of defective construction apparent to senses.

Cited in notes (34 L. R. A. 824) on liability of landlord for injury to tenant from defect in premises; (46 L. R. A. 83) on liability of owner of premises of which he is not in possession for injuries from defects.

Agreements as to tenantability.

Cited in *Hamilton v. Emerson*, 31 Misc. 258, 64 N. Y. Supp. 48, holding evidence of contemporaneous verbal agreement as to tenantability inadmissible where written lease disclaims lessor's responsibility for condition or defects.

6 L. R. A. 773, *Re* BALLOT ACT, 16 R. I. 766, 19 Atl. 656.

Elections; form of printed ballots.

Cited in footnotes to *State ex rel. Mize v. McElroy*, 16 L. R. A. 279, which holds name written on ballot in place of printed name erased cannot be counted; *State ex rel. McCarthy v. Moore*, 59 L. R. A. 447, which sustains prohibition against placing on official ballot, name of unsuccessful candidate for party nomination at primary election; *State ex rel. Phelan v. Walsh*, 17 L. R. A. 364, in which various decisions as to validity of ballots are made.

Cited in note (10 L. R. A. 151) on form of ballot.

6 L. R. A. 775, *WARWICK v. WARWICK*, 86 Va. 596, 10 S. E. 843.

Wills; sufficiency of execution.

Cited in footnote to *Re Andrews*, 48 L. R. A. 662, which holds signature to will on second page without anything to connect portions contained on third page insufficient; *Shaw v. Camp*, 36 L. R. A. 112, which holds unsigned, unattested sheet attached to will made effective by subsequent codicil.

Holographic wills.

Cited in *Baker v. Brown*, 33 Miss. 797, 36 So. 539, holding that writing of caption "My Will" by another does not invalidate holographic will.

Cited in footnotes to *Re Booth*, 12 L. R. A. 452, which holds holographic will containing maker's name at beginning only, insufficiently executed; *Neer v. Cowhick*, 18 L. R. A. 588, which holds necessity of two witnesses to make holographic wills valid, not dispensed with by statute.

6 L. R. A. 778, *NEWCUMB v. BOSTON PROTECTIVE DEPARTMENT*, 151 Mass. 215, 24 N. E. 39.

What are public charities.

Followed in *Bates v. Worcester Protective Department*, 177 Mass. 134, 58 N. E. 274, holding corporation to assist in saving life and property at fire, not a public charity.

Cited in *Minns v. Billings*, 183 Mass. 128, 97 Am. St. Rep. 420, 66 N. E. 593, holding trust fund maintained by gifts and bequests, entirely within trustees' control, for purpose of assisting members of certain association, a public charity.

Liability for negligence.

Followed in *Bates v. Worcester Protective Department*, 177 Mass. 134, 58 N. E. 274, holding corporation to assist in saving property at fire liable for property of which its officers took possession at fire, and negligently permitted destruction.

Cited in *George v. Cypress Hills Cemetery*, 32 App. Div. 305, 52 N. Y. Supp. 1097 (dissenting opinion), majority holding cemetery association not exempt from liability for negligence as charitable corporation; *Powers v. Massachusetts Homeopathic Hospital*, 47 C. C. A. 128, 109 Fed. 300, holding public hospital chartered as charitable corporation not liable for nurse's negligence; *Haggerty v. St. Louis, K. & N. W. R. Co.* 100 Mo. App. 447, 74 S. W. 456, holding railroad relief department liable for negligence in selecting physician to treat injured member.

Cited in notes (23 L. R. A. 201) on liability of charitable institution for negligence; (7 L. R. A. 170) on liability of public agencies for negligence of their servants.

6 L. R. A. 780, *NISSEN v. CRAMER*, 104 N. C. 574, 10 S. E. 670.

Slander; privileged publications.

Cited in *Gudger v. Penland*, 108 N. C. 599, 23 Am. St. Rep. 73, 13 S. E. 168, holding that complaint for slander need not negative privilege although words uttered in judicial proceeding; *Gattis v. Kilgo*, 128 N. C. 409, 38 S. E. 931, holding slanderous words uttered by college president on trial before trustees when relevant and pertinent to issue, privileged; *Cawfield v. Asheville Street R. Co.* 111 N. C. 599, 16 S. E. 703, holding rebuke of opprobrious epithets applied by attorney to witness, when supported by evidence, within discretion of court.

Cited in footnote to *Morasse v. Brochu*, 8 L. R. A. 524, which holds actionable statement by priest to congregation that physician excommunicated, and should not be employed in parish.

Cited in note (9 L. R. A. 621) on libel and slander in general.

6 L. R. A. 783, *CAMPBELL v. JONES*, 52 Ark. 493, 12 S. W. 1016.

Fraudulent conveyance of homestead.

Cited in *Gray v. Patterson*, 65 Ark. 378, 67 Am. St. Rep. 937, 46 S. W. 730, holding that creditors cannot complain that conveyance of homestead is fraudulent.

Distinguished in *Gray v. Patterson*, 65 Ark. 380, 67 Am. St. Rep. 937, 46 S. W. 730, by *Battle, J.*, dissenting, as not considering point whether conveyance of homestead in consideration of maintenance for life was fraudulent.

Cancellation of deed.

Cited in *Watters v. Wagley*, 53 Ark. 511, 22 Am. St. Rep. 232, 14 S. W. 774, holding that title cannot be divested or conveyed by cancellation of grantee's deed.

Exemption of proceeds of exempt property.

Cited in note (19 L. R. A. 38) on how far proceeds of exempt property retain exempt character.

When written instrument takes effect.

Cited in *Findley v. Means*, 71 Ark. 290, 73 S. W. 101, holding contract delivered to obligee to take effect upon certain condition, binding, though condition never performed.

6 L. R. A. 785, *ADAMS FEMALE ACADEMY v. ADAMS*, 65 N. H. 225, 18 Atl. 777, 23 Atl. 430.

Doctrine of *cy pres*.

Cited in *Edgerly v. Barker*, 66 N. H. 472, 26 L. R. A. 342, 31 Atl. 900, modifying gift to grandchildren on attaining forty years to take effect at twenty.

Cited in footnotes to *Crerar v. Williams*, 21 L. R. A. 454, which holds other mode for taking effect of charity will be provided if mode pointed out in will fails; *Kelly v. Nichols*, 19 L. R. A. 413, which holds doctrine of *cy pres* inapplicable to bequest not made to definite charitable use.

6 L. R. A. 788, *CENTRAL LITHOGRAPHING & ENGRAVING CO. v. MOORE*, 75 Wis. 170, 17 Am. St. Rep. 186, 43 N. W. 1124.

Adoption of jury's conclusion.

Cited in *Wright v. C. S. Graves Land Co.* 100 Wis. 274, 75 N. W. 1001, to point that court adopts jury's conclusion by refusing to set aside verdict.

Contract for skill and labor.

Cited in *Beck & P. Lithographing Co. v. Colorado Mill. & Elevator Co.* 3 C. C. A. 252, 10 U. S. App. 465, 52 Fed. 704, holding contract to make designs, execute engravings, and embody them on stationery not contract of sale but one for artistic skill and labor.

Bailment.

Cited in footnote to *Sattler v. Hallock*, 46 L. R. A. 679, which holds bailment not sale created by contract by which farmers deliver produce at their factory for manufacture and division of proceeds.

Cited in notes (17 L. R. A. 178) on vendor as bailee of vendee after contract perfected; (37 Am. St. Rep. 540) bailment where work to be done on chattel.

6 L. R. A. 792. *HUMPHREYS v. HOPKINS*, 81 Cal. 551, 15 Am. St. Rep. 76, 22 Pac. 892.

Attachment.

Cited in *Risdon Iron & Locomotive Works v. Citizens' Traction Co.* 122 Cal. 97, 68 Am. St. Rep. 25, 54 Pac. 529, holding cars, trucks, and other personal property of carrier of passengers, attachable.

Cited in note (64 L. R. A. 502) on attachment or garnishment of foreign railroad cars.

Receivers.

Cited in *Grogan v. Egbert*, 44 W. Va. 78, 67 Am. St. Rep. 763, 28 S. E. 714; *Ward v. Pacific Mut. L. Ins. Co.* 135 Cal. 236, 67 Pac. 124, holding that foreign receiver will not be allowed to maintain action where there are conflicting claims of domestic creditors; *Lackmann v. Supreme Council*, O. C. F. 142 Cal. 26, 75 Pac. 583, holding domestic creditor entitled to fund attached as against foreign receiver.

Cited in footnote to *State v. Hubbard*, 39 L. R. A. 860, which holds receiver not an agent within statute as to embezzlement.

Cited in notes (8 L. R. A. 62) on foreign receivers; (9 L. R. A. 601) on restricted authority of foreign receivers; (11 L. R. A. 480) on foreclosure of railroad mortgage, appointment of receiver, and authority; (20 L. R. A. 392) on exclusiveness of jurisdiction by appointment of receiver; (23 L. R. A. 54) on rights of receiver as to property outside of jurisdiction in which he is appointed.

6 L. R. A. 799. *CARRIER v. CHICAGO, R. I. & P. R. CO.* 79 Iowa, 89, 44 N. W. 203.

Limitation of actions; effect of concealment of cause of action.

Cited in *Mereness v. First Nat. Bank*, 112 Iowa, 14, 51 L. R. A. 411, 84 Am. St. Rep. 318, 83 N. W. 410, and *Mather v. Rogers*, 99 Iowa, 294, 68 N. W. 700, holding that fraudulent concealment of cause of action suspends running of statute until right of action is discovered; *Clark v. Ellsworth*, 84 Iowa, 529, 51 N. W. 31, holding that equity will relieve against judgment obtained by fraud, which by reasonable diligence could not have been discovered within time for application for retrial; *Baird v. Omaha & C. B. R. & Bridge Co.* 111 Iowa, 330, 82 N. W. 1020, holding that limitation to recover tax voted in aid of resident bridge company, but illegally paid to foreign company, runs only from discovery

of mistake; *Cook v. Chicago*, R. I. & P. R. Co. 81 Iowa, 564, 9 L. R. A. 767, 3 Inters. Com. Rep. 387, 25 Am. St. Rep. 512, 46 N. W. 1080, holding running of statute against action for unreasonable freight charge suspended where facts fraudulently concealed by defendant, and plaintiff without knowledge.

Cited in footnotes to *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery known to husband to deny same; *Mereness v. First Nat. Bank*, 51 L. R. A. 410, which holds running of limitations on demand certificate of deposit, not interrupted by bank's misrepresentations in denial of liability; *Smith v. Blachley*, 53 L. R. A. 549, which holds running of limitation against action to recover back money not prevented by fraud unless investigation prevented by affirmative efforts.

Cited in notes (25 L. R. A. 569) on statutes of limitation as affected by concealment of cause of action; (8 L. R. A. 688) on statute of limitations in case of concealed fraud; (7 L. R. A. 826) on limitation does not begin to run until discovery of fraud.

Distinguished in *McBride v. Burlington*, C. R. & N. R. Co. 97 Iowa, 95, 59 Am. St. Rep. 395, 66 N. W. 73, holding concealment of cause of injury resulting in death not prevent running of statute against right to maintain action; *Daugherty v. Daugherty*, 116 Iowa, 248, 90 N. W. 65, holding running of limitations against action for proceeds of land by beneficiary of trust arising from fraudulently procured conveyance, not suspended till discovery of fraud.

Exceptions to operation of statute.

Cited in *Hawley v. Griffin*, 121 Iowa, 609, 97 N. W. 86, holding proceeding by heirs of insane person to vacate decree quieting title of grantee in tax deed governed by limitations contained in statute authorizing it.

Disapproved in *Murray v. Chicago & N. W. R. Co.* 35 C. C. A. 65, 92 Fed. 871, Affirming 62 Fed. 44, holding concealment of cause of action for unreasonable charge for freight, not within exception to statute of limitation providing relief in cases of fraud, and common law cannot make exception.

6 L. R. A. 802, *CHESTER v. BLACK*, 132 Pa. 568, 19 Atl. 276.

Followed without special discussion in *Harrisburg v. Adams*, 2 Dauphin Co. Rep. 388, 5 Pa. Dist. R. 379; *Chester v. Cunliffe*, 7 Del. Co. Rep. 99; *Dunbar v. Williamsport*, 9 Pa. Co. Ct. 452.

Validity of retroactive legislation.

Cited in *Donley v. Pittsburgh*, 147 Pa. 351, 29 W. N. C. 363, 30 Am. St. Rep. 738, 23 Atl. 304, holding that legislature may provide for assessments for street improvements made under void act; *Shuttuck v. Smith*, 6 N. D. 80, 60 N. W. 5, holding that legislature may validate defective tax levy; *Philadelphia v. Armstrong*, 16 Pa. Super. Ct. 58, raising without deciding question whether act permitting filing of municipal liens within six months after assessment operates retroactively; *Philadelphia v. Hey*, 20 Pa. Super. Ct. 482, holding that legislature may revive municipal liens for street improvements theretofore expired.

Constitutional provision for uniformity of taxation.

Cited in *Harrisburg v. McPherran*, 4 Dauphin Co. Rep. 64, Affirmed in 14 Pa. Super. Ct. 483; *Beaumont v. Wilkes-Barre*, 6 Kulp, 126; *Harrisburg v. Miller*,

2 Dauphin Co. Rep. 225,—holding front-foot assessments, constitutional; Meggett v. Eau Claire, 81 Wis. 330, 51 N. W. 566, holding absence of benefits no defense to front-foot assessment for local improvement; Alfalfa Irrig. Dist. v. Collins, 46 Neb. 425, 64 N. W. 1086, holding act providing for local assessments for irrigation system, constitutional.

Cited in note (12 L. R. A. 852) on exemption of church property from special assessment under exemption from taxes generally.

6 L. R. A. 804, ST. LOUIS, I. M. & S. R. CO. v. BIGGS, 52 Ark. 240, 20 Am. St. Rep. 174, 12 S. W. 331.

Limitation of actions.

Cited in St. Louis, I. M. & S. R. Co. v. Yarborough, 56 Ark. 616, 20 S. W. 515, holding that limitation runs from time of overflow, and not from making embankment, where probability of such damage uncertain at earlier date; Valparaiso City W. Co. v. Dickover, 17 Ind. App. 241, 46 N. E. 591, holding that limitation upon action for diversion of water during dry seasons runs from time of injury; Augusta v. Lombard, 101 Ga. 728, 28 S. E. 994, holding that limitation upon action for injuries from removal of gate to mill race in certain times of high water, runs from overflow; Fremont, E. & M. Valley R. Co. v. Harlin, 50 Neb. 711, 36 L. R. A. 422, 61 Am. St. Rep. 578, 70 N. W. 263, holding that limitation of action for overflow from railway ditches does not run from time of construction; St. Louis, I. M. & S. R. Co. v. Anderson, 62 Ark. 363, 35 S. W. 791, holding that limitation upon action for obstruction of ditch by railway embankment runs from time of construction; Cockrill v. Cooper, 20 C. C. A. 532, 57 U. S. App. 576, 86 Fed. 10, holding one year statute not applicable in Arkansas to actions against bank directors for excessive loans or for misfeasance or nonfeasance; Frerich v. Little Rock Traction & Electric Co. 71 Ark. 75, 70 S. W. 1036, holding husband's action for damages resulting from injury to wife governed by limitation applicable to "actions on case founded on any contract or liability."

Cited in footnote to Church of Holy Communion v. Paterson Extension R. Co. 55 L. R. A. 81, which holds limitation begins to run for injuries to church wall from insufficiency of retaining wall built in constructing track from time injury occurs.

Damages.

Cited in Kansas City, Ft. S. & M. R. Co. v. Cook, 57 Ark. 396, 21 S. W. 1066, holding loss in rental value, measure of damages from insufficient outlet in roadbed; Cleveland, C. C. & St. L. R. Co. v. Kline, 29 Ind. App. 394, 63 N. E. 483, holding prospective damages not recoverable in action for obstruction of water course by railroad embankment.

6 L. R. A. 805, FAYERWEATHER v. PHENIX INS. CO. 118 N. Y. 324, 28 N. Y. S. R. 689, 23 N. E. 192.

Effect of agreement giving carrier benefit of insurance.

Cited in North British & Mercantile Ins. Co. v. Central Vermont R. Co. 9 App. Div. 8, 40 N. Y. Supp. 1113, holding that where carrier has benefit of insurance no cause of action accrues to insurer by subrogation; Dundee Chemical Works v. New York Mut. Ins. Co. 12 Misc. 355, 33 N. Y. Supp. 628, holding

that acceptance of bill of lading giving carrier benefit of insurance and destroying insurer's right of subrogation invalidates policy.

Subrogation of insurer to rights of insured.

Cited in *Munson v. New York C. & H. R. R. Co.* 32 Misc. 286, 65 N. Y. Supp. 848, holding insurer subrogated to rights of insured against one causing loss; *London & L. F. Ins. Co. v. Rome, W. & O. R. Co.* 68 Hun, 600, 23 N. Y. Supp. 231, holding insurer paying loss on goods in common carrier's charge subrogated to rights of insured; *Kennedy Bros. v. Iowa State Ins. Co.* 119 Iowa, 33, 91 N. W. 831, holding that one releasing railroad from liability for negligently causing fire, without knowledge of insurer entitled to subrogation, cannot recover insurance; *Lyons v. Boston & L. R. Co.* 181 Mass. 557, 64 N. E. 404 (dissenting opinion), majority holding statute giving railroad liable for causing fire, benefit of insurance on property not impair obligation of policies previously issued providing for insurer's subrogation to insured's rights.

Action on insurance policy — Pleading and proof.

Cited in *Long Creek Bldg. Asso. v. State Ins. Co.* 29 Or. 573, 46 Pac. 366, holding that performance or waiver of condition precedent to recovery on insurance policy must be pleaded and proved.

6 L. R. A. 807, *TWENTY-THIRD STREET BAPTIST CHURCH v. CORNWELL*, 117 N. Y. 601, 28 N. Y. S. R. 482, 23 N. E. 177.

Voluntary contract.

Cited in *Myers v. Dean*, 11 Misc. 370, 32 N. Y. Supp. 237, holding no action lies on promise to pay brokerage made after services performed; *Re James*, 78 Hun, 125, 28 N. Y. Supp. 992, holding bond by husband to wife unenforceable against estate when without actual consideration; *Rogers v. Galloway Female College*, 64 Ark. 637, 39 L. R. A. 641, 44 S. W. 454, holding organizer of, and subscriber to, fund to found college, bound after acceptance of subscription and location of college; *Davis v. Bronson*, 2 N. D. 309, 16 L. R. A. 659, 33 Am. St. Rep. 783, 50 N. W. 836, holding that party performing executory contract after repudiation by other party, cannot recover contract price.

Cited in note (22 L. R. A. 80) on whether subscription contract joint or several.

6 L. R. A. 808, *BARRY v. CAPEN*, 151 Mass. 99, 23 N. E. 735.

Effect on contract of illegal performance.

Cited in *Fox v. Rogers*, 171 Mass. 547, 50 N. E. 1041, holding recovery on contract to lay drain not barred by illegal construction; *Dunham v. Hastings Pavement Co.* 56 App. Div. 250, 67 N. Y. Supp. 632, holding contract, to endeavor to secure right to make bids for laying certain paving material, not rendered illegal by illegal acts in performance; *Knut v. Nutt*, 83 Miss. 374, 35 So. 686, holding attorney entitled to agreed compensation for prosecuting claim against government, though procuring settlement by use of influence; *Dunham v. Hastings Pavement Co.* 57 App. Div. 429, 68 N. Y. Supp. 221, holding whether contracting parties contemplated performance of illegal acts, question for jury.

Cited in footnote to *Crichfield v. Bermudez Asphalt Paving Co.* 42 L. R. A. 347, which holds void, employment to promote business of paving company including

procuring of passage of ordinance for paving streets and alleys with commissions contingent on success.

Cited in note (12 L. R. A. 120) as to contracts not binding on makers.

6 L. R. A. 809, *PULLMAN PALACE CAR CO. v. LOWE*, 28 Neb. 239, 26 Am. St. Rep. 325, 44 N. W. 226.

Innkeeper's liability.

Cited in *Taylor v. Downey*, 104 Mich. 536, 29 L. R. A. 97, 53 Am. St. Rep. 472, 62 N. W. 716, holding hotel keeper not liable for boarder's money taken by night clerk from drawer in safe to which boarder carried key.

Cited in footnote to *Fay v. Pacific Improvement Co.* 16 L. R. A. 188, which holds character of guest at hotel not lost by merely inquiring as to price of room and board, without any agreement as to length of stay.

Cited in notes (12 L. R. A. 383) as to who is a guest; (8 L. R. A. 98; 12 L. R. A. 382) liability of innkeeper as bailee; (21 L. R. A. 201) on liability of sleeping car company as innkeeper.

Carrier's liability.

Cited in *Voss v. Wagner Palace Car Co.* 16 Ind. App. 298, 43 N. E. 20 (dissenting opinion) majority holding company liable for loss of passenger's cape through dishonesty of porter.

Cited in note (6 L. R. A. 620) on delivery to agent or servant of carrier is delivery to carrier.

Disapproved in *Williams v. Webb*, 27 Misc. 510, 58 N. Y. Supp. 300, holding sleeping car company not insurer of passenger's baggage, money, or effects; *Voss v. Wagner Palace Car Co.* 16 Ind. App. 279, 43 N. E. 20, holding sleeping car company liable as common carrier for safe delivery of baggage intrusted to porter who undertook to deliver.

6 L. R. A. 813, *MILLER v. FINEGAN*, 26 Fla. 29, 7 So. 140.

Homestead exemption.

Cited in *Godwin v. King*, 31 Fla. 530, 13 So. 108, holding that dower right in homestead exemption not taken away by provision that such exemption shall inure to widow and heirs of party entitled thereto; *Scull v. Beatty*, 27 Fla. 435, 9 So. 4, holding constitutional provisions for accrual of exemptions to heirs not limited to resident heirs.

Cited in footnotes to *Campbell v. Jones*, 6 L. R. A. 783, which holds land larger in area than law allows, received in exchange for homestead, liable as to excess, to existing debts; *Wilkinson v. Merrill*, 11 L. R. A. 632, which holds householder not deprived of homestead right by death of entire family; *Bosquett v. Hall*, 9 L. R. A. 351, which refuses homestead exemption because of residence of children strangers in blood; *Purnell v. Reed*, 21 L. R. A. 839, holding that husband can dispose of homestead by will, subject to widow's dower, where without children.

Cited in notes (11 L. R. A. 705, 9 L. R. A. 804) as to homestead rights.

Family defined.

Cited in notes (7 L. R. A. 747) as to definition of family; (8 L. R. A. 746) as to construction of wills.

6 L. R. A. 821, *WILLIAMS v. STATE*, 25 Fla. 734, 6 So. 831.

6 L. R. A. 823, *GATO v. EL MOELO CIGAR MFG. CO.* 25 Fla. 886, 23 Am. St. Rep. 537, 7 So. 23.

Trademarks.

Cited in footnotes to *McVey v. Brendel*, 13 L. R. A. 377, which holds equity will not protect labor union in use of nontrademark label; *Koehler v. Sanders*, 9 L. R. A. 576, which denies right to appropriate word "international" as trademark.

Cited in notes (9 L. R. A. 145, 146, 149) as to trademarks and rights thereto; (10 L. R. A. 833) as to trademark and tradename; (17 L. R. A. 130) concerning labels as trademarks; (19 L. R. A. 56) as to invalidity of deceptive trademarks.

— **Proprietor's name.**

Cited in *Robinson v. Storm*, 103 Tenn. 54, 52 S. W. 880, holding that proprietor cannot so use his name in business as to defraud another.

Cited in footnotes to *American Order of S. C. v. Merrill*, 8 L. R. A. 320, which refuses to enjoin organization of corporation with name similar to existing one; *Lamb Knit-Goods Co. v. Lamb Glove & Mitten Co.* 44 L. R. A. 841, which denies right to use own name so as to deceive public as to business rightfully engaged in by another; *Symonds v. Jones*, 8 L. R. A. 570, which holds transferer of trademark though containing his name or initials cannot use same.

— **Geographical name.**

Cited in *Pillsbury-Washburn Flour Mills Co. v. Eagle*, 41 L. R. A. 167, footnote p. 162, 30 C. C. A. 307, 58 U. S. App. 490, 86 Fed. 619, which authorizes injunction against use of geographical name on flour made elsewhere from wheat of different grade.

Cited in footnotes to *American Waltham Watch Co. v. United States Watch Co.* 43 L. R. A. 826, which authorizes injunction against deceptive use of word "Waltham" by other manufacturer of watches at same place; *Levy v. Waite*, 25 L. R. A. 190, which refuses to enjoin, as infringement, uninterrupted and innocent use without question of local geographical name for five years.

Distinguished in *Elgin Butter Co. v. Elgin Creamery Co.* 155 Ill. 137, 40 N. E. 616, holding *Elgin Creamery Co.* entitled to use its name as against pre-existing *Elgin Butter Co.* also of *Elgin*, in absence of fraud.

Damages.

Cited in *Hennessy v. Wilmerding-Lowe Co.* 103 Fed. 94, holding wilful infringer of trademark liable for injury to business; *C. F. Simmons Medicine Co. v. Mansfield Drug Co.* 93 Tenn. 146, 23 S. W. 165, holding ordering accounting customary in assessment of damages in trademark infringement cases.

Distinguished in *Gregory v. Spieker*, 110 Cal. 155, 52 Am. St. Rep. 70, 42 Pac. 576, holding business lost to buyer, not profits of seller measure for breach of contract of sale of proprietary compound.

6 L. R. A. 829, *FOOT v. CARD*, 58 Conn. 1, 18 Am. St. Rep. 258, 18 Atl. 1027.

Alienating husband's affection.

Cited in *Lockwood v. Lockwood*, 67 Minn. 482, 70 N. W. 784; *Williams v. Williams*, 20 Colo. 56, 37 Pac. 614; *Humphrey v. Pope*, 122 Cal. 258, 54 Pac. 847.

holding that wife has action at common law for damages against woman enticing away husband; *Knapp v. Wing*, 72 Vt. 338, 47 Atl. 1075, holding that woman has action for alienation of husband's affections resulting in loss of conjugal society and support; *Price v. Price*, 91 Iowa, 697, 29 L. R. A. 151, 51 Am. St. Rep. 360, 60 N. W. 202; *Haynes v. Nowlin*, 129 Ind. 583, 14 L. R. A. 790, 28 Am. St. Rep. 213, 29 N. E. 389; *Beach v. Brown*, 20 Wash. 268, 43 L. R. A. 116, 72 Am. St. Rep. 90, 55 Pac. 46; *Deitzman v. Mullin* R. Co. 108 Ky. 614, 50 L. R. A. 810, footnote p. 808, 94 Am. St. Rep. 390, 57 S. W. 247, holding that wife may maintain action for enticing husband away and alienating affections where disability to sue removed; *Warren v. Warren*, 89 Mich. 128, 14 L. R. A. 547, footnote p. 545, 50 N. W. 842; *C'low v. Chapman*, 125 Mo. 104, 26 L. R. A. 413, footnote p. 412, 46 Am. St. Rep. 468, 28 S. W. 328—upholding wife's right of action for alienating husband's affections and depriving her of his society where she has right to own separate property, including actions for violation of personal rights: *Gerner v. Gerner*, 185 Pa. 236, 40 L. R. A. 550, 42 W. N. C. 51, 64 Am. St. Rep. 646, 39 Atl. 884, and *Wolf v. Frank*, 92 Md. 141, 52 L. R. A. 104, footnote p. 102, 48 Atl. 132, holding that married woman may sue for enticing husband away where statute removes disability to sue for tort; *Postlewaite v. Postlewaite*, 1 Ind. App. 478, 28 N. E. 99, holding that divorced woman has action for alienating affections of former husband; *Daley v. Gates*, 65 Vt. 593, 27 Atl. 193, holding original allegation of enticing husband away *per quod consortium amisit*, and new count charging criminal conversation with same *per quod*, set up same cause of action.

Cited in footnotes to *Betser v. Betser*, 52 L. R. A. 630, which sustains wife's right of action for alienating husband's affections; *Tucker v. Tucker*, 32 L. R. A. 623, which holds parent not liable for advising son to separate from wife; *Doe v. Roe*, 8 L. R. A. 833, which holds action for alienating husband's affections by debauching and carnally knowing him; not maintainable; *Houghton v. Rice*, 47 L. R. A. 310, which denies right of action against woman for alienating husband's affections unaccompanied by adultery; *Sanborn v. Gale*, 26 L. R. A. 864, which holds running of limitation against action for alienation of wife's affections not prevented by agreement of parties to adultery known to husband to deny same; *Hodgkinson v. Hodgkinson*, 27 L. R. A. 120, holding that wife has an action for damages against any one causing abandonment by her husband.

Cited in notes (10 L. R. A. 468) as to liability for interrupting marital relations; (11 L. R. A. 549) as to actions for inducing violation of obligations.

Disapproved in *Duffies v. Duffies*, 76 Wis. 380, 8 L. R. A. 423, 20 Am. St. Rep. 79, 45 N. W. 522, holding that wife has no right of action for enticing husband away, thus depriving her of society and support; *Smith v. Smith*, 98 Tenn. 105, 60 Am. St. Rep. 838, 38 S. W. 439, holding that wife cannot prosecute for alienating husband's affections where statute authorizes her to so prosecute for causes arising subsequent to desertion.

Cruelty.

Cited in *Mayhew v. Meyhew*, 61 Conn. 235, 29 Am. St. Rep. 195, 23 Atl. 966, holding that husband must forbear exercise of marital rights when injurious to wife's health.

Coexistence of wrong and remedy.

Cited in *New Haven v. Fresenius*, 75 Conn. 150, 52 Atl. 823, holding that city may maintain action at law against treasurer failing to deposit funds in desig-

nated bank; *Lonstorf v. Lonstorf*, 118 Wis. 161, 95 N. W. 961, denying wife's right of action for alienation of husband's affections.

6 L. R. A. 833, *BANK OF MENDOCINO v. BAKER*, 82 Cal. 114, 22 Pac. 1037. **Notice.**

Cited in *Dennis v. Northern P. R. Co.* 20 Wash. 331, 55 Pac. 210, holding statute granting right of way to railroad, notice to purchaser from one holding under deed from railway omitting reservation of right by mistake; *Tarke v. Bingham*, 123 Cal. 166, 55 Pac. 759, holding mortgagee not chargeable with knowledge of scrivener's error in copying note in mortgage; *Svetinich v. Sheean*, 124 Cal. 218, 71 Am. St. Rep. 50, 56 Pac. 1028, holding party notified at time of execution sale of half interest of wife, that husband claims entire interest, purchaser with notice; *Hyde v. Mangan*, 88 Cal. 327, 26 Pac. 180, holding notorious and exclusive possession under land contract equivalent to express notice to subsequent purchaser from vendor out of possession; *Prouty v. Devin*, 118 Cal. 260, 50 Pac. 380, holding omission to pass upon question of constructive notice from facts arousing inquiry, ground for reversing judgment determining priority of mortgages.

Cited in note (8 L. R. A. 211) on constructive notice by possession of land.

What constitutes title by adverse possession.

Cited in footnote to *Swan v. Munch*, 35 L. R. A. 743, which holds title by prescription obtainable by wrongful entry under claim of right.

Cited in note (10 L. R. A. 388) on title under adverse possession.

6 L. R. A. 835, *GERMAN INS. CO v. GUECK*, 130 Ill. 345, 23 N. E. 112.

Waiver of conditions in policy.

Cited in *Home Ins. Co. v. Bethel*, 142 Ill. 549, 32 N. E. 510, holding requirement of proofs of loss waived where refusal to pay based on ground of lack of insurable interest; *Millers' Nat. Ins. Co. v. Jackson County Mill. & Elevator Co.* 60 Ill. App. 229, holding proof of loss waived where refusal to pay placed on other ground of nonliability; *Phenix Ins. Co. v. Belt R. Co.* 82 Ill. App. 271; *Home Ins. Co. v. Bethel*, 42 Ill. App. 480, holding proofs of loss waived where liability denied in any event; *Phenix Ins. Co. v. Stocks*, 149 Ill. 335, 36 N. E. 408, holding condition requiring arbitration waived where refusal to pay based on grounds not subject to arbitration.

Cited in footnote to *Hoffman v. Michigan Home & Hospital Asso.* 54 L. R. A. 746, which holds failure to comply with requirements as to proofs of loss not fatal when liability denied for other reason.

Cited in notes (8 L. R. A. 78) on waiver of proofs of loss; (7 L. R. A. 83) on provision requiring statement and proof of loss.

Reformation of instruments.

Cited in *Cook v. Westchester F. Ins. Co.* 60 Neb. 131, 82 N. W. 315, reforming and enforcing, after loss, policy incorrectly inserting wrong person's name as owner through mistake of agent; *McGuire v. Hartford F. Ins. Co.* 7 App. Div. 586, 40 N. Y. Supp. 300, holding insured entitled to enforce policy without reformation, where agent failed to note disclosed encumbrances; *Keith v. Henkleman*, 173 Ill. 142, 50 N. E. 692, holding that equity, on reforming bond, may assess damages for its breach.

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Cited in footnote to *Bigham v. Madison*, 47 L. R. A. 267, which authorizes rescission for mutual mistake as to location of boundary lines pointed out by vendor.

Cited in notes (11 L. R. A. 857) on mistake in written contract, relief from; (17 L. R. A. 273) on parol evidence to vary, add to, or alter written contract in case of fraud, surprise, or mistake.

Recovery of money paid by mistake.

Cited in footnotes to *Alton v. First Nat. Bank*, 18 L. R. A. 144, which denies indorsee's right to recover back amount paid under mistaken belief as to liability; *Langevin v. St. Paul*, 15 L. R. A. 766, which holds agent's mistaken belief that all of lots jointly sold for taxes belonged to principal not ground for recovery back of any of redemption money paid.

6 L. R. A. 839, *CHADWICK v. COVELL*, 151 Mass. 190, 21 Am. St. Rep. 442, 23 N. E. 1068.

Trademark, trade name, and labels.

Cited in *Covell v. Chadwick*, 153 Mass. 266, 24 Am. St. Rep. 625, 26 N. E. 856, holding that purchaser of formulas has no exclusive right to accompanying labels and trademarks as against former donee; *Weener v. Brayton*, 152 Mass. 102, 8 L. R. A. 642, 25 N. E. 46, refusing injunction to restrain use of label adopted generally by association of workmen on products of each; *Gessler v. Grieb*, 80 Wis. 26, 27 Am. St. Rep. 20, 48 N. W. 1098, refusing injunction against use of unpatented formula, where products sold under different name; *Dover Stamping Co. v. Fellows*, 163 Mass. 196, 28 L. R. A. 450, 47 Am. St. Rep. 448, 40 N. E. 105, refusing to enjoin use of name merely descriptive of patented article, after expiration of patent; *Messer v. The Fadettes*, 168 Mass. 143, 37 L. R. A. 722, 60 Am. St. Rep. 371, 46 N. E. 407, refusing to enjoin use of name of orchestra by former members, though organizer sold all rights in same to plaintiff; *Stewart v. Hook* (Ga.) 63 L. R. A. 256, 45 S. E. 369, denying liability of subsequent to prior purchaser from same vendor of secret formula for medical preparation.

Cited in footnote to *Dempsey v. Dobson*, 32 L. R. A. 761, which holds carpet manufacturers entitled to record of recipes prepared by color mixer employed.

Distinguished in *Brown Chemical Co. v. Meyer*, 139 U. S. 548, 35 L. ed. 250, 11 Sup. Ct. Rep. 625, holding that retiring member of firm may sell to latter exclusive right to use his trade name; *New England Awl & Needle Co. v. Marlborough Awl & Needle Co.* 168 Mass. 155, 60 Am. St. Rep. 377, 46 N. E. 386, enjoining use of packages for products identical with those used by established business; *Watkins v. Landon*, 52 Minn. 393, 19 L. R. A. 239, 38 Am. St. Rep. 560, 54 N. W. 193, holding party honestly obtaining formula, entitled to compound and sell product, but not to use established trade name; *Le Page Co. v. Russia Cement Co.* 17 L. R. A. 355, 2 C. C. A. 557, 5 U. S. App. 112, 51 Fed. 943, and *Petrolia Mfg. Co. v. Bell & B. Soap Co.* 97 Fed. 783, enjoining vendor to manufacturing corporation of right to use trade name on its products, from infringing use of name; *Harrison v. Glucose Sugar Ref. Co.* 58 L. R. A. 921, 53 C. C. A. 491, 116 Fed. 311, enjoining employee from putting to use in competitive business, secrets learned during service; *Little v. Gallus*, 4 App. Div. 579, 38 N. Y. Supp. 487 (dissenting opinion), majority enjoining former employees from using secret processes learned during service.

— As property.

Cited in *Hart v. Smith*, 159 Ind. 186, 58 L. R. A. 952, 95 Am. St. Rep. 280, 64 N. E. 661, holding goodwill of business subject to taxation as property.

Cited in note (13 L. R. A. 652) on property in secrets, processes, and recipes.

6 L. R. A. 842, *Re WOMEN AS NOTARIES PUBLIC*, 150 Mass. 586, 23 N. E. 850.

Supplementary opinion on construction of statute in Opinion of Justices, 165 Mass. 599, 32 L. R. A. 350, 43 N. E. 927.

Woman's right to hold office.

Cited in *State ex rel. Atty. Gen. v. Adams*, 58 Ohio St. 815, 41 L. R. A. 727, 65 Am. St. Rep. 792, 51 N. E. 135, holding woman ineligible to appointment as notary under constitutional qualifications for state officers; *Atty. Gen. v. Abbott*, 121 Mich. 547, 47 L. R. A. 96, 80 N. W. 372, holding disability bar to appointment as notary, in absence of enabling statute; Opinion of Justices, 165 Mass. 599, 32 L. R. A. 350, footnote p. 350, 43 N. E. 927, holding statute authorizing appointment of women as notaries public by governor with consent of common council, unconstitutional.

Cited in note (38 L. R. A. 214) on right of woman to hold office.

— To practise law.

Cited in footnote to *Re Maddox*, 55 L. R. A. 298, which denies right of woman to practise law.

6 L. R. A. 844, *WESTERN U. TELEG. CO. v. ADAMS*, 75 Tex. 531, 16 Am. St. Rep. 920, 12 S. W. 857.

Damages for negligence as to telegram.

Cited in *Young v. Western U. Teleg. Co.* 107 N. C. 378, 9 L. R. A. 672, 22 Am. St. Rep. 883, 11 S. E. 1044; *Mentzer v. Western U. Teleg. Co.* 93 Iowa, 755, 28 L. R. A. 73, 57 Am. St. Rep. 294, 62 N. W. 1; *Western U. Teleg. Co. v. Odom*, 21 Tex. Civ. App. 539, 52 S. W. 632; *Potts v. Western U. Teleg. Co.* 82 Tex. 547, 18 S. W. 604 — upholding recovery for mental anguish and suffering; *Western U. Teleg. Co. v. Ferguson*, 157 Ind. 78, 54 L. R. A. 851, 60 N. E. 1080 (dissenting opinion) majority holding damages for mental anguish not recoverable; *Mitchell v. Western U. Teleg. Co.* 5 Tex. Civ. App. 530, 24 S. W. 550, holding more than nominal damages recoverable for substantial injury due to delay in delivering message; *McPeck v. Western U. Teleg. Co.* 107 Iowa, 363, 43 L. R. A. 218, 70 Am. St. Rep. 205, 78 N. W. 63, holding that sendee's damages include all injurious results flowing naturally from delay in delivery of telegram; *Western U. Teleg. Co. v. Kirkpatrick*, 76 Tex. 218, 18 Am. St. Rep. 37, 13 S. W. 70, holding only damages recoverable and those in contemplation of parties at time of contract; *Western U. Teleg. Co. v. Jobe*, 6 Tex. Civ. App. 408, 25 S. W. 168, holding evidence of expressions tending to show mental anguish, admissible; *Western U. Teleg. Co. v. Johnson*, 9 Tex. Civ. App. 50, 28 S. W. 124, holding proof of mental anguish unnecessary where record shows facts indicating it; *Thomas v. Western U. Teleg. Co.* 25 Tex. Civ. App. 400, 61 S. W. 501, holding that law of state where telegram sent governs right to damages for mental anguish resulting from nondelivery.

Cited in footnote to *Getty v. Peters*, 10 L. R. A. 464, which holds damages for mental anguish alone from delay in delivering telegram unrecoverable.

Cited in notes (7 L. R. A. 583) on damages for neglect to deliver telegram; (13 L. R. A. 860) on right to recover damages for mental anguish alone.

Distinguished in *Western U. Teleg. Co. v. Waller*, 96 Tex. 593, 97 Am. St. Rep. 936, 74 S. W. 751, holding evidence of dying mother's inquiries and requests for son's presence inadmissible in action for delay in delivering telegram summoning him.

Disapproved in *Chapman v. Western U. Teleg. Co.* 88 Ga. 764, 17 L. R. A. 431, 30 Am. St. Rep. 183, 15 S. E. 901; *Connell v. Western U. Teleg. Co.* 116 Mo. 49, 20 L. R. A. 178, 38 Am. St. Rep. 575, 22 S. W. 345; *Kester v. Western U. Teleg. Co.* 55 Fed. 604; *Western U. Teleg. Co. v. Wood*, 21 L. R. A. 712, 6 C. C. A. 450, 13 U. S. App. 317, 57 Fed. 477; *Western U. Teleg. Co. v. Rogers*, 68 Miss. 756, 13 L. R. A. 862, 24 Am. St. Rep. 300, 9 So. 823—holding damages for mere mental suffering unrecoverable.

— **Messages in cipher.**

Distinguished in *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 471, 35 L. R. A. 552, holding consequential damages recoverable for delayed cipher message.

Notice of importance — Communications relating to sickness and death.

Cited in *Western U. Teleg. Co. v. Gahan*, 17 Tex. Civ. App. 661, 44 S. W. 933, holding message: "Your father is very sick, would like to see you," plainly for benefit of addressee; *Western U. Teleg. Co. v. Ward*, 4 Tex. App. Civ. Cas. (Willson) p. 554, holding telegram, "Minnie died to-day," sufficient notice to company of its importance; *Western U. Teleg. Co. v. Hargrove*, 14 Tex. Civ. App. 83, 36 S. W. 1077, holding telegram, "Daniel is very sick, come at once," sufficient notice to company; *Kennon v. Western U. Teleg. Co.* 126 N. C. 235, 35 S. E. 468, holding that notice of importance of telegram must be brought to attention of company in some way to authorize recovery; *Davis v. Western U. Teleg. Co.* 107 Ky. 529, 92 Am. St. Rep. 371, 54 S. W. 849, holding message relating to death, sufficient notice of necessity of prompt delivery.

— **Nature of communication disclosed by its terms.**

Cited in *Western U. Teleg. Co. v. Feegles*, 75 Tex. 540, 12 S. W. 860, holding that relationship need not be disclosed on face of telegram, to sustain action for injury to mother's feelings; *Western U. Teleg. Co. v. Moore*, 76 Tex. 67, 18 Am. St. Rep. 25, 12 S. W. 949, holding words, "Billie is very low; come at once," sufficient notice of relationship; *Western U. Teleg. Co. v. Carter*, 85 Tex. 585, 34 Am. St. Rep. 826, 22 S. W. 961, holding telegraph company only charged with notice of relationship existing between person named in message; *Western U. Teleg. Co. v. Linn*, 87 Tex. 11, 47 Am. St. Rep. 58, 26 S. W. 490, holding telegram, "Grace is very low," sufficient notice of its importance; *Erie Teleg. Co. v. Grimes*, 82 Tex. 95, 17 S. W. 831, holding agent's actual or discoverable knowledge of importance of telegram from its face, chargeable to company; *Western U. Teleg. Co. v. Nagle*, 11 Tex. Civ. App. 541, 32 S. W. 707, holding company liable where cipher message was known by it to be important and marked "rush;" *Western U. Teleg. Co. v. Snow*, 31 Tex. Civ. App. 279, 72 S. W. 250, holding expression "Come quick" sufficient notice of urgency of telegram to render company liable for delay in delivering; *Mitchell v. Western U. Teleg. Co.* 5 Tex. Civ. App. 531, 24 S. W. 550, holding that sufficient notice of main purpose

of message puts telegraph company upon inquiry of other facts; *Western U. Teleg. Co. v. Church* (Neb.) 57 L. R. A. 909, 90 N. W. 878, holding telegram to physician "Come at once," sufficient notice to support action for substantial damages; *Western U. Teleg. Co. v. Turner*, 94 Tex. 309, 60 S. W. 432, holding company in default liable when message read: "Accept offer five three quarters."

Liability for mistake in telegram.

Cited in footnote to *Western U. Teleg. Co. v. Short*, 9 L. R. A. 744, which holds company prima facie liable for failure to transmit message correctly.

Who may sue for breach of contract.

Distinguished in *House v. Houston Waterworks Co.* 88 Tex. 239, 28 L. R. A. 533, 31 S. W. 179, holding that citizen cannot recover for injuries due to breach of contract between waterworks company and municipality.

— As to telegrams.

Cited in *Western U. Teleg. Co. v. Beringer*, 84 Tex. 39, 19 S. W. 336, upholding recovery by person for whom message was sent, although sender not his agent; *Western U. Teleg. Co. v. Hale*, 11 Tex. Civ. App. 81, 32 S. W. 814, holding message, "Allen is very low," for benefit of addressee; *Fererro v. Western U. Teleg. Co.* 9 App. D. C. 467, 35 L. R. A. 550, holding that receiver of message may maintain action for damages; *Sherrill v. Western U. Teleg. Co.* 109 N. C. 533, 14 S. E. 94; *Butler v. Western U. Teleg. Co.* 62 S. C. 232, 89 Am. St. Rep. 893, 40 S. E. 162; *Western U. Teleg. Co. v. Mellon*, 96 Tenn. 71, 33 S. W. 725—holding action for nondelivery maintainable by person named as beneficiary, although not addressee; *Herron v. Western U. Teleg. Co.* 90 Iowa, 134, 57 N. W. 696, holding that telegraph company may be liable to addressee for delay in delivery of message; *Mathonican v. Scott*, 87 Tex. 398, 28 S. W. 1063, holding that agreement for valuable consideration to pay debt of third person inures to benefit of third person; *Western U. Teleg. Co. v. Evans*, 5 Tex. Civ. App. 58, 23 S. W. 998, upholding recovery where language of message was sufficient to show its purpose and scope.

Cited in footnote to *Western U. Teleg. Co. v. Barefoot*, 64 L. R. A. 491, which holds that agent may maintain action for nondelivery of telegram sent principal to obtain confirmation of sale entitling him to commissions; *Shingleur v. Western U. Teleg. Co.* 30 L. R. A. 444, which denies right of one voluntarily carrying out contract by agent in accordance with telegram wrongly transmitted, to recover against company; *McCornick v. Western U. Teleg. Co.* 38 L. R. A. 684, which denies telegraph company's liability to banker cashing draft on faith of incorrectly transmitted telegram from drawee purporting to authorize drawer to make draft.

Cited in note (9 L. R. A. 669) on who may recover damages for delay in delivering telegram.

6 L. R. A. 847, *STATE v. GILMAN*, 33 W. Va. 146, 10 S. E. 283.

Police power.

Cited in *Mon Luck v. Sears*, 29 Or. 427, 32 L. R. A. 739, 54 Am. St. Rep. 804, 44 Pac. 693, upholding validity of statute making possession of opium without license or prescription, a crime; *State v. Goodwill*, 33 W. Va. 185, 6 L. R. A. 624, 25 Am. St. Rep. 863, 10 S. E. 285, holding statute discriminating between mine and factory owners, and other owners of property, as to labor contracts,

void; *State v. Peel Splint Coal Co.* 36 W. Va. 857, 17 L. R. A. 403, 15 S. E. 1000 (dissenting opinion) majority holding statutes prohibiting issue of scrip by employer to employee redeemable in anything except lawful money, and requiring payment for coal by weight before screening, valid; *State v. Swift*, 35 W. Va. 545, 14 S. E. 135, holding agent receiving order in Roane county on his firm in Wood county, indictable where order taken unless acting under state license.

6 L. R. A. 849, *RICHMOND & D. R. CO. v. PAYNE*, 86 Va. 481, 10 S. E. 749.

Limitation of common-law liability.

Cited in *Normile v. Oregon Nav. Co.* 41 Or. 189, 69 Pac. 928, sustaining contract limiting carrier's liability to certain valuation, in consideration of reduced rate; *Zouch v. Chesapeake & O. R. Co.* 36 W. Va. 534, 17 L. R. A. 120, 15 S. E. 185, holding valuation agreed upon at shipment for reduced rate, controlling in absence of gross negligence; *Pacific Exp. Co. v. Foley*, 46 Kan. 463, 12 L. R. A. 802, 26 Am. St. Rep. 107, 26 Pac. 665, holding limitation of liability where no value disclosed in freight receipt, controlling in case of ordinary negligence; *Ullman v. Chicago & N. W. R. Co.* 112 Wis. 157, 56 L. R. A. 249, 88 Am. St. Rep. 949, 88 N. W. 41, holding agreed valuation whether inserted by shipper or carrier, and not objected to, controlling in absence of gross negligence.

Cited in footnotes to *Chicago & N. W. R. Co. v. Chapman*, 8 L. R. A. 508, which holds carrier cannot limit liability for gross negligence or wilful misconduct; *Taffe v. Oregon R. & Nav. Co.* 58 L. R. A. 187, which denies initial carrier's liability under bill of lading beyond own line; *Union State Bank v. Fremont, E. & M. Valley R. Co.* 59 L. R. A. 939, which sustains initial carrier's right to limit liability to own line; *Illinois C. R. Co. v. Carter*, 36 L. R. A. 527, which denies liability of initial carrier for misdelivery by connecting line or warehouseman.

Distinguished in *Calderon v. Atlas S. S. Co.* 170 U. S. 279, 42 L. ed. 1036, 18 Sup. Ct. Rep. 588, holding limitation of liability to certain amount except where special agreement on disclosed value made, invalid; *Baltimore & O. S. W. R. Co. v. Ragsdale*, 14 Ind. App. 410, 42 N. E. 1106, holding agreed valuation of stock in bill of lading not controlling in case of loss by negligence; *Western U. Teleg. Co. v. Beals*, 56 Neb. 418, 71 Am. St. Rep. 682, 76 N. W. 903, holding limitation of liability for negligence in transmission of unrepeatable telegraph messages not controlling.

Bill of particulars.

Cited in *Clarke v. Ohio River R. Co.* 39 W. Va. 742, 20 S. E. 696, holding demand proper only where cause of action not disclosed and declaration not demurrable.

6 L. R. A. 855, *DELAWARE, L. & W. R. CO. v. CENTRAL STOCK YARDS & TRANSIT CO.* 45 N. J. Eq. 50, 17 Atl. 146.

Mandatory injunction, when issuable.

Cited in *Gatzmer v. St. Vincent School Soc.* 147 Pa. 319, 23 Atl. 452, holding mandatory injunction not issuable where complainant's rights not clear.

When property impressed with public use.

Cited in *Indiana Natural & Illuminating Gas Co. v. State*, 158 Ind. 519, 57

L. R. A. 762, 63 N. E. 220, holding gas company impressed with public use, compelling nondiscriminating service; Willoughby v. Chicago Junction R. & Union Stock-Yards Co. 50 N. J. Eq. 695, 25 Atl. 277, raising without deciding whether stock-yards company charged with public duty.

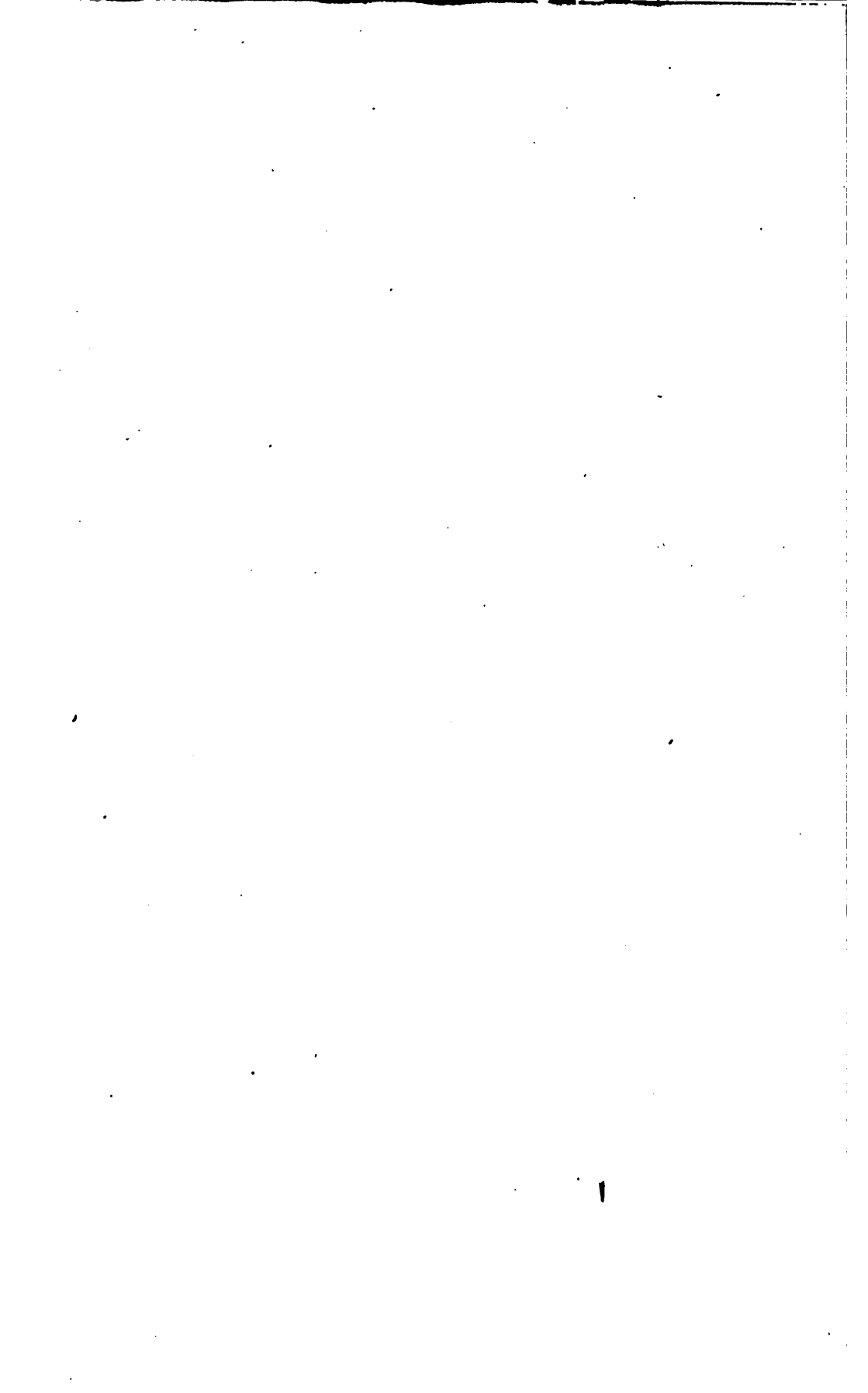
— **Power of legislature to declare and regulate.**

Cited in State *ex rel.* Star Pub. Co. v. Associated Press, 159 Mo. 462, 51 L. R. A. 168, 81 Am. St. Rep. 368, 60 S. W. 91, holding that only legislature can declare news-gathering agency impressed with public use; Budd v. New York, 143 U. S. 543, 36 L. ed. 255, 12 Sup. Ct. Rep. 468, and State *ex rel.* Stoeser v. Brass, 2 N. D. 501, 52 N. W. 408, holding grain elevators devoted to public use and subject to legislative regulation; Cotting v. Kansas City Stock Yards Co. 183 U. S. 85, 46 L. ed. 99, 22 Sup. Ct. Rep. 30, holding that legislature may fix maximum stock-yard charges.

Rights of warehousemen.

Cited in footnote to Central Elevator Co. v. People, 43 L. R. A. 658, which denies right of licensed warehouseman to deal in and store grain in own licensed warehouse.

Cited in note (7 L. R. A. 529) on warehousemen as bailees.





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